BEFORE THE ARKANSAS POLLUTION CONTROL & ECOLOGY COMMISSION

IN THE MATTER OF: **DOCKET NO. 23-010-P**
PULASKI COUNTY PROPERTY OWNERS'
MULTIPURPOSE IMPROVEMENT DISTRICT
No. 2021-2

PERMIT NO. AR0053210

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, MOTION TO DISMISS

Comes now the Arkansas Department of Energy and Environment, Division of Environmental Quality (DEQ), and for its Brief in Support of DEQ's Motion for Summary Judgment, or in the alternative, Motion to Dismiss filed in the above styled matter, states as follows:

INTRODUCTION

On July 13, 2023, the Pinnacle Mountain Community Coalition and one of the individual petitioners filed a Request for Hearing with the Arkansas Pollution Control and Ecology Commission (APC&EC or Commission) challenging DEQ's permitting decision to issue NPDES permit number AR0053210 to Pulaski County Property Owners' Multipurpose Improvement District No. 2021-2. This Request for Hearing was assigned APC&EC Docket No. 23-010-P.

On July 14, 2023, a request for hearing was filed with the Arkansas Pollution Control and Ecology Commission (APC&EC) on behalf of several individual petitioners and the Pinnacle Mountain Community Coalition. That Request for Hearing was assigned APC&EC Docket No. 23-012-P.

At the preliminary hearing for each of these dockets on August 3, 2023, the attorneys representing the individual petitioners and the Pinnacle Mountain Community Coalition

(collectively PMCC or Petitioners) in APC&EC Docket No. 23-010-P and APC&EC Docket No. 23-012-P agreed to file a consolidated petition.

On September 1, 2023, the attorneys representing the individual petitioners and the Pinnacle Mountain Community Coalition filed a consolidated Request for Hearing (Consolidated Request for Hearing) in APC&EC Docket No 23-010-P.

DEQ compiled the administrative record for this permitting decision and filed it in this docket on September 15, 2023.

In response to PMCC's Consolidated Request for Hearing, DEQ files its Motion for Summary Judgment, or in the alternative, Motion to Dismiss and this accompanying brief in support. As outlined in its Motion and detailed in this brief, DEQ moves for summary judgment on, or dismissal of, each claim put forward in PMCC's Consolidated Request for Hearing. Generally, this brief addresses each issue by identifying the deficiencies in the Consolidated Request for Hearing that warrant dismissal and then by providing DEQ's arguments in support of its motion for summary judgment on each issue, as appropriate.

The deficiencies PMCC's Consolidated Request for Hearing fall into the following categories: 1) failure to identify the rule or law that DEQ violated by issuing this permitting decision, 2) failure to provide a detailed factual basis for the objection to the permit, including a failure to articulate facts that support PMCC's conclusory statements, and 3) failure to plead facts that are supported by the record that was before DEQ.

DEQ's arguments in support of its motion for summary judgment generally demonstrate that DEQ considered the issues raised and addressed those issues appropriately pursuant to the applicable rules. Where appropriate, DEQ provides citation to the record to correct or clarify factual issues.

PERMITTING HISTORY and BACKGROUND

The procedural history of this permitting decision is longer and more complicated than most. The public notice for the first draft permit was published on July 11, 2021. R. 264-265. Following that initial comment period and as part of the Arkansas Department of Health requirements, Paradise Valley Subdivision formed an improvement district to manage the subdivision sanitary sewer and other subdivision infrastructure. e.g. R. 376-395. The improvement district was named the Pulaski County Property Owners' Multipurpose Improvement District No. 2021-2 and that name was on the subsequent draft permits. R. 405-411. DEQ also received additional updated application information from the Pulaski County Property Owners' Multipurpose Improvement District No. 2021-2. R. 402-418. These submissions are part of the record submitted by DEQ in this matter. Based on those submissions DEQ issued a revised draft permit and held a public hearing on this permit. R. 423-461. DEQ requested and received additional information from Pulaski County Property Owners' Multipurpose Improvement District No. 2021-2 e.g. R. 1896-1897, 1910-2103, 2105-2113, 2122-2124. Again, these submissions are part of the record submitted by DEQ in this matter. Based on those submissions DEQ issued a second revised draft permit and held a public hearing on this permit. R. 2284-2322.

On June 16, 2023, DEQ issued final NPDES permit number AR0053210. R. 3233-3302.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law. *Meadors v. Still*, 344 Ark. 307, 313, 40 S.W.3d 294, 299 (2001). The Supreme Court of Arkansas no longer refers to summary judgment as a drastic remedy, but simply as a tool that promotes efficiency. *Laird v. Shelnut*, 348 Ark. 632, 641, 74 S.W.3d 206, 211 (2002). Summary judgment is properly granted if reasonable

persons would reach the same conclusion from the undisputed facts. *George v. Jefferson Hosp. Ass'n, Inc.*, 337 Ark. 206, 210-211, 987 S.W.2d 71, 712 (1999).

Once the moving party has demonstrated an entitlement to summary judgment, the non-moving party must "meet proof with proof and demonstrate the existence of a material issue of fact." *Meadors*, 344 Ark. at 314, 40 S.W.3d at 299. If the non-moving party is unable to meet that burden, the case should be disposed of by summary judgment rather than exposing the litigants to unnecessary delay and expense. *Joey Brown Interest, Inc. v. Merchants Nat'l Bank*, 284 Ark. 418, 423, 683 S.W.2d 601, 604 (1985).

MOTION TO DISMISS STANDARDS

Requests for Hearing on permitting decisions are subject to the requirements of Ark. Code Ann. § 8-4-205(b) (3), which states:

> A request for a hearing shall identify the permit action in question and its date and must include a complete and detailed statement identifying the legal and factual objections to the permit action

Likewise, Commission Rule 8.603(C)(1)(c) requires a "complete and detailed statement identifying the legal issues and factual objections being appealed."

> Commission Rule 8.613 mandates that the Administrative Law Judge must determine whether a Request for Hearing provides sufficient factual details about the issue raised and specifically articulates what rule or law DEQ allegedly violated by issuing the permitting decision. In the matter of Big River Steel, LLC, Docket No. 13-006-P, Order No. 9. In practice, this analysis has been a two-step process. Step one: Does the Request for Hearing provide sufficient factual details about the issues being raised? Step two: Does the Request for Hearing articulate what rule or law was allegedly violated by the permitting decision?
>
> Implicit in the first step and explicit in the second step is the requirement that the objection allege that a permitting decision violated a rule or law within the jurisdiction of the permitting

> decision. Ark. Code Ann. § 8-4-205(b)(3) and Commission Rule 8.603(C)(1)(c).

In the Matter of Eco-Friendly Materials, LLC, APC&EC Docket No. 23-002-P, Order No. 4, pp. 5-6.

Any issue raised in a request for hearing that does not allege that a permitting decision violated a rule or law and that is within the jurisdiction of the permitting decision fails to meet the pleading requirements under Ark. Code Ann. § 8-4-205(b)(3) and Commission Rule 8.603(C)(1)(c). *Id.*

When a request for hearing alleges that a permitting decision violated a rule or law within the jurisdiction of the permitting decision, the only remaining question is whether the request for hearing provides sufficient factual details to support that allegation.

When considering a motion to dismiss under Ark. R. Civ. P. 12(b)(6), courts treat the facts alleged in the complaint as true and view them in the light most favorable to the plaintiff. *Deer/Mt. Judea Sch. Dist. v. Kimbrell,* 2013 Ark. 393, 430 S.W.3d 29, 2013 WL 5571202. In testing the sufficiency of a complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint, and the pleadings are to be liberally construed. *Baptist Health v. Murphy,* 2010 Ark. 358, 373 S.W.3d 269.

Arkansas Rule of Civil Procedure 8(a)(1) requires that a complaint state facts, not mere conclusions, in order to entitle the pleader to relief. *Worden v. Kirchner*, 2013 Ark. 509, 6, 431 S.W.3d 243, 247 (2013) (citing *Born v. Hosto & Buchan, PLLC,* 2010 Ark. 292, 372 S.W.3d 324.). Similarly, Ark. Code Ann. § 8-4-205(b)(3) and APC&EC Rule 8.603(C)(1)(c) require that a request for hearing state facts to support any objection to a permit or its conditions. Only *facts* alleged in the complaint are treated as true, not the plaintiff's theories, speculation, or statutory interpretation. *Worden v. Kirchner*, 2013 Ark. 509, 6, 431 S.W.3d 243, 247 (2013)(citing *Dockery*

v. Morgan, 2011 Ark. 94, 380 S.W.3d 377)(emphasis added). When testing the sufficiency of a complaint, Ark. R. Civ. P. Rules 8(a)(1) and 12(b)(6) must be read together. *Worden v. Kirchner*, 2013 Ark. 509, 6, 431 S.W.3d 243, 247 (2013). Likewise, in testing the sufficiency of a request for hearing, Ark. Code Ann. § 8-4-205(b)(3) and Commission Rule 8.603(C)(1)(c) serve the same role as Ark. R. Civ. P. Rules 8(a)(1) and must be read together with Ark. R. Civ. P. 12(b)(6), so that only *facts* alleged in the request for hearing are treated as true, not the plaintiff's theories, speculation, or statutory interpretation.

In addition, a request for hearing that incorporates comments by reference into a request for hearing is inconsistent with the pleading requirements set forth in Rule 8.603(C)(1)(c). *In the matter of Big River Steel*, LLC, APC&EC Docket No. 13-006-P, Order No. 9., p. 6.

ARGUMENT

I. PMCC's objections to DEQ's Anti- Degradation analysis are without basis.

In its Consolidated Request for Hearing, PMCC objects to DEQ's statement about Anti-degradation in the permit's Statement of Basis. This issue should be dismissed or in the alternative, DEQ is entitled to summary judgment on this issue for the reasons set forth below.

A. PMCC's Anti- Degradation argument is not supported by facts or legal analysis.

PMCC asserts that DEQ "fails to conduct antidegradation review when issuing water discharge permits under its federally delegated Clean Water Act permitting powers." PMCC takes issue with DEQ's statement that "[t]he limitations and requirements set forth in this permit for discharge into waters of the State are consistent with the Anti-degradation Policy and all other applicable water quality standards found in APC&EC Rule 2." PMCC concludes that "[t]his is not an antidegradation analysis" and that DEQ "fails to perform any antidegradation analysis." PMCC provides a list of specific actions that DEQ failed to do. PMCC's Consolidated Request for Hearing

fails to provide an explanation of what law or rule requires DEQ to perform the identified actions and what facts trigger a requirement that DEQ perform those actions for this permitting decision.

The only fact presented by PMCC on this point is DEQ's Anti-Degredation statement, which is quoted in PMCC's Consolidated Request for Hearing. While the heading of this section of the argument references APC&EC Rule 2, Chapter 2 and 40 C.F.R. § 131.12, it is not clear how DEQ's statement violates either one of these rules. Again, while PMCC provides a list of actions that DEQ failed to do, it is not clear what the factual basis is for each of these asserted failures or what rule or law requires DEQ to take each of these actions. For example, Paragraph 36.e. of the Consolidated Request for Hearing states that DEQ failed to "…determine if the permit protects existing uses, is necessary to accommodate an important economic or social development, or should not be allowed at all due to the presence of outstanding resource waters." DEQ is left to wonder which of these determinations PMCC is claiming that DEQ failed to make. Alternatively, DEQ is left to wonder if PMCC is asserting that DEQ must make all of these determinations. In both cases, PMCC has presented no factual or legal basis to support its conclusory statements.

In the absence of a detailed factual and legal basis for PMCC's assertion that DEQ failed "to perform any antidegradation analysis," this issue should be dismissed pursuant to Ark. Code Ann. § 8-4-205(b)(3) and Rule 8.603 (C)(1)(c).

B. DEQ's permitting decision is consistent with Arkansas's Anti-degradation Policy.

Arkansas's Anti-degradation Policy in Chapter 2 of APC&EC Rule 2.201 states, "[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." The effluent limitations and requirements set forth in a permit for discharge into waters of the State must be based on the applicable water quality standards found in APC&EC Rule 2. APC&EC Rule 2.102 states that the purpose of the water quality standards in

APC&EC Rule 2 is to protect the water quality and uses of waters of the state of Arkansas. Thus, under Arkansas law, when an effluent limit is based on the applicable water quality standards, the level of water quality necessary for existing uses is maintained and protected.

To put it more simply, effluent limitations and requirements that are based on applicable water quality standards meet the requirements and achieve the results in APC&EC Rule 2.201. Assuming for the sake of argument that some degradation would occur as a result of this discharge, APC&EC Rule 2.202 states:

> In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully. Further, the State shall assure that (1) there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and (2) that the provisions of the Arkansas Water Quality Management Plan be implemented with regard to nonpoint sources.

Under Arkansas law, the level of water quality necessary to maintain and protect the existing uses is established in APC&EC Rule 2, Arkansas's water quality standards. Effluent limitations and requirements based on the applicable water quality standards achieve "the highest statutory and regulatory requirements for all new and existing point sources" in Arkansas.

The Statement of Basis for the permit, Section 12, Development and Basis for Permit Conditions, Part A, Justification for Limitations and Conditions of the Permit, includes a table that indicates the parameters for which DEQ has included a water quality based effluent limit and the basis for that effluent limit. R. 3263.

Absent a demonstration that the effluent limitations and requirements in this permit are not based on applicable water quality standards in APC&EC Rule 2, the permit is in compliance with the highest statutory and regulatory requirements for all new and existing point sources as

mandated by Rule 2.202. That compliance makes the permit consistent with Arkansas's Anti-degradation Policy, specifically APC&EC Rules 2.201 and 2.202.

PMCC asserts that DEQ failed "to perform any antidegradation analysis." PMCC does not provide a detailed factual or legal basis its assertion. PMCC has failed to demonstrate that this permit is inconsistent with APC&EC Rule 2 and by extension Arkansas's Anti-degradation Policy.

DEQ's permitting decision is based on the applicable water quality standards. R. 3263. Those standards are protective of the applicable uses in APC&EC Rule 2. Without a factual basis for a different conclusion, neither APC&EC Rule 2, Chapter 2 and 40 C.F.R. § 131.12 require additional action or findings by DEQ.

For the reasons stated above, DEQ is entitled to judgment as a matter of law on this issue, and PMCC has failed to provide a legal and factual basis that can demonstrate that DEQ should or could have reached a different conclusion under Arkansas's laws and rules

II. DEQ responded to public comments in compliance with APC&EC Rule 8.211.

In its Consolidated Request for Hearing, PMCC makes two separate claims about DEQ's response to comments. PMCC asserts that DEQ "fails to respond to substantive comments made on the record." PMCC explains that "DEQ chose to either ignore many of the comments, or to dismiss them with perfunctory responses that are not supported by appropriate reference to the scientific and engineering literature or written studies conducted by the Department as required by Commission Regulation No. 8.211." PMCC also asserts that DEQ "fails to respond to some comments made during the public comment period." These issues should be dismissed, or in the alternative, DEQ is entitled to summary judgment on these issues for the reasons set forth below.

A. PMCC's claim that DEQ failed to respond to some comments should be dismissed.

In its Consolidated Request for Hearing, PMCC claims that several comments were not included in the responsive summary. PMCC identifies those comments by the name of the individual who allegedly submitted the comment. (Consolidated Request for Hearing, Paragraph 46). PMCC then states that others may be missing as well. PMCC fails to provide facts that could support its claim that DEQ did not respond to comments from the identified individuals.

The only way that PMCC identifies the alleged missing comments is by naming the individuals who allegedly submitted those comments. PMCC does not include the comments as an exhibit. PMCC does not state the date on which the comments were allegedly submitted to DEQ. PMCC does not relate the substance of the comments. PMCC simply states that "those comments" were not included in the responsive summary.

PMCC does not explain how PMCC determined that these comments were not included. An explanation is required because DEQ's Response to Comments is organized by topics, not by the name of the commenter. DEQ's Response to Comments states:

> This document contains a summary of the comments that the DEQ received during the public comment period. A summary of the changes to the NPDES Permit can be found on the last page of this document. Where several similar issues were raised throughout the comments, those comments were grouped together, with a single response from the DEQ. The comments have been sorted into 18 different topics.
>
> R. 3270.

Because DEQ's Response to Comments is a summary organized by topics, providing only the name of an individual who submitted a comment is insufficient to support the assertion that DEQ failed to respond to a comment. PMCC provides no additional facts to support its claim that

DEQ failed to respond to comments from these individuals. PMCC failed to identify a single issue raised by these individuals.

PMCC's failure to identify a single issue that was raised and not addressed is fatal to PMCC's claim on this issue. PMCC provides no factual basis for its conclusion that DEQ failed to respond to comments from these individuals. To satisfy the requirements of Ark. Code Ann. § 8-4-205(b)(3) and APC&EC Rule 8.603(C)(1)(c), PMCC must, at the very least, state some fact that supports its conclusion that DEQ did not respond to those comments.

PMCC's claim that "others may be missing" is also not supported by any facts. PMCC's claim that there could be other comments missing appears to be an attempt to incorporate some known subset of comments by reference to comments that are hypothetically missing. In so far as PMCC is attempting to incorporate comments by reference, PMCC has failed to satisfy the requirements of Ark. Code Ann. § 8-4-205(b)(3) and APC&EC Rule 8.603(C)(1)(c). In the matter of Big River Steel, LLC, the petitioner attempted to include all issues in all comments it submitted on the draft permit by incorporating the comments into its request for hearing. *In the matter of Big River Steel, LLC*, APC&EC Docket No. 13-006-P, Order No. 9, p. 6. The Commission found that incorporating comments by reference is inconsistent with the pleading requirements set forth in Rule 8.603(C)(1)(c). *Id*. In this case, PMCC attempts to incorporate other unknown comments by claiming that some other comments may be missing from DEQ's response. This is inconsistent with the pleading requirements set forth in Rule 8.603(C)(1)(c), therefore, this issue should be dismissed.

B. DEQ provided responses to substantive comments and the facts presented by PMCC fail to support its claim that DEQ's responses were inadequate.

In Paragraph 38 of its Consolidated Request for Hearing, PMCC asserts that "DEQ chose to either ignore many of the comments, or to dismiss them with perfunctory responses that are not supported by appropriate reference to the scientific and engineering literature or written studies conducted by the Department as required by Commission Regulation No. 8.211." Specifically, PMCC alleges that DEQ failed to respond to substantive comments regarding antidegredation and concerns about existing uses (Consolidated Request for Hearing, Paragraph 40), and to the concerns raised by Maumelle Water Corporation (MWC) concerning its drinking water wells (Consolidated Request for Hearing, Paragraph 41).

1. PMCC makes no arguments about DEQ's responses to comments on antidegredation and on concerns about existing uses being inadequate.

PMCC does not present arguments to support its claims about DEQ's responses to comments on antidegredation and on concerns about existing uses. While PMCC's arguments about antidegredation are addressed above, those arguments do not identify any issues with DEQ's Response to Comment. Similarly, PMCC's arguments about existing uses are in a separate section of its Consolidated Request for Hearing; however, PMCC's argument in that section appears focused on DEQ's application of APC&EC Rule 2.507, not on DEQ's response to comments on that issue.

PMCC provides no factual basis for its conclusion that DEQ failed to respond to comments on antidegredation and on concerns about existing uses. To satisfy the requirements of Ark. Code Ann. § 8-4-205(b)(3) and APC&EC Rule 8.603(C)(1)(c), PMCC must, at the very least, state some fact that supports its conclusion that DEQ did not respond to those comments.

2. PMCC's arguments about DEQ's general statement are not based on facts or law.

In relation to the comments and requests submitted by MWC, PMCC states that DEQ failed to provide the scientific and factual basis for DEQ's conclusion that "the terms and conditions of the permits are protective of the Water Quality of the State…" PMCC's arguments do not include facts and law to support its claims, and PMCC's objection to DEQ's statement is misplaced in this permit appeal.

DEQ's general statement is just that, a statement that DEQ developed this permit using the applicable laws and regulations. DEQ's response to comments includes several general statements that DEQ issues permits in accordance with Federal and State Regulations and that the permits issued are "protective of the water quality of the State…" PMCC claims that these statements are insufficient because they do not include a "scientific and factual basis for that conclusion." DEQ's responses at issue in this instance is:

> DEQ issues permits in accordance with Federal and State Regulations. The terms and conditions of the permits are protective of the Water Quality of the State of Arkansas and are designed to protect all designated uses of the receiving waters, including use as a raw water source for domestic (public and private) water supplies.
>
> R. 3279.

DEQ's general statements are acknowledgements that DEQ is obliged to follow the rules and processes for developing effluent limits and issuing permits. Another example of this type of general statement by DEQ is:

> The Division issues permits with discharge limits that are protective of water quality standards in accordance with Rule 2 and the permitting procedures contained in the CPP approved by EPA.
>
> R. 3288.

Both of these examples are statements about the purpose, process, and rules that govern DEQ's permitting decisions.

DEQ's statement is not a statement that requires a "scientific and factual basis" because it a reference to the rules that DEQ must follow and does not by itself establish a discharge limit, emission limit, environmental standard, analytical method, or monitoring requirement. DEQ's statement sets the stage for its process for developing permits based on Arkansas's water quality standards in APC&EC Rule 2. APC&EC Rule 2.102 makes clear that the purpose of the water quality standards in APC&EC Rule 2 is to protect the water quality and uses of waters of the state of Arkansas. As explained in DEQ's final permitting decision, DEQ developed water quality based effluent limits using Arkansas's water quality standards in Rule 2. Since Arkansas's water quality standards in Rule 2 are protective of the uses of the receiving stream, DEQ's basis for its "conclusion" can be found in the rulemaking record where those water quality criteria were established.

PMCC provides no factual or legal basis for its conclusion that DEQ's statement is one that requires a "scientific and factual basis." PMCC does not explain how this statement is a discharge limit, emission limit, environmental standard, analytical method, or monitoring requirement. PMCC simply assumes that each and every statement in a permit is an environmental standard that requires a "scientific and factual basis." DEQ's general statement is not an environmental standard. DEQ's general statement identifies the source of DEQ's environmental standards. PMCC's real objection is to DEQ stating that a permit with conditions and limits based on Arkansas's water quality standards in APC&EC Rule 2 is protective of water quality. That is an objection to APC&EC Rule 2, not this permit.

To satisfy the requirements of Ark. Code Ann. § 8-4-205(b)(3) and APC&EC Rule 8.603(C)(1)(c), PMCC must, at the very least, state some fact that supports its conclusion. DEQ is entitled to judgment as a matter of law as to PMCC's claim that DEQ failed to comply with APC&EC Rule 8.211 when responding to MWC's comments by stating that a permit with conditions and limits based on Arkansas's water quality standards in APC&EC Rule 2 is protective of water quality.

3. PMCC fails to provide facts to support its claim that DEQ's response to MWC is inadequate based on the word upstream.

PMCC asserts that the proposed outfall location is "upstream" from the well, and that this "fact" demonstrates that DEQ's "[r]esponse was based on a totally erroneous assumption." According to PMCC, DEQ's response to comments requesting a study about potential impacts on MWC's drinking water well was based on the "erroneous 'impression' that the well in question is upgradient" from the discharge location. Consolidated Request for Hearing, Paragraph 44. PMCC's misuse of the term "upstream" does not make DEQ's response inadequate.

PMCC's claim that the well is upstream is misleading. PMCC is using "upstream" in a way that is different from the ordinary meaning. According to *Merriam-Webster.com Dictionary*, "upstream" means "in the direction opposite to the flow of a stream."[1] An example sentence from *Merriam-Webster.com Dictionary* using the word "upstream" is:

> On Wednesday, a kayaker died on the Kern River, about 20 miles *upstream* from the campground from where Ms. Pett was sitting.

[1] "Upstream." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/upstream. Accessed 11 Aug. 2023.

The antonym of "upstream" is "downstream." Thus, the following sentences have the same meaning:

St. Louis is upstream of Memphis.

Memphis is downstream of St. Louis.

In the case of Memphis and St. Louis, the common understanding is that both cities are located on the banks of the Mississippi River. In the *Merriam-Webster.com Dictionary* example sentence, the location of the campground is understood to be on the banks of the Kern River, the same waterbody on which the kayaker died.

The well that PMCC described as "upstream" is not located on the banks of or adjacent to Mill Bayou. The well is far enough from the streambed to be located outside Mill Bayou's flood plain. R. 822. In other words, PMCC's use of the term "upstream" would be more analogous to the statement that "St. Louis is upstream from Forest City" than "St. Louis is upstream from Memphis."

PMCC's misuse of the term "upstream" does not prove that DEQ's response is based on an "erroneous assumption" that the well is up-gradient. The way that PMCC uses the term "upstream" does not preclude the possibility that a downstream location could also be up-gradient. For example, Murray Lock and Dam is upstream from Fort Roots and Burns Park. Both Fort Roots and Burns Park are near to the Arkansas River. While Murray Lock and Dam may be upstream, as PMCC uses that term, Fort Roots and parts of Burns Park would be considered up-gradient from Murray Lock and Dam.

PMCC provides no additional facts to support its claim that the discharge point is upstream from the well or its conclusion that DEQ made an erroneous assumption. To satisfy the

requirements of Ark. Code Ann. § 8-4-205(b)(3) and APC&EC Rule 8.603(C)(1)(c), MWC must, at the very least, state some facts to support its claims and conclusions. Without factual support, PMCC claims that that DEQ did not respond to MWC's comments appropriately do not satisfy the requirements of Ark. Code Ann. § 8-4-205(b)(3) and APC&EC Rule 8.603(C)(1)(c).

PMCC's legal arguments on this issue are also lacking. In Paragraph 45, PMCC states:

> 45. The responses to these substantive comments do not constitute a legal analysis, determination of the impact of the resolution on the permitting process, or acknowledge the specific role local government entities have in approving expansion of *solid waste disposal facilities*. (emphasis added)

In Paragraph 47, PMCC states:

> 47. ADEQ fails to comply with APCEC Reg. 8.211(A)(2), which requires "a response to each issue raised in any public comments," and in the "case of any" "environmental standard," that response must include a "written explanation of the rationale" based on "generally accepted scientific knowledge and engineering practices."

PMCC's Paragraph 45 does not apply to this permit because the permit is not for a solid waste disposal facility. Paragraph 47 appears to be claiming that DEQ's determination that the well will not be impacted is an environmental standard. DEQ's statement that "the discharge poses no demonstrable risk to the source wells" appears in the sentence following DEQ's statement that DEQ consulted with the Arkansas Department of Health (ADH). R. 3279. DEQ clearly responded to MWC's comment and stated that DEQ consulted ADH to prepare its response. PMCC does not address DEQ's consultation with ADH.

PMCC appears to assume or conclude that DEQ's response must be an "environmental standard" under APC&EC Rule 8.211. APC&EC Rule 8.211 provides:

> In the case of any discharge limit, emission limit, environmental standard, analytical method or monitoring requirement, the record of the proposed action and the response shall include a written explanation of the rationale for the proposal, demonstrating that any technical requirements or standards are based upon generally accepted scientific knowledge and engineering practices.

The list of items that require the type of response that PMCC claims is focused on permit conditions. Each of these items, discharge limit, emission limit, environmental standard, analytical method and monitoring requirement, would fall into the category of permit conditions. DEQ's statement based on its consultation with ADH does not establish a permit condition. DEQ's response reports that DEQ, after consulting with ADH, determined that the discharge poses no demonstrable risk to the source wells. Thus, DEQ's response satisfies APC&EC Rule 8.211, and DEQ is not required to provide the same rational required for permit conditions in this response. PMCC simply has not connected the dots to show how APC&EC Rule 8.211 requires DEQ to do more than provide a response MWC's comments.

Just as required in Arkansas Rule of Civil Procedure 8(a)(1), both Ark. Code Ann. § 8-4-205(b)(3) and Commission Rule 8.603(C)(1)(c) require that PMCC state facts to support its objection to a permitting decision. Even if PMCC has articulated what rule or law DEQ allegedly violated in issuing the permitting decision, PMCC's objection must be based on facts. Conclusions are not facts that could satisfy the pleading requirements under Arkansas Rule of Civil Procedure 8(a)(1). Because Ark. Code Ann. § 8-4-205(b)(3) and Commission Rule 8.603(C)(1)(c) require fact pleading, conclusions are not facts that could satisfy the pleading requirements set forth by Ark. Code Ann. § 8-4-205(b)(3) and Commission Rule 8.603(C)(1)(c).

For these reasons, PMCC's conclusory claims about DEQ failing to respond to various comments do not satisfy requirements of Ark. Code Ann. § 8-4-205(b)(3), and APC&EC Rule

8.603(C)(1)(c) because PMCC does not provide a complete and detailed statement identifying the legal and factual objections to the permit action being appealed. Therefore, PMCC has failed to state facts upon which relief can be granted and this issue should be dismissed pursuant to Ark. R. Civ. P. 12(b)(6).

C. DEQ's Response to Comments appropriately addressed the issues raised by Maumelle Water Corporation, and DEQ is entitled to summary judgment

DEQ states affirmatively that DEQ's Response to Comments addressed the issues raised by Maumelle Water Corporation's comments and that DEQ is entitled to summary judgment on this issue.

In Paragraphs 104 and 105 of its Consolidated Request for Hearing, PMCC makes its arguments that "there is a high potential for contamination of the Maumelle Water Corporation Well, a public drinking water source." These paragraphs seem to provide additional explanation for PMCC's claim that DEQ did not consider MWC's comment. PMCC presented the following statements as facts in support of its assertion:

- Maumelle Water Company ("MWC") obtains the water that it distributes to its customers from three (3) subsurface water wells in the Roland, Arkansas area. See Exhibit No. 2 to this Request for Hearing.[2]
- MWC Well No. 1 is located in close proximity to the floodplain of Mill Bayou.
- The area under the channel of Mill Bayou is within the zone of influence of Well No. 1.
- The zone of influence means that water in that channel is subject to being drawn into the well and entering MWC's water system.
- MWC submitted comments that DEQ should "perform or cause to be performed a study of the potential impact of the discharge from the proposed Paradise Valley wastewater treatment plant upon the aquifer underling Mill Bayou and MWC's Well No. 1."

[2] Exhibit No. 2 was not actually attached to the Request for Hearing submitted by MWC in Docket No. 23-011-P.

- DEQ assured MWC that its comments would be considered.

PMCC repeats MWC's conclusion that the requested analysis of the potential impact of the discharge from the proposed Paradise Valley wastewater treatment plant upon the aquifer underling Mill Bayou and MWC's Well No. 1 was never done. PMCC goes on to assert that "DEQ has no scientific or engineering basis for its finding in the Permit that the effluent from the outfall will not endanger the integrity of the water well."

PMCC does not identify the facts on which PMCC relies to come to the conclusion that no analysis of the potential impact was ever conducted or its conclusion that DEQ had no basis for stating that the discharge poses no demonstrable risk to the source wells. In Paragraph 105, the facts presented are that DEQ received numerous requests that DEQ conduct, or cause to be conducted, a study to determine the potential impact on MWC's well. Those requests are not facts that support a conclusion that DEQ did not conduct (or cause to be conducted) the analysis requested by MWC.

1. The permitting record demonstrates that Arkansas Department of Health performed an analysis and communicated the results to DEQ.

In contrast to assertions by PMCC, DEQ did not dismiss the concerns expressed in MWC's comments. Rather, DEQ consulted the Arkansas Department of Health (ADH), whose regulations address Public Water Supplies like the well utilized by MWC. ADH's Rules Pertaining to Public Water Systems, Section VIII. Ground Water Supplies, A. Location, 2. Proximity to Sources of Contamination states:

> 2. Proximity to Sources of Contamination
>
> The horizontal distance from any such possible source of contamination such as privies, septic tanks, sewers, sub-surface pits, sub-surface sewage disposal fields, and barnyards must not be less than 100 feet. This distance shall be used only where a sanitary

> survey performed by the Arkansas Department of Health indicates it to be safe, and greater distances shall be required where local conditions necessitate. Chemical storage or disposal facilities shall not be located within 100 feet of the well, without written approval of the Arkansas Department of Health.

Because ADH's rule indicates the required distance between a potential contamination source and the water supply could be greater than 100 feet based on local conditions, DEQ consulted with ADH to get more information. Based on this consultation with ADH, DEQ responded to the MWC comment:

> Response: DEQ issues permits in accordance with Federal and State Regulations. The terms and conditions of the permits are protective of the Water Quality of the State of Arkansas and are designed to protect all designated uses of the receiving waters, including use as a raw water source for domestic (public and private) water supplies. DEQ - Office of Water Quality has been in communication with the Arkansas Department of Health regarding the questions related to the proximity of the discharge under AR0053210 to Maumelle Water Corporation's source wells. As understood, Maumelle Water Corporation's wells are significantly up-gradient from the permitted outfall under NPDES permit AR0053210 and the discharge poses no demonstrable risk to the source wells.
>
> R. 3279.

ADH is the authority for determining the appropriate safe distances and establishing the protective areas for drinking water wells that are used by Public Water Supplies. Based on the analysis provided by ADH, DEQ understood that the discharge and the receiving stream were located at such a distance and under such conditions to have no influence on the well and that ADH had determined that the well was up-gradient from Mill Bayou. In other words, ADH informed DEQ that ADH believed that this discharge was likely to have no impact on the MWC well in question. Thus, DEQ, relying on ADH's analysis of the potential for contamination of MWC's well from this discharge, determined that the discharge poses no demonstrable risk to the source wells.

While ADH rules require a minimum of 100 feet for the safe horizontal distance from any possible source of contamination, that radius can be larger based on local conditions. PMCC is silent on ADH's regulatory role for Public Water Supplies. PMCC does not provide any facts about ADH's determination of appropriate horizontal distance from possible source of contamination. Under ADH rules, the field lines of septic systems are considered possible sources of contamination. DEQ received comments stating that septic systems are commonly used in this area. In fact, it is thus apparent that several residences with septic systems are already located within a few hundred feet of the well and are actually much closer than Mill Bayou and the permitted outfall location of the facility currently before the Commission. Exhibit –Well No. 1.[3] PMCC does not address how those nearby septic systems are of no concern, but a discharge to surface waters that is further away requires additional study.

Presumably, MWC is aware of ADH's determination of the safe horizontal distance from any such possible source of contamination. That horizontal distance is referred to as the Well Head Protection Area (WHPA). ADH rules require MWC to provide a map showing the location of all buildings, privies, sewers, underground conduits or other possible sources of contamination within 1320 feet of the proposed wells, galleries or gravity conduits.

PMCC does not address the radius of the WHPA as determined by ADH or the map with possible sources of contamination within 1320 feet that is required by ADH rules. PMCC does not address the multiple homes with septic systems within this 1320-foot radius. Exhibit 1. DEQ concedes that most of those septic systems are to the east of the well and that the gradient generally flows from west to east. However, even if those septic systems are down gradient from the well,

[3] The location of this well is based on comments received by DEQ. For example the well's location can be found in the record at R. 820.

PMCC's arguments about groundwater flow and the likelihood of contamination through that groundwater pathway could also apply to each septic system within 1320-foot radius.

2. ADH performed the analysis and communicated its results to EPA.

ADH provided an analysis of the potential for contamination from this discharge to EPA. ADH's communication to EPA is attached as Exhibit 2. In its response to EPA, ADH stated that the WHPA radius is 1600 feet for Well #1. Exhibit 2. ADH calculated that radius using aquifer properties of the alluvial terrace deposits of the Arkansas River (alluvial sediments). Exhibit 2. According to ADH, about half of the WHPA is in the alluvial sediments and the rest is in the Jackfork Sandstone and Shale (Jackfork Sandstone), which is the bedrock. Exhibit 2. ADH states that the extension of the WHPA into the Jackfork Sandstone is misleading for three reasons:

1) 100 percent of the groundwater comes from the alluvial sediments;
2) there is virtually no hydraulic communication between the Jackfork Sandstone and the alluvial sediments; and
3) the hydraulic conductivity of the alluvial sediments is several orders of magnitude greater than the hydraulic conductivity of the Jackfork Sandstone. Exhibit 2.

ADH determined that when Mill Bayou is flowing in the Jackfork Sandstone the lower hydraulic conductivity of the Jackfork Sandstone prevents the surface water from communicating with the groundwater in the alluvial sediments where the well is located. Exhibit 2. This lack of surface water communication with groundwater is also applicable to the proposed discharge point. ADH states that Mill Bayou crosses into the alluvial sediments approximately 1700 feet south of the WHPA. Exhibit 2. Based on that distance and the WHPA radius, ADH determined that Mill Bayou

"is likely far enough from the well to have no impact." Exhibit 2. In other words, ADH informed EPA that Mill Bayou, at the point where water in-stream can communicate with groundwater, was outside of the zone of influence for Well No. 1 and water in that channel was unlikely to be subject to being drawn into the well and entering MWC's water system.

PMCC's assertion that the discharge point is "upstream" from the well also does not capture the hydraulic conditions in the area that determine groundwater flow and how surface water can influence groundwater. Based on the facts presented by ADH, water from Mill Bayou cannot reach the aquifer connected to MWC Well No. 1 when Mill Bayou is in the Jackfork Sandstone. Exhibit 2. Once Mill Bayou crosses into the alluvial sediments, the water in the Mill Bayou would need to seep into groundwater almost immediately and flow north, or possibly to the northwest, to reach the MWC well. R. 820. As noted by the commenters, the general gradient in this area is west to east, i.e. towards the Arkansas River. R. 819. Mill Bayou flows towards the river in an easterly or southeasterly direction at the point where Mill Bayou Crosses into the Jackfork Sandstone. Exhibit 2; R. 819. A northward flow would be perpendicular to the known gradient in this area. R. 819.

Again, the hydraulic conditions in the area indicate that PMCC's use of the term "upstream" would be closer to an example like "St. Louis is upstream from Forest City" than "St. Louis is upstream from Memphis." When Mill Bayou crosses into the alluvial sediments the water in its stream bed is not "upstream" from the well. At that point, the stream flow and hydraulic gradient are both flowing towards the east. R. 819. The MWC well is north of the location where Mill Bayou crosses into the alluvial sediments. R. 820. Thus, a significant change in groundwater flow direction would be required for the surface water from Mill Bayou to have any influence on

groundwater at the well. According to ADH rules, there are closer potential sources of groundwater contamination, i.e. septic systems, that appear more likely to impact this well.

For these reasons, PMCC has failed to present any facts that demonstrate that DEQ did not consider its comments or that DEQ's response was inappropriate. As stated in the final permitting decision, DEQ consulted ADH. R. 3279. Under Arkansas law, ADH has the regulatory authority to determine the WHPA radius and to determine the safe distance for possible sources of contamination such as privies, septic tanks, sewers, sub-surface pits, sub-surface sewage disposal fields, and barnyards. ADH's Rules Pertaining to Public Water Systems, Section VIII. Ground Water Supplies, A. Location, 2. Proximity to Sources of Contamination. Given ADH's authority, DEQ consulting with ADH and receiving ADH's analysis satisfies any request for DEQ to study of the potential impact of the discharge from the proposed Paradise Valley wastewater treatment plant upon the aquifer underling Mill Bayou and MWC's Well No. 1.

While MWC's request for a study would have been more appropriately directed to ADH, neither MWC nor PMCC object to DEQ consulting ADH. PMCC only objected to DEQ's conclusions that were reasonably based on ADH's analysis. As explained above, PMCC's objection does not contain facts that could overcome the facts presented in ADH's analysis and relied upon by DEQ. Petitioner has also failed to provide a legal basis for claiming that DEQ's consultation with ADH is improper under Arkansas law. PMCC relies on the claims that the discharge is "upstream" from the well and that the analysis of potential impacts was never done to argue that DEQ's response was inadequate.

DEQ is entitled to judgment as a matter of law as to PMCC's claim that DEQ did not respond to the comments from MWC. DEQ has presented sufficient evidence from DEQ's

permitting decision that DEQ considered MWC's comments and that DEQ's response was appropriate. DEQ received ADH's analysis, as did EPA. DEQ based its response to MWC's comment on ADH's analysis. In addition, PMCC has failed to provide a sufficient factual basis for Petitioners' objection to the substance of DEQ's response. PMCC's claim that the water from Mill Bayou is "upstream" from the well is not credible or supported by evidence once you know that surface water flowing over the Jackfork Sandstone cannot communicate with the groundwater in the alluvial sediments.

III. PMCC claims about unaddressed water quality criteria are without basis.

PMCC asserts that DEQ failed to include several permit limits or terms required by APC&EC Rule 2. PMCC's objections related to effluent limits are that the limit is missing or the limit is not correct or the pollutant is not properly controlled. PMCC also makes an objection to the monitoring frequency and technology. DEQ addresses each of these objections individually. Each issue should be dismissed or in the alternative, DEQ is entitled to summary judgment on each issue for the reasons set forth below.

A. APC&EC Rule 2.502 does not require a Temperature limit for this facility.

PMCC states no facts to support its assertion that this permit must include a temperature limit. PMCC states that APC&EC Rule 2.502 requires that a temperature limit be included in the permit.

Contrary to PMCC's assertion, APC&EC Rule 2.502, by itself, does not require a limit. APC&EC Rule 2.502 states:

> Heat shall not be added to any waterbody in excess of the amount that will elevate the natural temperature, outside the mixing zone, by more than 5° F (2.8°C) based upon the monthly average of the

> maximum daily temperatures measured at mid-depth or three feet (whichever is less) in streams, lakes, or reservoirs.

APC&EC Rule 2.502 applies when the discharge is adding heat to the receiving waterbody above the natural temperature. PMCC has provided no evidence that this discharge could add heat to this waterbody. PMCC has provided no evidence that discharge from this facility would or could be more than 5° F (2.8°C) warmer than the natural temperature, outside the mixing zone, based upon the monthly average of the maximum daily temperatures measured at mid-depth or three feet (whichever is less). PMCC merely provides its legal conclusion that a temperature limit is required.

In addition, PMCC failed to address DEQ's response to comments on this issue. DEQ's response stated:

> Temperature limits are typically only included in permits when there is reasonable potential for exceedance of the water quality standard. The influent to a wastewater treatment plant for a subdivision like this does not include waste streams which would be high in temperature such as cooling tower or boiler blowdown, non-contact cooling water, etc. Also, the overall treatment time from when wastewater enters the WWTP to when it is discharged will be around twenty-four hours which is sufficient time for its temperature to become equal to the temperature of the water in the receiving stream.
>
> R. 3284.

Therefore, PMCC was on notice that DEQ had specific responses on this issue: 1) DEQ found that the facility did not have waste streams that are high in temperature and 2) DEQ found that the treatment time of twenty-four hours is sufficient time for its temperature to become equal to the temperature of the water in the receiving stream. PMCC provides no facts to support its assertion or to challenge the response provided by DEQ.

For these reasons, PMCC's conclusory claims about APC&EC Rule 2.502 requiring a temperature limit do not satisfy the requirements of Ark. Code Ann. § 8-4-205(b)(3), and APC&EC Rule 8.603(C)(1)(c). PMCC has not provided any supporting facts, much less a complete and detailed statement identifying the legal and factual objections on this issue. In light of DEQ's response, a response that is part of the permitting action being challenged, PMCC's failure to address DEQ's response is evidence that PMCC has not provided a complete and detailed statement identifying the legal and factual objections on this issue. Therefore, PMCC has failed to state facts upon which relief can be granted and this issue should be dismissed pursuant to Ark. R. Civ. P. 12(b)(6).

In the alternative, DEQ is entitled to judgment as a matter of law as to PMCC's objection to the lack of a temperature limit. DEQ has presented sufficient evidence from DEQ's permitting decision that this facility has no waste streams that are high in temperature and that the treatment time of twenty-four hours is sufficient time for its temperature to become equal to the temperature of the water in the receiving stream. PMCC's objection fails to address those facts.

B. PMCC misrepresents how Dissolved Oxygen limits work in APC&EC Rule 2.505.

PMCC objects to the permit limit of 3 mg/L for dissolved oxygen. PMCC claims that this 3 mg/L limit is wrong because APC&EC Rule 2 establishes a 2 mg/L limit for dissolved oxygen. PMCC's objection simply does not make sense because a dissolved oxygen limit of 3 mg/L is more stringent than the 2 mg/L that that PMCC identifies as the right number. In the simplest terms, 3 mg/L is better than 2 mg/L because a higher level of dissolved oxygen in the water is more protective of aquatic life than a lower level of dissolved oxygen.

DEQ provides an explanation for the dissolved oxygen limit in the Statement of Basis for this permit. In Statement of Basis for NPDES Permit AR0053210, DEQ states:

> Dissolved Oxygen (DO):
>
> As stated previously, domestic wastewater contains *pollutants that are oxygen-demanding*. These *pollutants may have adverse effects on the existing level of DO* and the propagation of desirable species of fish and other aquatic life in the receiving stream. Therefore, effluent limitations for DO, expressed as an *instantaneous minimum*, were derived from a modeling analysis dated March 9, 2021 to ensure protection of water quality and the designated uses of the receiving stream. An *instantaneous minimum* required DO effluent level has been included in the permit to ensure that the dissolved oxygen water quality standards are met in accordance with APC&EC Rule 2.505.
>
> R. 3264 (*emphasis added*)

DEQ states that the limit for dissolved oxygen is an "*instantaneous minimum*." Minimum is defined as "of, relating to, or constituting the smallest acceptable or possible quantity in a given case."[4] A similar, if not almost identical, explanation was in each of the draft permits. e.g. R. 299. DEQ provided links to the March 9, 2021 Water Quality Model in each draft and the final permit. R.302, 460, 2320, 3268. In addition, DEQ provided the following response to a comment questioning the dissolved oxygen limit:

> The DO effluent limits in the permit ensure that the dissolved oxygen water quality standards are met in accordance with APC&EC Rule 2.505. The minimum required DO levels are based on a water quality model performed by DEQ staff and is dependent on the levels of CBOD5, TSS, and NH3-N in the effluent as well as seasonal flow and temperature.
>
> R. 3284

[4] MINIMUM, Black's Law Dictionary (11th ed. 2019).

That response also included the internet address for March 9, 2021 Water Quality Management Plan Summary. The Water Quality Management Plan Summary can be found in the Record at R. 306-318 and R. 3220-3232.

All of this information was available to PMCC before it objected to the dissolved oxygen limit that is higher than the minimum dissolved oxygen standard found in APC&EC Rule 2. Apparently, PMCC does not realize that limits for dissolved oxygen are expressed in terms of the "*minimum*" amount of dissolved oxygen allowed in the discharge. PMCC does not explain why the dissolved oxygen limit is wrong. PMCC's only objection is that the limit of 3 mg/L is not the same as the lower water quality standard of 2 mg/L. Had PMCC attempted to provide a complete and detailed statement identifying the legal and factual objections to this dissolved oxygen limit as required by Ark. Code Ann. § 8-4-205(b)(3), and APC&EC Rule 8.603(C)(1)(c), PMCC presumably would have discovered that limits for dissolved oxygen are expressed in terms of the "*minimum*" amount of dissolved oxygen allowed in the discharge. Then PMCC would have known that a higher level of dissolved oxygen means that there is more oxygen in the water and that more oxygen in the water is better for aquatic life.

For these reasons, PMCC's objection to the limit for dissolved oxygen does not satisfy the requirements of Ark. Code Ann. § 8-4-205(b)(3), and APC&EC Rule 8.603(C)(1)(c). PMCC has not provided any facts supporting its assertion that a higher dissolved oxygen limit is inappropriate, much less a complete and detailed statement identifying the legal and factual objections to this limit. PMCC's apparent failure to understand that limits for dissolved oxygen are expressed in terms of the "*minimum*" amount of dissolved oxygen allowed in the discharge is evidence that PMCC has not provided a complete and detailed statement identifying the legal and factual

objections on this issue. Therefore, PMCC has failed to state facts upon which relief can be granted and this issue should be dismissed pursuant to Ark. R. Civ. P. 12(b)(6).

In the alternative, DEQ is entitled to judgment as a matter of law as to PMCC's objection to the dissolved oxygen limits. DEQ has presented sufficient evidence from DEQ's permitting decision that a higher limit expressed as an "*instantaneous minimum*" is appropriate. PMCC's objection appears based on PMCC's erroneous impression that the dissolved oxygen limit is a maximum limit.

C. APC&EC Rule 2.511 does not require Minerals, chlorides, and sulfates limits for this permit.

PMCC states no facts to support its assertion that this permit must include minerals, chlorides, and sulfates limits. PMCC states that APC&EC Rule 2.511(B) requires that minerals, chlorides, and sulfates limits be included in the permit.

APC&EC Rule 2.511(B), by itself, does not require a limit. APC&EC Rule 2.511(B) sets guidelines for which waterbodies should be considered as candidates for site specific criteria development based on the instream concentrations of minerals. APC&EC Rule 2.511(B) states in part:

> The following values were determined from Arkansas's least-disturbed ecoregion reference streams and are considered to be the maximum naturally occurring levels. For waterbodies not listed above, any discharge that results in instream concentrations more than 1/3 higher than these values for chlorides (Cl^-) and sulfates (SO_4^{2-}) or more than 15 mg/L, whichever is greater, is considered to be a significant modification of the maximum naturally occurring values. These waterbodies should be considered as candidates for site specific criteria development in accordance with Rules 2.306 and 2.308. Similarly, site specific criteria development should be considered if the following TDS values are exceeded after being increased by the sum of the increases to $Cl^-$and SO_4^{2-}. Such criteria

> may be developed only in accordance with Rules 2.306 and 2.308. The values listed in the table below are not intended to be used by the Division to evaluate attainment of water quality standards for assessment purposes.

PMCC does not explain how the language in APC&EC Rule 2.511(B) requires limits for minerals, chlorides, and sulfates. PMCC has provided no evidence that this discharge could cause the conditions described in APC&EC Rule 2.511(B). PMCC merely provides its legal conclusion that APC&EC Rule 2.511(B) requires limits for minerals, chlorides, and sulfates.

In addition, PMCC failed to address DEQ's response to comments on this issue. DEQ's response stated:

> As stated in Rule 2.511(B), the minerals levels listed are ecoregion reference stream minerals values. The values are not intended to be used by the Division to evaluate the attainment of water quality standards for assessment purposes. Therefore, they are not intended to be used to determine permit limits. Minerals limits will not be included in this permit at this time.
>
> R. 3284.

PMCC has failed to make a complete and detailed statement identifying the legal and factual objections to DEQ's permitting decision. PMCC provides no facts to support its assertion about APC&EC Rule 2.511(B) or to challenge the response provided by DEQ.

For these reasons, PMCC's conclusory claims about APC&EC Rule 2.511(B) requiring limits for minerals, chlorides, and sulfates do not satisfy requirements of Ark. Code Ann. § 8-4-205(b)(3), and APC&EC Rule 8.603(C)(1)(c). PMCC has not provided any supporting facts, much less a complete and detailed statement identifying the legal and factual objections on this issue. In light of DEQ's response, a response that is part of the permitting action being challenged, PMCC's failure to address DEQ's response is evidence that PMCC has not provided a complete and detailed

statement identifying the legal and factual objections on this issue. Therefore, PMCC has failed to state facts upon which relief can be granted and this issue should be dismissed pursuant to Ark. R. Civ. P. 12(b)(6).

In the alternative, DEQ is entitled to judgment as a matter of law as to PMCC's objection to the lack of limits for minerals, chlorides, and sulfates. The language in APC&EC Rule 2.511(B), by itself, does not require a limit, just like any other water quality standard does not, by itself, require a specific effluent limit. PMCC's objection fails to provide any dots to connect on this issue.

D. DEQ included appropriate Ammonia-Nitrogen limits based on APC&EC Rule 2.

With respect to Ammonia-Nitrogen, PMCC relies on statements from commenters, including Rick Barger and Dr. Laura Ruhl to support its objection to the Ammonia-Nitrogen limits in the Permit.

PMCC asserts that the limit of 10 mg/L of ammonia-nitrogen for the period of November through March is too high based on Rick Barger's comments. R. 1725-1726. Neither PMCC nor Rick Barger's comments claim that a limit of 10 mg/L of ammonia-nitrogen violates an APC&EC Rule or that DEQ did not develop that limit of 10 mg/L of ammonia-nitrogen based on APC&EC Rules.

PMCC claims that it is unclear from the record how ADEQ reached each of the ammonia-nitrogen limits in the permit, and if those limits meet EPA standards. PMCC does not state what EPA's standards are. The Statement of Basis for this permit addresses the limits for Ammonia-Nitrogen, stating:

> Ammonia Nitrogen (NH3-N):

> Ammonia is known to have adverse effects to aquatic life and human health when discharged in toxic amounts. If discharged without any reduction, ammonia will also exert an unacceptable oxygen demand on the receiving stream. In order to protect the water quality and designated uses of the receiving stream, effluent limitations are included for ammonia nitrogen (NH3-N), which measures the amount of ammonia in the wastewater discharge. These limitations are based on the toxicity standards provided in APC&EC Rule 2.512 and the modeling analysis dated March 9, 2021.
>
> R. 3264

DEQ provided links to the March 9, 2021 Water Quality Model in each draft and the final permit. R.302, 460, 2320, 3268. The model results are in the Water Quality Management Plan Summary which can be found in the Record at R. 306-318 and R. 3220-3232. DEQ in response to comments that the Ammonia-Nitrogen limits in the permit are above the EPA criteria stated:

> The Ammonia-Nitrogen limits are based either on the toxicity criteria in Rule 2.512 or on maintaining the Dissolved Oxygen criteria in Rule 2.505, whichever is more stringent. These criteria in Rule 2 has been approved by EPA Region VI.
>
> R. 3284.

PMCC also asserts, based on Dr. Laura Ruhl's comments, that the proposed permitted levels of Ammonia-Nitrogen will be toxic to aquatic organisms while exceeding EPA's ambient water quality criteria for total ammonia in some instances. DEQ reviewed the comment submitted by Dr. Laura Ruhl and found no mention of Ammonia-Nitrogen, APC&EC Rule 2.409, or EPA's ambient water quality criteria. See R. 818-833. PMCC does not state what EPA's ambient water quality criteria are. DEQ notes that Arkansas's water quality standards are in APC&EC Rule 2.

None of PMCC's objections to the Ammonia-Nitrogen limits identify how these limits in the permit violate APC&EC Rules. For these reasons, PMCC's conclusory claims that Ammonia-Nitrogen is not properly controlled by the permit do not satisfy requirements of Ark. Code Ann. § 8-4-205(b)(3), and APC&EC Rule 8.603(C)(1)(c). PMCC has not identified a rule that DEQ

violated, much less a complete and detailed statement identifying the legal and factual objections on this issue. In light of DEQ's Statement of Basis, and its responses on this issue, which are part of the permitting action being challenged, PMCC's failure to address DEQ's Statement of Basis or DEQ's response to comments is evidence that PMCC has not provided a complete and detailed statement identifying the legal and factual objections on this issue. Therefore, PMCC has failed to state facts upon which relief can be granted and this issue should be dismissed pursuant to Ark. R. Civ. P. 12(b)(6).

In the alternative, DEQ is entitled to judgment as a matter of law as to PMCC's objection to the Ammonia-Nitrogen limits. DEQ's Statement of Basis and the model results in the Water Quality Management Plan Summary demonstrate how DEQ followed APC&EC Rule 2, specifically APC&EC Rule 2.512 – Ammonia and APC&EC Rule 2.505 – Dissolved Oxygen. PMCC's objection fails to provide facts, rules, or law supporting its claim that DEQ failed to follow APC&EC Rules in developing these Ammonia-Nitrogen limits.

E. PMCC fails to identify any provision of APC&EC Rule 2 that requires more frequent monitoring.

PMCC, relying on statements from Rick Barger, alleges that the monitoring frequencies are not frequent enough. PMCC provides no citation to an APC&EC Rule that requires more frequent monitoring. PMCC does not address DEQ's response to comments on this issue, which stated:

> The monitoring frequencies listed in the draft permit are more stringent than the recommendations in the OWQ's memo titled "Recommended Monitoring Frequencies and Sample Types for NPDES Permits."
>
> R. 3297

In addition to this response, the permit requires that "[s]amples and measurements taken as required herein shall be representative of the volume and nature of the monitored discharge during the entire monitoring period." R. 3235. In the Statement of Basis, DEQ states that "[r]equirements for sample type and sampling frequency were based on best engineering judgment for a new facility with a design flow of 0.05 MGD." R. 3267.

PMCC's objection to the monitoring frequencies listed in the permit fails to identify how these monitoring frequencies violate APC&EC Rules or are otherwise inappropriate based on the facility. PMCC's conclusory claim that the monitoring frequencies are not frequent enough does not satisfy the requirements of Ark. Code Ann. § 8-4-205(b)(3), and APC&EC Rule 8.603(C)(1)(c). PMCC has not identified a rule that DEQ violated or addressed DEQ's statements on this issue. PMCC cannot be said to have provided a complete and detailed statement identifying the legal and factual objections on this issue without at least providing some factual or legal basis for its claim. In light of DEQ's response to comments on this issue, which are part of the permitting action being challenged, PMCC's failure to address DEQ's Statement of Basis or the response to comments is evidence that PMCC has not provided a complete and detailed statement identifying the legal and factual objections on this issue. Therefore, PMCC has failed to state facts upon which relief can be granted and this issue should be dismissed pursuant to Ark. R. Civ. P. 12(b)(6).

In the alternative, DEQ is entitled to judgment as a matter of law as to PMCC's objection to monitoring frequencies in the Permit. DEQ's response to comments on this issue demonstrate how DEQ arrived at the monitoring frequencies in the Permit. PMCC's objection fails to provide facts, rules, or law that show the monitoring frequencies in the permit are inappropriate.

F. DEQ included appropriate Fecal coliform bacteria limits based on APC&EC Rule 2.

PMCC, relying on statements from Rick Barger, alleges that Fecal coliform bacteria is not properly controlled by this Permit. PMCC's basis for that allegation appears to be that limits based on APC&EC Rule 2.507 may not be protective of downstream uses. PMCC provides no additional factual or legal basis for its allegation that the limit is not protective.

DEQ developed the limits for Fecal coliform bacteria based on APC&EC Rule 2.507. R. 3264-3265. DEQ responded to multiple comments about Fecal coliform bacteria and pathogens, stating that the limits for Fecal coliform bacteria based on APC&EC Rule 2.507 were deemed protective of the downstream designated uses of the receiving stream when placed in Rule 2 and approved by the EPA. R. 3281. PMCC acknowledges that the limits for Fecal coliform bacteria are based on APC&EC Rule 2.507. PMCC provides no factual or legal basis for its allegation that limits for Fecal coliform bacteria based on APC&EC Rule 2.507 are not protective.

PMCC's objection to limits for Fecal coliform bacteria fails to identify how these limits violate APC&EC Rules. PMCC's argument appears to be directed at APC&EC Rule 2.507, but PMCC failed to include any factual or legal basis for its claim that APC&EC Rule 2.507 is not protective of downstream uses.

PMCC's objection to limits for Fecal coliform bacteria does not satisfy the requirements of Ark. Code Ann. § 8-4-205(b)(3), and APC&EC Rule 8.603(C)(1)(c). PMCC has not identified a rule that DEQ violated or addressed DEQ's statements in the permit and in response to comments on this issue. PMCC cannot provide a complete and detailed statement identifying the legal and factual objections on this issue without at least providing some factual or legal basis for its claim. PMCC's failure to address DEQ's Statement of Basis or the response to comments is evidence that

PMCC has not provided a complete and detailed statement identifying the legal and factual objections on this issue. Therefore, PMCC has failed to state facts upon which relief can be granted and this issue should be dismissed pursuant to Ark. R. Civ. P. 12(b)(6).

In the alternative, DEQ is entitled to judgment as a matter of law as to PMCC's objection to limits for Fecal coliform bacteria in the permit. DEQ's Statement of Basis and responses to comments on this issue demonstrate how DEQ arrived at the limits for Fecal coliform bacteria in the Permit. PMCC's objection fails to provide facts, rules, or law that show the limits for Fecal coliform bacteria in the permit are inappropriate.

G. PMCC's argument regarding Phosphorus is not based on this permitting decision violating a rule or law, but on speculation about future events.

In the Consolidated Request for Hearing, PMCC alleges that Phosphorus is not properly controlled by this Permit. This issue should be dismissed or in the alternative, DEQ is entitled to summary judgment on this issue for the reasons set forth below.

1. PMCC's argument regarding Phosphorus is not based on this permitting decision violating a rule or law, but on speculation about future events.

PMCC asserts that DEQ received comments stating that phosphorus will negatively impact the receiving and that APC&EC Rule 2.509(A) prohibits that negative impact. In support of that assertion, PMCC makes a slippery slope argument about future permitting decisions by claiming that "[t]his one small wastewater treatment plant will in time turn into many package treatment plants with hundreds of thousands of gallons of poorly treated wastewater going into Mill Bayou daily." PMCC provides no additional factual or legal basis for its allegation that Phosphorus is not properly controlled by this Permit.

PMCC presents no facts to support the allegation that "[t]his one small wastewater treatment plant will in time turn into many package treatment plants with hundreds of thousands of gallons of poorly treated wastewater going into Mill Bayou daily." This slippery slope argument about the impact of future permits relies on speculation; speculation is not a fact. The absence of a detailed factual basis for PMCC's speculation means that PMCC has failed to meet the pleading requirements under Ark. Code Ann. § 8-4-205(b)(3) and Commission Rule 8.603(C)(1)(c). Without a factual basis, this issue cannot survive a motion to dismiss pursuant to Ark. Code Ann. § 8-4-205(b)(3) and Commission Rule 8.603(C)(1)(c) or Ark. R. Civ. P. 12(b)(6).

2. DEQ addressed limits for Total Phosphorus in accordance with APC&EC Rule 2.509.

DEQ, in its response to comments, addressed limits for Total Phosphorus. That response stated:

> Typically, limits or monitoring and reporting requirements for Total Phosphorus are only included in permits when one of the following instances is applicable:
>
> 1. The discharger is a major municipality;
> 2. The discharger is a food processor; or
> 3. The receiving stream is a lake, has been deemed impaired due to nutrients, or is located in a nutrient surplus area.
>
> None of the instances above are applicable to this facility. Rule 2.509 does not apply to this facility because the receiving stream is not located in a nutrient surplus area and has not been deemed impaired. Thus, nutrient limits are not warranted at this time. The limits for Preston Community Wastewater System (NPDES Permit No. AR0050571), which discharges directly into Lake Conway are based on an extensive study regarding Total Phosphorus in Lake Conway concluded in 2015. The study determined that TP limits for dischargers to Lake Conway are necessary.
>
> R. 3283.

In other words, APC&EC Rule 2.509 does not require a Total Phosphorus limit for this facility; however, in those instances where DEQ has data indicating that Total Phosphorus is the cause of a water quality problem in a particular waterbody and adding a Total Phosphorus effluent limit to permits will alleviate the problem, DEQ has added appropriate limits. Thus, DEQ based its decision on the applicable water quality standard relative to Total Phosphorus.

While PMCC identifies APC&EC Rule 2.509 as the rule that could provide a basis for phosphorus limits, PMCC does not address or object to DEQ's response to comments on this issue. PMCC's failure to address DEQ's response to comments on this issue is evidence that PMCC has not provided a complete and detailed statement identifying the legal and factual objections on this issue.

DEQ is entitled to judgment as a matter of law because APC&EC Rule 2.509 does not require a Total Phosphorus limit for this facility. DEQ's response to comments on this issue demonstrates that APC&EC Rule 2.509 does not require a Total Phosphorus limit for this facility. PMCC's objection fails to provide facts, rules, or law that demonstrate that DEQ's response to comments was wrong on this issue.

H. PMCC's objection to the discharge of Chlorine into Mill Bayou is without basis

In the Consolidated Request for Hearing, PMCC objects to the discharge of chlorine into Mill Bayou. This issue should be dismissed, or in the alternative, DEQ is entitled to summary judgment on this issue for the reasons set forth below.

1. Contrary to PMCC's assertions, the permit does contain an effluent limitation for TRC.

In Paragraph 48.h., PMCC asserts that the "draft permit" (sic) fails to contain a limit for Total Residual Chlorine (TRC).

The assertions in this paragraph that the "draft permit" contains no effluent limitation for TRC is simply false. NPDES Permit No. AR0053210, Part I, Section A. of the permit includes a limit of 0.011mg/L and states that the effluent limitation for TRC is the instantaneous maximum and cannot be averaged for reporting purposes. R. 3235. It also states that TRC shall be measured within fifteen (15) minutes of sampling. R. 3235.

DEQ is entitled to judgment as a matter of law as to PMCC's claim that this permit has no effluent limit for TRC because NPDES Permit No. AR0053210, Part I, Section A. of the permit includes a limit of 0.011mg/L for TRC.

2. PMCC's arguments regarding the discharge of Chlorine into Mill Bayou are not based on this permitting decision.

Paragraphs 50 through 56 of PMCC's Consolidated Request for Hearing contain its argument that the permit conditions should not allow chlorine to be discharged into Mill Bayou. Each of these paragraphs appears to be based entirely on the permitting and compliance history of a different, separate wastewater treatment plant under a different NPDES permit. For example, Paragraph 50 directly quotes from "[t]he Statement of Basis for the [p]ermit…(p. 8)" a paragraph that is not in the statement of basis for this permit, NPDES Permit AR0053210. Compare Paragraph 50 with page 8 of the Statement of Basis for NPDES Permit AR0053210, R. 3265. PMCC repeatedly identifies the discharge as going into Mill Bayou and the permittee as Waterview Estates. See Paragraphs 52-56. The permitting and compliance history for a different NPDES permit is unrelated to the permit that is at the core of this appeal.

To challenge DEQ's permitting decision, PMCC must provide sufficient factual details about the issue raised and specifically articulate what rule or law DEQ allegedly violated by issuing the permitting decision. The "facts" stated in Paragraphs 50 through 56 of PMCC's Consolidated

Request for Hearing do not relate to the permitting decision that is being appealed in APC&EC Docket 23-011-P. Further, Paragraphs 50 through 56 of PMCC's Consolidated Request for Hearing do not specifically articulate what rule or law DEQ allegedly violated by issuing *this* permitting decision.

Paragraphs 50 through 56 of PMCC's Consolidated Request for Hearing fail to meet the pleading requirements under Ark. Code Ann. § 8-4-205(b)(3) and Commission Rule 8.603(C)(1)(c). Those paragraphs do not allege that DEQ violated a rule or law by issuing *this* permitting decision or provide sufficient factual details about *this* permitting decision to identify the issue being raised.

3. The TRC effluent limitation in the permit is based on APC&EC Rule 2.409.

PMCC alleges that the discharge of TRC into Mill Bayou, with its low-to-zero flows, will negatively impact water quality and aquatic life.

The Statement of Basis for *this* permit identifies APC&EC Rule 2.409 as the basis for the effluent limit for TRC and provides the following explanation for the effluent limit:

> The facility's treatment system consists of chlorine disinfection and dechlorination. EPA considers TRC concentrations at the edge of the mixing zone higher than 0.011 mg/l (Chronic Criteria) to be toxic to aquatic organisms. In accordance with APC&EC Rule 2.409, which forbids the discharge of toxic pollutants in amounts which are toxic, a TRC limit based on meeting the EPA criteria in the receiving stream has been included in the permit. Since the receiving stream has a 7Q10 of 0 cfs, the EPA criteria must be included as an end-of-pipe limit.
>
> R. 3265.

DEQ also included a link to the toxicity-based TRC calculations in the list of sources provided in the Statement of Basis. R. 3268. In addition, DEQ stated in its response to comments

that "[t]he TRC limit in the permit, 0.011 mg/l, is based on the EPA acute and chronic criteria for protection of aquatic life. This level has been determined to be protective of the water quality of the receiving stream." R. 3284. Thus, the TRC effluent limitation in the permit is protective of the uses of the receiving stream.

PMCC does not address or object to DEQ's response to comments on this issue. PMCC's failure to address DEQ's response to comments on this issue is evidence that PMCC has not provided a complete and detailed statement identifying the legal and factual objections on this issue.

DEQ is entitled to judgment as a matter of law as to PMCC's objection to the effluent limit for TRC. APC&EC Rule 2.409 provides the basis for the effluent limit for TRC, and PMCC has provided no factual or legal basis for its assertion that the TRC limit is wrong.

IV. PMCC's objection to the permit based the claim that that the requirements for nonmunicipal domestic sewage treatment works have not been met is without basis.

PMCC asserts that "the record contains no complete financial plan satisfying Ark. Code Ann. § 8-4-203 requirements." PMCC is referring to the requirements for nonmunicipal domestic sewage treatment works that are found in Ark. Code Ann. § 8-4-203(b). This issue should be dismissed or in the alternative, DEQ is entitled to summary judgment on this issue for the reasons set forth below.

A. PMCC's conclusions about the record are not facts that support its allegations.

PMCC asserts that "the record contains no complete financial plan satisfying Ark. Code Ann. § 8-4-203 requirements." Paragraph 60.

On August 19, 2022, the Pulaski County Property Owners' Multipurpose Improvement District No. 2021-2 submitted updated information to fulfil the requirements of Ark. Code Ann. §

8-4-203(b) for Non-municipal Domestic Sewage Treatment Works. R. 1910-1918. Comment 10.e. which states, "[t]he developer's financial plan does not go beyond the first five years" indicates that Pulaski County Property Owners' Multipurpose Improvement District No. 2021-2 submitted a financial plan. R. 3289. DEQ's response to Comment 10.e. states:

> Pulaski County Property Owners' Multipurpose Improvement District No. 2021-2 has applied for a permit for the purpose of providing sewer service to a subdivision. The subdivision and the sewer treatment plant have not been constructed. For this reason, the revenue and operational costs are estimated. The plan provides the estimated costs for the facility, the estimated operating cost, and the estimated revenue for the five-year period.
>
> The Improvement District's financial plan states that the Improvement District will collect fees for sewer service to cover the cost of treatment and that the Improvement District will subsidize the difference until revenue exceeds expenses. Ark. Code Ann. § 8-4-203(b)(1)(D) requires that the permittee update the financial plan in its renewal application, which is due in five years.
>
> It is recognized that the maintenance costs, etc. can rise as the WWTP ages. However, a cost estimate for operating and maintaining the WWTP for longer than the five years specified by the Non-municipal Domestic Sewage Treatment Works statutory requirements is not required, and prediction of repair costs beyond a 5-year timeframe likely not reliably calculated.
>
> R. 3289.

PMCC's claim that "the record contains no complete financial plan satisfying Ark. Code Ann. § 8-4-203 requirements" is not a fact that deserves any deference; it is a conclusion that is not supported by the record.

PMCC's objection did not address DEQ's response to comments on this issue. To satisfy Ark. Code Ann. § 8-4-205(b)(3) and Rule 8.603 (C)(1)(c), PMCC must state some factual and legal basis for its objection. Had PMCC addressed DEQ's response on this issue, PMCC presumably could have explained the basis for its assertion about what is lacking in the record. As

it stands, DEQ's response and the record contradict PMCC's assertion that "the record contains no complete financial plan satisfying Ark. Code Ann. § 8-4-203 requirements." PMCC's failure to address DEQ's response to comments on this issue is evidence that PMCC has not provided a complete and detailed statement identifying the legal and factual objections on this issue. Thus, this objection should be dismissed for failing to provide a factual or legal basis as required by Ark. Code Ann. § 8-4-205(b)(3) and Rule 8.603 (C)(1)(c).

B. Pulaski County Property Owners' Multipurpose Improvement District No. 2021-2 provided updated information to fulfil the requirements of Ark. Code Ann. § 8-4-203(b).

The requirements of Ark. Code Ann. § 8-4-203(b) for nonmunicipal domestic sewage treatment works have been met. On August 19, 2022, the Pulaski County Property Owners' Multipurpose Improvement District No. 2021-2 submitted updated information to fulfill the requirements of Ark. Code Ann. § 8-4-203(b) for Non-municipal Domestic Sewage Treatment Works. R. 1910-1918 and 2122-2133. This updated information was provided in response to DEQ's July 14, 2022 letter requesting clarification on this issue. R. 1896-1897. On October 26, 2022, DEQ informed Pulaski County Property Owners' Multipurpose Improvement District No. 2021-2 of its evaluation of the updated information and stated:

> The Division of Environmental Quality (DEQ) - Office of Water Quality (OWQ) has reviewed the documents provided in response to the deficiency letter dated July 14, 2022, and in response to the meeting held on July 28, 2022. Those documents included the updated wastewater treatment plant construction cost estimate, updated disclosure statement, and revised application forms including updated attachments required for Nonmunicipal Domestic Sewage Treatment Works (Arkansas Code Annotated § 8-4-203(b)). At this time, the OWQ does not require additional information regarding these documents.
>
> Due to substantial revisions to the application documentation and the revisions that will be included in the draft permit, DEQ has

> determined that the revised draft permit must be resubmitted for public review through an additional public notice and 30-day public comment period. The revisions to the draft permit are currently being prepared for the public notification process, and the OWQ will notify you via letter or e-mail when the publication date for the legal notice has been scheduled.
>
> R. 2134.

After the update was provided, DEQ issued a revised draft permit that provided an opportunity for public comment on the updated information to satisfy the requirements of Ark. Code Ann. § 8-4-203(b) applicable to nonmunicipal domestic sewage treatment works. Between DEQ's letter dated October 26, 2022 (R. 2134) and DEQ's response to comment on this issue (R. 3289), the record is clear that DEQ addressed the requirements of Ark. Code Ann. § 8-4-203(b) for Non-municipal Domestic Sewage Treatment Works for this permit prior to issuing the permit. PMCC's objection on this issue only references comments that were submitted before this information was provided to DEQ and before the last public comment period.

DEQ is entitled to judgment as a matter of law because a financial plan was part of the updated information provided to satisfy the requirements of Ark. Code Ann. § 8-4-203(b) that are related to nonmunicipal domestic sewage treatment works. In addition, DEQ provided a response to comments related to nonmunicipal domestic sewage treatment works requirements.

V. PMCC's objections based on Local Planning are without basis.

PMCC objects to the permit based on issues with "the floodplain permit" and the "plat approved by Pulaski County." PMCC states that the applicant fails to meet these requirements prior to submitting an application. Pursuant to Ark. Code Ann. § 8-4-203(b), those requirements must be met before DEQ issues the permit, not prior to the application like the pre-application requirement for certain solid waste facilities. PMCC states that a floodplain permit was issued and that the plat was approved. PMCC provides no document to support its claim that the floodplain

permit is expired. PMCC's objections appear aimed at the actions of Pulaski County when it approved the plat and issued the floodplain permit, not at DEQ. Ark. Code Ann. § 8-4-203(b) requires that the permittee certify compliance with local ordinances and regulations. That certification was provided. R. 1916. The permit states:

> Permittees are responsible for compliance with all applicable terms and conditions of this permit. Receipt of this permit does not relieve any operator of the responsibility to comply with any other applicable federal regulations such as endangered species, state or local statute, ordinance or regulation.
>
> R. 3244

The issues raised by PMCC are subject to enforcement by Pulaski County, not DEQ. Any issue raised in a request for hearing that does not allege that a permitting decision violated a rule or law and that is within the jurisdiction of the permitting decision fails to meet the pleading requirements under Ark. Code Ann. § 8-4-205(b)(3) and Commission Rule 8.603(C)(1)(c). In the Matter of Eco-Friendly Materials, LLC, Docket No. 23-002-P, Order No. 4, pp. 5-6. Therefore, PMCC's claims on this issue must be dismissed.

In the alternative, DEQ is entitled to judgment as a matter of law because the requirements set out in Ark. Code Ann. § 8-4-203(b) were met before DEQ issued the permit.

VI. Concerns about Mr. Ferguson based on inspection reports for the Waterview Estates Wastewater Treatment Plant.

PMCC asserts that "Mr. Ferguson should not be given another permit due to his history of noncompliance." PMCC cites to inspection reports for NPDES Permits AR0050393, Waterview Estates Wastewater Treatment Plant (Waterview) and stormwater issues documented in reports for inspections of Permit ARR150142.

PMCC is not alleging that DEQ violated a rule by issuing this permitting decision; PMCC is asking DEQ to deny a permit to Pulaski County Property Owners' Multipurpose Improvement District No. 2021-2 because Mr. Ferguson is involved. PMCC claims that he has a history of noncompliance under APC&EC Rule 8.204(A) and (D)(4).

APC&EC Rule 8.204(A) is the statement of purpose for APC&EC Rule 8.204. APC&EC Rule 8.204(D)(4) provides more details. For example, under APC&EC Rule 8.204(D)(4)(a), the Director must find that an individual "has a documented history of violations of state or federal environmental laws or regulations that evidence a history of non-compliance or a pattern of disregard for state or federal laws or regulations; *and* has either made no attempt or has failed to remediate the disclosed violations." (emphasis added) APC&EC Rule 8.204(D)(4)(b) provides structure to this determination and states in part that "the Director shall *not* consider the applicant's prior violations of environmental laws or regulations if those violations are addressed in a consent administrative order and the applicant is in compliance with that order."(emphasis added)

PMCC's support for its assertion that Mr. Ferguson has a history of noncompliance is limited to inspection reports that are not provided as exhibits. Any violations noted in these reports are not described by PMCC. PMCC does not claim that Mr. Ferguson made no attempt to remediate any violations noted during those inspections. PMCC does not identify violations that are not addressed in a consent administrative order. PMCC also does not claim that Mr. Ferguson is not in compliance with any consent administrative order. In short, PMCC provides none of the evidence that would be required under APC&EC Rule 8.204(D)(b).

To satisfy Ark. Code Ann. § 8-4-205(b)(3) and Rule 8.603 (C)(1)(c), PMCC must state some factual and legal basis for its objection. PMCC's failure to address the required

considerations set forth in APC&EC Rule 8.204(D)(b) is evidence that PMCC has not provided a complete and detailed statement identifying the legal and factual objections on this issue. Thus, this objection should be dismissed for failing to provide a factual or legal basis as required by Ark. Code Ann. § 8-4-205(b)(3) and Rule 8.603 (C)(1)(c).

DEQ is entitled to judgment as a matter of law because APC&EC Rules require DEQ to consider corrective actions taken in response to inspections. PMCC provides no analysis of any violations noted or the corrective actions taken, ignoring considerations that DEQ would be required to address by APC&EC Rule 8.204(D)(b). DEQ reviewed a response from Waterview Estates to a 2021 inspection report; and that response addressed the issues noted in that inspection report. Exhibit 3. Based on that response, DEQ cannot determine that Mr. Ferguson made no attempt to remediate or failed to remediate any violations noted in that 2021 inspection report.

VII. PMCC's objection to a "permit transfer" is without basis and untimely.

PMCC argues that this permit was "transferred" from Southwest Equity Investment to Pulaski County Multipurpose Improvement District No. 2021-2 and that the "transfer" was improper for several reasons. PMCC concludes that the permit transfer is a nullity and no application exists for DEQ to approve.

PMCC constructs a narrative that is not supported by the record. For example, PMCC claims that DEQ transferred the permit to an entity before it existed and that it is impossible to know what comments the Arkansas Department of Health might have had if the improvement district were identified as the applicant. On November 29, 2021, when the transfer form was submitted, Doug Ford stated, "[a]s part of the Arkansas Department of Health (ADH) requirements, Paradise Valley Subdivision has formed an Improvement District to manage the subdivision sanitary sewer and other subdivision infrastructure." R. 376. On December 17, 2021,

ADH approved the plans and specifications for this project and in that approval acknowledged that the Pulaski County Property Owners' Multipurpose Improvement District No. 2021-2 would be the permittee for this facility. R. 396-397. On January 6, 2022, DEQ requested the signed formation documents for Pulaski County Property Owners' Multipurpose Improvement District No. 2021-2 and stated:

> DEQ has determined that an additional thirty-day (30-day) public comment period is necessary in order to provide opportunity for public review and comment. This determination is made in consideration of the new application information recently provided that was not originally included in the permitting record at the time of the previous draft decision announcement.
>
> R. 399-400.

January 18, 2022, DEQ received the requested documentation, including the order forming the improvement district and the oaths of the commissioners of the improvement district. R. 402-418. Then, on March 6, 2022, DEQ public noticed a revised draft permit that listed Pulaski County Property Owners' Multipurpose Improvement District No. 2021-2 as the permittee. R. 423-461.

First, not only did ADH know and approve of the change, it appears that ADH's comments were the impetus for the formation of Pulaski County Property Owners' Multipurpose Improvement District No. 2021-2. Second, DEQ determined that the change required DEQ to propose a revised draft permit and provide another 30-day comment period, and DEQ did not publish that revised draft permit before the improvement district was formed.

PMCC's conclusion that the application is a nullity is based the fiction that once an application is submitted, neither applicant nor DEQ can accept changes to that application. DEQ both requests and receives updated application information. For example, a corporation that has an application before DEQ could provide an updated disclosure statement because it has been bought by another corporation. In that instance, DEQ would view that change in ownership as

transfer. *EnviroClean, Inc. v. Arkansas Pollution Control & Ecology Comm'n*, 314 Ark. 98, 858 S.W.2d 116 (1993). PMCC is claiming that once an applicant notifies DEQ that ownership has changed, that change should nullify the application and in effect deny the permit application.

Assuming for the sake of argument that DEQ could not "transfer" the permit application to Pulaski County Property Owners' Multipurpose Improvement District No. 2021-2, DEQ did what it could under ACP&EC Rules. DEQ issued a revised draft permit on March 6, 2022. That revised draft permit replaced the previous draft permit effectively withdrawing that previous draft permit. In that revised draft permit, DEQ identified the applicant as Pulaski County Property Owners' Multipurpose Improvement District No. 2021-2. That public notice satisfied the requirements for a draft permitting decision in APC&EC 8.207. PMCC had the opportunity to comment on both draft permits.

Once DEQ issued that revised draft permit based on new application information, Pulaski County Property Owners' Multipurpose Improvement District No. 2021-2 was the applicant under Arkansas law and APC&EC Rules. The issuance of a draft permit allows for public comment, which PMCC did. Pulaski County Property Owners' Multipurpose Improvement District No. 2021-2 is the permittee in DEQ's final permitting decision that is the subject of this appeal.

PMCC's theory that any change to the applicant must result in the nullification of that application is an absurd result under Arkansas law. PMCC's argument implies that DEQ cannot make this change to a draft permit by issuing a revised draft based on new application information. PMCC does not state that outright because it would be absurd to claim that DEQ nullified an application by informing the public about new information and changes to the draft permit. PMCC would read APC&EC Rules so that DEQ's public notice of a revised draft permit based on new

application information nullifies that permit application and any work DEQ did on that application after that change.

DEQ is entitled to judgment as a matter of law because under APC&EC Rules, DEQ did what was required to provide adequate notice of this change to the draft permit and provided the appropriate public comment period.

Assuming for the sake of argument that DEQ "transferred" the permit application to Pulaski County Property Owners' Multipurpose Improvement District No. 2021-2, PMCC's objection to this transfer is untimely. If DEQ "transferred" the permit application, then that action would be a permitting decision because a "transfer" is one of the final administrative decisions in the definition of "permitting decision" in Rule 8.103(BB). Because a transfer can happen automatically under Arkansas law, a transfer can become a final administrative decision without any action by DEQ. Transfers are different from permit modifications, minor or otherwise.

In this case, DEQ received notice of the proposed transfer more than thirty (30) days before the change would become effective. DEQ did not move forward with its permitting process to incorporate that change until DEQ received documentation that the new entity, Pulaski County Property Owners' Multipurpose Improvement District No. 2021-2, had been formed and the commissioners has signed their oaths. Then, on March 6, 2022, DEQ issued a revised draft permit to allow for comment on new application information with Pulaski County Property Owners' Multipurpose Improvement District No. 2021-2 named as the applicant. R. 423-461. On that date, PMCC was on notice that DEQ considered Pulaski County Property Owners' Multipurpose Improvement District No. 2021-2 the applicant for this Permit.

PMCC's objection to this transfer is untimely because PMCC did not appeal DEQ's decision to "transfer" the permit application to Pulaski County Property Owners' Multipurpose Improvement District No. 2021-2 in the time required by APC&EC Rule 8. PMCC did not appeal that transfer within thirty days of March 6, 2022, when DEQ issued a revised draft permit with Pulaski County Property Owners' Multipurpose Improvement District No. 2021-2 named as the applicant.

PMCC also misunderstands the limits that Arkansas law places on transfers and denials of transfers. Under Arkansas law, "[a]s the agency charged with enforcing the public policy of the state to protect the environment, and the public's health, safety, and welfare, [DEQ] must be able to know the true identity of the persons or entities which own and control its corporate applicants and permittees. *EnviroClean, Inc. v. Arkansas Pollution Control & Ecology Comm'n*, 314 Ark. 98, 107–08, 858 S.W.2d 116, 122 (1993). Transfers of NPDES permits are governed by Ark. Code Ann. § 8-4-203(h), which states:

> (h)(1) Permits for the discharge of pollutants into the waters of the state or for the prevention of pollution of the waters of the state shall remain freely transferable if the applicant for the transfer:
>
> (A) Notifies the director at least thirty (30) days in advance of the proposed transfer date;
>
> (B) Submits a disclosure statement as required under § 8-1-106;
>
> (C) Provides any replacement financial assurance required under this section; and
>
> (D) Ensures that all past and currently due annual permit fees and the trust fund contribution fees for the nonmunicipal domestic sewage treatment works have been paid.
>
> (2) Only the reasons stated in § 8-1-103(4), § 8-1-106(b)(1), § 8-1-106(c), and this section constitute grounds for denial of a transfer.
>
> (3) The permit is automatically transferred to the new permittee unless the director denies the request within thirty (30) days of the receipt of the disclosure statement.

In addition, APC&EC Rule 8.212(A) states, "[t]he permit is automatically transferred to the new permittee unless the Director denies the request to transfer within thirty (30) calendar days of the Department's receipt of the disclosure information." APC&EC Rule 8.212(A) also states, "denial [of a transfer] shall constitute a final permitting decision of the Director and may be appealed to the Commission." Neither Ark. Code Ann. § 8-4-203 nor APC&EC Rule 8 require public notice of a transfer. For purposes of permits and applications, DEQ has the right to know the true identity of the persons or entities which own and control its corporate applicants and permittees, but DEQ's authority to deny a transfer is specifically limited and can be appealed to APC&EC.

DEQ is entitled to judgment as a matter of law because permits and applications are freely transferable when DEQ is informed of the true identity of the persons or entities which own and control its corporate applicants and permittees. Additionally, PMCC's challenge to this transfer is time barred because PMCC had notice of this transfer on March 6, 2022 and PMCC did not challenge that transfer within thirty days.

PMCC's argument about an incomplete disclosure are moot. DEQ received an updated disclosure before this permit was issued. R. 2128-2133.

PMCC's arguments related to APC&EC Rule 6.205 are moot because Ark. Code Ann. § 8-4-203(b) has been amended and now nonmunicipal sewage treatment works have to comply with the trust fund requirements discussed above.

PMCC's arguments related to Pulaski County approvals raise issues that are properly subject to enforcement by Pulaski County, not DEQ. Any issue raised in a request for hearing that does not allege that a permitting decision violated a rule or law and that is within the jurisdiction of the permitting decision fails to meet the pleading requirements under Ark. Code Ann. § 8-4-

205(b)(3) and Commission Rule 8.603(C)(1)(c). In the Matter of Eco-Friendly Materials, LLC, Docket No. 23-002-P, Order No. 4, pp. 5-6. Therefore, PMCC's claims on this issue must be dismissed.

VIII. Wastewater Operator License requirements are appropriate.

PMCC contends that the individual named as the operator in the permit application is inadequate for the job. This issue should be dismissed, or in the alternative, DEQ is entitled to summary judgment on this issue for the reasons set forth below.

A. Dismissal is appropriate for this issue.

PMCC fails to articulate a factual and legal basis for its objection to this permit based on the wastewater operator named in the permit application. PMCC fails to identify any rule or law that DEQ allegedly violated by issuing the permitting decision. In fact, PMCC does not allege that the wastewater operator license requirements in the permit are inappropriate. PMCC directs its objection at an individual, not at DEQ's permitting decision.

For each issue raised in a request for hearing, the request must "include a complete and detailed statement identifying the legal and factual objections to the permit action." Ark. Code Ann. § 8-4-205(b)(3). For this issue, PMCC's Consolidated Request for Hearing contains no allegation that a permitting decision violated a rule or law. PMCC simply objects to the individual who is named in the permit application. Thus, PMCC has failed to meet the pleading requirements under Ark. Code Ann. § 8-4-205(b)(3) and Commission Rule 8.603(C)(1)(c).

B. PMCC's concerns are unfounded and addressed in the permit.

PMCC objects to the individual identified in the application. In reality, the name of the individual in the application is not of significant consequence. Part II, Condition 1 of the permit

requires that the operator of this wastewater treatment facility shall be licensed as at least Class III by the State of Arkansas in accordance with APC&EC Rule 3.

The concerns raised about a specific operator are meaningless because the permit condition does not depend on the identity of the specific individual whose name appears in the application. PMCC does not challenge Part II, Condition 1 of the permit or any other part of the permit that places requirements on the operator. Thus, DEQ is entitled to judgment as a matter of law because PMCC has not objected to the permit or its conditions.

IX. PMCC's objection based on low or no-flow streams is without merit.

PMCC claims that the "permitting process fails to account for the fact that the receiving stream has no assimilative capacity because it is a low or no flow stream most of the year." PMCC states that Pennsylvania properly considers these dischargers and DEQ does not.

DEQ in response to a comment about low or no flow streams stated:

> The proposed discharge into Mill Bayou was evaluated in accordance with APC&EC Rule 2 Water Quality Standards and in accordance with permitting procedures specified by the Continuous Planning Process (CPP) approved by EPA. The CPP states that discharge effects on receiving streams must be evaluated at worst case scenarios, i.e. critical low-flow conditions, which is the 7Q10 low flow. The 7Q10 for this receiving stream has been set at 0 cubic feet per second (cfs) due to lack of flow or extremely low flows observed during parts of the year. Mill Bayou is a surface water of the state. DEQ, in accordance with Rule 2 and the evaluation completed during the technical review of the draft permit, concludes that the limits set in this final permit decision meet Arkansas's Water Quality Standards and will continue to protect all designated uses of the downstream receiving waters.
>
> R. 3274.

PMCC fails to state any facts that refute DEQ's statement that the limits for this permit were developed with the 7Q10 for this receiving stream set at 0 cubic feet per second (cfs), i.e. no flow.

PMCC states that Pennsylvania does is right and DEQ does not. PMCC claims that an example from Pennsylvania is in the comments.

To satisfy Ark. Code Ann. § 8-4-205(b)(3) and Rule 8.603 (C)(1)(c), PMCC must state some factual and legal basis for its objection. PMCC's failure to address the statements in DEQ's response to comments that specifically state that DEQ considered the receiving stream a no flow stream is evidence that PMCC has not provided a complete and detailed statement identifying the legal and factual objections on this issue. Thus, this objection should be dismissed for failing to provide a factual or legal basis as required by Ark. Code Ann. § 8-4-205(b)(3) and Rule 8.603 (C)(1)(c).

DEQ is entitled to judgment as a matter of law because DEQ followed APC&EC Rules and the CPP to develop permit limits based on a receiving stream with no flow. PMCC provides no analysis of DEQ's process and does not claim that DEQ did not follow APC&EC Rules or the CPP. PMCC just claims that Pennsylvania does it better.

X. PMCC's Objection to the permitted design flow are without merit.

PMCC's concerns about inadequate design flow are unfounded and addressed in separate permit conditions. Part II, Conditions 6 and 7 of the permit address the concerns regarding increased flow. R. 3238-3239. Condition 6 triggers an evaluation when the monthly average flow exceeds 80% of design flow, i.e. 0.04 MGD. R. 3238. Condition 7 limits the number of connections and requires approval from DEQ and ADH before the permittee may increase the number of sewer connections to the facility. R. 3239. These conditions are sufficient to provide advanced notice about changes in flow due to increased connections or inflow and infiltration. DEQ also address this issue in response to comments, stating:

> In a letter to the Division dated January 18, 2022, the permittee's consultant stated that the actual flow rate at similar subdivisions is approximately 135 gallons per house per day which equals 40,500 gpd for 300 homes. The design flow for this treatment system is 50,000 gpd. The Division is allowing this number of homes for the flow rate listed because the permittee will be required to begin expansion of the WWTP when actual flows are 80% of the design flow.
>
> R. 3288

PMCC has failed to discover or object to the permit conditions concerning connections and flow evaluations. Therefore, PMCC has failed to allege that these conditions are inadequate to address the concerns raised or provide facts to support such an allegation. PMCC's failure to address relevant permit conditions or DEQ's response to comments is evidence that PMCC has not provided a complete and detailed statement identifying the legal and factual objections on this issue. Thus, this objection should be dismissed for failing to provide a factual or legal basis as required by Ark. Code Ann. § 8-4-205(b)(3) and Rule 8.603 (C)(1)(c).

DEQ is entitled to judgment as a matter of law because the concerns raised have already been addressed by other permit conditions that PMCC failed to mention or demonstrate were somehow inadequate.

XI. PMCC fails to identify the exiting uses that are not protected by the permit.

PMCC asserts that existing uses are not protected by the permit. In Paragraph 96, in support of this claim, PMCC states:

> Comments submitted by Al Drinkwater and Kristy Eanes discuss why the presumption against primary contact recreation (due to watershed size) and other existing uses is improper here.

PMCC is attempting to incorporate comments by reference and that is inconsistent with the pleading requirements set forth in Rule 8.603(C)(1)(c). In the matter of Big River Steel, LLC, Docket No. 13-006-P, Order No. 9., p. 6.

PMCC has also failed to identify the existing uses that are allegedly not protected by the permit. In Paragraph 96, PMCC mentions a presumption against primary contact recreation. DEQ believes that PMCC might be referring to APC&EC Rule 2.507, which states in part, "[f]or the purposes of this rule, all streams with watersheds less than 10 mi^2 shall not be designated for primary contact unless and until site verification indicates that such use is attainable."

PMCC provides no facts to support any site verification that indicates primary contact use is attainable. In Paragraph 85, PMCC states, "the receiving stream has no assimilative capacity because it is a low or no flow stream most of the year." DEQ states, "[t]he 7Q10 for this receiving stream has been set at 0 cubic feet per second (cfs) due to lack of flow or extremely low flows observed during parts of the year." R. 3274. The record and PMCC's own claims indicate that site verification would be unlikely to support a claim that primary contact use is attainable in the receiving stream.

PMCC's failure to identify the existing uses that are allegedly not protected is evidence that PMCC has not provided a complete and detailed statement identifying the legal and factual objections on this issue. Thus, this objection should be dismissed for failing to provide a factual or legal basis as required by Ark. Code Ann. § 8-4-205(b)(3) and Rule 8.603 (C)(1)(c).

XII. PMCC's objection to the permit based on the required accuracy for Flow Measurement is without basis.

PMCC objects to the required accuracy for flow measurement. PMCC contends that DEQ should require flow measurement with an accuracy of +/- 1% in a permit condition. This issue

should be dismissed, or in the alternative, DEQ is entitled to summary judgment on this issue for the reasons set forth below.

A. PMCC's objection fails to state a legal and factual basis for its objection to the required accuracy for Flow Measurement.

PMCC fails to specifically articulate what rule or law DEQ allegedly violated by issuing the permitting decision that requires flow measurement with an accuracy of +/- 10% in a permit condition. PMCC offers speculation about inflow and infiltration and additional homes being connected to the system causing problems that would not be discovered by a flow measurement with an accuracy of +/- 10%. PMCC states, "[t]hose additional homes, high precipitation, and an out-of-date flow meter may mean that untreated wastewater is discharged into Mill Bayou that goes undiscovered." PMCC's assertions are speculative. DEQ provides the following examples of PMCC's speculations. First, PMCC's claim is based on the speculation that a 10% change in the flow will result in untreated wastewater being discharged. Second, PMCC's claim is based on the speculation that that a substantial number of homes will be added without appropriate changes to the wastewater treatment plant or the permit. Finally, PMCC's claim is based on the speculation that the discharge of untreated wastewater will not be discovered through effluent monitoring.

PMCC fails to provide facts to support its speculations. Thus, PMCC has failed to provide a sufficient factual basis for its objection on this issue.

Further, PMCC failed to identify a rule or law that has been violated by requiring flow measurement with an accuracy of +/- 10% in a permit. When an issue is raised in a request for hearing and the request contains no allegation that a permitting decision violated a rule or law and provides no facts to support its conclusions, the petitioner has failed to meet the pleading requirements under Ark. Code Ann. § 8-4-205(b)(3) and Commission Rule 8.603(C)(1)(c).

B. DEQ included appropriate conditions in the permit to address increases in flow.

PMCC's concerns about undiscovered flow causing a problem are unfounded and addressed in separate permit conditions. Part II, Conditions 6 and 7 of the permit address the concerns regarding increased flow raised by PMCC. R. 3238-3239. Condition 6 triggers an evaluation when the monthly average flow exceeds 80% of design flow, i.e. 0.04 MGD. R. 3238. Condition 7 limits the number of connections and requires approval from DEQ and ADH before the permittee may increase the number of sewer connections to the facility. R. 3239. These conditions are sufficient to provide advanced notice about changes in flow due to increased connections or inflow and infiltration.

PMCC has failed to mention these conditions concerning connections and flow evaluations. Therefore, PMCC has failed to allege that these conditions are inadequate to address the concerns raised or provide facts to support such an allegation.

DEQ is entitled to judgment as a matter of law because the concerns raised have already been addressed by other permit conditions that PMCC failed to mention or demonstrate were somehow inadequate. In the alternative, PMCC's failure to address Part II, Conditions 6 and 7 of the permit regarding increased flow is evidence that PMCC has not provided a complete and detailed statement identifying the legal and factual objections on this issue. Thus, this objection should be dismissed for failing to provide a factual or legal basis as required by Ark. Code Ann. § 8-4-205(b)(3) and Rule 8.603 (C)(1)(c).

XIII. Concerns about the 100-year floodplain are addressed.

PMCC fails to articulate a factual and legal basis for its objection to this permit based on wastewater treatment facility being located within the 100-year floodplain. In support of this objection, PMCC asserts that "10-state standards" do not recommend that wastewater treatment

facilities be located in the 100-year floodplain. This issue should be dismissed or in the alternative, DEQ is entitled to summary judgment on this issue for the reasons set forth below.

A. Dismissal is appropriate for this issue.

PMCC fails to articulate what rule or law DEQ allegedly violated by issuing the permitting decision for a facility located within the 100-year floodplain. PMCC states that "10-state standards" do not recommend that wastewater treatment facilities be located in the 100-year floodplain. PMCC does not cite to a rule or law that provides a legal basis for this objection to the permit.

For each issue raised in a request for hearing, the request must "include a complete and detailed statement identifying the legal and factual objections to the permit action." Ark. Code Ann. § 8-4-205(b)(3). When an issue is raised in a request for hearing and the request contains no allegation that a permitting decision violated a rule or law, the petitioner has failed to meet the pleading requirements under Ark. Code Ann. § 8-4-205(b)(3) and Commission Rule 8.603(C)(1)(c).

B. PMCC misstates the requirements of the "10 State Standards."

The purpose of submitting a flood plain map with an NPDES permit renewal application is to verify either that the wastewater treatment plant is above the 100-year flood plain or that the necessary precautions have been taken to ensure that the wastewater treatment plant is protected as required by 10 State Standards. R. 3294. Paragraph 51.2 of the 10 State Standards states that "[t]he treatment plant structures, electrical, and mechanical equipment shall be protected from physical damage by the one hundred (100) year flood." R. 3294. The site evaluation criteria in Paragraph 11.28.d.6 of the 10 State Standards states "[f]lood considerations, including the 25 and 100-year flood levels, impact on floodplain and floodway, and compliance with applicable

regulations regarding construction in flood-prone areas, shall be evaluated. R. 3294. Paragraph 51.2 of the 10 State Standards contains requirements for protection from flooding." R. 3294. Thus, the recommendation from the 10 State Standards is a requirement that "[t]he treatment plant structures, electrical, and mechanical equipment shall be protected from physical damage by the one hundred (100) year flood." R. 3294.

DEQ provided the details about the 10 State Standards requirement that "[t]he treatment plant structures, electrical, and mechanical equipment shall be protected from physical damage by the one hundred (100) year flood" in DEQ's Response to Comment 14.f. R. 3294. PMCC's Consolidated Request for Hearing does not address DEQ's response to comments on this issue.

DEQ is entitled to judgment as a matter of law because the concerns expressed by PMCC do not accurately reflect the applicable requirement stated in the 10 State Standards. In the alternative, PMCC's failure to address DEQ's response to comments on this issue is evidence that PMCC has not provided a complete and detailed statement identifying the legal and factual objections on this issue. Thus, this objection should be dismissed for failing to provide a factual or legal basis as required by Ark. Code Ann. § 8-4-205(b)(3) and Rule 8.603(C)(1)(c)

XIV. Concerns about lack of common control.

PMCC asserts that the wastewater treatment facility is not located on property of the Paradise Valley Subdivision, LLC. A different legal entity, Pulaski County Property Owners' Multipurpose Improvement District No. 2021-2, is the permittee for this wastewater treatment facility.

For each issue raised in a request for hearing, the request must "include a complete and detailed statement identifying the legal and factual objections to the permit action." Ark. Code

Ann. § 8-4-205(b)(3). PMCC fails to specifically articulate what rule or law DEQ allegedly violated by issuing the permitting decision based on the fact that the land for the wastewater treatment facility is not owned by Paradise Valley Subdivision, LLC. Paradise Valley Subdivision, LLC is not the permittee. When an issue is raised in a request for hearing and the request contains no allegation that a permitting decision violated a rule or law, the petitioner has failed to meet the pleading requirements under Ark. Code Ann. § 8-4-205(b)(3) and Commission Rule 8.603(C)(1)(c).

DEQ is entitled to judgment as a matter of law because there is no legal basis or reason for DEQ to require that the wastewater treatment facility be owned by an entity that is not the permittee.

XV. Concerns about pollution of Mill Bayou.

PMCC asserts that the discharge from the wastewater treatment facility will pollute Mill Bayou.

For each issue raised in a request for hearing, the request must "include a complete and detailed statement identifying the legal and factual objections to the permit action." Ark. Code Ann. § 8-4-205(b)(3). PMCC's objection is based on PMCC's claim that permit violations will occur. Thus, PMCC's objection is actually to the existence of any permit that allows a discharge, and not an objection based on this permitting decision. Basically, PMCC's argument is the DEQ should deny this permit because no permits can be protective if a permit violation could occur. This objection is based on the possibility of future noncompliance, and does not articulate what rule or law DEQ allegedly violated by issuing the permitting decision.

When an issue is raised in a request for hearing and the request contains no allegation that a permitting decision violated a rule or law, the petitioner has failed to meet the pleading requirements under Ark. Code Ann. § 8-4-205(b)(3) and Commission Rule 8.603(C)(1)(c).

DEQ is entitled to judgment as a matter of law because PMCC's argument is based on speculation about future events that amounts to an objection to any NPDES permit for this subdivision. That speculation does not provide a legal basis for action by DEQ.

XVI. Claims that there is a high potential for Contamination of MWC's well were not found credible by ADH.

PMCC asserts that a high potential for contamination of MWC's well exists if this wastewater treatment facility discharges. PMCC also claims that DEQ did not "determine the potential impact" of this facility's discharge on MWC's well.

DEQ did not make that determination, but ADH, the entity tasked with regulating public water supplies, did analyze this issue. Exhibit 2. As explained above, ADH determined that this discharge was likely to have no impact on the MWC well. Exhibit 2. DEQ stated as much in its response to the comments on this issue. R. 3279. This issue should be dismissed or in the alternative, DEQ is entitled to summary judgment on this issue for the reasons set forth below.

A. Dismissal is appropriate for this issue.

PMCC does not cite to a rule or law that DEQ allegedly violated by issuing the permitting decision. PMCC alleges that the potential exists for this discharge to contaminate one of MWC's wells, but PMCC does not explain what rule or law would require DEQ to deny a permit that discharges to surface water based on the alleged potential risk. For each issue raised in a request for hearing, the request must "include a complete and detailed statement identifying the legal and factual objections to the permit action." Ark. Code Ann. § 8-4-205(b)(3). When an issue is raised in a request for hearing and the request contains no allegation that a permitting decision violated a

rule or law, the petitioner has failed to meet the pleading requirements under Ark. Code Ann. § 8-4-205(b)(3) and Commission Rule 8.603(C)(1)(c).

B. PMCC's assertion about the likely impact on MWC's well is not supported by ADH's analysis.

PMCC claims that DEQ did not address MWC's concerns. The record indicates that DEQ responded to MWC's comments. R. 3279. After consulting with ADH, DEQ found that this permitted discharge poses no demonstrable risk to the source wells. R. 3279. ADH made the same determination and provided that to EPA. Exhibit 2. Thus, ADH, the entity that regulates public water supplies, analyzed the potential for this discharge to impact the MWC well and determined that this discharge was likely to have no impact on the MWC well.

PMCC does not address DEQ's response to comments requesting that DEQ "conduct or cause to be conducted a study to determine the potential impact of the location of the outfall for the Paradise Valley WWTP on Well No. 1 of the Maumelle Water Company." PMCC simply asserts: "That analysis was never done." DEQ understands that MWC is regulated by ADH. PMCC has not objected to DEQ consulting ADH.

DEQ is entitled to judgment as a matter of law because ADH performed the requested analysis and there is no legal or factual basis for DEQ to dispute the conclusion that ADH presented to EPA and DEQ.

XVII. Concerns about Section 404 of the CWA permitting.

PMCC asserts that the wastewater treatment facility is located in a wetland that should be considered a "Water of the United States" (WOTUS) and that Pulaski County Property Owners' Multipurpose Improvement District No. 2021-2 has not requested a "404 permit." DEQ does not issue permits pursuant to Section 404 of the Clean Water Act. PMCC fails to specifically articulate

what rule or law DEQ allegedly violated by issuing the permitting decision or how that would be impacted by a "404 permit."

When an issue is raised in a request for hearing and the request contains no allegation that a permitting decision violated a rule or law, the petitioner has failed to meet the pleading requirements under Ark. Code Ann. § 8-4-205(b)(3) and Commission Rule 8.603(C)(1)(c). When the rule or law that could be implicated is not within the purview of DEQ's permitting action, the claim should be dismissed pursuant to Ark. Code Ann. § 8-4-205(b)(3) and Commission Rule 8.603(C)(1)(c).

CONCLUSION

WHEREFORE, DEQ respectfully requests that the Commission grant its Motion for Summary Judgment, or in the alternative, its Motion to Dismiss on each issue.

Respectfully Submitted,

ARKANSAS DEPARTMENT OF ENERGY AND ENVIRONMENT

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CERTIFICATE OF SERVICE

I, Basil Hicks, do hereby certify that on this 29th day of September, 2023, I have duly served a copy of the foregoing Motion for Summary Judgment, or in the alternative, Motion to Dismiss by e-mail, hand delivery, fax or by first class mail, postage prepaid, to the following:

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