

BEFORE THE ARKANSAS POLLUTION CONTROL & ECOLOGY COMMISSION

IN THE MATTER OF)
C & H HOG FARMS)

DOCKET NO. 18-001-P

**ADEQ'S RESPONSE TO C&H'S MOTION FOR SUMMARY JUDGMENT
AND INCORPORATED BRIEF IN SUPPORT**

Comes now the Arkansas Department of Environmental Quality ("ADEQ" or "Department"), by and through its attorneys, Stacie R. Wassell, Basil V. Hicks III, and Tracy R. Rothermel, and for its Response to C&H Hog Farm, Inc.'s ("C&H") Motion for Summary Judgment, states the following:

C&H begins its Brief in Support of its Motion for Summary Judgment by presenting one question of law for resolution: "Whether [C&H] retains coverage under NPDES General Permit No. ARG590000 (the "NPDES General Permit") until such time as ADEQ issues an individual NPDES permit to C&H." C&H's Motion for Summary Judgment argues two issues to support its position C&H obtained coverage under the NPDES General Permit and retains such coverage until ADEQ issues an individual NPDES permit to C&H:

- (1) that C&H's application for a Regulation 5 permit had no effect on C&H's coverage under the NPDES General Permit, and
- (2) that ADEQ's decision to deny C&H's application for a Regulation 5 permit had no effect on C&H's coverage under the expired NPDES General Permit.

The common theme throughout C&H's Motion for Summary Judgment is that ADEQ should allow C&H to apply for an NPDES individual permit under Arkansas Pollution Control & Ecology Commission (APC&EC) Regulation 6. This theme differs from C&H's previous

assertions that the Department's permitting decision should be reversed and remanded so C&H can supplement the APC&EC Regulation 5 permit application. See ¶¶ 28, 42, and 44 on pp. 15, 19–20, and 21, respectively, of C&H's Amended Request for Adjudicatory Hearing and Commission Review and Request for Declaratory Judgment. Moreover, the issues raised in C&H's Motion for Summary Judgment are outside the scope of this permit appeal. The decision C&H has appealed is the Department's decision to deny the APC&EC Regulation 5 permit application submitted by C&H. Any questions that relate to C&H's coverage under the NPDES General Permit are clearly outside the scope of the Department's final permitting decision at issue and C&H's appeal of that decision.

ADEQ moves that C&H's Motion for Summary Judgment be denied and that Summary Judgment be granted in favor of ADEQ as addressed more fully below. In the alternative, ADEQ requests that its Motion to Dismiss, filed contemporaneously with this Response, be granted.

STATEMENT OF FACTS

The "facts" as asserted by C&H in its Motion for Summary Judgment are misrepresentative of the actual facts as reflected in the permitting record. ADEQ restates the relevant facts to include accurate information or supplement information that was lacking in C&H's partial and misleading statements.

1. The NPDES General Permit was issued on October 6, 2011, with an effective date of November 1, 2011, and an expiration date of October 31, 2016. The NPDES General Permit is attached as Exhibit 1.

2. On August 3, 2012, ADEQ issued notice of coverage under the NPDES General Permit to C&H with permit tracking number ARG590001. The Notice of Coverage with permit tracking number ARG590001 is attached as Exhibit 2.

3. On March 21, 2016, ADEQ issued notice of coverage under the NPDES General Permit to C&H with permit tracking number ARG590001 for a Third Substantial Change. See Exhibit 2.

4. On April 7, 2016, C&H submitted an APC&EC Regulation 5 permit application for a no-discharge permit for its liquid animal waste management system. The APC&EC Regulation 5 permit application is attached as Exhibit 10.

5. On April 20, 2016, C&H prematurely filed a Notice of Intent (NOI) and a Nutrient Management Plan (NMP) for coverage under a general permit that had not yet been re-issued by the Department. The April 20, 2016 NOI is attached as Exhibit 9.

6. On May 3, 2016, ADEQ sent notice to C&H that stated, "The Arkansas Department of Environmental Quality has reached the final permitting decision not to renew the statewide general permit ARG590000 for Concentrated Animal Feeding Operations (CAFO). All facilities currently operating under the conditions of this permit will be asked to request coverage under an individual permit." This notice goes on to state, "An application for a liquid animal waste management system under APC&EC Regulation 5 was received on April 7, 2016 to replace coverage under ARG590000. The application is currently in review for administrative completeness. The [NOI] and [NMP] for recertification for coverage under ARG590000, submitted on April 20, 2016, are being returned." The notice to C&H is attached as Exhibit 3.

7. On May 4, 2016, ADEQ public noticed the Notification of Decision to Not Renew NPDES General Permit Number ARG590000 Operators of [CAFOs] within the State of Arkansas. The Notification is attached as Exhibit 4.

8. C&H had notice when the NPDES General Permit was issued on October 6, 2011, of the conditions of that permit stating that a formal permit decision by ADEQ to not re-issue the

NPDES General Permit would require a facility with coverage under the NPDES General Permit to seek coverage under an individual permit or another alternative permit. See Part 9.6 on page 27 of 33 of Exhibit 1.

9. On May 25, 2016, ADEQ notified C&H by letter that “The application for a no-discharge permit for C&H Hog Farms, Inc. was received on April 7, 2016. In accordance with Department policy, the application has been reviewed and determined to be administratively complete.” The May 25, 2016 Letter is attached as Exhibit 5.

10. On February 15, 2017, Public Notice of Draft APC&EC Regulation 5 No-Discharge Permit, Permit Number 5264-W, AFIN 51-00164 was published in The Newton County Times. ADEQ, through The Newton County Times, gave notice of the proposed draft permit, Permit Number 5264-W, that C&H applied for on April 7, 2016. The Certificate of Publication is attached as Exhibit 6.

11. In the Draft Permit, ADEQ described C&H’s application in the Statement of Basis, which is meant only to provide information and is not enforceable. The Draft Permit containing the Statement of Basis is attached as Exhibit 7; the description referenced by C&H’s Motion for Summary Judgment is located in Paragraph 3 on Page 1 of the Statement of Basis. Paragraph 12 of the Statement of Basis, which is not enforceable, in the Draft Permit provides the Basis for Permit Conditions. The Basis for Permit Conditions states:

The Arkansas Department of Environmental Quality has made the determination to issue a draft permit for the no-discharge facility as described in the application and the NMP. Permit requirements and conditions are based on regulations pursuant to the Arkansas Water and Air Pollution Control Act (Ark. Code Ann. § 8-4-101 et seq.), Arkansas Pollution Control and Ecology Commission (APC&EC) Regulation 5 and generally accepted scientific knowledge and engineering practices (Ark. Code Ann. § 8-4-203(e)(2)(B)(i)).

See Page 4 of the Statement of Basis in Exhibit 7.

12. On January 10, 2018, ADEQ issued its Notice of Final Permitting Decision denying the application for an APC&EC Regulation 5 permit. The Notice of Final Permitting Decision is attached as Exhibit 8.

I. C&H'S COVERAGE UNDER THE EXPIRED NPDES GENERAL PERMIT CONTINUES ONLY PURSUANT TO THE COMMISSION'S STAY OF THE DIRECTOR'S FINAL PERMITTING DECISION DENYING THEIR INDIVIDUAL PERMIT.

C&H retained coverage under the expired NPDES General Permit pursuant to the NPDES General Permit's terms, federal regulation, and Arkansas statute until such time that a final decision was reached for an individual permit. The Director issued a final decision for C&H's individual permit on January 10, 2018, and the Commission stayed the Director's final decision pending appeal on January 17, 2018 through Minute Order 18-01. Minute Order 18-01 is attached as Exhibit 11.

The terms of the NPDES General Permit provide for continuance of the general permit should it not be re-issued or replaced prior to the expiration date:

6.12 Continuance of the Expired General Permit

An expired general permit continues in force and effect until a new (renewal) general permit is issued. If this permit is not re-issued or replaced prior to the expiration date, it will be administratively continued in accordance with 40 CFR 122.6 and remain in force and effect. If applicants were granted permit coverage prior to the expiration date, they will automatically remain covered by the continued permit until the earliest of:

- 6.12.1 Re-issuance or replacement of this permit, at which time permittee must comply with the conditions of the new permit to maintain authorization to discharge; or
- 6.12.2 Permittee submit a Notice of Termination; or
- 6.12.3 Issuance of an individual permit for the project's discharges; or

6.12.4 A formal permit decision by the ADEQ to not re-issue this general permit, at which time you must seek coverage under an individual permit or other general permits, if available.

See page 21 of 33 of Exhibit 1.

The NPDES General Permit clearly sets forth the terms under which the non-re-issued general permit will be administratively continued and the requirement for the permittee to seek coverage under another permit should the general permit not be re-issued. Federal regulation, as referenced in the NPDES General Permit, provides for continuation of the permit only if State law allows.

§ 122.6 Continuation of Expiring Permits

(d) State continuation. (1) An EPA-issued permit does not continue in force beyond its expiration date under Federal law if at that time a State is the permitting authority. States authorized to administer the NPDES program may continue either EPA or State-issued permits until the effective date of the new permits, if State law allows. Otherwise, the facility or activity is operating without a permit from the time of expiration of the old permit to the effective date of the State-issued new permit.

40 C.F.R. § 122.6(d).

Ark. Code Ann. § 8-4-203(m)(5)(D) provides for the continuation of coverage under a general permit in the event the Department makes a decision to not renew the general permit and states:

In the event the department makes a decision to not renew the general permit, existing coverage under the general permit shall continue under the terms of the expired permit until a final decision is reached for an individual permit.

As set forth above, the NPDES General Permit as administratively continued in accordance with 40 C.F.R. § 122.6. 40 C.F.R. § 122.6 provides for continuation of the general

permit only if State law allows, and State law provides for continuance of coverage under the terms of the expired permit until a final decision is reached for an individual permit, not necessarily until a permit is issued.

In this case, C&H applied for an individual permit under APC&EC Regulation 5. The Department denied the APC&EC Regulation 5 permit application. C&H sought a stay of the final decision denying the APC&EC Regulation 5 permit application. The Commission stayed the Director's final decision of the APC&EC Regulation 5 permit application pending appeal. C&H has appealed the Department's decision to deny the APC&EC Regulation 5 permit application. Thus, it is only because of the Commission's stay of the Director's decision that C&H can claim to have continued coverage under the terms of the expired NPDES General Permit until the Commission decides the APC&EC Regulation 5 permitting decision appeal.

C&H's reliance on APC&EC Regulation 6.201 is misplaced. APC&EC Regulation 6.201 provides for the continuance of an expired permit past the expiration date pending issuance of a new permit if the permittee submits a timely and complete application as described in 40 C.F.R. § 122.21. C&H fails to recognize that 40 C.F.R. § 122.21(a) specifically excludes persons covered by general permits under 40 C.F.R. § 122.28. Additionally, different submittal dates may be required under the terms of applicable general permits. 40 C.F.R. § 122.21(c). A discharger must submit a notice of intent in accordance with the terms of the general permit. 40 C.F.R. § 122.28(b)(2)(i). Part 9.6.1 of the NPDES General Permit requires dischargers to notify the Department of their intent to be covered under the NPDES General Permit within 120 days after the effective date of the renewal permit. See page 27 of 33 of Exhibit 1.

In this case, the Department made the decision to not renew the NPDES General Permit and thus there was no effective date for a renewal NPDES General Permit. C&H's Notice of

Intent dated April 20, 2016, was void because C&H had coverage under the NPDES General Permit and there was not another general permit under which C&H could obtain coverage.

As set forth above, C&H only retained coverage under the expired NPDES General Permit pursuant to the NPDES General Permit, federal regulation, and Arkansas statute until such time that the Director reached a final decision regarding C&H's APC&EC Regulation 5 permit application. By the terms of Ark. Code Ann. § 8-4-203(m)(5)(D), C&H's coverage under the expired NPDES General Permit ended when the Director issued the final decision to deny the APC&EC Regulation 5 permit application on January 10, 2018. Now, C&H only retains coverage under the expired NPDES General Permit pursuant to the Commission's stay of the Director's final decision to deny C&H's APC&EC Regulation 5 permit application.

II. BEFORE THE DIRECTOR'S FINAL DECISION TO DENY C&H'S APC&EC REGULATION 5 PERMIT APPLICATION, C&H'S COVERAGE UNDER THE NPDES GENERAL PERMIT CONTINUED PURSUANT TO ARK. CODE ANN. § 8-4-203(m)(5)(D).

As discussed above, C&H retained coverage to operate under the terms of the expired NPDES General Permit according to state law, which allowed C&H to continue to operate under the terms of the expired permit until the Director issued the final decision for the APC&EC Regulation 5 individual permit. C&H makes two arguments to challenge the language of Ark. Code Ann. § 8-4-203(m)(5)(D):

- (1) that C&H's application for an APC&EC Regulation 5 permit had no effect upon C&H's coverage under the NPDES General Permit; and
- (2) that ADEQ's decision to deny the APC&EC Regulation 5 permit application had no effect upon C&H's coverage under the expired NPDES General Permit.

C&H's arguments, as stated above, are invalid. The language of the statute is clear: "In the event the department makes a decision to not renew the general permit, existing coverage

under the general permit shall continue under the terms of the expired permit until a final decision is reached for an individual permit.”

Here, the Department made the decision to not renew the NPDES General Permit; as such, C&H’s existing coverage under the NPDES General Permit could only continue under the terms of the expired permit until a final decision was reached for an individual permit. C&H submitted an APC&EC Regulation 5 permit application to the Department for an individual no-discharge permit. The Department denied C&H’s APC&EC Regulation 5 permit application. C&H sought and was granted a stay of the permit denial by the Commission, C&H appealed the Department’s permitting decision, and the Commission will make a decision on the permitting decision appeal. C&H’s coverage under the terms of the expired NPDES General Permit continues only because of the Commission’s stay and only *until* the Commission reaches a decision regarding C&H’s appeal of the Director’s APC&EC Regulation 5 permitting decision. See Exhibit 11.

C&H claims that its coverage under the NPDES General Permit must remain in place until a new NPDES permit has been issued pursuant to APC&EC Regulation 6.201. Again, C&H’s reliance upon APC&EC Regulation 6.201 is misplaced. See argument above regarding an appropriate reading of APC&EC Regulation 6.201. C&H has not submitted an application for an individual NPDES permit to the Department. The Department cannot render a decision on a non-existent permit application. The Department can only render a decision on a permit application that it has received and reviewed. In this case, the Department received, reviewed, and reached a final decision regarding C&H’s individual APC&EC Regulation 5 permit application. The individual permit that is relevant to the language of Ark. Code Ann. § 8-4-203(m)(5)(D) is the individual APC&EC Regulation 5 permit sought by C&H. The final decision

that is relevant to the language of Ark. Code Ann. § 8-4-203(m)(5)(D) is the Director's final decision regarding the individual APC&EC Regulation 5 permit sought by C&H. And, C&H admitted that the final decision that is relevant to the language of Ark. Code Ann. § 8-4-203(m)(5)(D) is the Director's final decision when C&H filed its Motion for Stay of Permitting Decision with the Commission on January 11, 2018, seeking to stay the Director's final permitting decision on C&H's APC&EC Regulation 5 permit application. The Motion for Stay of Permitting Decision is attached as Exhibit 12.

As stated by C&H in its description of the differences between individual NPDES permits and general NPDES permits, "dischargers covered under general permits know their applicable requirements before obtaining coverage under that permit." C&H knew the applicable requirements before obtaining coverage under the NPDES General Permit. C&H knew that Part 9.6 of the NPDES General Permit required the facility to seek coverage under an individual permit or other alternate permits should the Department make a formal decision to not re-issue the NPDES General Permit. C&H did not appeal this term or any terms of the NPDES General Permit. C&H asserts that it retains coverage under the terms of the expired NPDES General Permit. If C&H continues to argue that its APC&EC Regulation 5 permit application has no effect upon C&H's coverage under the expired NPDES General Permit, then C&H has clearly violated Part 9.6 of the expired NPDES General Permit.

C&H misconstrues the meaning of Ark. Code Ann. § 8-4-203(m)(1)(B)(ii). Ark. Code Ann. § 8-4-203(m)(1)(B)(ii) states, "[t]he director may require a person who has been granted coverage under a general permit to apply for and obtain an individual permit." C&H then misapplies 40 C.F.R. § 122.28(b)(3) to its misunderstanding of Arkansas law. Here, the Director has not required C&H to apply for and obtain an individual permit. The Director only made the

decision to not re-issue the NPDES General Permit. This decision invoked Parts 6.12.4 and 9.6 of the NPDES General Permit, both of which require the discharger to seek coverage under an individual permit or alternate permit. The terms of the NPDES General Permit, not the Director, required the discharger to apply for and obtain an individual permit.

ADEQ has abided by the terms of the expired NPDES General Permit, federal regulation, state law, and the Commission's stay by allowing C&H to continue to operate under the terms of the expired NPDES General Permit until such time that the Commission reaches a decision regarding C&H's appeal of the Director's APC&EC Regulation 5 permitting decision.

ADEQ respectfully requests that C&H's Motion for Summary Judgment be denied and that Partial Summary Judgment be granted in favor of ADEQ. In the alternative, ADEQ requests the ALJ grant ADEQ's Motion to Dismiss, filed contemporaneously with this Response.

Respectfully submitted,

Arkansas Department of Environmental Quality
5301 Northshore Drive
North Little Rock, AR 72118-5317

By: 

Stacie R. Wassell, Ark. Bar No. 2016032
Attorney for ADEQ
wassell@adeq.state.ar.us
(501) 682-0886

Basil V. Hicks III, Ark. Bar No. 2015117
Attorney for ADEQ
hicks@adeq.state.ar.us
(501) 682-0884

Tracy R. Rothermel, Ark. Bar No. 2003005
General Counsel for ADEQ
rothermel@adeq.state.ar.us
(501) 682-0743

CERTIFICATE OF SERVICE

I, Stacie R. Wassell, hereby certify that a true and correct copy of the foregoing was sent via electronic mail and United States mail, postage prepaid, this ~~20th~~ day of March, 2018, to the following:

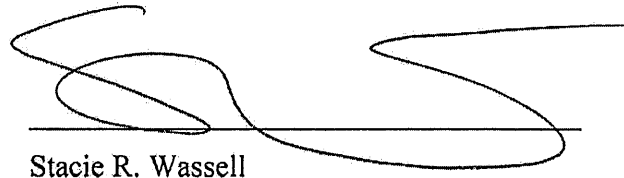
William A. Waddell, Jr. (waddell@fridayfirm.com)
FRIDAY, ELDREDGE & CLARK, LLP
400 West Capitol Avenue, Suite 2000
Little Rock, Arkansas 72201

Charles R. Nestrud (cnestrud@barberlawfirm.com)
BARBER LAW FIRM, PLLC
425 West Capitol Avenue, Suite 3400
Little Rock, Arkansas 72201

Samuel E. Ledbetter (sam@mcmathlaw.com)
MCMATH WOODS P.A.
711 West Third Street
Little Rock, Arkansas 72201

Richard H. Mays (rmays@williamsanderson.com)
WILLIAMS & ANDERSON PLC
111 Center Street, Suite 2200
Little Rock, Arkansas 72201

Stephen G. Jeffery (sjeffery@jefferylawgroup.com)
JEFFERY LAW GROUP
400 Chesterfield Center, Suite 4000
Chesterfield, Missouri 63017



Stacie R. Wassell