

ARKANSAS COMMISSION OF POLLUTION CONTROL AND ECOLOGY

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

DOCKET NO. 18-001-P

Secretary
Arkansas Commission on Pollution Control and Ecology
101 South Main, P.O. Box 873
Little Rock, AR 72203
Filed 3/7/18 RB

C&H HOG FARMS, INC.'S MOTION FOR PARTIAL
SUMMARY JUDGMENT

Comes the Petitioner, C&H Hog Farms, Inc (“C&H”), by its attorneys, Friday Law Firm, LLC and Barber Law Firm PLLC and for its motion for partial summary judgment states that it is entitled to a judgment as a matter of law on the issues specifically set forth below, and as more particularly described in the Brief in Support of C&H’s Motion for Partial Summary Judgment (“Brief”), which is filed concurrently herewith, and incorporated herein.

This motion presents a question of law for resolution: Whether C&H has and will retain 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 has raised the issue presented in this motion in the pending matter through an appeal of ADEQ’s decision to not issue APC&EC Regulation No. 5, No-Discharge Permit No. 5264-W (the “Reg. 5 Permit”) to C&H, and through a request for declaratory order to resolve a dispute over the status of C&H’s continued coverage under the expired NPDES General Permit. The issues raised in this motion can be resolved as a matter of law.

For purposes of this Motion, the following facts are not in dispute:

- NPDES General Permit No. ARG590000 (the “General Permit”) was issued on October 6, 2011, with an expiration date of October 31, 2016.

- On August 3, 2012 ADEQ issued notice of coverage under the NPDES General Permit to C&H, issued as NPDES General Permit No. ARG590001.
- On March 21, 2016 ADEQ issued notice of coverage under the NPDES General Permit to C&H, issued as NPDES General Permit No. ARG590001, for a Second Substantial Change. A copy of the March 21, 2016 notice of coverage, along with a copy of the NPDES General Permit, was filed herein on February 7, 2018 as Exhibit A to the Amended Request for Adjudicatory Hearing, and is incorporated herein by reference.
- On April 20, 2016, 191 days before the NPDES General Permit expired, C&H filed an application (Notice of Intent) and a Nutrient Management Plan (“NMP”) for renewal of coverage under the NPDES General Permit. (Exhibit 1, attached hereto and incorporated herein)
- On May 3, 2016 ADEQ sent a letter to C&H which stated that “The Arkansas Department of Environmental Quality has reached that 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.” A copy ADEQ’s May 3, 2016 letter to C&H was filed herein on February 7, 2018 as Exhibit C to the Amended Request for Adjudicatory Hearing, and is incorporated herein by reference.
- On May 4, 2016 ADEQ issued its decision to not renew the NPDES General Permit and issued a notice of its decision. A copy ADEQ’s May 4, 2016 decision to not renew the NPDES General Permit was filed herein on February 7, 2018 as Exhibit B

to the Amended Request for Adjudicatory Hearing, and is incorporated herein by reference.

- At no time has ADEQ sent a written notice to C&H stating that an individual NPDES permit application was required; at no time has ADEQ sent a written notice to C&H providing C&H with a copy of the required application for an individual NPDES permit; and at no time has ADEQ sent a written notice to C&H providing C&H with a reasonable time to submit an application for an individual NPDES permit; at no time has ADEQ provided a statement to C&H that on the effective date of the individual NPDES permit C&H's coverage under the NPDES General Permit will automatically terminate.
- On May 25, 2016 ADEQ issued a letter to C&H informing C&H that the application for a liquid animal waste management system under APC&EC Regulation No. 5 was administratively complete. (Exhibit 2, attached hereto and incorporated herein)
- On February 15, 2017 ADEQ prepared a draft of the liquid animal waste management system under APC&EC Regulation No. 5, No-Discharge Permit No. 5264-W (the "Draft Reg. 5 Permit"), to issue to C&H, and published notice of its intent to issue the Reg. 5 Permit to C&H. A copy Draft Reg. 5 Permit was filed herein on February 7, 2018 as Exhibit E to the Amended Request for Adjudicatory Hearing, and is incorporated herein by reference.
- ADEQ described the application in the Draft Reg. 5 Permit as follows: "The permittee submitted a permit issuance application for a no-discharge permit, which was received on April 7, 2016 with additional information received on June 29, 2016. The facility is applying for an administrative change in coverage from under NPDES

General Permit ARG590000 for Concentrated Animal Feeding Operations to a no-discharge permit. It is proposed that the water no-discharge permit be issued.”

- The Statement of Basis for the draft Reg. 5 Permit 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)).”
- On January 10, 2018 ADEQ issued its final decision on the draft Reg. 5 Permit, which was a decision to not issue a Reg. 5 Permit to C&H. A copy ADEQ’s January 10, 2018 decision to not issue a Reg. 5 Permit to C&H was filed herein on February 7, 2018 as Exhibit G to the Amended Request for Adjudicatory Hearing, and is incorporated herein by reference.

WHEREFORE, for the reasons stated herein and in the Brief, C&H requests the Commission to grant partial summary judgment and find as follows:

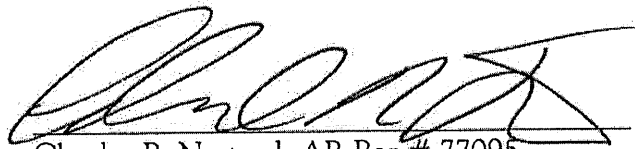
- C&H obtained coverage under the General Permit;
- C&H’s coverage under the General Permit continued when the General Permit expired;
- C&H will retain coverage under the NPDES General Permit until ADEQ issues the notifications required by 40 CFR 122.28(b)(3)(ii-iv), including providing a reasonable time within which C&H must apply for an individual NPDES permit; and

- Following receipt of the appropriate notifications, and timely submission of the requested individual NPDES application, C&H will retain coverage under the General Permit until ADEQ actually issues an individual NPDES permit, at which time C&H's coverage under the NPDES General Permit will automatically terminate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing pleading upon the following attorneys of record by U.S. Mail or Electronic Mail, this 7th day of March, 2018

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ARKANSAS COMMISSION OF POLLUTION CONTROL AND ECOLOGY

IN THE MATTER OF C&H HOG)
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DOCKET NO. 18-001-P

Arkansas Department of Pollution Control and Ecology
101 East Capitol, Suite 805
Little Rock, AR 72201
Filed 3/7/18 *RLB*

BRIEF IN SUPPORT OF C&H HOG FARMS, INC.'s MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This motion presents the following threshold, and dispositive question of law for resolution: Whether C&H Hog Farms, Inc. ("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. At the heart of this threshold legal issue are the status of C&H's continued coverage under the expired NPDES General Permit, ADEQ's failure to follow the procedural requirements for addressing C&H's coverage under the expired NPDES General Permit, and the impact of ADEQ's decision to deny C&H's application to administratively change from an NPDES General Permit to a Reg. 5 Permit.

C&H has raised this issue in the pending matter through an appeal of ADEQ's decision to not issue APC&EC Regulation No. 5, No-Discharge Permit No. 5264-W (the "Reg. 5 Permit") to C&H, and through a request for declaratory order to resolve a dispute over the status of C&H's continued coverage under the expired NPDES General Permit. The issues raised in this motion can be resolved as a matter of law.

SUMMARY JUDGMENT STANDARD

Summary Judgment shall be entered if there is "no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law on the issues specifically set forth in the motion." Ark. Rules Civ. Proc. Rule 56. See *Childs v. Berry*, 268 Ark. 970, 973, 597 S.W.2d 134, 135 (1980) ("no genuine issue of fact regarding the question of liability."). The Arkansas Supreme Court has noted, "summary judgment is no longer viewed by this court as a drastic remedy; rather, it is viewed simply as one of the tools in a trial court's efficiency arsenal." *Chavers v. GMC*, 349 Ark. 550, 558 (2002). Moreover, "[t]he purpose of summary judgment is not to try the issues, but to determine whether there are any issues to be tried." *Id.* Therefore, "[o]nce a moving party has established a *prima facie* entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact." *Id.* at 559. See also *Rankin v. City of Fort Smith*, 337 Ark. 599, 990 S.W.2d 535 (1999).

BACKGROUND

ADEQ issues two types of permits, individual permits and general permits. The General Permit at issue in this proceeding is an NPDES general permit. EPA describes the difference between an individual NPDES permit and a general NPDES permit as follows:

A National Pollutant Discharge Elimination System (NPDES) individual permit is written to reflect site-specific conditions of a single discharger (or in rare instances to multiple co-permittees) based on information submitted by that discharger in a permit application and is unique to that discharger whereas an NPDES general permit is written to cover multiple dischargers with similar operations and types of discharges based on the permit writer's professional knowledge of those types of activities and discharges. Individual permits are issued directly to an individual discharger whereas a general permit is issued to no one in particular with multiple dischargers obtaining coverage under that general permit after it is issued, consistent with the permit eligibility and authorization provisions. As such, dischargers covered under general permits know their applicable requirements before obtaining coverage under that permit.

Furthermore, obtaining coverage under a general permit is typically quicker than an individual permit with coverage under a general permit often occurring immediately (depending on how the permit is written) or after a short waiting period. Coverage under an individual permit may take six months or longer. See, <https://www.epa.gov/npdes/npdes-permit-basics>

The Arkansas legislature has authorized ADEQ to issue permits, including general permits. See, Ark. Code Ann 8-7-203(a) and (n). The Commission has also promulgated rules relating to permits, including general permits. With respect to NPDES permits, including NPDES general permits, ADEQ was required to promulgate regulations required by EPA to obtain authorization to issue NPDES permits. The Commission has adopted the required federal rules in Regulation No. 6, which includes incorporation of certain federal regulations by reference. See, Regulation No. 6: *Regulations for State Administration of the National Pollutant Discharge Elimination System (NPDES)* (“Reg. 6”). Reg. 6.104 identifies which of the federal NPDES permitting rules have been incorporated by reference.¹

On March 9, 1999 the U.S. Department of Agriculture (“USDA”) and the U.S. Environmental Protection Agency (“EPA”) published the *U.S. Department of Agriculture U.S. Environmental Protection Agency Unified National Strategy for Animal Feeding Operations March 9, 1999* (“AFO Strategy”). The AFO strategy established several key components of the existing regulatory programs and made the recommendations that resulted in the confined animal feeding operation permitting program that is the subject of this proceeding. In particular, the AFO Strategy stated:

- Manure and wastewater from AFOs have the potential to contribute pollutants such as nutrients (e.g., nitrogen, phosphorus), organic matter, sediments, pathogens, heavy metals, hormones, antibiotics, and ammonia to the environment.

¹ Federal regulations incorporated by reference into Reg. 6.104 are referred to herein as “Reg. 6/40 CFR _____.”

- USDA and EPA's goal is for AFO owners and operators to take actions to minimize water pollution from confinement facilities and land application of manure. To accomplish this goal, this Strategy is based on a national performance expectation that all AFOs should develop and implement technically sound, economically feasible, and site-specific Comprehensive Nutrient Management Plans (CNMPs) to minimize impacts on water quality and public health.
- Large facilities (those with greater than 1000 animal units) produce quantities of manure that can be a risk to water quality and public health. Because the amount of manure stored is so large, a spill while handling manure or a breach of a storage system can release large quantities of manure and wastewater into the environment causing catastrophic water quality impacts and threatening public health. Land application of large volumes of manure and wastewater also requires very careful planning to avoid water quality and public health impacts. These large facilities are considered to be CAFOs and therefore are "point sources" subject to having an NPDES permit and are a priority for NPDES permit issuance.
- EPA will work with States to establish a two-phase approach to permitting CAFOs. Round I of CAFO permitting will begin this year, will focus on large CAFOs (i.e., over 1,000 animal units (AUs)), and will occur under EPA's existing regulations. Starting in 2005, Round II permits will reflect revisions to the effluent guidelines, permit program regulations, and State-adopted water quality standards.

Round I Permits for CAFOs (2000-2005)

In Round I, EPA and NPDES-authorized States will give top priority to issuing Statewide general NPDES permits and, where appropriate, individual permits, to cover all CAFOs with significant manure production (i.e., greater than 1000 AUs).

General permits should be issued not later than January 2000 and affected CAFOs will be expected to submit a notice of intent (NOI) to be covered by the permit.

- Beginning on the date of this Strategy, EPA plans to issue and strongly recommends that States issue individual permits to new CAFOs only where the permits are consistent with CWA requirements and the priorities described in this Strategy. EPA emphasizes that all CAFOs must have an NPDES permit to discharge and are subject to enforcement action if they discharge without such a permit.

EPA has implemented the AFO Strategy by developing regulations for CAFOs, which the Commission has incorporated into Regulation 6, and ADEQ issued the NPDES General Permit pursuant thereto. The applicable regulations, Reg. 6/40 CFR 122.23(d), require an NPDES permit for CAFOs, as follows:

(d) NPDES permit authorization.

(1) Permit Requirement. A CAFO must not discharge unless the discharge is authorized by an NPDES permit. In order to obtain authorization under an NPDES permit, the CAFO owner or operator must either apply for an individual NPDES permit or submit a notice of intent for coverage under an NPDES general permit.

In addition to adopting the federal CAFO regulations into Regulation No. 6, the Commission also promulgated Regulation No. 5, *Liquid Animal Waste Management Systems*, which has as its purpose to provide the “management, operational and maintenance procedures necessary to prevent point source pollution and minimize nonpoint source pollution to the waters of the state and control to the degree practicable the generation of offensive odors by regulated confined animal operations.”

Whereas the Reg. 6 CAFO regulatory program is a federally authorized NPDES program that regulates point source discharges from a CAFO, the Reg. 5 CAFO regulatory program is a state program that prohibits point source discharges from a CAFO. As a result, the NPDES General Permit authorizes a point source discharge, whereas the Reg. 5 Permit prohibits a point source discharge. Regulation 5 provides the coordination language for the two regulatory programs by deferring to the NPDES permitting program. In particular, Reg. 5.105 provides an exemption from Regulation 5 for facilities covered by an NPDES permit, as follows:

Reg. 5.105 Exemption

Any confined animal operation using a liquid waste disposal system shall be exempt from the requirements of this regulation if the owner or operator obtains and maintains active coverage under either a National Pollutant Discharge Elimination System individual or general permit for discharges from a concentrated animal feeding operation.

For purposes of this Motion, the following facts are not in dispute:

- NPDES General Permit No. ARG590000 (the “General Permit”) was issued on October 6, 2011, with an expiration date of October 31, 2016.
- On August 3, 2012 ADEQ issued notice of coverage under the NPDES General Permit to C&H, issued as NPDES General Permit No. ARG590001.
- On March 21, 2016 ADEQ issued notice of coverage under the NPDES General Permit to C&H, issued as NPDES General Permit No. ARG590001, for a Second Substantial Change.
- On April 20, 2016, 191 days before the NPDES General Permit expired, C&H filed an application (Notice of Intent) and a Nutrient Management Plan (“NMP”) for renewal of coverage under the NPDES General Permit.
- On May 3, 2016 ADEQ sent a letter to C&H which stated that “The Arkansas Department of Environmental Quality has reached that 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.”
- On May 4, 2016 ADEQ decided to not renew the NPDES General Permit and issued a notice of its decision.
- At no time has ADEQ sent a written notice to C&H stating that an individual NPDES permit application was required; at no time has ADEQ sent a written notice to C&H providing C&H with a copy of the required application for an individual NPDES permit; and at no time has ADEQ sent a written notice to C&H providing C&H with a reasonable time to submit an application for an individual NPDES permit; at no time has ADEQ provided a statement to C&H that on the effective date of the individual

NPDES permit C&H's coverage under the NPDES General Permit will automatically terminate.

- On May 25, 2016 ADEQ issued a letter to C&H informing C&H that C&H's application for an administrative change in coverage from under NPDES General Permit ARG590000 for Concentrated Animal Feeding Operations to a no-discharge permit under APC&EC Regulation No. 5 was administratively complete.
- On February 15, 2017 ADEQ prepared a draft of the liquid animal waste management system under APC&EC Regulation No. 5, No-Discharge Permit No. 5264-W (the "Draft Reg. 5 Permit"), to issue to C&H, and published notice of its intent to issue the Reg. 5 Permit to C&H.
- ADEQ described C&H's application in the Draft Reg. 5 Permit as follows: "The permittee submitted a permit issuance application for a no-discharge permit, which was received on April 7, 2016 with additional information received on June 29, 2016. The facility is applying for an administrative change in coverage from under NPDES General Permit ARG590000 for Concentrated Animal Feeding Operations to a no-discharge permit. It is proposed that the water no-discharge permit be issued."
- The Statement of Basis for the draft Reg. 5 Permit 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)).”

- On January 10, 2018 ADEQ issued its final decision on the draft Reg. 5 Permit, thereby denying C&H’s application for an administrative change in coverage from under NPDES General Permit ARG590000 for Concentrated Animal Feeding Operations to a no-discharge permit under Reg. 5.

THE APPLICABLE LAWS AND REGULATIONS PROVIDE FOR C&H’S CONTINUED COVERAGE UNDER THE EXPIRED GENERAL PERMIT.

C&H’s continued coverage under the expired NPDES General Permit is clearly provided in Arkansas statutes and regulations. Ark. Code Ann. 8-4-203(m)(4)(D), which addresses continuation of general permits, generically,² provides as follows:

(D) 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.

APC&EC Reg. 6.201, which specifies that for NPDES permits coverage continues until the issuance of a new permit, provides as follows:

Reg.6.201 Status and Continuation of Permits

Conditions of a National Pollutant Discharge Elimination System permit issued by the Arkansas Department of Environmental Quality will continue in effect past the expiration date pending issuance of a new permit, if:

- (1) The permittee has submitted a timely and complete application as described in 40 C.F.R. § 122.21; and

² ADEQ has issued general permits under its air and wastewater permitting programs for a number of activities, including air emission general permits for air curtain incinerators, animal/human remains incinerators, cotton gins, gasoline bulk plants, hot mix asphalt facilities, natural gas compression stations and rock crushing facilities; and including wastewater general permits for construction, industrial and municipal stormwater, and for discharges from landfills, cooling water facilities, sand and gravel operations, package treatment plants, drinking water supply backwash, pipeline hydrostatic testing, car/truck wash, and groundwater remediation

(2) The Director, through no fault of the permittee, does not issue a new permit prior to the expiration date of the previous permit.

C&H submitted a timely and complete application as described in 40 CFR 122.21, and its NPDES General Permit coverage continues until a new NPDES permit has been issued.³

**ADEQ’S DECISION TO NOT ISSUE THE REG. 5 PERMIT DID NOT
TERMINATE C&H’S CONTINUED COVERAGE UNDER THE EXPIRED
NPDES GENERAL PERMIT**

1. C&H’s Application for a Reg. 5 Permit Had No Effect Upon C&H’s Coverage Under the NPDES General Permit

ADEQ may argue that when C&H applied for a Reg. 5 Permit it “volunteered” to lose its coverage under the NPDES General Permit in the event ADEQ ultimately decided to not issue a Reg. 5 Permit to C&H. Such an argument would be wrong.

First, the entire premise of this potential argument by ADEQ is misplaced. As ADEQ noted in its Draft Reg. 5 Permit, “The facility is applying for an administrative change in coverage from under NPDES General Permit ARG590000 for Concentrated Animal Feeding Operations to a no-discharge permit.” By rejecting C&H’s application for a change in coverage, all ADEQ has done is reject C&H’s request for an “administrative change in coverage,” and as a result there has been no change in coverage--C&H’s coverage under the NPDES General Permit remains in place until a new NPDES permit has been issued. Reg. 6.201

Furthermore, the applicable regulations also severely limit C&H’s ability to be excluded from the coverage of the NPDES General Permit; and failure to obtain a state Reg. 5 Permit is

³ 40 CFR 122.21 defers to 40 CFR 122.23(d) for the application requirements for CAFO’s. See, 40 CFR 122.21(a) (“The requirements for concentrated animal feeding operations are described in § 122.23(d)). 40 CFR 122.23(d) states that “A notice of intent for a general permit must include the information specified in §§ 122.21 and 122.28.” C&H timely submitted a Notice of Intent and NMP for extended coverage under the Reg. 6 permit, which included all of the applicable information, as specified in 40 CFR §§ 122.21(i)(1) and 122.28(b)(1)

not an exclusion option under the Reg. 6 NPDES regulatory program. The applicable Reg. 6 NPDES regulation is 40 CFR 122.28(b)(3)(iii), which severely limits the ability of a permittee operating under an NPDES Permit to be excluded from continued coverage under an NPDES general permit, provides as follows:

(iii) Any owner or operator authorized by a general permit may request to be excluded from the coverage of the general permit by applying for an individual permit. The owner or operator shall submit an application under §122.21, with reasons supporting the request, to the Director no later than 90 days after the publication by EPA of the general permit in the FEDERAL REGISTER or the publication by a State in accordance with applicable State law. The request shall be processed under part 124 or applicable State procedures. The request shall be granted by issuing of any individual permit if the reasons cited by the owner or operator are adequate to support the request.

Lest there be any confusion as to what is meant by an individual “permit” in this regulation, the applicable definition of “permit”, found in Reg. 6/40 CFR 122.1, clears up any potential confusion:

Permit means an authorization, license, or equivalent control document issued by EPA or an “approved State” to implement the requirements of this part and parts 123 and 124. “Permit” includes an NPDES “general permit” (§ 122.28). Permit does not include any permit which has not yet been the subject of final agency action, such as a “draft permit” or a “proposed permit.”

The use of the term “permit” in Reg. 6, and permits issued pursuant to Reg. 6 means a final, federal NPDES permit. A “permit” issued under Reg. 5 is not included within the term “permit” under Reg. 6, nor is a decision to not issue a Reg. 5 permit.

Section 1.6.2 of the NPDES General Permit, which implements the restrictions of Reg. 6/40 CFR 122.28(b)(3)(iii), reiterates that a facility covered under the NPDES General Permit cannot exclude itself from coverage until a new NPDES permit is issued, and even offers as an

example that denial of a new NPDES permit further extends coverage under the NPDES General Permit until the new NPDES permit is issued. In particular, Section 1.6.2 of the NPDES General Permit provides as follows:

1.6.2 Any operator covered under this general permit may request to be excluded from the coverage of this permit by applying for an individual permit. The operator shall submit an application for an individual permit (ADEQ Form 1, Disclosure Form, and Form 28) with the reasons supporting the application to ADEQ. If a final, individual NPDES permit is issued to an operator otherwise subject to this general permit, the applicability of this NPDES CAFO general permit to the facility is automatically terminated on the effective date of the individual NPDES permit. Otherwise, the applicability of this general permit to the facility remains in full force and effect (for example, if an individual NPDES permit is denied to an operator otherwise subject to this general permit).

If there is anything that is clear from this authority, it is that C&H cannot “voluntarily” obtain an exclusion from coverage under the General Permit until an individual NPDES permit is issued. As a matter of undisputed fact, that has not occurred. The applicable regulations require no gap in coverage. Any suggestion by ADEQ that C&H has somehow “voluntarily” excluded itself from coverage under the NPDES General Permit is misplaced, and wrong as a matter of law.

2. ADEQ’s Decision to Deny the Reg. 5 Permit Had No Effect Upon C&H’s Coverage under the Expired NPDES General Permit

ADEQ may also argue that ADEQ’s decision to not renew the NPDES General Permit is final, that ADEQ has authority to require C&H to apply for an individual permit, and that when ADEQ did not renew the NPDES General Permit and denied the Reg. 5 Permit, C&H’s continued coverage under the expired NPDES General Permit terminated. C&H does not

challenge ADEQ's authority to not renew the NPDES General Permit,⁴ or to require an individual NPDES Permit, which is clearly stated in state and federal law, and in the NPDES General Permit. See, Ark. Code Ann 8-4-203(m)(1)(B)(ii) ("The director may require a person who has been granted coverage under a general permit to apply for and obtain an individual permit."); Reg. 6/40 CFR 122.28(b)(3)(i) ("The Director may require any discharger authorized by a general permit to apply for and obtain an individual NPDES permit.").

Reg.6/ 40 CFR 122.28(b)(3)(ii-iv) further describes the procedure that ADEQ must follow to request an individual NPDES permit in lieu of an NPDES General Permit, as follows:⁵

(ii) For ADEQ issued general permits only, the Director may require any owner or operator authorized by a general permit to apply for an individual NPDES permit as provided in paragraph (b)(3)(i) of this section, only if the owner or operator has been notified in writing that a permit application is required. This notice shall include a brief statement of the reasons for this decision, an application form, a statement setting a time for the owner or operator to file the application, and a statement that on the effective date of the individual NPDES permit the general permit as it applies to the individual permittee shall automatically terminate. The Director may grant additional time upon request of the applicant.

(iv) When an individual NPDES permit is issued to an owner or operator otherwise subject to a general NPDES permit, the applicability of the general permit to the individual NPDES permittee is automatically terminated on the effective date of the individual permit.

⁴ During the Preliminary Hearing in this matter, the ALJ expressed a concern that this appeal was a challenge of ADEQ's decision to not renew the NPDES General Permit. See, Preliminary Hearing transcript at page 26. C&H is not attempting to appeal from ADEQ's decision to not renew the NPDES General Permit.

⁵ Reg. 6.104 states that for purposes of adopting the EPA rules by reference, "all references therein to 'Administrator,' 'Regional Administrator,' 'Director' or 'State Director' shall be considered references to the 'Director of the Arkansas Department of Environmental Quality', and all references to the 'U.S. Environmental Protection Agency' or 'EPA' shall be considered references to the 'Arkansas Department of Environmental Quality'. Accordingly, when quoting the applicable EPA rules, those substitutions are made herein.

This regulation could not be more clear—coverage under the NPDES General Permit continues until the individual NPDES permit becomes effective, at which time coverage under the NPDES General Permit terminates. No gap in coverage is allowed.⁶

(1) the operator fails to submit the required individual NPDES permit application within the defined time frame; or

(2) the individual NPDES permit is issued by ADEQ.

ADEQ has never followed this procedure with respect to C&H, a procedure mandated by federal law and ADEQ's authorization to issue NPDES permits, and incorporated into state law. In particular, ADEQ has never notified C&H that an individual NPDES permit is required,⁷ has never provided a copy of the individual NPDES permit application form, and has never provided a time frame for C&H to submit that individual NPDES application, and has never provided a statement that on the effective date of the individual NPDES permit C&H's coverage under the NPDES General Permit will automatically terminate.

ADEQ decided to not renew the General Permit, which was its prerogative. The issue here is not ADEQ's decision to not renew the NPDES General Permit, but rather ADEQ's

⁶ The applicable regulations require ADEQ's to issue written notice to C&H that an individual NPDES permit is requested, including a time frame for submitting the NPDES permit application. C&H's obligation to submit that application, once requested, is restated in Sections 1.7, 6.12, and 9.6 of the NPDES General Permit. The requirement that the individual NPDES permit be issued before the NPDES General Permit is terminated is restated in Section 1.6 of the NPDES General Permit.

⁷ On May 3, 2016, prior to its May 4, 2016 decision to not renew the NPDES General Permit, ADEQ provided notice to C&H that "The Arkansas Department of Environmental Quality has reached that 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." ADEQ never followed up and asked C&H to apply for coverage under an individual permit, as required by the applicable rules.

undisputed failure to comply with the regulatory prerequisites for terminating C&H's continuing coverage under the expired NPDES General Permit, including the required notices and the issuance of a new, individual NPDES permit.

ADEQ intended to authorize C&H to administratively change from the NPDES General Permit to a Reg. 5 Permit, and even issued a Draft Reg. 5 Permit, which may explain why ADEQ never required or imposed a time limit for C&H to apply for an individual NPDES permit. In any event, ADEQ's decision to deny C&H's request for an administrative change from the NPDES General Permit to a Reg. 5 Permit has left C&H's coverage under the expired NPDES General Permit in place, which must continue until ADEQ follows the regulatory procedure required by Reg. 6/40 CFR 122.28(b)(3)(ii-iv).

CONCLUSION

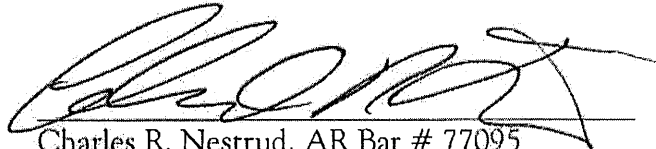
As a matter of law, C&H requests that the Commission find that:

- C&H obtained coverage under the NPDES General Permit, and
- C&H's coverage under the NPDES General Permit continued when the General Permit expired.
- C&H will retain coverage under the NPDES General Permit until ADEQ issues the notifications required by 40 CFR 122.28(b)(3)(ii-iv), including providing a reasonable time within which C&H must apply for an individual NPDES permit; and
- Following receipt of the appropriate notifications, and timely submission of the requested individual NPDES application, C&H will retain coverage under the General Permit until ADEQ actually issues an individual NPDES permit, at which time C&H's coverage under the NPDES General Permit will automatically terminate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

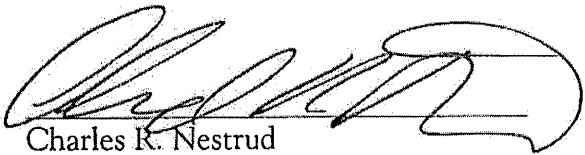
I hereby certify that I have served a copy of the foregoing pleading upon the following attorneys of record by U.S. Mail or Electronic Mail, this 7th day of March, 2018

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