

ARKANSAS POLLUTION CONTROL  
AND ECOLOGY COMMISSION

SUBJECT – In The Matter of C&H Hog  
Farms, Inc.



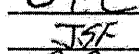



MINUTE ORDER NO. 18-01


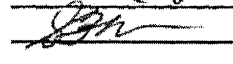
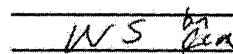
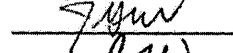
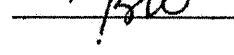

PAGE 1 OF 1

On January 11, 2018, C&H Hog Farms Inc. (C&H) filed a Motion for Stay of Permitting Decision with the Arkansas Pollution Control and Ecology Commission (“Commission”) pursuant to Reg.8.612. C&H seeks a stay from the Commission of the Director of the Arkansas Department of Environmental Quality’s (“ADEQ”) final permitting decision to deny C&H a Regulation 5 permit – Permit No. 5264-W.

Regulation 8.612 allows the Commission to provide for a stay, modify the terms of a stay, or terminate a stay under appropriate circumstances to avoid substantial prejudice to a party. However, Reg.8.612(A)(1) mandates that the denial of a permit, as is the case in this instance, shall stand. C&H has been operating under a Regulation No. 6 permit –Permit No. ARG590001 – during the pendency of ADEQ’s review of C&H’s Regulation No. 5 permit application. The Commission finds that continuing to allow C&H to operate pursuant to the terms and conditions of Permit No. ARG590001 is fair and equitable and substantial prejudice will result to C&H if C&H is required to implement an immediate closure of its facility at this juncture. Accordingly, the Commission grants C&H’s motion for a temporary stay to allow it to continue to operate under Permit No. ARG590001 until February 10, 2018, the date a Request for Commission Review of the Director’s decision to deny Permit No. 5264-W is due. If C&H files a timely Request for Commission Review of the Director’s decision to deny C&H Permit No. 5264-W with the Commission, then the Commission will continue this temporary stay until the completion of the Commission’s administrative review process.

COMMISSIONERS:

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SUBMITTED BY: Charles Moulton  
M. Goggans - Chair

PASSED: 01/17/18

**BEFORE THE ARKANSAS COMMISSION ON  
POLLUTION CONTROL AND ECOLOGY**

**IN THE MATTER OF:**

**C & H Hog Farms**

**NPDES Permit No. Permit No. 5264-W**

Secretary

Arkansas Pollution Control and Ecology

101 East Capitol, Suite 205

Little Rock, AR 72201

Filed

LIS No.

18-001-P

1/18/18 PLG

**REQUEST FOR ADJUDICATORY  
HEARING AND COMMISSION REVIEW**

Pursuant to Ark. Code Ann. 8-4-205 and APCEC Regulation No. 8, Reg. 8.603, C&H Hog Farms ("C&H"), by its attorneys, Friday Law Firm, LLC and Barber Law Firm, PLLC, hereby requests an adjudicatory hearing and the opportunity to present evidence and oral argument before the Arkansas Commission on Pollution Control and Ecology (the "Commission") regarding the decision of the Director of the Arkansas Department of Environmental Quality ("ADEQ") to deny Permit No. 5264-W, with related implications for Arkansas State NPDES Permit Number ARG590001 (the "Reg. 6 Permit), for the reasons enumerated below (the "Appeal").

**General Background: Factual and Legal Matters Applicable to All Issues**

1. C&H owns and operates a concentrated animal feeding operation ("CAFO") in Mt. Judea, Arkansas. C&H operates two waste storage ponds and a process wastewater land application system pursuant to Arkansas State NPDES Permit Number ARG590001 (the "Reg. 6 Permit). The permit was initially issued June 4, 2014, and modified on May 12, 2015 and March 21, 2016. A copy of the Reg. 6 Permit, as modified on March 21, 2016, is attached as Exhibit A and incorporated herein.

2. On April 7, 2016 C&H filed an application for a No-Discharge Permit pursuant to Regulation No. 5, which was deemed complete by ADEQ.
3. On April 20, 2016 C&H timely filed an application to renew the Reg. 6 Permit.
4. On May 3, 2016 ADEQ issued notice of its decision to not renew NPDES General Permit No. ARG590000 (the Reg. 6 Permit). A copy of the decision to not renew is attached hereto as Exhibit B and incorporated herein.
5. ADEQ unilaterally returned C&H's application for renewal of the Reg. 6 Permit, and advised C&H that it was considering C&H's application for a No-Discharge Permit as the application to "replace coverage under ARG590000 (the Reg. 6 Permit)." A copy of ADEQ's letter returning the renewal application is attached hereto as Exhibit C and incorporated herein.
6. On February 15, 2017 ADEQ made a decision to issue a permit to C&H and issued its Statement of Basis and draft permit, including all of the terms and conditions for the permit for public comment (the "Draft Permit"). A copy of the Draft Permit is attached hereto as Exhibit D and incorporated herein. In particular, the Statement of Basis and Draft Permit states: "This Statement of Basis is for information and justification of the permit monitoring requirements as well as other conditions in the permit only and is not enforceable. This draft permit decision is for issuance of a no-discharge facility under draft permit number 5264-W and AFIN 51-00164." The decision to issue the Draft Permit is stated as follows in the Statement of Basis: "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.” Furthermore, the Statement of Basis described the issues for comment as follows: “During a 30-day period, any interested persons may submit written comments on the permit and may request a public hearing to clarify issues involved in the permitting decision.” The Draft Permit stated that ADEQ’s decision was that “C&H Hog Farms, Inc. is authorized to store and land apply liquid waste from a swine facility on sites listed in Condition No. 7 of Part II of the permit for a facility located at HC 72 Box 2 Vendor, Arkansas 72683 in Newton County . . .”

7. The Comment Period on the Draft Permit ended on April 6, 2017.
8. Following the close of the comment period, ADEQ requested C&H to provide additional information, and by December 29, 2017 ADEQ confirmed that all requested additional information had been submitted and received. Attached hereto as Exhibit E and incorporated herein is the exchange of communication between counsel for ADEQ and C&H.
9. On January 10, 2018 ADEQ issued its Final Permitting Decision and revised Statement of Basis (the “Permit Decision”). Attached hereto as Exhibit F and incorporated herein is a copy of the Permit Decision. The Permit Decision was to deny the permit. The revised Statement of Basis was not only substantially different from the draft Statement of Basis, but it was in direct contradiction to the draft Statement of Basis. In particular, the Statement of Basis for the Permit Decision states: “ADEQ denies issuance of the permit after determining that the

record lacks necessary and critical information to support granting of the permit. The record fails to include the requisite geological, geotechnical, groundwater, soils, structural, and testing information specified in Reg. 5.402. Without the detailed geophysical and engineering data required by the Agricultural Waste Management Field Handbook, as amended, ADEQ is unable to ascertain compliance with Reg. 5.402.” ADEQ had not requested the information which it apparently contends was not provided and without giving C & H the opportunity to address such issues determined that certain information that was not required was now necessary. For example, and without limitation to other issues that ADEQ did not permit C & H to address before issuing its permitting decision, in response to Comment 74, ADEQ stated, “The permit application does not contain a groundwater flow direction study as *recommended* by AWMFH Chapter 7. The Department has determined that a groundwater direction study is *necessary* due to the specific siting of this facility.” (Emphasis added in italics) *See also* ADEQ’s responses to Comments 320 & 352. Similarly, ADEQ stated in response to Comments 209, 324, 346, 359, 417 and 425 that “[t]he geologic investigation of the waste storage ponds does not comply with AWMFH Chapter 7,” but it never raised this issue with C & H before denying the permit application for lack of information and did not give C & H an opportunity to address the issue. Related examples concerning the “compaction test and permeability analysis” (Responses to Comments 348, 417) and the “geologic investigation of the berms” (Response to Comment 424) were never raised by ADEQ before the denial of the permit application for lack of information, and C & H was never allowed to address the

issues. Moreover, as stated in the responses to comments in the Regulation 6 Permit (Exhibit A hereto) (e.g., Response to Comment 6 regarding the liners in the ponds), ADEQ has previously approved compliance with the NRCS Agricultural Management Field Handbook regarding the construction of the waste ponds.

10. This Appeal is taken from the Permit Decision of the Director, as more particularly described below.
11. Through this action, C&H requests an adjudicatory hearing and Commission review with respect to the Permit Decision, as more particularly described in the specific issues enumerated below and based upon the process followed by ADEQ as described above. C&H requests that the Commission find that the Permit Decision is arbitrary, capricious, not supported by substantial evidence, and contrary to the Commission's rules and its governing statutory authority. C&H requests that the Commission find that ADEQ has failed to include in the written record of this proceeding a written explanation of the rationale for the Permit Decision, and that ADEQ has failed to provide an adequate written explanation of the rationale for the Permit Decision, and that ADEQ has failed to demonstrate that the Permit Decision was based upon generally accepted scientific knowledge and engineering practices, all as required by Regulation No. 8, Section 8.211(A)(2). Further, C & H requests the Commission to find that ADEQ is estopped to deny the permit application for the reasons stated in its Statement of Basis due to the reliance of C & H on ADEQ's requests for information and its

responses thereto. *Foote's Dixie Dandy, Inc. v. McHenry*, 270 Ark. 816, 607 S.W.2d 323 (1980).

**ISSUE NO. 1-DENIAL OF THE PERMIT WAS NOT AN OPTION**

12. The contents of paragraphs 1-11 are incorporated herein.
13. Reg.6.201 Status and Continuation of Permits, provides as follows: "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) The Director, through no fault of the permittee, does not issue a new permit prior to the expiration date of the previous permit."
14. C&H submitted a timely and complete application for renewal of the Reg. 6 Permit, and through no fault of C&H, ADEQ did not issue a new permit prior to the expiration date of the previous permit. When a timely application has been filed, ADEQ lacks authority to refuse to issue a new permit to a facility that has a permit, and has timely applied for renewal of that permit.
15. Accordingly, the Reg. 6 Permit remains in effect until such time as ADEQ issues a new permit, or the Permit has been duly revoked through an enforcement action pursuant to Regulation 8, Section 8.402, and the Permit Decision should be remanded to ADEQ with directions to issue a new permit.

**ISSUE NO. 2-THE DECISION WAS PROCEDURALLY FLAWED DUE TO FAILURE TO PROVIDE NOTICE AND COMMENT**

16. The contents of paragraphs 1-11 are incorporated herein.

17. ADEQ was required by law, regulation, and constitutional due process to provide public notice of its proposed decision and provide an opportunity for comment upon its proposed decision prior to issuing a final decision. The Permit Decision to deny the permit was not noticed in the Draft Permit, was not noticed as a draft for the Permit Decision, was not supported in the Statement of Basis for the Draft Permit, was not supported in a Statement of Basis for the Permit Decision, and as a result the Permit Decision must be remanded to ADEQ so that a draft of the decision can be issued for public notice and comment.

**ISSUE NO. 3-THE PERMIT DECISION WAS ARBITRARY, CAPRICIOUS AND ADEQ SHOULD BE ESTOPPED FROM DENYING THE PERMIT FOR THE REASONS STATED IN THE STATEMENT OF BASIS**

18. The contents of paragraphs 1-11 are incorporated herein.
19. When ADEQ issued the Draft Permit, it represented that it had all the information required to do so, and it did not request comment upon the issue of whether complete information was available to support the decision reflected in the Draft Permit. It would be arbitrary, capricious, and contrary to law to deny the same permit for the purported reason that information was lacking. Within days of issuing the Permit Decision, ADEQ represented that it had all of the additional information it required, and without providing any notice or an opportunity to respond, ADEQ denied the permit for the purported reason that information was lacking. The Permit Decision was inappropriate, and ADEQ is estopped from denying the permit on this basis and under these circumstances. The Permit Decision should be reversed and remanded to ADEQ with instructions to advise C&H as to what additional information is required, and to provide C&H an



opportunity to provide such additional information, and upon receipt and review of that information to provide public notice and an opportunity to comment on whatever decision might result.

**ISSUE NO. 4-THE STATEMENTS CONTAINED IN THE RESPONSIVE SUMMARY DO NOT REFLECT THE RATIONALE FOR THE PERMIT DECISION AND SHOULD NOT BE CONSIDERED IN THIS APPEAL, BUT TO THE EXTENT THE RESPONSES TO COMMENTS ARE CONSIDERED, THEY ARE INAPPROPRIATE TO SUPPORT THE PERMIT DECISION**

20. The contents of paragraphs 1-11 are incorporated herein.
21. The Responsive Summary includes the following statement in response to many comments: “The Department made this permitting decision in accordance with state laws and APC&EC Regulation 5, Liquid Animal Waste Management Systems. Upon consideration of the completed permit application, the public comments on the record, and additional data and information submitted during the permitting process, the Department denies issuance of the permit.” See, e.g. Response to Comments 74, 209, 320, 324, 346, 348, 352, 359, 417, 424). ADEQ goes on to provide vague references to information that is lacking, such as a groundwater flow study, the geologic investigation of the waste storage ponds and berms, the compaction test and permeability analysis, inadequate documentation of compliance with the Agricultural Waste Management Field Handbook with respect to the presence of karst, application of waste in excess of agronomic need, the impact of sudden breach or accidental release for waste impoundments, an emergency action plan for waste impoundments, application of waste on flood prone and sloping 8-15% fields, the use of injection or incorporation, and proximity of a waste impoundment to sensitive ground water

areas. None of the responses to comments makes any substantive findings on any of these issues, but rather just states that adequate information has not been presented and, in some cases, transforms recommendations of the AWMFH into requirements that were not communicated to C & H before the denial of the permit application. Under the circumstances, the responses to comments are not supported by generally accepted scientific and engineering knowledge and practices, and to the extent that the responses to comments are part of the Permit Decision, those responses are not appropriate to support the Permit Decision.

22. The Permit Decision should be reversed and remanded so that any additional information actually necessary to address these issues can be submitted, and so that ADEQ can actually review the information and determine whether it should proceed to issue the Draft Permit as written, or provide additional limitations and conditions as may be appropriate.
23. ADEQ has agreed to provide C & H with a list of the reasons for the denial of the permit application but has not done so as of the filing of this Request for Adjudicatory Hearing and Commission Review. In addition, ADEQ has agreed to meet with C & H to review the reasons for the denial. Accordingly, in addition to its general right to amend this Request for Adjudicatory Hearing and Commission Review, C & H expressly reserves the right to amend the request upon receipt of the list and the completion of the meeting with ADEQ.

WHEREFORE, C&H requests an adjudicatory hearing and the opportunity to present evidence and oral argument before the Arkansas Pollution Control & Ecology Commission; that the stay entered herein on January 17, 2018 remain in place that the Commission find that

ADEQ's Permit Decision was arbitrary, capricious, not in accordance with state and federal law, in violation of the Arkansas and United States Constitution, and not supported by generally accepted scientific and engineering knowledge and practices; and for such other relief to which it may be entitled.

Respectfully submitted,



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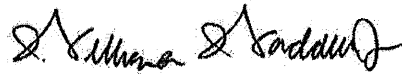
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*Attorneys for C & H Hog Farms, Inc.*

**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, postage prepaid, this 18th day of January 2018.

Becky Keogh, Director  
*via*  
Michael McAlister  
Attorney Supervisor  
ARKANSAS DEPARTMENT OF  
ENVIRONMENTAL QUALITY  
5301 Northshore Drive  
North Little Rock, AR 722118-5317



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WILLIAM A. WADDELL, JR.