

**IN THE CIRCUIT COURT OF NEWTON COUNTY, ARKANSAS
CIVIL DIVISION**

C & H HOG FARMS, INC.

APPELLANT

v

CASE NO. 51CV-18-58

**ARKANSAS POLLUTION CONTROL
& ECOLOGY COMMISSION**

APPELLEE

BUFFALO RIVER WATERSHED ALLIANCE, ET AL.

INTERVENORS

**ARKANSAS DEPARTMENT OF
ENVIRONMENTAL QUALITY**

ALLEGED CONTEMNOR

MOTION FOR ORDER TO SHOW CAUSE

Comes the appellant, C & H Hog Farms, Inc. (“C & H”), and for its motion for an order to show cause as to why the Arkansas Department of Environmental Quality should not be held in contempt, states:

1. On September 7, 2018, C & H filed its motion for stay pending appeal. On October 17, 2018, the Court held a hearing on the motion and entered its order staying APC&EC’s Minute Order No. 18-20 by which APC&EC remanded the decision of the Arkansas Department of Environmental Quality (“ADEQ”) back to ADEQ to comply with the law regarding public comment. A partial transcript of the October 17 hearing is attached hereto as Exhibit A and is made a part hereof by reference. The partial transcript contains portions of the hearing that are directly relevant to the present motion. Attached hereto as Exhibit B is the Court’s stay order filed on October 17. In addition to staying APC&EC’s Minute Order No. 18-20, the order

further provided that “the stay allowing C&H to continue to operate its facility is continued until further order of this court.”

2. At the October 17th hearing, C & H explained why any further action by ADEQ pending the appeal would be null and void, because ADEQ does not have jurisdiction to act after the notice of appeal. *See Transcript*, pp. 25-26. In support of its argument, C & H cited to the Court the case of *Myers v. Yingling*, 369 Ark. 87, 251 S.W.3d 287 (2007), which held that an order of a circuit court following a notice of appeal and lodging of the record in the appellate court was without jurisdiction and void. *See Transcript*, pp. 27-28.¹ In the *Myers* opinion, the Court noted that “Once the record is lodged in the appellate court, the circuit court no longer exercises jurisdiction over the parties and the subject matter in controversy. Certainly, circuit courts have continuing jurisdiction to correct records . . . however, the circuit court loses jurisdiction to *act further* in the matter once the record is lodged in the appellate court.” *Myers*, 369 at 89 (2007) (citations omitted) (emphasis in original).

3. In its oral ruling, the Court made the following statements regarding the jurisdictional issue as to whether ADEQ could act following the Court’s stay order:

COURT: So I’m going to continue the stay. I’m not going to directly say that ADEQ is affected by the stay. But if you ask me to say what the order would say – I don’t have an order. Mr. Waddell proposed one. Well, it’s just stayed. And I guess if ADEQ attempts to shut down the C&H, then C&H could join them as a party, and we can address whether they had authority to do that. But apparently no one here is harmed by that. . . . If they’re operating pursuant to something that’s stayed, well, I mean, they could make their arguments, but I don’t see what they’re doing – how that would have any effect. But that’s for another day. . . . Amended Order 18-20, I guess is stayed. . . . It’s stayed.

DARA HALL: The Commission [is a party]. And if you stay the Commission, then it’s like their remand didn’t happen.

¹ C & H noted in its reply to response to motion for stay filed on September 20, 2017 that this same rule had been applied in Texas to an administrative appeal. *See Raghunath Dass, P.E. v. Texas Bd. of Prof’l Engineers*, 517 S.W.3d 252 (Tex. App. 2017).

COURT: Right.

Transcript, pp. 63-64. As noted above, the Court then entered an order staying Minute Order No. 18-20.

4. On November 19, 2018, with knowledge of this Court's stay order, ADEQ issued its permit decision attached hereto as Exhibit C. *See also* Exhibit D hereto. ADEQ did not have jurisdiction to issue the permit decision, and ADEQ's conduct was in violation of the Court's stay order regarding Minute Order No. 18-20. In addition, ADEQ's permit decision provides for a process to shut down C & H's operations, contrary to the Court's stay order.

5. In *Arkansas Dep't of Human Servs. v. Gruber*, 39 Ark. App. 112, 115, 839 S.W.2d 543, 544 (1992), the Arkansas Court of Appeals stated as follows:

Disobedience of any valid judgment, order, or decree of a court having jurisdiction to enter it may constitute contempt; punishment for such contempt is an inherent power of the court. *Gatlin v. Gatlin*, 306 Ark. 146, 811 S.W.2d 761 (1991); *Hilton Hilltop, Inc. v. Riviere*, 268 Ark. 532, 597 S.W.2d 596 (1980). Even one not a party to an action, who has been served with an order, or who has notice of it, may be held in contempt of the order. *Id.* Before a person may be held in contempt for violating a court order, the order must be in definite terms as to the duties imposed upon him and the command must be expressed rather than implied. *Id.*

...

One who has full knowledge of a court order and its import, as DHS did, cannot flout it with impunity. *Dennison v. Mobley, Chancellor*, 257 Ark. 216, 515 S.W.2d 215 (1974).

6. ADEQ had actual knowledge of the Court's stay order. *See, e.g.*, the comment attributed to ADEQ in the October 19, 2018 ARKANSAS DEMOCRAT GAZETTE article attached hereto as Exhibit E. *See also* Exhibit E hereto (C & H's response to motion for change of venue filed on November 9, 2018 in Newton County Circuit Court Case No. 51CV-18-68 to which C &

H attached the Court's stay order). ADEQ's action in issuing the permit decision on November 19 without jurisdiction and in violation of the stay constitutes contempt. Therefore, C & H respectfully submits that an order should be issued for ADEQ to show cause why it should not be held in contempt.

WHEREFORE, C & H Hog Farms, Inc. moves the Court to issue an order to show cause as to why the Arkansas Department of Environmental Quality should not be held in contempt and for all other proper relief to which it may be entitled.

Respectfully Submitted,

/s/ William A. Waddell, Jr.
WILLIAM A. WADDELL, JR.
ARK. BAR ID NO. 84154
FRIDAY, ELDREDGE & CLARK, LLP
400 West Capitol Avenue, Suite 2000
Little Rock, AR 72201
(501) 370-1510 (telephone)
(501) 244-5342 (facsimile)
waddell@fridayfirm.com

AND

CHARLES R. NESTRUD
ARK. BAR ID NO. 77-095
BARBER LAW FIRM, PLLC.
425 W. Capitol Ave., Suite 3400
Little Rock, Arkansas 72201
(501) 372-6175

*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 electronic mail on this 20th day of November, 2018:

Dara A. Hall
LESLIE RUTLEDGE
Attorney General
323 Center Street, Suite 200
Little Rock, AR 72201-2007

Richard H. Mays
WILLIAMS & ANDERSON, PLC
111 Center Street, Suite 2200
Little Rock, Arkansas 72201

/s/ William A. Waddell, Jr.
WILLIAM A. WADDELL, JR.