BEFORE THE ARKANSAS POLLUTION
CONTROL AND ECOLOGY COMMISSION

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

C & H HOG FARMS, INC.'S RESPONSE TO ADEQ'S MOTION TO DISMISS APPEAL

ADEQ has moved to dismiss Issues 1-4 in C&H Hog Farms, Inc. ("C&H") Amended Request for Adjudicatory Hearing and Commission Review ("Appeal"). None of ADEQ's arguments presented in ADEQ's Motion to Dismiss and Incorporated Brief ("Appeal Motion") have merit, and ADEQ's Appeal Motion should be denied and dismissed.

LEGAL STANDARD

The standard of review in this proceeding is "de novo." APC&EC Reg. 8, Sec. 2.5.18. The Commission undertakes a de novo review, including an adjudicatory hearing, resulting in a final decision. Ark. Code Ann 8-4-205(c)(7); APC&ED Reg. 8, Section 2.5.18, 2.6.1-2.6.2

The standard of proof in this proceeding is the preponderance of evidence standard. *In re El Dorado Joint Pipeline Group Permits*, Consolidated Docket No. 07-006-P, Order No. 9 (May 8, 2008), citing *Johnson v. Ar k. Ed. of Examiners in Psychology*, 305 Ark. 451, 455, 880 S.W.2d 766 (1991); See also, *In Re Big River Steel, LLC*, APC&EC Docket No. 13-006-P, Order No. 18 (March 20, 2014) (the standard of proof in a Commission administrative hearing is the preponderance of the evidence standard. *Johnson v. Ark. Ed. of Examiners in Psychology*, 305 Ark. 451, 455, 880 S.W.2d 766 (1991) Nucor bears the burden of proving, by a preponderance of the evidence, that the BRS Permit does not meet the requirements of applicable state and federal law.)

The legal standard which applies to ADEQ's Appeal Motion is much different. "In a motion to dismiss a petitioner's Request for Hearing is to be liberally construed, and all reasonable inferences must be resolved in favor of the petitioner." Ark. R. Civ. Pro. 12(b) (6); *Born v. Hosto & Buchan, PLLC*, 2010 Ark. 292, 372 S.W.3d 324 (2010). *In re Big River Steel, LLC*, APC&EC Docket No. 13-006-P, Order No. 9, page 3 (December 13, 2013). In a motion to dismiss pursuant to Regulation No. 8 and the Arkansas Rule of Civil Procedure 12(b)(6), the Commission must treat the facts alleged by C&H as true, and view them in the light most favorable to C&H. In viewing the facts in the light most favorable to C&H, the facts should be liberally construed in C&H's favor. *Biedenham v. Thicksten*, 361 Ark. 438, 441, 206 S.W.3d 837, 840 (2005).

Against this backdrop, ADEQ requests that C&H's Appeal be dismissed. Each of ADEQ's arguments in support of its Appeal Motion will be addressed in turn.

LAW AND ARGUMENT

I. C&H Does Not Dispute ADEQ's Authority to Deny a Permit, But Does Insist that ADEQ Follow the Applicable Laws and Procedures When Doing So, and That the Legal Implications of Denying a Permit Be Appropriately Implemented.

ADEQ's argument in Section I of its Motion is premised on the following statement: "The Department's decision to not renew the General Permit removed the applicability of APC&EC Regulation 6.201, as there was neither a new General Permit pending issuance nor a permit application for an individual APC&EC Regulation 6 permit pending issuance." Curiously, ADEQ fails to cite Regulation 6.201 in its Motion, likely because Regulation 6.201 expressly refutes ADEQ's entire argument. Regulation 6.201 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) The Director, through no fault of the permittee, does not issue a new permit prior to the expiration date of the previous permit.

Did ADEQ issue a new permit prior to the expiration of the NPDES General Permit? The undisputed answer to this question is "No." To state that Reg. 6.201 does not apply is simply incorrect. It is Reg. 6.201, in part, that provided C&H continued coverage under the expired NPDES General Permit.

ADEQ raises the red herring issue in its Appeal Motion that C&H is attempting to appeal the terms of the NPDES General Permit or ADEQ's decision to not renew the NPDES General Permit. As more fully briefed in the C&H Reply, nothing could be further from the truth.

II. C&H Has Adequately Alleged that ADEQ's Permitting Decision Was Improper.

C&H has alleged that ADEQ was required to re-issue a public notice that identified its proposed decision to deny the Reg. 5 Permit. ADEQ argues that its decision was merely a "change incorporated into a final permitting decision by ADEQ based on the public comments" and therefore "not required to be issued for public notice and comment." While that may be an appropriate result in some permit decisions, it is not here, when there was nothing in the public notice that provided an inkling that the permit might be denied. The authority relied upon by ADEQ simply does not apply. In *Webb v Gorsuch*, 699 F. 2d 157 (4th Circuit 1983) the agency

requested and obtained information during the course of the permit review that supplemented the record, which was allowed without re-publishing the draft decision. Similarly, in *Nucor Steel-Arkansas v APC&EC*, 2015 Ark. App. 703, 478 S.W.2d 232 (2015) the Court of Appeals authorized changes such as a "scrivener's error", and a change in the greenhouse gas (GHG) limit from 0.0723 tons of GHG to 0.155 tons of GHG based on a comment from Big River Steel, without the need for additional public comment.

Contrast those decisions with the decision of EPA's Environmental Appeals Board in *In re District of Columbia Water and Sewer Authority*, NPDES Appeal Nos. 05-02, 07-10, 07-11 and 07-12 (EAB 2008). In *Columbia* the change was "the elimination in the Final Permit of the general language requiring compliance with the District's water quality standards. . . . [Appellants] argue that the Region's deletion of the general requirement to comply with water quality standards prior to full implementation of the LTCP and certification thereof, without providing the public an opportunity to comment on the change, was unlawful because the language in the Final Permit deviated materially and substantially from the language in the August 2006 Draft Permit, in a way that was not reasonably foreseeable." "[EPA's] July 6, 2007 response argues that the Final Permit need not have been subject to further notice and comment because its terms and conditions were a logical outgrowth of the December 2006 Draft Permit." "EPA argued that [Appellants] did, in fact, have ample opportunity to comment on the Final Permit provision and assert that because this provision has been 'on the table' throughout rounds of comment periods, [Appellants] have been able to make their views heard throughout this process. . . . According to [EPA], the new language was foreseeable."

EPA's Environmental Appeals Board ("EAB") remanded the permit for additional public comment, holding that "We agree with [Appellants] that the Region did not provide adequate

notice and opportunity to comment on the final language relating to compliance with water quality standards for CSOs, and we therefore remand the permit to the Region on this basis."

The EAB's discussion of this issue is particularly applicable in this case, where ADEQ issued a Draft Permit and public notice of its intent to issue the permit, thereby advising the public that it had sufficient information to issue a permit to C&H. ADEQ was in the process of responding to comments and issuing a final permit, and even advised C&H that it had all the information it needed. Then, in an about face, ADEQ abruptly denied the permit. That could not have been more unforeseeable. The EAB discussed at length the principles that apply to a challenge to the sufficiency of public notice. Those principles are the same as those, which apply to notice and comment rulemaking:

> Under the Administrative Procedure Act, EPA must provide the public with notice and opportunity to comment before it issues NPDES permits. 5 U.S.C. § 553(b)-(c); *see* 40 C.F.R.§§ 124.6(d), .10(a)(1)(ii); *see also NRDC v. EPA*, 863 F.2d 1420, 1429 (9th Cir. 1988) (applying the notice and comment requirement to NPDES permitting procedures); *NRDC v. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002) (same). A final permit need not be identical to the corresponding draft permit and, indeed "[t]hat would be antithetical to the whole concept of notice and comment." *NRDC v. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002). It is, in fact, "'the expectation that the final rules will be somewhat different and improved from the rules originally proposed by the agency.'" *Id.* (quoting *Trans-Pac. Freight Conference v. Fed. Mar. Comm'n*, 650 F.2d 1235, 1249 (D.C. Cir. 1980)); *see also In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 145 (EAB 2006); *In re Amoco Oil Co.*, 4 E.A.D. 954, 980 (EAB 1993); *In re Chem-Sec. Sys., Inc.*, 2 E.A.D. 804, 807 n.11 (Adm'r 1989). Thus, the "'law does not require that every alteration in a proposed rule be reissued for notice and comment.'" *NRDC*, 279 F.3d at 1186 (quoting *First Am. Discount Corp. v. Commodity Futures Trading Comm'n*, 222 F.3d 1008, 1015 (D.C. Cir. 2000)).
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> However, a final permit that differs from a proposed permit and is not subject to public notice and comment must be a "logical outgrowth" of the proposed permit. *See NRDC*, 279 F.3d at 1186; *see also In re Old Dominion Elec. Corp.*, 3 E.A.D., 779, 797 (Adm'r 1992) ("[t]he revised permit by all accounts is a logical outgrowth of the notice and comment process"). To determine whether a final permit is a "logical outgrowth" of a draft permit, the essential inquiry focuses on whether interested parties reasonably could have anticipated the final rulemaking

from the draft permit. In determining this, one of the most salient questions is whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule.

NRDC, 279 F.3d at 1186 (internal quotation marks and citations omitted). EPA rules and previous Board decisions reflect this standard. The regulations advise that when comments submitted during the comment period raise "substantial new questions" about a permit, it may be appropriate for the permit issuer to reopen the comment period. *See* 40 C.F.R. § 124.14(b). Although the reopening of the comment period is discretionary, and the Board often defers to the permit issuer's discretion in deciding not to reopen a comment period, we nonetheless consider changes to draft permits on a case-by-case basis and, depending on the significance of the change, may determine that reopening the comment period is warranted. *See, e.g., Indeck*, 13 E.A.D. at 145-47 (remanding when the permit issuer did not provide an opportunity for public comment on a significant addition to the permit); *In re Amoco Oil Co.*, 4 E.A.D. 954, 981 (EAB 1993) (remanding permit and directing Region to reopen public comment period when Region failed to provide public with opportunity to prepare an adequately informed challenge to a permit change); *In re GSX Servs. of S.C., Inc.*, 4 E.A.D. 451, 467 (EAB 1992) (remanding and directing Region to reopen public comment period when public was not given opportunity to comment on significant permit changes); see also *Old Dominion*, 3 E.A.D. at 797 (explaining that despite the discretionary wording of the regulations, "there may be times when a revised permit differs so greatly from the draft version that additional public comment is required").

To determine whether the changes that appear in the Final Permit raise "substantial new questions" or fail to meet the "logical outgrowth" standard, which are fact-based inquiries, we must consider the evolution of the permit condition at issue, and the Region's corresponding explanatory statements.

* * *

We find that, based on the Region's previous statements interpreting the CWA, the CSO Policy, and the District's water quality standards, FOE/SC could not have reasonably anticipated that the Region would delete from the Final Permit the general prohibition covering the interim period. We hold that the new language in the Final Permit was not a logical outgrowth of the language in the previous draft and, accordingly, FOE/SC were denied the opportunity to provide meaningful comments on the issue. . . . In removing the general provision covering the interim period and calling it "redundant" and "duplicative," the Region appears to have done a complete about-face with respect to its interpretation of the requirements of the CWA and the CSO Policy. Such an about-face is not a logical outgrowth of the original proposal. *Cf. Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005) (explaining that federal courts

"have refused to allow agencies to use the rulemaking process to pull a surprise switcheroo on regulated entities").

The Region and WASA argue that the omission of the language covering the interim period in the Final Permit was foreseeable by FOE/SC, and, even given the opportunity to comment, they would have advanced the same objections that they had advanced with respect to the other proposed language, . . . FOE/SC have not had the opportunity to comment on the effect that removing the general prohibition would have on water quality standards compliance during the interim period. It is true that the Region's revision to the permit provision is consistent with past public comments that WASA had made, yet it is the history of the Region's thinking, not WASA's, that is important here. It is well settled that "EPA 'cannot bootstrap notice from a comment,'" *Envtl. Integrity Project*, 425 F.3d at 996 (quoting *Int'l Union v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1261 (D.C. Cir. 2005)), and FOE/SC should not be expected to "divine [the agency's] unspoken thoughts." *Id.*

* * *

WASA additionally argues that, to prevail on its notice-and-comment argument, FOE/SC would have to show prejudice from the claimed procedural violation, and they have not done so. . . . a petitioner need *not* show prejudice to prevail. *Shell Oil*, 950 F.2d at 752. Moreover, courts have found that when an agency fails to comply with notice-and-comment procedures, it is inappropriate to place the burden of demonstrating prejudice on the challenger (here, the petitioner). *See, e.g., Mc-Louth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1323-24 (D.C. Cir. 1988); *see also U.S. Steel Corp v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979) (holding that when an agency fails to comply with notice-and-comment rules, courts cannot apply the harmless error doctrine unless absence of prejudice is clear). Because we find that the Region failed to provide adequate public notice and opportunity to comment on the proposed permit terms, we will not place the burden on FOE/SC to demonstrate prejudice in this case. Further, we do not find that the Region's failure to comply with notice-and-comment requirements was harmless error that would render FOE/SC's procedural argument moot. In sum, we find that the Region's legal rationale for excluding the general prohibition from the Final Permit differs greatly from its stated rationale for including such a provision in previous drafts of the Blue Plains Permit. Accordingly, we hold that it was clear error for the Region to have made the modification to the water quality standards provision without reopening the comment period. On this basis, we remand the Final Permit on this issue.

C&H has certainly alleged sufficient facts to state a claim that additional public notice and comment is required in this case.

III. ADEQ's Permitting Decision Was Not Proper

ADEQ seeks to dismiss the Appeal because it believes that it issued a good permit decision. C&H has provided detailed allegations to the contrary, citing the applicable statutes and regulations supporting the Appeal. Although ADEQ has failed to explain how C&H's allegations are deficient, a few examples of C&H's allegations are illustrative of ADEQ's misunderstanding of C&H's allegations in light of the standard of review for a motion to dismiss, and why ADEQ's Appeal Motion should be denied.

> **Paragraph 40**: 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 inappropriate to deny the same permit for the purported reason that information was lacking. 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 inappropriate to deny the same permit for the purported reason that information was lacking.

C&H has alleged that the reasons ADEQ has proffered for denying the Reg. 5 Permit are not accurate, which must be accepted as true for purposes of ADEQ's Appeal Motion. ADEQ's Appeal Motion must be denied.

> **Paragraph 42**: 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, 405, 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 these

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, these responses to comments are not supported by generally accepted scientific and engineering knowledge and practices, and to the extent that these responses to comments are part of the Permit Decision, these responses are not appropriate to support the Permit Decision.

C&H has alleged that the reasons ADEQ has proffered for denying the Reg. 5 Permit are not appropriate,[1] which must be accepted as true for purposes of ADEQ's Appeal Motion. As ADEQ noted in its Appeal Motion, and as alleged in the Appeal, C&H submitted all the information required to support issuance of the Permit. Whether that is accurate is an issue to be resolved through an adjudicatory hearing, and cannot be resolved through a motion to dismiss. The Appeal Motion must be denied.

Paragraph 12: C&H requests that the Commission find that the Permit Decision is arbitrary, capricious, not supported by substantial evidence, that a preponderance of the evidence (as well as the Commission's rules and the governing statutory authority) supports a resolution of the issues presented herein in favor of C&H. 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, 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).

[1] A citation to the Agricultural Waste Management Field Handbook ("Handbook") is not sufficient to meet ADEQ's obligation to present "generally accepted scientific knowledge and engineering practices" to support its decision because, as alleged in Paragraph 42, the Handbook references relied upon by ADEQ are recommendations, not mandatory, and ADEQ is required to present "generally accepted scientific knowledge and engineering practices" to support its decision that the recommendations were requirements and that the documentation submitted was insufficient.

C&H has alleged what standards ADEQ were required to satisfy in its permitting decision and that ADEQ failed to satisfy those standards, which must be accepted as true for purposes of ADEQ's Appeal Motion. Whether those allegations are accurate is an issue to be resolved through an adjudicatory hearing, and cannot be resolved through a motion to dismiss. The Appeal Motion must be denied.

CONCLUSION

For all these reasons, ADEQ's Appeal Motion should be denied.

Respectfully Submitted,

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 and/or U.S. Mail, postage prepaid, this 18th day of April, 2018:

Stacie Wassell
Tracy Rothermel
Basil Hicks
ARKANSAS DEPARTMENT OF
ENVIRONMENTAL QUALITY
5301 Northshore Drive
North Little Rock, AR 722118-5317

Samuel E. Ledbetter
MCMATH WOODS P.A.
711 West Third Street
Little Rock, Arkansas 72201

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

Stephen G. Jeffery
JEFFERY LAW GROUP
400 Chesterfield Center, Suite 400
Chesterfield, Missouri 63017-4800

CHARLES R. NESTRUD