

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
REQUEST FOR DECLARATORY JUDGMENT**

ADEQ has moved to dismiss C&H Hog Farms, Inc. ("C&H") the Request for Declaratory Judgment ("RDJ") Count in C&H's Amended Request for Adjudicatory Hearing and Commission Review and Request for Declaratory Judgment ("Amended Request"), arguing that it "is not properly part of this appeal, is untimely, and does not comply with the statutory requirements." None of ADEQ's arguments presented in ADEQ's Motion to Dismiss C&H's Request for Declaratory Judgment and Incorporated Brief ("ADEQ RDJ Motion") have merit, and the ADEQ RDJ Motion should be denied and dismissed.

I. Legal Standard

The legal standard which applies to the ADEQ RDJ Motion is clear. 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 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).

II. Law and Argument

Regulation 8, Section 8.622 provides that "Any permittee or person subject to regulation by the Commission or the Department may petition the Commission for a Declaratory Order as

to the applicability of any rule, statute, permit, or order enforced by the Commission or the Department. The petition shall be processed in the same manner as a Request for Hearing."

As more fully explained in C&H's Brief in Support of Motion for Summary Judgment, the ADEQ Response, and C&H's Reply, the parties are in substantial dispute as to the applicability of certain laws, regulations and permit conditions. For example,

- Does Ark Code Ann 8-4-203(m)(5)(D) apply as ADEQ contends?
- Does 40 CFR 122.28 apply as C&H contends?
- Does Section 1.7 of the NPDES General Permit apply as ADEQ contends or as C&H contends?
- Does Section 6.201 of Regulation No. 6 apply as C&H contends?
- Does the definition of "permit" in Regulation No. 6 apply to the term "permit" in the NPDES General Permit?

The ADEQ RDJ Motion is premised on its argument that C&H is challenging a permitting decision through the RDJ, which is not the case.¹ In fact, C&H has alleged just the opposite—that no final NPDES permitting decision has been made. Nonetheless, ADEQ seeks to terminate C&H's coverage under the NPDES General Permit without following the appropriate procedures. See, Amended Complaint, paragraphs 1-28, 48, 49; C&H Motion for Partial Summary Judgment and Brief in Support.

In furtherance of its incorrect premise, ADEQ argues that C&H has not identified the "permitting" decision that is subject to the RDJ. C&H is not challenging a permitting decision in its RDJ. As clearly stated in C&H's RDJ, the issue upon which declaratory judgment is

¹ ADEQ's argument that the RDJ is "untimely" is likewise based on its incorrect position that the RDJ is an appeal of a permitting decision.

requested is which laws, regulations and permit conditions are applicable, and whether the proper interpretation of the applicable laws, regulations and permit conditions supports ADEQ's position that the applicable laws, regulations and permit conditions has the effect of terminating C&H's coverage under Reg. 6 NPDES General Permit No. ARG150000 when ADEQ denies a Reg. 5 permit application. ADEQ has clearly and unmistakably stated its position on this matter, a position that C&H strongly disputes.

- MR. MCALISTER: But you're right, assuming that we get to finality, that the appeal period passes or that appeal process ends, if we're in the same position in terms of a permit, we are going to have to talk about a closure plan and what it will take to wind down and close this facility." Statement of Michael McAlister to the Commission, January 17, 2018 (Transcript, page 18).
- COMMISSIONER STITES: You talked a bit about this, and I'm not sure I fully understand it. So if, in fact, we vote to deny the stay and the denial stands, what are the next steps that ADEQ would take in conjunction with C&H?

MR. MCALISTER: Well, we would have to ask for a closure plan detailing how they were going to close the facility and the ponds and remediate it. There's a time period for that. I don't want to guess at it not looking at it in front of me, Commissioner. I think they would have no more than 60 days to get us a closure plan for review and approval. Statement of Michael McAlister to the Commission, January 17, 2018 (Transcript, page 18).

In its Response to C&H's Motion for Summary Judgment, and in the ADEQ RDJ Motion, ADEQ argues the applicability of certain laws, regulations and permit conditions will

require C&H to cease operation if the denial of C&H's application for a Reg. 5 permit is affirmed by the Commission. In its Motion for Partial Summary Judgment and supporting Brief, as well as its Consolidated Response (adopted and incorporated herein pursuant to Rule 10 of the Arkansas Rules of Civil Procedure), C&H argues that the applicability of certain laws, regulations, and permit conditions supports the opposite conclusion; *i.e.* the denial of C&H's application for a Ret. 5 permit has no impact on C&H's continued coverage under the expired NPDES General Permit, and such coverage will continue until ADEQ issues the NPDES individual permit to C&H. There is a legitimate dispute, and if ADEQ's interpretation is correct, C&H may be required to cease operations. The significance of this dispute, and the need to have it resolved could not be more important. That is precisely what the request for declaratory judgment was designed to accomplish, resolve a dispute over the applicability of certain laws, regulations, and permit conditions and avoid an inevitable train wreck before it occurs. *See McEuen Burial Ass'n v. Arkansas Burial Ass'n Bd.*, 298 Ark. 572, 769 S.W.2d 415 (1989) (an action for declaratory judgment is a proper method for testing the validity of rules which, in the plaintiff's view, threaten future damage).

Finally, ADEQ argues that the RDJ should be severed from the permit appeal. Because the permit appeal and the RDJ involve common issues of law and fact, it would seem that consolidation of the permit appeal and the RDJ would serve judicial economy. The RDJ, presented as a separate count in C&H's Amended Request would also ensure that all parties that have an interest in this issue are represented. Should the Commission disagree, and choose to sever the RDJ and move it to a separate docket, that is within the Commission's prerogative.


III. Conclusion

For all these reasons, ADEQ RDJ Motion should be denied and dismissed.

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

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