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 CONSOLIDATED REPLY/RESPONSE TO ADEQ'S RESPONSE TO C&H'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

ADEQ has submitted three pleadings that present many of the same legal arguments relating to C&H's Motion for Summary Judgment; *i.e.*, the status of C&H's continued coverage under the expired NPDES General Permit No. ARG590000. These pleadings are ADEQ's Response to C&H's Motion for Summary Judgment and Incorporated Brief ("ADEQ SJ Response"), ADEQ's Motion to Dismiss C&H's Request for Declaratory Judgment and Incorporated Brief in Support ("ADEQ DJ Motion"), and ADEQ's Motion to Dismiss and Incorporated Brief in Support relating to C&H's Request for Review ("ADEQ Appeal Motion"). Additionally, Intervenors filed a Joint Response to C&H's Motion for Summary Judgment, which adopted the arguments raised by ADEQ in its three pleadings, as well as additional argument in support of a separate Cross Motion for Summary Judgment ("Interveners' Brief"). Accordingly, C&H submits this consolidated brief in reply and response to all of these pleadings ("C&H Consolidated Brief").

ADEQ and Intervenors misstate the issue presented in C&H's Motion for Partial Summary Judgment and proceed to argue that they should prevail on an issue that is not before the Commission. C&H's appeal of ADEQ's decision to deny the Reg. 5 permit and request for

declaratory judgment are not attempts to belatedly appeal the NPDES General Permit or ADEQ's decision to not renew the NPDES General Permit; nor are they inconsistent with C&H's Motion for Summary Judgment. It should be abundantly clear from the briefs filed by all parties in this case that there are legitimate disputes over the applicability and proper interpretation of the laws, regulations, and conditions of the NPDES General Permit as they relate to this dispute. Furthermore, C&H has not argued that the terms of the NPDES General Permit or that ADEQ's decision to not renew the NPDES General Permit should be reviewed or reversed.

For nearly two years C&H and ADEQ worked together to administratively change from an NPDES **discharge** permit to a state Reg. 5 **no-discharge** permit; but after proposing to approve that change, and on the eve of doing so, ADEQ did an about face and chose to not approve that administrative change. C&H is authorized to appeal ADEQ's permitting decision, and has done so. Whether ADEQ's decision to deny the Reg. 5 permit has any impact on C&H's continued coverage under expired NPDES General Permit No. ARG590000 is the separate issue presented in C&H's Motion for Partial Summary Judgment. ADEQ's apparent confusion about the issue presented by C&H's motion for summary judgment is reflected in the following inconsistent statements from ADEQ:

- "Any questions that relate to C&H's coverage under the NPDES General Permit are clearly outside the scope of the Department's final permitting decision at issue and C&H's appeal of that decision. (ADEQ SJ Response, page 2)
- C&H's coverage under the terms of the expired NPDES General Permit continues only because of the Commission's stay and only until the Commission reaches a decision

regarding C&H's appeal of the Director's APC&EC Regulation 5 permitting decision." (ADEQ SJ Response, page 9)

C&H anticipated that ADEQ would seek to improperly whipsaw it in this fashion. Had C&H not appealed and obtained a stay of ADEQ's Reg. 5 permit decision, ADEQ would be taking action now to shut down C&H's operations. The need to appeal ADEQ's Reg. 5 permit decision and to obtain a stay thereof could not have been more obvious. Yet ADEQ now argues that C&H's appeal of ADEQ's Reg. 5 permit decision has nothing to do with C&H's continued coverage under the expired NPDES General Permit. ADEQ cannot have it both ways. ADEQ's anticipated strategy to whipsaw C&H is precisely why C&H pursued both appeal and declaratory judgment as remedies. [1]

II. RESPONSE TO STATEMENTS OF UNDISPUTED FACTS AND ADDITIONAL STATEMENTS OF UNDISPUTED FACTS

The documents cited in the Statements of Undisputed Facts presented by ADEQ and Intervenors speak for themselves and C&H disputes any characterization, interpretation, or comment upon such document that is contrary to the express language of the documents.

C&H disputes ADEQ Statement #8. C&H had a copy of the NPDES General Permit, but ADEQ seems to imply an interpretation that is in dispute. The references to an "individual permit" in the NPDES General Permit were references to a "permit" as that term is described in

[1] In enacting Ark. Code Ann. § 8-1-201, the Arkansas General Assembly stated in subparagraph (b) that "in delineating the responsibility between the department and the commission, it is the intent of the General Assembly neither to expand nor to diminish any rights of property owners of this state under Arkansas Constitution, Article 2, § 22." It is clear to C & H that it has become a victim of ADEQ's unfair efforts to deny its ability to operate in accordance with the laws of the State of Arkansas. That is contrary to Ark. Code Ann. § 8-1-201(b) and the mission of both ADEQ and the Commission. Respectfully, the Commission should not allow itself to become a party to the improper conduct of ADEQ that is both unfair to C&H and an inappropriate attempt to diminish C&H's property rights.

Regulation No. 6. See, C&H Brief in Support of Motion for Partial Summary Judgment and for Declaratory Judgment, C&H Consolidated Brief.

On or about April 13, 2018 C&H filed an application for an individual Regulation No. 6 NPDES Permit (the "NPDES Individual Permit Application"). A copy of the NPDES Individual Permit Application is attached hereto as **Exhibit 1**, and incorporated herein.

III. C&H'S COVERAGE UNDER THE EXPIRED GENERAL PERMIT CONTINUES UNTIL ADEQ ISSUES AN INDIVIDUAL NPDES PERMIT OR TERMINATES C&H'S COVERAGE THROUGH ENFORCEMENT.

ADEQ's and Intervenors' arguments are based on a misunderstanding of the fundamental differences between the Regulation 6 procedures for continuing coverage under an expired NPDES permit, the Regulation 6 procedures for converting from an NPDES general permit to an individual NPDES permit, and the Regulation 5 procedures for processing an application for a Regulation 5 permit.

Continued Coverage: When ADEQ elected to not renew the NPDES General Permit, it is not disputed that C&H's coverage under the expired NPDES General Permit continued (and such coverage continues to this day).[2] The disputed issue is not whether coverage under the expired NPDES General Permit continued past the expiration date, but whether that coverage can be terminated through a decision on a state Reg. 5 permit. As discussed in C&H's motion for partial summary judgment/request for declaratory judgment, and in this consolidated

[2] Whether or not C&H was required to submit a Notice of Intent to be eligible for continued coverage is immaterial. C&H filed what it considered to be a timely application for renewal by filing a Notice of Intent, which ADEQ now says was not necessary. Regardless of whether a Notice of Intent was required prior to the expiration of the NPDES General Permit to secure continued coverage, ADEQ agrees that coverage did continue past the expiration of and past ADEQ's decision to not renew the NPDES General Permit. See, ADEQ SJ Brief, pages 6-8.

reply/response, coverage cannot be terminated through a decision on a state Reg. 5 permit, as a matter of law.

Converting to an Individual Permit When an NPDES General Permit is Not Renewed: When ADEQ decided to not renew the NPDES General Permit it had two options to deal with C&H's continued coverage under the expired NPDES General Permit:

1) It could do nothing, in which case C&H's coverage would continue.

2) It could require C&H to secure coverage under an Individual NPDES Permit, in which case C&H's coverage would continue until the Individual NPDES Permit is issued (or terminated through enforcement). In order to pursue this second option, ADEQ was required to follow the procedural steps of 40 CFR 122.28, which it failed to do.

ADEQ did not select option #2, and as a result ADEQ defaulted to option #1. Under option #1, C&H's coverage under the NPDES General Permit remains in effect until an individual NPDES permit is issued, or until ADEQ terminates C&H's coverage through enforcement, pursuant to the procedures outlined in 40 CFR 122.28, the NPDES General Permit, and 40 CFR 122.6.

1. The Relevant Laws, Regulations, and Permit Conditions Must be Interpreted in Harmony

One of the most basic rules of construction is that, "[c]ourts should interpret statutes as a 'coherent regulatory scheme,' giving effect to all the statute's provisions." *Grunley Walsh Int'l, LLC v. United States*, 78 Fed. Cl. 35, 40 (2007) citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S. Ct. 1291 (2000). *See also Hill v. Gallagher*, 2016 Ark. 198; 491 S.W.3d 458. Furthermore, "where a specific provision conflicts with a general one, the specific governs."

Kerrigan v. Phila. Bd. of Election, 2008 U.S. Dist. LEXIS 62263, *77 (E.D. Pa. August 14, 2008) citing *Edmond v. United States*, 520 U.S. 651, 657, 117 S. Ct. 1573 (1997). In short, the applicable statutes, regulations and permit conditions must be read in harmony. *Hendrix v. Alcoa, Inc.*, 2016 Ark. 453, 506 S.W.3d 230 (It is axiomatic that the court strives to reconcile statutory provisions to make them consistent, harmonious, and sensible). As one district court has noted:

> "In pari materia" means "in the same matter." Black's Law Dictionary, p. 797 (7th Ed. 1999). A court, as a "canon of construction," (id.), must view related statutes [or regulations] on the same subject together, and thereby avoid inconsistencies. Therefore, the Court may not look at the regulations in isolation but must consider the regulations "in pari materia" with other related regulations. In doing so, the Court construes the framer's intent as a whole, and does not interpret one regulation without consideration of another.

WildEarth Guardians v. Lane, 2012 U.S. Dist. LEXIS 176180, at *28-29 n.5 (D.N.M. Dec. 3, 2012). *See also City of Fort Smith v. Tate*, 311 Ark. 405, 844 S.W.2d 356 (1993).

As C&H's responses below to the arguments of ADEQ and Intervenors are reviewed, it becomes obvious that ADEQ and Intervenors are proffering strained interpretations of statutes, regulations, and permit conditions, in isolation and with no context or relationship to applicable definitions. Those arguments must be rejected in favor of interpretations that seek to provide a harmonious interpretation. The only harmonious construction that can be given to the applicable statute (Ark. Code Ann. 8-4-203(m)(5)(D)), the applicable regulations (Regulation 6 and the incorporated EPA regulations), and the relevant provisions of the NPDES General Permit is that C&H's coverage under the NPDES General Permit continues until an NPDES Individual Permit is issued and effective, and that ADEQ was required to provide notice to C&H, which included a time frame for submitting the application, a copy of the required application, and notice that coverage will continue until the individual permit is issued.

2. 40 CFR 122.28 Applies and ADEQ Failed to Comply With its Procedural Obligations

ADEQ agrees that 40 CFR 122.28, which is listed among the federal regulations adopted by reference in Regulation 6, Section 6.104, is applicable to this proceeding. See, ADEQ SJ Brief, page 7. Curiously, Intervenors depart from ADEQ on this point, probably due to the absurdity of Intervenors' argument.

Although 40 CFR 122.28 was specifically incorporated by reference into Regulation 6 through Section 6.104, Intervenors argue that incorporation did not occur. Intervenors argue that the regulated community should have divined the Commission's intent to exclude 40 CFR 122.28 from incorporation because a preamble parenthetical to 40 CFR 122.28 states that 40 CFR 122.28 is only required when EPA is issuing the permit; *i.e.*, it is not required for state delegated programs. While the Commission may not have been required to adopt 40 CFR 122.28 for NPDES program delegation, it most certainly chose to do so, which was its prerogative.

The Commission's unambiguous intent is clearly contrary to that proffered by Intervenors. The Commission specifically identified which federal regulations were incorporated by reference, and which ones were excluded, leaving nothing to divination or speculation. A review of just a few of the federal regulations the Commission chose to adopt and to exclude from Regulation 6, and how the Commission did that, is instructive. For example, there are many subsections of EPA rules that are not required for state program delegation, and when the Commission adopted a category or EPA rules, it specifically called out those subsections for exclusion, such 40 CFR 122.7(a), 122.21(l), 122.29(c), and 122.49. Why did the Commission call out those regulations for exclusion, but not 40 CFR 122.28? There are many federal

regulations that include some subsections that are required for state programs and some subsections that are not. The Commission specifically identified which ones are incorporated by reference, such as 40 CFR 124.3, 124.5, 124.10, 124.12 and 124.17, leaving out those that it wanted to exclude. Why did the Commission specifically fail to omit those regulations it chose to exclude from Reg. 6.104(A)(5), but include 122.28, if it meant to exclude 122.28? Intervenors' suggestion that the Commission's specific incorporation of 40 CFR 122.28 into Regulation 6 should nonetheless, be ignored, does not hold up to scrutiny. When the Commission intended to exclude a federal regulation from incorporation, even a federal regulation with a preamble identifying it as "For EPA Issued Permits Only", the Commission specifically excluded it. Interveners' suggestion that even though the Commission incorporated 40 CFR 122.28 into Regulation 6, the regulated community should know that it did not mean to, is absurd.

The applicability of 40 CFR 122.28 is important because that regulation imposes important procedural requirements upon ADEQ that are designed to protect the due process rights of permit holders like C&H. In particular, 40 CFR 122.28 required ADEQ to provide notice to C&H that "***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.***" ADEQ's argument is that 40 CFR 122.28 does not apply in this instance because ADEQ never "required" C&H to apply for an Individual NPDES Permit.

ADEQ fails to explain its flip flop on this issue. If, as ADEQ argues, 40 CFR 122.28 did not apply to a situation when the General Permit is not renewed, why did ADEQ start down the path of complying with these procedural requirements? ADEQ does not address the undisputed

fact that it told C&H that it was not going to renew the NPDES General Permit and that it planned to comply with these procedural requirements; *i.e.*, ADEQ told C&H that when the decision was made it would provide the required notice. See, C&H Motion for Summary Judgment, incorporating Exhibit C to Amended Request. ADEQ likely avoided this issue in its brief because ADEQ failed to follow up and comply with its obligations under 40 CFR 122.28, and thereby, deprived C&H of these important procedural due process protections. *See Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 852 (9th Cir. 2003) (Having chosen to promulgate a regulation, the agency must follow that regulation.); *Kasirem v. Benov*, 2013 U.S. Dist. LEXIS 179892, *13-14 (E.D. Cal. December 20, 2013) ("With respect to the application of federal regulations generally, the government is bound by the regulations it imposes on itself."); *Sec. Benefit Life Ins. Co. v. United States*, 517 F. Supp. 740, 741 (D. Kan. 1980) (right to rely upon the Government's Regulations and their published illustrations); *Blakley v. Comm'r of Soc. Sec.*, 581 F.3d 399 (6th Cir. 2009) (An agency's failure to follow its own regulations may cause unjust discrimination, deny adequate notice, and consequently may result in a violation of an individual's constitutional right to due process); *Reich v. Valley Nat'l Bank*, 837 F. Supp. 1259, 1291 (S.D.N.Y. 1993) ("once a Government agency promulgates and publishes a regulation, this validly promulgated regulation binds the government as much as individuals subject to the regulation.") (internal quotations omitted); *Sameena Inc. v. United States Air Force*, 147 F.3d 1148 (9th Cir. 1998) (A federal agency is obliged to abide by the regulations it promulgates. An agency's failure to follow its own regulations tends to cause unjust discrimination and deny adequate notice and consequently may result in a violation of an individual's constitutional right to due process. Where a prescribed procedure is intended to protect the interests of a party before the agency, even though generous beyond the requirements that bind such agency, that

procedure must be scrupulously observed.); *Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 543 (6th Cir. 2004) (same); *Decker v. Comm'r of Soc. Sec.*, 2016 U.S. Dist. LEXIS 5322 (S.D. Ohio Jan. 15, 2016) (same). The failure to follow the required process means that C&H still has coverage under the NPDES General Permit.

As further explained below, ADEQ also fails to reconcile its objection to 40 CFR 122.28 with its reliance upon Section 1.7 of the NPDES General Permit as providing the proper procedure when the NPDES General Permit is not renewed. Section 1.7 reiterates most of the 40 CFR 122.28 procedural requirements—none of which ADEQ followed.

3. Ark Code Ann 8-4-203(m)(5)(D) and Regulation 6.201 Do Not Support ADEQ's and Intervenors' Arguments

ADEQ and Intervenors rely upon a strained an "interpretation" of Ark Code Ann 8-4-203(m)(5)(D) and APC&EC Regulation 6.201 to support their arguments and justify ADEQ's failure to comply with the procedural requirements of 40 CFR 122.28 and the NPDES General Permit. First, as ADEQ correctly notes, APC&EC did not adopt 40 CFR 122.6 into Regulation No. 6. Instead, for purposes of NPDES permits APC&EC adopted Reg. 6.201, which is a restatement of 40 CFR 122.6(a). The following is a comparison of 40 CFR 122.6 and Reg. 6.201:

40 CFR 122.6	APC&EC Reg. 6.201
§ 122.6 Continuation of expiring permits. (a) *EPA permits.* When EPA is the permit-issuing authority, the conditions of an expired permit continue in force under 5 U.S.C. 558(c) until the effective date of a new permit (see § 124.15) if: (1) The permittee has submitted a timely application under § 122.21 which is a complete (under § 122.21(e)) application for a new permit; and (2) The Regional Administrator, through no	**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

fault of the permittee does not issue a new permit with an effective date under § 124.15 on or before the expiration date of the previous permit (for example, when issuance is impracticable due to time or resource constraints). (b) *Effect.* Permits continued under this section remain fully effective and enforceable. (c) *Enforcement.* When the permittee is not in compliance with the conditions of the expiring or expired permit the Regional Administrator may choose to do any or all of the following: (1) Initiate enforcement action based upon the permit which has been continued; (2) Issue a notice of intent to deny the new permit under § 124.6. If the permit is denied, the owner or operator would then be required to cease the activities authorized by the continued permit or be subject to enforcement action for operating without a permit; (3) Issue a new permit under part 124 with appropriate conditions; or (4) Take other actions authorized by these regulations. (d) *State continuation.* (1) An EPA-issued permit does not continue in force beyond its expiration date under Federal law if at that time a State is the permitting authority. States authorized to administer the NPDES program may continue either EPA or State-issued permits until the effective date of the new permits, if State law allows. Otherwise, the facility or activity is operating without a permit from the time of expiration of the old permit to the effective date of the State-issued new permit.	(2) The Director, through no fault of the permittee, does not issue a new permit prior to the expiration date of the previous permit.

APC&EC Reg. 6.201 and its federal counterpart, 40 CFR 122.6(a), clearly and unmistakably require actual issuance of a new NPDES permit before coverage under an expired NPDES permit can be terminated. See, Reg. 6.201 ("continue in effect past the expiration date pending **issuance of a new permit**").

In order to avoid this inevitable conclusion, ADEQ proffers an interpretation of Ark Code Ann 8-4-203(m)(5)(D) that would eliminate the important procedural protections written into APC&EC 6.201 for NPDES permits. See, ADEQ SJ Brief, page 6. In particular ADEQ and Intervenors suggest that "until a final decision is reached for an individual permit" in 8-4-203(m)(5)(D) should be interpreted in a vacuum. What ADEQ and Intervenors fail to mention is that Ark Code Ann 8-4-203(m)(5)(D) is a general statute that applies to a variety of general permits. APC&EC has promulgated regulations that implement Ark Code Ann 8-4-203(m)(5)(D) and apply specifically to NPDES permits. Ark Code Ann 8-4-203(m)(5)(D), and the implementing regulations for NPDES general permits, APC&EC 6.201 and 40 CFR 122.28 must be interpreted in harmony with each other; *i.e.* when the general permit is an NPDES permit, the language in Ark Code Ann 8-4-203(m)(5)(D) "until a final decision is reached for an individual permit" means until the new, individual NPDES permit is issued as required by APC&EC Reg. 6.201 ("pending issuance of a new permit") and 40 CFR 122.28 ("on the effective date of the individual NPDES permit the general permit as it applies to the individual permittee shall automatically terminate"). There is nothing in the general language of Ark Code Ann 8-4-203(m)(5)(D) that prohibited APC&EC from promulgating a rule specifying that ADEQ's "final decision" must be a decision to issue the individual NPDES permit when dealing with NPDES general permits. Furthermore, Reg. 6.201 must be interpreted consistently with 40 CFR 122.6, the federal regulation counterpart ("the conditions of an expired permit continue in force under

5 U.S.C. 558(c) until the effective date of a new permit that it was implementing"). *See Gurley v Mathis*, 313 Ark. 412 (1993) ("we have long held that the federal courts' construction of federal statutes upon which state statutes have been patterned should be accorded great weight in our own construction of those state statutes") (internal quotations omitted). Ultimately, it would be improper, and contrary to every rule of construction, to interpret Ark Code Ann 8-4-203(m)(5)(D) in any other manner.

4. ADEQ and Intervenors Misread the Word "Require" in 40 CFR 122.28

ADEQ and Intervenors also argue that 40 CFR 122.28 does not apply in this case because ADEQ never "required" C&H to apply for an individual NPDES Permit. In particular, ADEQ now argues that it was exonerated from complying with the procedural requirements of 40 CFR 122.28 in this case because it was the condition of the NPDES General Permit that required C&H to apply for an individual permit. ADEQ and Intervenors then argue that C&H did apply for an individual permit when it applied for a state, no discharge, Reg. 5 permit. There are numerous reasons why that argument does not hold up to scrutiny.

First, ADEQ and Intervenors improperly conflate a federal, NPDES **discharge** permit under Regulation 6 with a state, **no discharge** permit under Regulation 5. It is ADEQ's and Intervenors' repeated failure to make this distinction that undermines their arguments.

It is important to note that ADEQ agrees that "APC&EC Regulation 6 does not apply to Regulation 5 applications." ADEQ Appeal Motion at page 3. C&H did not misapply Regulation 6.201 and actually agrees with the above statement; *i.e.*, APC&EC Regulation 6 does not apply to Regulation 5 applications; and the corollary to that statement is also true: APC&EC Regulation 5 does not apply to Regulation 6 applications or permits. Stated another way:

- APC&EC Regulation 5 applies to Regulation 5 applications and permits
- APC&EC Regulation 6 applies to Regulation 6 applications and permits

A "permit," as defined under Reg. 6 (40 CFR 122.2), is an NPDES permit. In particular, the definition of "permit" for Reg. 6 and Reg. 6 permits "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.**" Intervenors construe this federal definition as somehow including a state Reg. 5 no discharge permit, even though a Reg. 5 permit does not, and could not **"implement the requirements of this part and parts 123 and 124."** To say the least, Intervenors contortion of the definition of "permit" under Reg. 6 (40 CFR 122.2) strains credulity. Intervenors' argument notwithstanding, the Reg. 6 definition of "permit," does provide an exhaustive list of what "permits" fall within the definition "permit" in Reg. 6 (40 CFR 122.2)—to the contrary, only those permits that **"implement the requirements of this part and parts 123 and 124"** are included within the definition of "permit" under Reg. 6 (40 CFR 122.2). Because NPDES general permits are not issued under parts 123 or 124, but rather under 122.28, EPA clarified that the term "permit" also includes general permits issued under 122.28. Without that clarification (which the Commission has adopted) facilities operating under an NPDES general permit would not have a "permit" as that term is defined in Reg. 6, and would therefore be operating without a permit. A state no discharge permit under Reg. 5 simply does not meet the definition of "permit" in Reg. 6 (40 CFR 122.2).

Intervenors find it hard to understand why the EPA only authorized an individual NPDES permit to replace coverage under an NPDES general permit. The explanation is found in the critical distinction between the two types of permits.

- NPDES CAFO permits are **discharge permits** issued under the delegated NPDES program. See, 40 CFR 122.23(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."
- The Reg. 5 program is a **no discharge program**. See, Regulation 5, Section 5.303 "Prohibition. The operator of a confined animal operation constructed and operated as authorized by permit in accordance with the provisions of this regulation shall not allow or cause a point source discharge from any part of the liquid animal waste management system."

An NPDES CAFO discharge permit is simply not the same as a Regulation 5 CAFO no discharge permit. EPA made this abundantly clear in its response to frequently asked questions on the CAFO NPDES General Permit:

> Q: What is the benefit to the CAFO owner/operator of having an NPDES permit?
>
> A: Because the CWA prohibits discharges from unpermitted CAFOs, NPDES permit coverage provides certainty to CAFO operators regarding activities and actions that are necessary to comply with the Clean Water Act. Compliance with the permit is deemed compliance with the CWA under section 402(k) and thus acts as a shield against EPA or State CWA enforcement or against citizen suits under section 505 of the CWA. Furthermore, NPDES permits for Large CAFOs incorporate effluent limitations prescribed by the effluent limitations guideline, which allow for discharge when precipitation causes an overflow from a structure that is designed, constructed, operated, and maintained in accordance with the permit. Finally, upset provisions can afford permittees a defense when emergencies or natural disasters cause discharges beyond their reasonable control, as provided in 40 CFR 122.41(n).

> Under the CWA, operators that do not apply for permits operate at their own risk because any discharge from an unpermitted CAFO (other than agricultural stormwater) is a violation of the CWA subject to enforcement action, including third party citizen suits.

https://www3.epa.gov/npdes/pubs/cafo_final_rule2008_qa.pdf

None of the benefits of having an NPDES General Permit is available for a Reg. 5 permit.

Accordingly, when the word "permit" is found in the Reg. 6 NPDES General Permit, that term must be given its proper definition—the one found in Reg. 6. There is nothing in Regulation 6 or the NPDES General Permit that would support an interpretation of the term "permit" to mean anything other than the definition of "permit" provided in Reg. 6 (40 CFR 122.2).

Intervenors also argue that C&H "voluntarily" applied for a Reg. 5 permit which should preclude C&H from pursuing an Individual NPDES permit under Reg. 6. This is just another instance of Intervenors failing to appreciate the distinction between a Reg. 6 CAFO NPDES discharge permit, and a Reg. 5 state no-discharge permit. The "fact" is that ADEQ processed the Reg. 6 permit application as a request for administrative change from the NPDES General Permit (a discharge permit) to a Reg. 5 Permit (a non-discharge permit). ADEQ decided to not authorize that change. ADEQ's Reg. 5 permitting decision had no impact on C&H's coverage under the NPDES General Permit.

5. ADEQ's Argument that there is No Application for an Individual NPDES Permit Before it is Moot.

ADEQ argues that C&H's interpretation of its procedural rights is meaningless because there is no application for an Individual NPDES Permit before ADEQ. As explained in its opening brief, and above, ADEQ has never complied with its obligations under 40 CFR 122.28(b)(3(ii) and the NPDES General Permit to provide notice and a time period for C&H to apply for an individual NPDES Permit. Nonetheless, in order to get past this chicken or the egg stalemate, C&H has now filed an application for an individual NPDES permit. ADEQ can no longer hide behind its excuse that "The Department cannot render a decision on a non-existent permit application." ADEQ SJ Brief, page 9. Accordingly, the permit application is no longer "non-existent," and C&H's coverage under the expired NPDES General Permit will continue until the individual NPDES permit is issued and effective.

6. Part 1.7 of the NPDES Permit Provides No Support to ADEQ and Intervenors

Both ADEQ and Intervenors rely principally on Section 1.7 of the General Permit to support their arguments, but fail to note that Part 1.7 of the NPDES General Permit actually supports C&H's motion. Indeed, Part 1.7 states that coverage "will be administratively continued in accordance with 40 CFR 122.6." 40 CFR 122.6 addresses the issue, and in favor of C&H. As stated in 40 CFR 122.6, "the conditions of an expired permit continue in force under 5 U.S.C. 558(c) **until the effective date of a new permit.**" Nothing more need be said.

Other provisions in Part 1.7 further undermine the arguments of ADEQ and Intervenors. As noted in ADEQ's Appeal Motion at pages 4-5, and Intervenors' Brief at page 8, Part 1.7.3 of the NPDES General Permit provides that coverage under the expired NPDES General Permit will continue until "issuance or denial of an individual permit for the facility's discharges." For

the reasons stated above, ADEQ and Intervenors refuse to assign the Regulation 6 definition of "permit" to that term. The definition of "permit" in Regulation 6 (which is an NPDES permit) must apply to the provisions of a Regulation 6 permit. The context of Section 1.7.3 places another nail in the coffin of ADEQ's and Intervenors' argument. Section 1.7.3 refers to "an individual permit **for the facility's discharges.**" As explained in C&H's opening brief and above, only NPDES permits authorize "discharges." It is impossible to construe the term "permit" in Section 1.7.3 as applying to a non discharge permit.

ADEQ and Intervenors incorrectly claim that C&H's interpretation would prohibit ADEQ from ever terminating C&H's permit. (ADEQ Appeal Motion, pages 8-9, Intervenors' Brief, pages 6-7). Again, they are mistaken. As stated above, Section 1.7 of the NPDES General Permit refers to 40 CFR 122.6 for the procedures for terminating C&H's continued coverage under the NPDES General Permit. 40 CFR 122.6 addresses the concerns of ADEQ and Intervenors. At such time as ADEQ makes a decision on the now pending application for an Individual NPDES Permit, 40 CFR 122.6(c) provides the procedures ADEQ must follow, should it decide to deny the individual NPDES permit—"*Enforcement.*" ADEQ is not prohibited from terminating C&H's NPDES coverage; it is only prohibited from doing so without following the required procedures.

Section 1.7.4 provides the final nail in the coffin of ADEQ's and Intervenors' argument. Section 1.7.4 provides that if the NPDES General Permit is not renewed, coverage under the General Permit remains in effect until the following occurs:

> 1.7.4 A formal permit decision by ADEQ not to reissue this general permit, at which time ADEQ will identify a reasonable time period for covered dischargers to seek coverage under an alternative general permit or an individual permit. Coverage under this permit will cease at the end of this time period.

It is important to note that Section 1.7.4 of the NPDES General Permit reiterates, in part, the requirements of 40 CFR 122.28(b)(3(ii), which, as described above, is an important regulatory obligation that the Commission has placed upon ADEQ.

CONCLUSION

For the reasons stated in its Motion for Partial Summary Judgment and herein, C&H is entitled to Partial Summary Judgment, and the Commission should find, and declare that C&H's coverage under the NPDES General Permit remains in effect until the individual NPDES Permit that C&H has now applied for is issued and effective.[3]

[3] As stated above, ADEQ may pursue enforcement, but there are no violations to enforce.

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

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