

BEFORE THE ARKANSAS POLLUTION
CONTROL AND ECOLOGY COMMISSION

Secretary
Arkansas Pollution Control and Ecology
101 East Capitol, Suite 205
Little Rock, AR 72201
Filed 3/28/18 PLG

IN THE MATTER OF)
C & H HOG FARMS)

DOCKET NO. 18-001-P

INTERVENORS' JOINT RESPONSE TO C&H'S MOTION
FOR PARTIAL SUMMARY JUDGMENT
AND
INTERVENORS' JOINT MOTION FOR PARTIAL SUMMARY JUDGMENT

Come the Intervenors, who hereby jointly submit their Response to C&H's Motion for Partial Summary Judgment, and also submit their Intervenors' Joint Motion for Partial Summary Judgment, and for such Response and Joint Motion state:

1. C&H's Motion for Partial Summary Judgment is without merit for the reasons set forth in the Brief In Support of Intervenors' Joint Response to C&H's Motion for Partial Summary Judgment and Intervenors' Joint Motion for Partial Summary Judgment filed contemporaneously herewith, and should be denied.

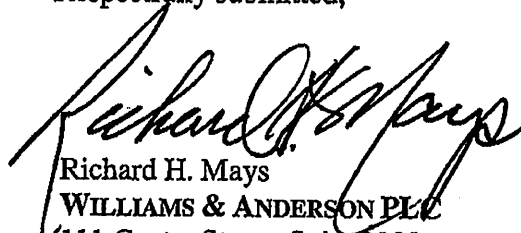
2. The Intervenors should be granted Partial Summary Judgment against C&H for the reasons set forth in the Brief In Support of Intervenors' Joint Response to C&H's Motion for Partial Summary Judgment and Intervenors' Joint Motion for Partial Summary Judgment filed contemporaneously herewith.

3. Intervenors hereby adopt and support the arguments contained in ADEQ's Motion to Dismiss and Accompanying Brief; in ADEQ's Response to C&H's Motion for Summary Judgment and Incorporated Brief in Support; and in ADEQ's Motion to Dismiss C&H's Request for Declaratory Judgment and Incorporated Brief in Support.

WHEREFORE, Intervenors jointly pray that the Motion of C&H for Partial Summary Judgment be denied; that the Motions of ADEQ for Dismissal of C&H's Amended Request for

Hearing, ADEQ's Motion for Summary Judgment against C&H, and ADEQ's Motion to Dismiss C&H's Request for Declaratory Judgment be granted; and that Intervenor's Motion for Partial Summary Judgment be granted.

Respectfully submitted,



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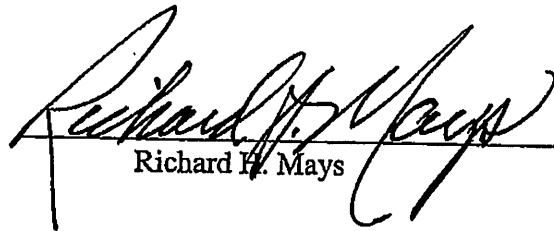
CERTIFICATE OF SERVICE

I, Richard H. Mays, hereby certify that a true and correct copy of the foregoing was sent via electronic mail and United States mail, postage prepaid, this 28th day of March, 2018, to the following:

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BRIEF IN SUPPORT OF
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FOR PARTIAL SUMMARY JUDGMENT
AND
JOINT MOTION FOR PARTIAL SUMMARY JUDGMENT

Introduction

C&H Hog Farms, Inc. ("C&H") has filed a Motion for Partial Summary Judgment. The thrust of its Motion is that, by having obtained coverage under a general NPDES permit (Permit No. ARG590000/590001) (hereinafter the "General Permit") in 2012, coverage under that permit continues until an individual NPDES permit is issued (*see* C&H Brief, p. 9). C&H's argument rests on the incorrect premise that permit denial was not an option.

When the General Permit came up for renewal, ADEQ made the decision not to renew it, explaining that:

The [ADEQ] has reached the final permitting decision not to renew the statewide general permit ARG590000 for Concentrated Animal Feeding Operations (CAFO). ADEQ determined a renewal of this CAFO General Permit is not warranted based on the limited use of this particular permitting option. Over the five-year period this CAFO permit has been available throughout Arkansas, only one facility, C&H Farms, Inc. in Newton County, Arkansas, has received coverage under the terms of this general permit. *See* ADEQ's Motion to Dismiss, Ex. 1; ADEQ's Response to C&H's Motion for Summary Judgment, Ex. 4.

C&H did not challenge ADEQ's decision not to renew the general permit. In fact, approximately one month before this decision, on April 7, 2016, C&H had submitted an application for an Individual No-Discharge Permit under Commission Regulation 5 (Reg. 5). *See* Exhibit 2 to C & H's Motion for Partial Summary Judgment. Following a lengthy period of public comment, review, a request for and submittal of supplemental information, ADEQ denied

C&H's application for a Reg. 5 permit. *See* Exhibit F to C&H's Amended Request for Adjudicatory Hearing. C&H is appealing that decision.

C&H claims that, as a matter of law, it is entitled to operate under the expired General Permit until it is given an individual NPDES permit, arguing in part that "all ADEQ has done [by rejecting C&H's Reg. 5 permit application] is reject C&H's request for an 'administrative change in coverage,'" and "as a result, there has been no "change in coverage" because "C&H's coverage under the NPDES General Permit remains in place until a new NPDES permit has been issued." (C&H Brief, p. 9). This argument amounts to a claim that coverage to operate under the General Permit means C&H can never be denied an individual permit. C&H *voluntarily* elected to apply for a Reg. 5 permit to replace coverage under the expired General Permit. Contrary to C&H's claims, ADEQ did not require that C&H apply for an individual permit, nor did C&H request that it be excluded from coverage under the general permit. Instead, ADEQ declined to renew the General Permit because only one facility (C&H) had obtained coverage. *See* Exhibit B to C&H's Amended Request for Adjudicatory Hearing. Non-renewal of the General Permit was an entirely separate decision, and should be distinguished from ADEQ's denial of C&H's Reg. 5 permit application.

ADEQ's denial of the Reg. 5 permit was a final agency action. C&H's coverage under the General Permit, which under Reg.6.201 had been extended past its original expiration date until the final permitting decision on C&H's Reg. 5 permit application, expired upon the final agency action. The Hearing Officer should recommend that a Partial Summary Judgment be rendered on those portions of C&H's Amended Request for Hearing relating to its claims that the General Permit continues coverage for its operations until ADEQ issues it an individual NPDES permit.

C&H's Motion for Partial Summary Judgment contains two sets of what it characterizes as undisputed facts. There is considerable duplication in those two sets, although they are not identical. Intervenors will stipulate to the following undisputed facts.

STATEMENT OF UNDISPUTED FACTS

1. ADEQ issued NPDES General Permit No. ARG590000 (the "General Permit") on October 6, 2011, with an expiration date of October 31, 2016. *See* C&H Motion for Partial Summary Judgment, Undisputed Fact No. 1.

2. On August 3, 2012, the Department issued notice of coverage under General Permit to C&H under tracking number ARG590001. *See* Amended Request for Adjudicatory Hearing, ¶ 2; C&H Motion for Partial Summary Judgment, Undisputed Fact No. 2.

3. On April 7, 2016, C&H submitted a permit application for an Individual No-Discharge permit under Commission Regulation 5. *See* Amended Request for Adjudicatory Hearing, ¶ 3.

4. On April 20, 2016, C&H filed an application (Notice of Intent) and a Nutrient Management Plan for renewal of coverage under the NPDES General Permit. *See* Exhibit 1 to C&H's Motion for Partial Summary Judgment, filed March 7, 2018.

5. On May 3, 2016, ADEQ sent a letter to C&H stating that ADEQ had determined not to renew the General Permit ARG590000, and that all facilities currently operating under the conditions of that permit would be asked to apply for coverage under an individual permit. *See* Exhibit C to C&H's Amended Request for Adjudicatory Hearing. *See* Exhibit C to C&H's Amended Request for Adjudicatory Hearing.

6. On May 4, 2016, the Department issued a Notice of Decision not to renew General Permit ARG590000 and informed C&H that ADEQ was considering C&H's application

for a permit under Regulation 5 submitted on April 7, 2016, as an application to replace coverage under Regulation 6 General Permit ARG 590000. *See Exhibit B to C&H's Amended Request for Adjudicatory Hearing.*

7. C&H did not appeal the decision to not renew General Permit ARG590000.

8. C&H did not submit an application for an individual NPDES permit.

9. General Permit ARG590000 expired on October 31, 2016. *See Amended Request for Adjudicatory Hearing, ¶ 14.*

10. On or about February 15, 2017, ADEQ gave public notice of its proposed decision to issue a permit under Reg. 5 to C&H by publishing a draft Notice of Intent to Issue Permit and Statement of Basis for public comment. *See Exhibit E to C&H's Amended Request for Adjudicatory Hearing.*

11. The period for public comment on the proposed Reg. 5 permit ended on April 6, 2017. *See Exhibit D to C & H Hog Farm's Request for Adjudicatory Hearing.*

12. On September 19, 2017, ADEQ sent a letter to C&H requesting supplemental information to support C&H's permit application, and requested that such information be provided within 90 days of the date of the request. *See Joint Intervenors' Exhibit 2.*

13. On December 6, 2017, C&H provided a partial response to ADEQ's request for additional information. C&H also requested additional time, until March 15, 2018, to provide the remainder of the requested information. *See Exhibit F to C&H's Request for Adjudicatory Hearing.*

14. On December 14, 2017, ADEQ responded to C&H's request for more time to provide additional information requested by ADEQ, allowing C&H until December 29, 2017, to provide the information. ADEQ stated that any information received from C&H after that date

would not be considered on C&H's application. *See* Exhibit F to C&H's Request for Adjudicatory Hearing.

15. On December 28, 2017, C&H provided additional information to ADEQ. *See* Exhibit F to C&H's Request for Adjudicatory Hearing.

16. On January 10, 2018, ADEQ announced its final permitting decision to deny C&H's permit application for an Individual No-Discharge Permit and its Statement of Basis. *Amended Request for Adjudicatory Hearing, ¶ 10*; Exhibit G to C&H's Amended Request for Adjudicatory Hearing.

17. On January 17, 2018, the Commission stayed the denial decision pending the outcome of an appeal of that decision. *See* Minute Order No. 18-01.

18. On January 18, 2018, C&H filed its Request for Adjudicatory Hearing and Commission Review, and amended its request on February 7, 2018.

19. On February 7, 2018, C&H filed its Amended Request for Adjudicatory Hearing and Commission Review and Request for Declaratory Order, in which C&H alleges, *inter alia*, certain procedural issues regarding the legal effect of the Department's May 4, 2016, Notice of Decision concerning General Permit ARG590000 and the purported continuation of General Permit ARG590000. *See, e.g.,* Amended Request for Adjudicatory Hearing, ¶¶ 15-28; 32-38; 44; 48-49.

ARGUMENT

Coverage Exists Under a General Permit Only Until a Permitting Decision Is Made on an Individual Permit Application and Not Until a Permit Is Granted

Contrary to C&H's assertion that continued coverage under the expired General Permit is "clearly provided in Arkansas statutes and regulations," the statutes and regulations cited by

C&H in its Brief state that such coverage ends *when a final decision is made on an application for an individual permit*. C&H cites Ark. Code Ann § 8-4-203(m)(5)(D):

- (D) In the event the Department makes a decision to not renew the general permit, existing coverage under the general permit shall continue under the terms of the expired permit **until a final decision is reached for an individual permit**. (emphasis added).

There is no dispute that coverage under the General Permit continued after it expired pending a decision on C&H's application for an individual permit. However, under the plain and unambiguous language in the statute, that coverage ends at the time a final decision is reached by the Director on an individual permit. Commission Reg. 8.103(BB) defines a "Permitting Decision" as:

a final administrative decision by the Director or the Director's delegate on all *applications for permits, permit renewals*, major modifications, minor modifications, administrative permit amendments, permit revocations, interim authority and temporary variances, construction permits, and transfers; ... (emphasis added).

Moreover, the first paragraph of Ark. Code Ann. § 8-4-203 provides:

- (a) The Arkansas Department of Environmental Quality or its successor is given and charged with the power and duty to issue, continue in effect, revoke, modify or **deny** permits, under such conditions as it may prescribe (emphasis added).

A decision to deny a permit application is squarely within the meaning of a "permitting decision," and the Director has the power and authority to deny permits.

C&H also relies on Reg.6.201 ("Status and Continuation of Permit") for the proposition that "NPDES permit coverage continues until the issuance of a new permit." That Regulation states that conditions of an NDPES permit issued by ADEQ "will continue in effect past the expiration date *pending issuance of a new permit* . . ." (emphasis added). C&H appears to argue

that this language mandates a decision to issue a permit or else the conditions of the expired permit continue forever.

Reg. 6.201 provides “bridge” coverage until a final permitting decision is made. Reg. 6.201 does not mandate issuance of a permit. As previously noted, the statute that outlines ADEQ’s permitting authority, Ark. Code Ann. § 2-4-203, gives the department authority to deny a permit. The language in Reg. 6.201, which C&H relies on, does not override it. Instead, Reg. 6.201 simply reiterates what Ark. Code Ann. § 8-4-203(m)(5)(D) already states: Coverage under an expired permit is granted “pending issuance of a new permit.” In other words, both Reg. 6.201 and § 8-4-203(m)(5)(D) provide coverage under an expired permit until a final permitting decision is reached. Here, ADEQ has the legal power and duty where appropriate to deny permits. C&H’s permit application was denied. Therefore, the issue is no longer pending, and a final permitting decision has been reached. As a result, C&H no longer has continued coverage under its expired general permit but for the action taken by the Commission on January 17, 2018.

***Coverage Under a General Permit Terminates
When an Individual Permit Is Denied***

C&H argues that the language in Section 1.6.2 of the General Permit provides for continuing coverage if an application for an individual NPDES permit is denied. Section 1.6.2 is of no help to C&H for two reasons. First, the permit application that was denied was not for an individual NPDES permit, but for a non-NPDES permit (a Reg. 5 state permit). Second, the operative language in Section 1.6.2 specifies that a general permit “remains in full force and effect” only in instances where an operator is “otherwise subject to this general permit.” Therefore, C&H retained coverage only so long as its operations were already subject to its general permit. For example, if C&H had been denied a permit at any time prior to October 31,

2016, its coverage would have continued anyway until the General Permit's expiration date. Section 6.1.2 cannot be reasonably construed to mean that C&H's coverage lasts perpetually.

In addition, Section 1.7 of the General Permit (which C&H ignores in its Brief) specifically states:

If this permit is not reissued or replaced prior to the expiration date, it will be administratively continued in accordance with 40 CFR 122.6 and remain in force and effect. If you were authorized to discharge under this permit prior to the expiration date, any discharges authorized under this permit will automatically remain covered by this permit until the earliest of:

1.7.3 Issuance or denial of an individual permit for the facility's discharges; or

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.

The conditions contained in Section 1.7 state unambiguously that if the permit is not renewed, coverage under the General Permit expires if an individual permit is denied.

C&H next claims that an individual permit issued to replace coverage under the General Permit must be a "final, federal NPDES permit," and that a Reg. 5 permit is not within the meaning of the word "permit" as defined by 40 CFR 122.2.¹ 40 CFR 122.2 defines "permit" as follows:

Permit 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. "Permit" includes an NPDES general permit. (§122.28) Permit does not include any permit which has not yet been the subject of final agency action, such as a "draft permit" or a "proposed permit."

¹ C&H mistakenly claims the definition of "Permit" appears in 40 CFR 122.1.

If C&H were correct, then it could only replace coverage under the General Permit with coverage under an NPDES permit. Yet, C&H applied for a Reg. 5 permit. Thus, C&H's actions contradict its argument. Moreover, the definition of Permit in 122.2 uses an NPDES permit as an example, not as a limitation. The regulation states, "'Permit' *includes* an NPDES 'general permit.'" (emphasis added). The regulation does not state that "permit" can *only* refer to NPDES permits. A permit that is not final (a draft or proposed permit) is excluded, but a final State program permit is not. Otherwise, even had C&H obtained its Reg. 5 permit, it would not be authorized to operate its liquid animal waste disposal system that was originally authorized by the General Permit. The reference to the NPDES general permit is not intended to be an exhaustive or exclusive listing of what types of "control documents" are included within the term "permit." The Reg. 5 permit that was denied clearly fits within the definition of "permit."

***C&H Misconstrues the Federal Regulations Requiring
General Permit Holders to Apply for Individual Permits***

Finally, C&H argues that 40 CFR 122.28(b)(3)(ii-iv) requires ADEQ, when it decides not to renew a general permit, to request that C&H apply for an NPDES individual permit. This argument rests on the mistaken claim that 122.28(b)(3)(ii) applies to general permits issued by ADEQ. It only applies to EPA issued general permits, as plainly stated²:

(ii) *For EPA issued general permits only*, the Regional Administrator may require any owner or operator authorized by a general permit to apply for an individual NPDES permit as provided in paragraph (b)(3)(i) of this section, only if the owner or operator has been notified in writing that a permit application is required. This notice 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. The Director may grant additional time upon request of the applicant.

² In its Brief (p. 12), C&H changes the wording so that the first line reads: For ADEQ issued general permits only, the Director may ...," thus making it appear that the quoted section applies to authorized State program, when, in fact, *it only applies to general permits issued by EPA.*

C&H argues that 40 CFR § 122.28(b)(3)(ii) applies because Reg 6.104 “adopts verbatim” Subpart B of 40 CFR § 122. C&H’s argument fails for several reasons. First, if 40 CFR § 122.28(b)(3)(ii) is construed as C&H urges, then subsection (b)(3)(i) which precedes it and grants the “Director” the authority to require application for an individual NPDES permit becomes redundant and superfluous. Second, Reg. 6.104 qualifies its adoption of the federal regulations by saying that adoptions will not be verbatim if “the context otherwise dictates.” Here, 40 CFR § 122.28(b)(3)(ii) italicizes “*For EPA issued general permits only,*” which is a context clue that it doesn’t apply to states that incorporate the EPA regulations verbatim. Third, the language in 40 CFR § 122.28(b) is permissive, not mandatory.

40 CFR 122.28(b)(3) addresses the Director’s authority to require an individual permit in certain cases and grants an owner or operator the option to request exclusion from a general permit. Neither scenario is applicable to the present situation. Instead, the General Permit expired and was not renewed. Per the terms of the permit, it was “administratively continued in accordance with 40 CFR 122.6.” *See* 1.7 at p. 3. 40 CFR 122.6, “Continuation of Expiring Permits” provides that expired permits continue in force until the effective date of a new permit and references § 124.15. 40 CFR 124.15, “Issuance and effective date of permit” provides “For purposes of this section, a final permit decision means a final decision to issue, **deny**, modify, revoke and reissue, or terminate a permit.” (emphasis added).

Clearly, the statement in the General Permit that coverage will only remain in effect until “Issuance or denial of an individual permit” and the reference to § 122.6 which then references § 124.15 and defines final permitting decision to include permit denials allows for denial of the individual permit and expiration of coverage. C&H realized this when it sought and received a stay from the Commission on January 17, 2018, claiming that otherwise, it would have to close.

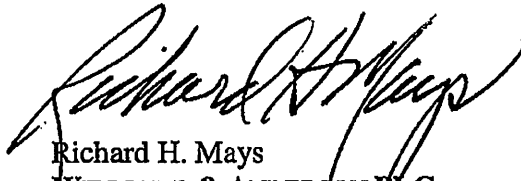
In summary, the General Permit expired and was not renewed. C&H concedes it was within the Director's prerogative not to renew the General Permit. C&H elected to apply for a permit under the state program for permitting liquid animal waste disposal systems instead of an individual NPDES CAFO permit. The Director did not require C&H to apply for and obtain an individual NPDES permit for the reasons set forth § 122.28 and C&H did not request to be excluded from coverage under the General Permit. C&H's reliance on the procedures in § 122.28 are inapplicable.

CONCLUSION

ADEQ issued a General Permit for CAFOs. Only one CAFO (C&H) applied for coverage under the General Permit. The Director decided not to renew the General Permit since no other facility had applied for coverage. C&H sought to permit its liquid animal waste disposal system under a Reg. 5 permit. ADEQ denied C&H's Reg. 5 permit application because it failed to submit the information needed to meet the requirements of that regulation. At that point C&H lost coverage under the NPDES program but for the stay granted it by the Commission. C&H is appealing the denial of its Reg. 5 permit application. Once that decision is affirmed, C&H will no longer be allowed to operate and must close its liquid animal waste disposal system. Contrary to what C&H is claiming, coverage under the expired General Permit did not guarantee it a permit for life.

The Hearing Officer should issue his recommended decision to the Commission that C&H's Motion for Partial Summary Judgment on the continuation of the Regulation 6 General Permit coverage pending issuance of an individual NPDES permit be denied and that Partial Summary Judgment on this same issue in favor of ADEQ and Intervenors be granted.

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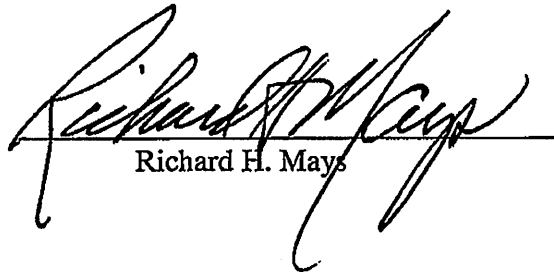
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