

ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION

IN THE MATTER OF  
ECO-VISTA, LLC

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DOCKET NO. 23-009-P  
ORDER NO. 4

ORDER

1. INTRODUCTION

Eco-Vista Landfill, LLC ("Eco-Vista") owns and operates a landfill in Washington County, Arkansas, near the incorporated town of Tontitown. Eco-Vista applied to the Division of Environmental Quality (DEQ) on July 6, 2021, for a "Permit Modification Application for Expansion of the Eco-Vista, LLC, Class 4 Landfill," Permit No. 0290-S4-R1. On March 17, 2023, DEQ issued its Final Permit Decision for Eco-Vista, LLC, Class 4 Landfill, Permit No. 0290-S4-R2 (the "Class 4 Permit"). The Class 4 Permit that DEQ issued authorizes the disposal of bulky, inert, non-putrescible solid waste as defined by Arkansas Pollution Control and Ecology Commission ("Commission") Rule 22.

On April 17, 2023, the Mayor of Tontitown, Angie Russell, ("Mayor Russell") along with the City of Tontitown ("the City"), filed a Request for Hearing with the Commission concerning DEQ's decision to issue the Class 4 Permit to Eco-Vista. On May 9, 2023, DEQ filed a Motion to Dismiss, and on May 16, 2023, Eco-Vista filed its own Motion to Dismiss. Both Motions to Dismiss echo the same argument - that Mayor Russell and the City's Request for Hearing was filed a day late in violation of Arkansas Code Annotated § 8-4-205(b)(1) and Commission Rule 8.603(B)(2). On May 30, 2023, Mayor Russell and the City filed its Response, and on June 5, 2023, Eco-

Vista filed a Reply. The Motions to Dismiss have been fully briefed and are ready for a decision.

## **2. JURISDICTION**

The Commission has jurisdiction over this matter pursuant to Ark. Code Ann. § 8-4-311(b)(4). Arkansas Code Annotated § 8-4-311(b)(4) provides the right to appeal the Director of DEQ's permitting decisions to the Commission.

## **3. BURDEN OF PROOF**

For a motion to dismiss the ALJ must view the facts alleged by Mayor Russell and the City as true and in a light most favorable to the Mayor and the City. *Neal v. Wilson*, 316 Ark. 588, 595-96, 873 S.W.2d 552 (1994).

## **4. FINDINGS OF FACT**

1. In July of 2021, Eco-Vista submitted an application for a permit modification to allow disposal of Class IV waste on an additional 12.2 acres at its existing 600+ acre site.

2. DEQ issued public notice of its draft permitting decision on August 5, 2022, with the initial public comment period ending September 6, 2022.

3. ADEQ held a public hearing on November 2, 2022, after which it accepted comments until November 4, 2022.

4. On March 17, 2023, DEQ issued the Class 4 Permit to Eco-Vista.

5. Email correspondence between counsel for DEQ and Arkansas Mailing Services, DEQ's mail service courier, indicates that Arkansas

Mailing Service's picked up from Energy and Environment headquarters the Notices of Final Permitting Decision on March 17, 2023. *Response to Motion to Dismiss, Exhibit 2; DEQ Response to Motion to Strike, Exhibit 3.*

6. These Notices of Final Permitting Decision were to be mailed the same date, March 17, 2023, to Eco-Vista and all individuals who publicly commented on Eco-Vista's Permit No. 0290-S4-R2. *Response to Motion to Dismiss, Exhibit 2.*

7. That same email correspondence demonstrates that Arkansas Mailing Services did not deliver the Notices of Permitting Decision for mailing to the U.S. Postal Service on March 17, 2023. Instead, because of an alleged late pickup on March 17, 2023, the Notices of Permitting Decision were delivered to the U.S. Postal Service on Monday, March 20, 2023. *Response to Motion to Dismiss, Exhibit 2.*

8. On April 17, 2023, Mayor Russell and the City of Tontitown filed a Request for Hearing pursuant to Commission Rule 8.

9. Mayor Russell and the City's Request for Hearing was filed thirty-one (31) days after March 17, 2023, but twenty-eight (28) days after March 20, 2023.

## **5. DISCUSSION AND CONCLUSIONS OF LAW**

### **A. Computation of Time For Filing a Request for Hearing**

In their Motions to Dismiss both DEQ and Eco-Vista contend that Mayor Russell and the City's Request for Hearing must be dismissed because it was not timely filed. According to DEQ and Eco-Vista the Mayor and City's Request for Hearing needed to be filed within thirty

(30) days of the date of issuance of DEQ's permitting decision. DEQ and Eco-Vista both note that the Commission's rules define the "date of issuance" as "the date notice of the decision is served upon the applicant or permittee;" that "service is deemed complete when the notice is placed in the mail to the applicant or permittee;" and that the "Commission [rules] also instruct that the thirty day period shall be counted in 'calendar days'." *DEQ Motion to Dismiss at pp. 2-5.* Eco-Vista's Motion to Dismiss advances the same arguments.

Mayor Russell and the City strenuously argue that no jurisdiction in the Nation has ever required pleadings to be filed on the last day of a time computation deadline if that last day falls on a weekend or holiday. *Response to Motion to Dismiss at pp. 3-5.* Mayor Russell and the City provide a blizzard of citations from other jurisdictions wherein those jurisdictions in their civil procedure rules, similar to Rule 6 of the Arkansas Rules of Civil Procedure, acknowledge and allow filings to be tolled to the next business day when the last day for filing lands on a weekend, holiday or when the clerk's office is closed. *Response to Motion to Dismiss, Exhibit 5.* Mayor Russell and the City included, as Exhibit 2, an email chain between DEQ and Arkansas Mailing Service.<sup>1</sup> Mayor Russell and the City also provide two Arkansas case citations - one from this Commission and one from the Arkansas Workers Compensation Commission - which they assert support their contention that this Commission

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<sup>1</sup> The ALJ notes that all the parties have included exhibits to their opening motions to dismiss, responses, and reply. Technically this converts DEQ and Eco-Vista's motions to dismiss to motions for summary judgment on this issue.



must allow filings past thirty (30) days if the last day for filing lands on a weekend or holiday. The ALJ has read the cases cited by the Mayor and the City, and the laundry list of other jurisdictions that have a time computation rule of civil procedure nearly identical to Rule 6 of the Arkansas Rules of Civil Procedure, and finds they are all distinguishable for the following reasons.

First, the Commission is bound by statute. The time in which to file a request for hearing is set out in Arkansas Code Annotated § 8-4-205(b) (1):

Only those interested persons, other than the applicant, that have submitted comments on the record regarding a proposed permit action during the public comment period shall have standing to request a hearing by the commission in connection therewith, upon written application made **within thirty (30) days after the date of the Arkansas Department of Environmental Quality's final decision regarding the permit action.** (Emphasis added.)

Unlike the various rules of civil procedure set forth in Exhibit 5 to the Mayor and City's Response there is no mention in Ark. Code Ann. § 8-4-205(b) (1) that the statutorily mandated thirty (30) day time-frame can be extended past thirty (30) days if the last day for filing falls on a weekend or holiday. In the extreme, and by way of example if the Mayor and City were correct in their arguments, given the amount of holiday and weekend time for the Thanksgiving and Christmas holidays, the thirty (30) day statutory mandate contained in Ark. Code Ann. § 8-4-205(b) (1) could be extended up to four (4) days past the thirty (30) day limit if a filing deadline were to fall on Thanksgiving or a Thursday Christmas Eve.

Admittedly, it appears that a similar issue arose in an Arkansas Workers Compensation case cited by the Mayor and the City, *Mary K. Bungard v. Wal-Mart et al.*, 2017 WL 945946 (Ark.Work.Comp.Com.). But the ALJ finds that case different from this case because of two factors. In the *Bungard* case the claimant had a two-year statutory period in which to file her workers compensation claim. The last day of the two-year period ended on a Sunday, and the claimant filed her claim the next day on Monday. The Workers Compensation Commission's ALJ held that she had filed her claim a day late in violation of Ark. Code Ann. § 11-9-702. The full Workers Compensation Commission reversed the ALJ and held:

In the present claim, the claimant's two-year statutory period for filing a claim ended on a Sunday. *Because the claimant could not file her claim on Sunday, she waited until the next business day to file her claim*

*Bungard*, 2017 WL 945946.

The ALJ has reviewed the Arkansas Workers Compensation Commission administrative rules and it is unclear to him what the Worker's Compensation Commission rules regarding electronic filing were when *Bungard* was decided. Nevertheless, this Commission has adopted a rule which allows filings on weekends and holidays. Rule 8.606(E) provides:

**FILING OF PLEADINGS OR OTHER DOCUMENTS**

(E) Notwithstanding the provisions of Reg.8.606(D), the Commission Secretary may accept facsimile or electronic mail copies for filing. Only one copy need be transmitted, and the Commission Secretary shall file that copy. Within three (3) business days of the filing, an original and one (1) copy of the pleading or other document must be received by the

Commission Secretary.

The Commission's adoption of 8.606(E) has allowed the practice of filing requests for hearings, motions, requests for rulemakings, and other documents with the Commission after business hours, and on weekends and holidays, to become common practice and consistent with the thirty (30) statutory mandate in Ark. Code Ann. § 8-4-205(b) (1). In short, parties are no longer constrained by business hours or business days to file pleadings and other documents with the Commission. Just as important the ALJ cannot locate an Arkansas Workers Compensation Commission rule that parallels Rule 8.603 which requires time to be counted in "calendar days," not just "days."

Mayor Russell and the City maintain that "for over twenty years before the lone decision in 2020 this tribunal applied Ark. R. Civ. P. 6 to proceedings before this tribunal" and that "[n]othing has changed in the rules to disallow Monday filing after a Sunday deadline." This assertion is incorrect. Rule 8 has been revised in the "last twenty years." The previous version of Rule 8 - promulgated in 2000 - used the following language to compute the thirty (30) day time limit for filing a Request for Hearing with the Commission.

**2.1.14 Request for Commission Review and Adjudicatory Hearing**

(a) The applicant or permittee may seek review of the Director's final permitting decision by filing a written Request for Commission Review and Adjudicatory Hearing with the Secretary *within thirty (30) days of the date of issuance of the decision.*

The 2000 version of Rule 8 can be found on the Commission website

under "list of old regulations." In 2009 the Commission amended Rule 8 and the thirty (30) day time computation language by adopting rule 8.603:

**REQUEST FOR HEARING**

(B) Filing Deadlines. (1) An applicant or permittee seeking review of a permitting decision must file a Request for Hearing within *thirty (30) calendar days after the date of issuance of the Director's final decision* as provided in Reg.8.211(B)(1).

Additionally, the former 2000 version of Rule 8 did not provide petitioners with the option to file a Request for Hearing electronically. The ability to file with the Commission electronically arose with the current 2009 version of Rule 8. Prior to 2009 petitioners were unable to file on a weekend or holiday with the Commission, as apparently was the case in the Arkansas Workers Compensation case, *Mary K. Bungard v. Wal-Mart et al.*

The Mayor and the City are absolutely correct that an earlier decision of the Commission, Order No. 3 issued in 2009 *In the Matter of Prairie County Landfarm, LLC, Docket No. 09-007-P*, held that if the last day of filing a Request for Hearing falls on a weekend or holiday then the time for filing is tolled until the next business day. For some reason the recommendation in *Prairie County Landfarm* never discussed or analyzed the change from "days" to "calendar days" in Rule 8.603. The rationale of Rule 8.603 and what the Commission meant by clarifying the thirty (30) day time limit in the 2000 iteration of Rule 8 to thirty (30) *calendar days* in the current version of Rule 8 was not addressed until the Commission decided *In*



*the Matter of Elemental Environmental Solutions, LLC; Docket No. 20-004-P.* For the first time the Commission addressed Rule 8.603 and held that thirty (30) calendar days includes weekends and holidays and if the last day for filing falls on a weekend or holiday petitioners can avail themselves of electronic filing and file on that day. Contrary to Mayor Russell and the City's assertions petitioners are not shortchanged in terms of their available time to file a Request for Hearing by this interpretation. Petitioners still have thirty (30) days in which to file a Request for Hearing, which is completely in line with Ark. Code Ann. § 8-4-205(b)(1). However, if petitioners choose to procrastinate and wait until the last possible day to file a Request for Hearing they may be doing so on a weekend or a holiday and filing that request electronically. Until Rule 8 is amended, or the Commission decides to reverse itself, the ALJ will continue to adhere to the precedent that was handed down in *Elemental Environmental Solutions* for computing time for filing a Request for Hearing in a permitting appeal.

#### **B. Issue Date of Permitting Decision**

The remaining issue does not require as much of an in-depth analysis as the issue above. The pertinent section of Rule 8.302 states:

##### **ISSUANCE OF DIRECTOR'S DECISION**

(1) The date of issuance of a final decision is the date notice of the decision is served upon the applicant. *Service shall be deemed complete when the notice is placed in the mail to the applicant.*

(2) The effective date of a final decision is the date of issuance as provided in Reg.8.302(A)(1), unless a later effective date is specified in the decision.

DEQ and Eco-Vista both argue that the date of issuance of the permitting decision in this case is March 17, 2023. Mayor Russell and the City contend that the date of issuance is March 20, 2023. DEQ, in responding to Petitioner' Motion to Strike, Motion to Determine Service date, and Motion to Extend time attached two (2) affidavits - an affidavit from Karen Blue, Budget and Environmental Records Manager for DEQ's Office of Land Management, and an affidavit from Morgan Warren who is a courier for Arkansas Mailing Services. Ms. Blue's affidavit states that she delivered the Notice of Permitting Decision to the E&E mail room in a timely fashion on March 17, 2023. Ms. Warren's affidavit states that she picked up the mail from E&E on March 17, 2023, delivered that mail to Arkansas Mailing Services between 4:00 p.m. and 4:30 p.m., and that there was "nothing remarkable" about her pickup and delivery. However, as it relates to Ms. Warren's affidavit other information contradicts her testimony.

Reading Exhibit 2 to the Response to the Motions to Dismiss it is clear to the ALJ that the Notices of Final Permitting Decision were not delivered to the post office on March 17, 2023, as DEQ intended. Instead, according to Exhibit 2:

It does appear that the mail was late getting to us that day by the courier which caused us to miss the deadline for the Post Office.

Due to the Postal requirements the mail we deliver to the Post Office must have the same date as the day we deliver. So in this instance the mail arrived Friday too late to make the Postal deadline so it was held until Monday when the Post Office

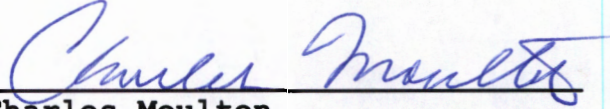
was open again to accept mail from us and was metered with the current date as it was going to be delivered that day

The ALJ understands DEQ's intent to mail, on March 17, 2023, the Notices of Final Permitting Decision to Eco-Vista and all public commenters. Unfortunately that did not happen and having a courier pick up mail is not the same as the notice actually being placed in the mail as required by Rule 8.302. By way of analogy, if a courier were to pick up a pleading for filing with a circuit court and that pleading was delivered days later to the clerk's office for filing a party could not claim that delivery to the courier was the equivalent of filing with the court. Based on the totality of the facts and exhibits provided by the parties the ALJ finds that the date of issuance and the effective date of the final permitting decision in this case is March 20, 2023, the day Arkansas Mailing Service delivered the Notice of Permitting Decision to the U.S. Postal Service. Accordingly, the ALJ finds that Mayor Russell and the City's Request for Hearing was timely filed.

**IT IS THEREFORE FOUND AND ORDERED:**

1. That DEQ and Eco-Vista's Motion to Dismiss is denied; and
2. That Mayor Russell and the City's Motion to Strike, Motion to Determine Service date, and Motion for Extension of Time is rendered moot by this order; and
3. Mayor Russell and the City can file an amended Request for Hearing consistent with Rule 15 of the Arkansas Rules of Civil Procedure

This 6<sup>th</sup> day of June 2023



Charles Moulton  
Administrative Law Judge

## CERTIFICATE OF SERVICE

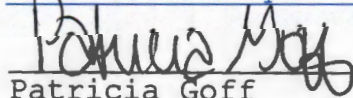
I, Patricia Goff, Commission Secretary, hereby certify that a copy of the foregoing Order No. 4, In the Matter of Eco-Vista, LLC; Docket No. 23-009-P, has been mailed by certified mail, by email, or by first class mail, postage prepaid, to the following parties of record, this 6<sup>th</sup> day of June 2023.

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ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION

IN THE MATTER OF ECO-VISTA )  
LLC )

DOCKET NO. 23-008-P  
ORDER NO. 4

ORDER

1. INTRODUCTION

Eco-Vista Landfill, LLC ("Eco-Vista") owns and operates a landfill in Washington County, Arkansas, near the incorporated town of Tontitown. Eco-Vista applied to the Division of Environmental Quality (DEQ) on July 6, 2021, for a "Permit Modification Application for Expansion of the Eco-Vista, LLC, Class 4 Landfill," Permit No. 0290-S4-R1. On March 17, 2023, DEQ issued its Final Permit Decision for Eco-Vista, LLC, Class 4 Landfill, Permit No. 0290-S4-R2 (the "Class 4 Permit"). The Class 4 Permit that DEQ issued authorizes the disposal of bulky, inert, non-putrescible solid waste as defined by Arkansas Pollution Control and Ecology Commission ("Commission") Rule 22.

On April 14, 2023, a number of citizens of the City of Tontitown ("Petitioners") filed a Request for Hearing with the Commission concerning DEQ's decision to issue the Class 4 Permit to Eco-Vista. On May 9, 2023, DEQ filed a Motion to Dismiss, and on May 16, 2023, Eco-Vista filed its own Motion to Dismiss. On May, 30, 2023, Petitioners filed their Response and on June 5, 2023, Eco-Vista filed its Reply. This matter is now fully briefed.

## 2. JURISDICTION

The Commission has jurisdiction over this matter pursuant to Ark. Code Ann. § 8-4-311(b)(4). Arkansas Code Annotated § 8-4-311(b)(4) provides the right to appeal the Director of DEQ's permitting decisions to the Commission.

## 3. BURDEN OF PROOF

For a motion to dismiss the ALJ must view the facts alleged by Petitioners as true and in a light most favorable to them. *Neal v. Wilson*, 316 Ark. 588, 595-96, 873 S.W.2d 552 (1994).

## 4. FINDINGS OF FACT

1. On July 6, 2021, Eco-Vista submitted an application to DEQ for a permit modification to allow for a lateral expansion of an additional 12.2 acres for disposal of Class IV waste at its existing 600+ acre site.

2. Public notice detailing DEQ's draft proposed decision to issue Permit 0290-S4-R2 was published in the Arkansas Democrat Gazette, Northwest edition on August 5, 2022, with the public comment period ending September 6, 2022. *DEQ Brief In Support of Motion to Dismiss, Exhibit 1.*

3. Notice of a public meeting and public hearing on the draft permit was published in the Arkansas Democrat Gazette, Northwest edition on October 13, 2022. *DEQ Brief In Support of Motion to Dismiss, Exhibit 2.*

4. A public meeting and public hearing were held by DEQ on November 2, 2022, and the public comment period was extended during

the public hearing until midnight on November 4, 2022.

5. DEQ received numerous public comments on the Class IV landfill expansion draft permit modification.

6. On March 17, 2023, DEQ issued the Class 4 landfill permit modification to Eco-Vista as Permit No. 0290-S4-R2.

7. On April 14, 2023, Petitioners submitted a Request for Adjudicatory Hearing and Commission Review on the permitting decision.

#### **5. DISCUSSION AND CONCLUSIONS OF LAW**

##### **A. Petitioners' Claim Regarding Tontitown's Withdrawal of Support for Eco-Vista's Landfill Expansion Fails to Plead a Factual and Legal Basis and Must be Dismissed**

Ark. Code Ann. § 8-4-205(b)(3) states that "[a] request for a hearing shall identify the permit action in question and its date and must include a complete and detailed statement identifying the legal and factual objections to the permit action." Commission Rule 8.603(C)(1)(c) states that "contents of a request for hearing shall include a complete and detailed statement identifying the legal issues and factual objections being appealed." Petitioners argue that DEQ was not authorized by law to process Eco-Vista's application for increased landfill acreage asserting that the host community, the City of Tontitown, withdrew its support of Eco-Vista's proposed Class IV expansion and that the City's July 2018 initial resolution referenced in Eco-Vista's permit application is not an "unconditional approval" of the proposed expansion. *Request for Hearing at p. 4.* Petitioners further state that "the City of Tontitown has not



provided a definitive acceptance of the proposed expansion by formal resolution in satisfaction of Rule 22.204(c)." *Request for Hearing at p. 5.*

DEQ and Eco-Vista both contend that Petitioners' argument fails to state what Arkansas law or rule DEQ has violated when it processed Eco-Vista's permit application and therefore should be dismissed. Reviewing the Petitioners' Request for Hearing, and applying the standard for a motion to dismiss to this issue, the ALJ respectfully disagrees with DEQ and Eco-Vista on this point. Petitioners have plainly stated that by processing Eco-Vista's permit application to its conclusion, i.e., a final permit in light of the fact that the City of Tontitown withdrew its support for the expansion prior to DEQ finalizing its permitting decision, is a violation of Rule 22.204. Viewing these allegations in a light most favorable to the Petitioners, the ALJ finds that DEQ and Eco-Vista have not met their burden which would necessitate a dismissal of this issue.

**B. Petitioners' Claims Involving the Certificate of Need Should be Dismissed**

Petitioners have alleged that the certificate of need (CON) issued by the Boston Mountain Waste Management District ("the District") was untimely and issued via an impermissible directive from DEQ warranting a remand. Petitioners state that "[e]ven assuming the CON was otherwise valid, it was not received by DEQ within the time for which it was valid based upon the District's extension of the CON to July 6, 2021." *Request for Hearing at p. 6.* Petitioners further state that "[a]ll of the [CON] extensions were unauthorized

and in excess of the authority of the District to issue as extensions [and] were not authorized by the District's regulations nor Commission Regulation 22." *Request for Hearing at 6.*

Arkansas Code Annotated § 8-6-706(a)(1) requires that before an application for a landfill permit is submitted to DEQ the applicant must obtain a CON from the regional solid waste management district board that has jurisdiction over the proposed site. DEQ and Eco-Vista allege in their Motions to Dismiss that the Petitioners' claims related to the CON are untimely and that Petitioners failed to properly challenge the District's CON decision in violation of Rule 22.206. Rule 22.206 sets forth the Commission's process for appealing a CON decision. The significant parts of Rule 22.206 state:

(1) Any person with standing to appeal a certificate of need determination by a board may appeal the board's determination to the Director by serving the appeal on the Director by certified mail. The appeal must be received by the Director no later than thirty (30) days after the date of issuance of the board's written determination. Persons with standing to appeal the determination shall be only the applicant or permittee and those persons who submitted written or oral public comments for the record during the comment period designated by the District.

**(c) Response by Board**

(1) Any board served with an appeal under Rule 22.206 (b) may file a written response to the appeal with the Director. The response must be received by the Director no later than thirty (30) days after the date the board received the appeal.

(2) The response shall contain a reply to each of the grounds for appeal and shall contain any supporting evidence

**Hearing by Director**

(1) The Director may issue a decision after reviewing the submissions by the parties. If, however, after reviewing the submissions the Director determines that a hearing on the matter



is necessary, he shall issue a Notice of Hearing to the party filing the appeal and to the board whose determination is being appealed, designating the time and place of the hearing. No such hearing shall be scheduled until after a response has been filed by the board pursuant to Part III or after the time for filing a response has elapsed, whichever comes first.

(2) The Director or his designee shall preside over any hearing held pursuant to this Section.

**(e) Director's Decision**

(1) After considering all relevant evidence presented in the appeal, the Director shall determine whether the decision of the board is supported by substantial evidence. His decision shall be based upon the factors set out in A.C.A. §8-6-706 and upon any other relevant factors.

(2) The Director shall issue his decision in writing and shall serve a copy of the decision upon the party filing the appeal and upon the board. The parties involved in the appeal of the district board decision may request Commission review of the Director's decision. Except that the parties with standing shall be the parties to the appeal of the district board decision, the appeal to the Commission shall be conducted in the form and manner in accordance with the requirements of Rule 8, Part 2.5 Practice and Procedure, for adjudicatory hearings before the Commission

There is no indication by the facts pled in Petitioners' Request for Hearing that the administrative process for appealing a CON decision in Rule 22.206 was followed. Petitioners fail to address Rule 22.206 in their Response to DEQ and Eco-Vista's Motions to Dismiss, or attempt to argue that Rule 22.206 is inapplicable to the facts as pled in this appeal. The ALJ finds that Petitioners have not exhausted the initial administrative remedy set forth in Rule 22.206 and cannot leapfrog their CON claims directly to the Commission without first availing themselves of the administrative appeal process in Rule 22.206. ([N]o one is entitled to relief for a supposed or threatened injury until the prescribed administrative

remedy has been exhausted) *Staton v. American Mfrs. Mut. Ins. Co.*, 207 S.W.3d 456, 362 Ark. 96 (Ark. 2005); *Arkansas Motor Vehicle Comm'n v. Cantrell Marine, Inc.*, 305 Ark. 449, 808 S.W.2d 765 (1991); *Ford v. Arkansas Game & Fish Com'n*, 979 S.W.2d 897, 335 Ark. 245 (Ark. 1998). Therefore, the ALJ will grant DEQ and Eco-Vista's Motions to Dismiss as it relates to each CON issue raised by the Petitioners in their Request for Hearing because the initial administrative remedy contained in Rule 22.206 has not been followed.

**C. Petitioners' Argument that DEQ was Not Responsive To Public Comments**

Petitioners' allege that Eco-Vista's Class IV permit does not address many issues raised by the Petitioners' public comments. These comments ranged from air contamination, surface water contamination, blown debris from the landfill to nearby private property, spillage from trucks travelling to and from the landfill resulting in tire punctures and broken windshields, and an increase in vectors. *Request for Hearing at pp. 8-9*. Because of the amount of time, and frequency, of these complaints from Tontitown residents Petitioners allege that DEQ was obligated to include special conditions in the Class IV permit to address the above-listed issues pursuant to Rule 8.211. *Petitioners' Request for Hearing at pp. 9-10*.

In their Motions to Dismiss DEQ and Eco-Vista aver that these allegations fail to state how DEQ's permitting decision violated a law or rule applicable to DEQ's permitting action. DEQ and Eco-Vista maintain that this claim must be dismissed from Petitioners' Request

for Hearing because it fails to comply with Rule 8.603(C)(1)(c) and Ark. Code Ann. § 8-4-205(b)(3). *DEQ Brief in Support of Motion to Dismiss at p. 8.* In their Response Petitioners contend that the requirements of Rule 8.603(C)(1)(c) and Ark. Code Ann. § 8-4-205(b)(3) have been met regarding this issue because DEQ has been provided adequate notice of the factual objections and the legal issue that the allegations are tied to, *i.e.* an alleged violation of Rule 8.211. *Petitioners' Response to Motion to Dismiss at p. 13.* Viewing the facts alleged by Petitioners as true and in a light most favorable to them, as required in deciding a motion to dismiss, the ALJ agrees with Petitioners. *Neal v. Wilson*, 316 Ark. 588, 595-96, 873 S.W.2d 552 (1994). Sufficient facts and law have been pled by the Petitioners on this issue which warrants denying dismissal.

**D. Petitioner Brandt Burress' Standing to Appeal**

Ark. Code Ann. § 8-4-205(b)(1) states that "only those interested persons, other than the applicant, that have submitted comments on the record regarding a proposed permit action during the public comment period shall have standing to request a hearing with the commission." DEQ moves to dismiss Petitioner Brandt Burress as a named party because he failed to comment on the Eco-Vista draft permit. *DEQ Brief in Support of Motion to Dismiss at pp. 8-9.*

Petitioners admit, in their Response to the Motion to Dismiss, that Mr. Burress was included in the list of petitioners seeking review of Eco-Vista's Class IV permit in error. Therefore, the ALJ will dismiss Mr. Burress as a petitioner in this appeal.



**IT IS THEREFORE ORDERED:**

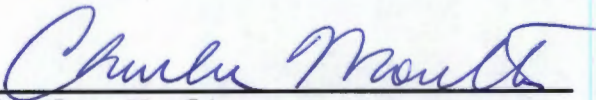
1. The ALJ denies the Motions to Dismiss relating to the issue of Tontitown's Withdrawal of Support for Eco-Vista's Landfill Expansion; and

2. The ALJ grants the Motions to Dismiss relating to the issues raised by Petitioners involving the CON; and

3. The ALJ denies the Motions to Dismiss relating to the issue that DEQ was not responsive to public comments in violation of Rule 8.211; and

4. The ALJ grants the Motions to Dismiss and dismisses Mr. Brandt Buress from this appeal.

**This 6<sup>th</sup> day of June 2023**

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**Charles Moulton**  
**Administrative Law Judge**

**CERTIFICATE OF SERVICE**

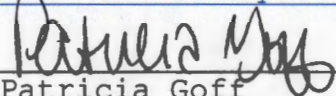
I, Patricia Goff, Commission Administrative Assistant, hereby certify that a copy of the foregoing Order No. 4, In the Matter of Eco-Vista, LLC; Docket No. 23-008-P, has been mailed by certified mail, by email, or by first class mail, postage prepaid, to the following parties of record, this 6<sup>th</sup> day of June 2023.

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