

**BEFORE THE ARKANSAS POLLUTION
CONTROL AND ECOLOGY COMMISSION**

IN THE MATTER OF)
C&H HOG FARMS, INC.)

DOCKET NO. 18-001-P

**REPLY OF OZARK INTERVENORS AND BRWA-ACC
INTERVENORS TO C&H'S RESPONSE TO MOTIONS TO INTERVENE**

Introduction

In C&H's Response to the Intervenor's Motions to Intervene, it attempts to limit the issues on which Intervenor can be involved. C&H asserts that because Intervenor did not comment on the "procedural issues raised by C&H" in this permit appeal, Intervenor are "barred by ADEQ's regulations and applicable law, including Reg.8.613(B)(5), from participating in those issues." See, ¶ 2 of C&H's Response to Motions to Intervene. However, C&H does not object to intervention to address issues raised during the public comment period.

C&H's reference to "procedural issues" is inartfully stated because of the lack of definition and clarity of what is "procedural" and what is "substantive." However, at the Pre-Hearing Conference held on February 9, 2017, Administrative Law Judge Moulton asked Mr. William Waddell, counsel for C&H, to articulate exactly what procedural issues he thought the Intervenor should be prohibited from raising. (Pre-Hearing Conf. transcript, p. 16, lines 22-24). Mr. Waddell responded: "Well, all the Reg 6 issues *that are – that are within our initial request and as amplified in the additional one*, okay, *and this estoppel issue*, which, you know, we – we haven't been able to comment too much upon that so far in the case" (Pre-Hearing Conf. Transcript, pp. 16 (line 25), 17 (lines 1-4)). (Emphasis added). Therefore, Intervenor will consider the "procedural issues" referred to by C&H as those issues related to C&H's claims that

it is somehow entitled to a permit under Regulation 6 or the theory of estoppel (which claim Intervenor's dispute).

1. C&H Acknowledges That The "Procedural Issues" It Now Raises Were Not Involved In The Regulation 5 Permit Proceedings From Which This Appeal Was Taken.

As an initial matter, C&H's objection that Intervenor's failed to comment on those issues is nonsensical. In C&H's Response to the Motions to Intervene, Paragraph 1, it states "C&H's request for adjudicatory hearing and its amended request assert procedural grounds for reversal of ADEQ's permit decision in addition to substantive grounds." In other words, C&H acknowledges that the "procedural issues" it asserts were raised only in its Request for Adjudicatory Hearing and its Amended Request (collectively, "C&H's Requests for Hearing"), and not during the Regulation 5 permit decision-making process from which this appeal was taken. Mr. Waddell's response to Judge Moulton's question, quoted above, supports this interpretation, and C&H has not identified any other points during the Regulation 5 proceedings where this issue was raised.

In Paragraph 2 of C&H's Response to the Motions to Intervene, it then states that "None of the Intervenor's commented on the procedural issues raised by C&H" The reference to "procedural issues" in Paragraph 2 obviously relates back to the "procedural issues" referenced in Paragraph 1 of C&H's Response. As noted above, C&H acknowledged in Paragraph 1 that those issues were first raised in this proceeding in C&H's Requests for Hearing. Consequently, it would have been impossible for Intervenor's to have raised any such "procedural issues" in their comments on the draft Regulation 5 permit because, by C&H's own admission, those issues were not involved at any time before the filing of C&H's Request for Hearing.

This is further buttressed by the following exchange during the Pre-Hearing Conference. When asked why the Regulation 6 issues were proper to be considered in this appeal from the denial of a Regulation 5 permit, Mr. Waddell responded that “There was not a time before now to raise it.” (Pre-Hearing Conf. transcript, p. 23, lines 22-23). If C&H did not deem it necessary, appropriate or possible to raise the alleged Regulation 6 issues until its appeal from the denial of the Regulation 5 permit, then the Intervenors should not be held to a more rigorous standard.

C&H is attempting to conflate legal issues that it is raising for the first time in its appeal from the denial of a Regulation 5 permit with the issues before ADEQ during its consideration of whether to grant or deny that permit. That attempt should be recognized for what it is – a “last grasp” effort to claim coverage under a Regulation 6 permit that was terminated nearly two years ago and which C&H did not timely appeal.

2. Regulation No. 8 Does Not Limit The Issues An Intervenor Can Address.

To have standing to intervene, Intervenors must only have commented during the public comment period and filed a timely petition for intervention whose contents are the same as set forth in Reg. 8.603(C)(1)(a)(b)(c)(d) and (e). *See*, Reg.8.604. C&H concedes Intervenors meet the requirements for Intervention. Where a person satisfies the standard for intervention, nothing in Regulation No. 8 limits an intervenor from fully participating in all issues raised in the proceeding for which that person has standing to intervene. This is reinforced by the language in Ark. Code Ann. § 8-4-205(b) that limits the issues that can be raised in a third-party request for Commission review to issues raised in the public comments, absent good cause. C&H initiated this request for Commission review, not Intervenors. Thus, Intervenors should be allowed full participation in all issues before the Commission.

3. Intervenor's Are Not The Ones "Raising Any Issue In The Hearing That Was Not Raised During The Public Comment Period On The Record."

Even if Intervenor's are bound by the language of Ark. Code Ann. § 8-4-205 and Reg. 8.613(B)(5), the prohibition is against any person, other than the applicant or permittee, "raising any issue in the hearing that was not raised during the public comment period on the record, unless the person raising the issue shows good cause why the issue could not, with reasonable diligence, have been discovered and presented during the public comment period." C&H is the one raising the "procedural issues," not the Intervenor's. (*See*, ¶ 2 of C&H's Response, "None of the Intervenor's commented on the procedural issues raised by C&H ... ") (Emphasis added).

"Raising" an issue is not the same as "responding" to an issue. In this case, C&H has raised the "procedural issues," and there is nothing in Regulation 8 or the statutes that prohibit Intervenor's from responding to those issues. If there were, permit applicants could raise issues for the first time on appeal of a permit without another party being entitled to make a response. Since Intervenor's are not the ones raising issues that C&H contends are not in the public comments, they are not prohibited from full participation in this proceeding. Neither Regulation No. 8, Ark. Code Ann. § 8-4-205(b)(3), nor any other statute prohibits an Intervenor from responding to issues or arguments raised by the party initiating Commission review.

4. Should The ALJ Determine That Intervenor's Are Somehow The Ones "Raising" The Procedural Issues Contained In C&H's Request For Commission Review, Good Cause Exists To Find That These "Procedural Issues" Could Not, With Reasonable Diligence, Have Been Discovered And Presented During The Public Comment Period On C&H's Reg. 5 Permit Application.

A person requesting third party review of a permitting decision is not limited to issues raised in that person's public comments. Third party review can include any issue raised during

the public comment period so long as the person seeking Commission review made comments during the public comment period. “No person other than the applicant or permittee may raise any issue in the hearing that was not raised during the public comment period on the record, unless the person raising the issue shows good cause why the issue could not, with reasonable diligence, have been discovered and presented during the public comment period.” Reg.8.613; Ark. Code Ann. § 8-4-205(b)(2).

Public comment in this matter involved a draft Reg. 5 permit. There were over 19,000 public comments on the draft permit, including what ADEQ characterized as 2,317 individualized comments consisting of thousands of pages. After considering public comment, ADEQ (correctly) decided to deny a final permit.

In addition to comments by C&H, there were comments (including Farm Bureau and the Arkansas Pork Producers, two organizations that are supporting C&H’s efforts to overturn the permitting decision) in support of issuing a permit to C&H. If C&H is correct that its “procedural grounds” for reversing the Director’s decision were not raised in any public comment on C&H’s Reg. 5 permit application (something that would require wading through thousands of pages of comment to ascertain), then even those supporting C&H’s application failed to raise the “procedural issues.” That alone demonstrates that there is good cause why the issues could not, with reasonable diligence, have been discovered and presented during the public comment period.

To sustain C&H’s objection and preclude Intervenors from participating in the issues C&H has raised in its hearing request would require finding that for an intervenor to participate in issues that are raised by a permit applicant for the first time on appeal, persons making comments during the public comment period must anticipate any “procedural issues” the

applicant intends to raise in its appeal of the permit denial decision and comment on those anticipated arguments months before the arguments are raised. Adopting this new requirement would not only create an impossibly high standard for public comment, it would be inconsistent with the Commission's intent that Regulation No. 8 "be *liberally construed* so as to *provide a fair opportunity for a hearing on all matters addressed herein to all persons who have standing in a specific question which is before the Commission ...*." The novel arguments C&H characterizes as "procedural issues" for reversal were not foreseeable to the public during the public comment period on C&H's application for a Reg. 5 "No Discharge" permit.

5. Prohibiting Intervenors From Participating In Issues Involving Regulation 6 Issues Would Violate The Spirit and Intent Of Regulation 8.102.

Reg.8.102 is titled **PURPOSE AND INTENT** and provides:

(A) The purpose of (this Regulation) is to set out the administrative procedures that govern the Commission, the Arkansas Department of Environmental Quality ("Department"), and any person appearing in any proceeding or matter before the Commission or the Department

(B) It is the intent of the Commission that the provisions of this Regulation be *liberally construed* so as to *provide a fair opportunity for a hearing on all matters addressed herein to all persons who have standing in a specific question which is before the Commission* and to expedite the administration of matters pending before the Commission. (Emphasis added).

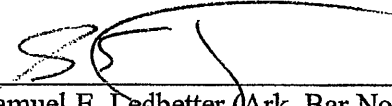
Prohibiting Intervenors from participating fully in the issues raised by C&H in this proceeding would run afoul of the Commission's stated intent. As such, C&H's attempt to limit Intervenors' participation should fail.

CONCLUSION

For the reasons stated, Intervenors' participation in this matter should not be limited or constrained.

Respectfully submitted,

By:


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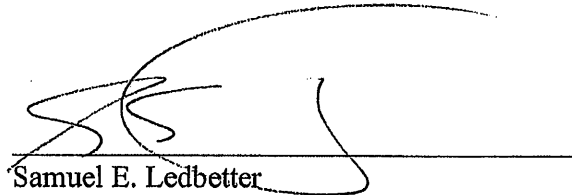
CERTIFICATE OF SERVICE

I, Samuel E. Ledbetter, hereby certify that a true and correct copy of the foregoing was sent via electronic mail and United States mail, postage prepaid, this 20th day of February, 2018, to the following:

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