

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

IN THE MATTER OF:

C & H Hog Farms

**DOCKET NO. 18-
NPDES Permit No. Permit No. 5264-W**

**REQUEST FOR ADJUDICATORY
HEARING AND COMMISSION REVIEW
AND STAY**

Pursuant to Ark. Code Ann. 8-4-205 and APCEC Regulation No. 8, Reg. 8.603, C&H Hog Farms (“C&H”), by its attorneys, Friday, Eldredge & Clark, LLC and Barber Law Firm, PLLC, hereby requests an adjudicatory hearing and the opportunity to present evidence and oral argument before the Arkansas Commission on Pollution Control and Ecology (the “Commission”) regarding the decision of the Director of the Arkansas Department of Environmental Quality (“ADEQ”) dated November 19, 2018 to deny Permit No. 5264-W, with related implications for Arkansas State NPDES Permit Number ARG590001 (the “Reg. 6 Permit), for the reasons enumerated below (the “Appeal”). A copy of the Director’s November 19, 2018 decision is attached hereto as Exhibit 1 and incorporated herein. The decision identifies a number of documents relied upon for the decision, some of which are referenced herein, and those documents are publically available and can be found at https://www.adeg.state.ar.us/home/pdssql/p_permit_details_water_spb.aspx?AFINDash=51-00164&AFIN=5100164&PmtNbr=5264-W (“5264-W Record”).

General Background: Factual and Legal Matters Applicable to All Issues

1. C&H owns and operates a concentrated animal feeding operation (“CAFO”) in Mt. Judea, Arkansas. C&H operates two waste storage ponds and a process wastewater land application system pursuant to Arkansas State NPDES Permit Number ARG590001. NPDES Permit Number ARG590000 was initially issued on October 6, 2011, with an expiration date of October 31, 2016. ADEQ issued coverage under the NPDES Permit Number ARG590000 to C&H on August 3, 2012, which was assigned NPDES Permit No. ARG590001 (the “Reg. 6 Permit”). The Reg. 6 Permit was modified on June 5, 2014, May 12, 2015 and March 21, 2016. The Reg. 6 Permit documents, some of which are referenced, are publically available and can be found at https://www.adeg.state.ar.us/home/pdssql/p_permit_details_water_npdes.aspx?AFINDash=51-00164&AFIN=5100164&PmtNbr=ARG590001 (“ARG590001 Record”).
2. On April 7, 2016 C&H filed an application to administratively change from the Reg. 6 Permit to a No-Discharge Permit pursuant to Regulation No. 5, which was deemed complete by ADEQ on May 25, 2016. 5264-W Record.
3. On April 20, 2016 C&H timely filed an application to renew coverage under the Reg. 6 Permit. ARG590001 Record.
4. On May 3, 2016 ADEQ sent a letter to C&H advising C&H that it was not going to renew the Reg. 6 Permit, and also stating that “All facilities currently operating under the conditions of this permit will be asked to request coverage under an individual permit.” The next day, on May 4, 2016, ADEQ issued its decision to not renew the NPDES General Permit No. ARG590000. The Reg. 6 Permit

expired on October 31, 2016. ADEQ never asked C&H to request coverage under an individual NPDES permit as required by the Reg. 6 Permit and as stated in the May 3, 2016 letter. ARG590001 Record.

5. On February 15, 2017 ADEQ made a proposed decision to issue a Reg. 5 Permit to C&H and issued its Statement of Basis and draft permit, including all of the terms and conditions for the permit, for public comment (the "Draft Permit"). 5264-W Record. In particular, ADEQ described the application for a Reg. 5 Permit as follows: "The permittee submitted a permit issuance application for a no-discharge permit, which was received on April 7, 2016, with additional information received on June 29, 2016. The facility is applying for an administrative change in coverage from under NPDES General Permit ARG590000 for Concentrated Animal Feeding Operations to a no-discharge permit. It is proposed that the water no-discharge permit be issued." By issuing the Draft Permit, ADEQ acknowledged that the application was both administratively and technically complete.
6. The basis for the decision to issue the Draft Permit is stated as follows in the Statement of Basis: "The Arkansas Department of Environmental Quality has made the determination to issue a draft permit for the no-discharge facility as described in the application and the NMP. Permit requirements and conditions are based on regulations pursuant to the Arkansas Water and Air Pollution Control Act (Ark. Code Ann. 8-4-101, et seq.) Arkansas Pollution Control and Ecology Commission (APC&EC) Regulation No. 5 and generally accepted scientific knowledge and engineering practices (Ark. Code Ann 8-4-

203(e)(2)(B)(i))” The Draft Permit stated that ADEQ’s decision was that “C&H Hog Farms, Inc. is authorized to store and land apply liquid waste from a swine facility on sites listed in Condition No. 7 of Part II of the permit for a facility located at HC 72 Box 2 Vendor, Arkansas 72683 in Newton County . . .”

7. The Comment Period on the Draft Permit ended on April 6, 2017. 5264-W Record.
8. Following the close of the comment period, ADEQ requested C&H to provide additional information to assist it in responding to public comments, and by December 29, 2017 ADEQ confirmed through an exchange of communications that all requested additional information had been submitted and received. ADEQ also confirmed through deposition testimony that all information requested was timely received.
9. On January 10, 2018 ADEQ issued its Final Permitting Decision and revised Statement of Basis (the “Original Permit Decision”). 5264-W Record. Whereas the Draft Permit was for the issuance of the Reg. 5 Permit, the Original Permit Decision was to deny the Reg. 5 Permit. The revised Statement of Basis for the Original Permit Decision was not only substantially different from the Draft Permit Statement of Basis, but it was in direct contradiction to the Draft Permit Statement of Basis. In particular, the Statement of Basis for the Original Permit Decision stated: “ADEQ denies issuance of the permit after determining that the record lacks necessary and critical information to support granting of the permit. The record fails to include the requisite geological, geotechnical, groundwater, soils, structural, and testing information specified in Reg. 5.402. Without the

detailed geophysical and engineering data required by the Agricultural Waste Management Field Handbook, as amended, ADEQ is unable to ascertain compliance with Reg. 5.402.” ADEQ had not requested the information which it contended was not provided, and did not provide C & H the opportunity to address such issues. For example, and without limitation to other issues that ADEQ did not permit C & H to address before issuing its Original Permit Decision, in response to Comment 74, ADEQ stated, “The permit application does not contain a groundwater flow direction study as *recommended* by AWMFH Chapter 7. The Department has determined that a groundwater direction study is *necessary* due to the specific siting of this facility.” (Emphasis added in italics) *See also* ADEQ’s responses to Comments 320 & 352. Similarly, ADEQ stated in response to Comments 209, 324, 346, 359, 405, and 417 that “[t]he geologic investigation of the waste storage ponds does not comply with AWMFH Chapter 7,” but it never raised this issue with C & H before denying the permit application for lack of information and did not give C & H an opportunity to address the issue. Related examples concerning the “compaction test and permeability analysis” (Responses to Comments 348, 417) and the “geologic investigation of the berms” (Response to Comment 424) were never raised by ADEQ before the denial of the permit application for lack of information, and C & H was never allowed to address the issues. Moreover, as stated in the responses to comments in the Regulation 6 Permit (e.g., Response to Comment 6 regarding the liners in the ponds), ADEQ had previously approved compliance with the NRCS Agricultural Waste Management Field Handbook (“AWMFH”)

regarding the geologic investigation, design and construction of the two liquid animal waste storage ponds ("Ponds").

10. C&H appealed the Original Permit Decision and the appeal was divided into two dockets: DOCKET NO. 18-001-MISC to address the issues related to the Reg. 6 Permit and DOCKET NO. 18-001-P to address the Reg. 5 Permit. The documents comprising the record of Docket No. 18-001-MISC, some of which are referenced herein, are publically available and can be found at <https://www.adeg.state.ar.us/commission/misc.aspx> ("18-001-MISC Record"). The documents comprising the record of Docket No. 18-001-P, some of which are referenced herein, are publically available and can be found at <https://www.adeg.state.ar.us/commission/p.aspx> ("18-001-P Record").
11. On June 4, 2018, the Administrative Law Judge ("ALJ") issued his Recommended Decision as Order 1 in the Reg. 6 Permit appeal. 18-001-MISC Record. The Commission adopted Order No. 1 on July 27, 2017 as Minute Order 18-16. 18-001-MISC Record. C&H appealed Minute Order 18-16 to the Newton County Circuit Court where it remains pending as Case No. 51CV-18-48 (the Reg. 6 Judicial Appeal"). C&H's Brief on the Merits of the Reg. 6 Judicial Appeal, which is incorporated herein, is attached hereto as Exhibit 2. In addition to being filed with the Newton County Circuit Clerk, the documents filed in the Reg. 6 Judicial Appeal are also available in the 18-001-MISC Record.
12. On July 10, 2018, the ALJ issued his Recommended Decision in the Reg. 5 Permit appeal as Order No. 14. 18-001-P Record. The Commission adopted the Recommended Decision as Minute Order 18-20 on August 24, 2018. 18-001-P

Record. C&H appealed Minute Order 18-20 to the Newton County Circuit Court on September 7, 2018, where it remains pending as Case No. 51CV-18-58. In addition to being filed with the Newton County Circuit Clerk, the documents filed in the Reg. 5 Judicial Appeal are also available in the 18-001-P Record. C&H also filed a motion for stay pending appeal with the circuit court on September 7, 2018 (the “Reg. 5 Judicial Appeal”). See 18-001-P Record. The Circuit Court granted the motion to stay through an Interim Order and Stay on October 17, 2018 (the “Judicial Stay”). See 18-001-P Record, also attached hereto as Exhibit 3. On information and belief, ADEQ had actual notice of the Judicial Stay as of October 17, 2018, but in the event ADEQ disputes the date of its actual knowledge, it is undisputed that ADEQ had actual knowledge of the Judicial Stay before it issued the permit decision that is the subject of this Appeal.

13. Because ADEQ had not complied with the Commission’s Regulation 8.208(E) in response to C&H’s request for records under the Freedom of Information Act (“FOIA”), C&H was also forced to file a FOIA lawsuit against ADEQ in the Newton County Circuit Court as Case No. 51CV-18-68 (the “FOIA Appeal”). The FOIA Appeal has recently been transferred to the Pulaski County Circuit Court. The Judicial Stay entered in the Reg. 5 Judicial Appeal was attached to a pleading filed by C&H in the FOIA case on November 9, 2018, and that pleading was served upon ADEQ’s attorney of record.
14. Notwithstanding the Reg. 6 Judicial Appeal, the Reg. 5 Judicial Appeal and the FOIA Appeal, ADEQ proceeded to provide notice of its intent to deny the Reg. 5

Permit application without regard to the pending judicial appeals and the pending request for a stay. 5264-W Record.

15. On November 19, 2018, ADEQ issued its second permit decision denying the Reg. 5 Permit (“the Second Permit Decision”). It is the Second Permit Decision that is the subject of this Appeal. 5264-W Record, also attached hereto as Exhibit 1. The Second Permit Decision states that:

“Continued coverage under the expired general permit ARG590000 ends upon notice of this final permit decision. Operations at the facility must cease within thirty (30) days notice of this final permitting decision. Pursuant to Section 1.9 of ARG590000, and Permit Tracking Number ARG590001, C&H Hog Farms must submit a closure plan to ADEQ for review and approval within sixty (60) days of the final day of operation. Upon approval of the closure plan and schedule by ADEQ, C&H Hog Farms must perform closure activities in accordance with the approved plan. C&H Hog Farms must submit certification that the facility was closed in accordance with the approved plan within ten (10) days of completion of the closure activities.”

16. This Appeal is taken from the Second Permit Decision, as more particularly described below.
17. Through this Appeal, C&H requests an adjudicatory hearing and Commission review with respect to the Second Permit Decision, as more particularly described in the specific issues enumerated below and based upon the process followed by ADEQ as described above and below. The Second Permit Decision is null and void as it was issued by ADEQ without jurisdiction due to the pendency of the Reg. 6 Judicial Appeal and the Reg. 5 Judicial Appeal, and in violation of the Judicial Stay. That issue is before the Newton County Circuit Court through an Amended Motion for an Order to Show Cause, which is currently pending. 18-001-P Record. Further, and to the extent that jurisdiction exists to address these

issues, C&H requests that the Commission find that the Second Permit Decision is arbitrary, capricious, and that a preponderance of the evidence and the Commission's rules and the governing statutory authority supports a resolution of the issues presented herein in favor of C&H. C&H requests that the Commission find that ADEQ has failed to include in the written record of this proceeding an adequate written explanation of the rationale for the Second Permit Decision, and that ADEQ has failed to provide an adequate written explanation of the rationale for the Second Permit Decision, and that ADEQ has failed to demonstrate that the Second Permit Decision was based upon generally accepted scientific knowledge and engineering practices, and that ADEQ has failed to provide an adequate response to comments, all as required by Regulation No. 8. Further, C & H requests the Commission to find that ADEQ is estopped to deny the permit application for the reasons stated herein and prior statements and representations of ADEQ that the site was properly investigated, that the facility was properly designed and constructed, all of which C&H relied upon when constructing its facility at a cost in excess of \$4 million, and because ADEQ failed and refused to provide C&H with a fair and appropriate opportunity to provide any additional information that may be required by applicable regulations. *Foote's Dixie Dandy, Inc. v. McHenry*, 270 Ark. 816, 607 S.W.2d 323 (1980). Further, inasmuch as the Reg. 6 Judicial Appeal and the Reg. 5 Judicial Appeal and the FOIA Appeal remain pending and the decisions in those appeals will impact the present Appeal, C&H requests the Commission to stay all matters herein, and, consistent with the Judicial Stay, continue C&H's coverage under the Reg. 6

Permit pending the *final* resolution of the pending appeals and any further appeals.

18. C&H specifically objects to, disputes and challenges each of ADEQ's responses to public comments that do not support the issuance of the Reg. 5 Permit applied for by C&H, including, but not limited to, the issues raised below.
19. As further support for the Appeal, C&H relies upon the study, report and findings of the University of Arkansas Big Creek Research and Extension Team and ADEQ's contractor, Harbor Drilling. 18-001-P Record.

**ISSUE NO. 1-THE SECOND PERMIT DECISION WAS NULL AND VOID
WITH RESPECT TO C&H'S CONTINUED COVERAGE UNDER THE
REG. 6 PERMIT
AND A STAY SHOULD BE ISSUED**

20. The contents of paragraphs 1-19 are incorporated herein.
21. On September 7, 2018, C & H filed its motion for stay pending appeal in 51CV-18-58. On October 17, 2018, the Circuit Court held a hearing on the motion and entered the Stay Order. A partial transcript of the October 17 hearing is attached as Exhibit A to C&H's motion for stay, filed in the Reg. 5 Judicial Appeal on November 20, 2018. 18-001-P Record. In addition to staying the Commission's Minute Order No. 18-20, the Judicial Stay further provided that "the stay allowing C&H to continue to operate its facility is continued until further order of this court."
22. At the October 17th hearing, C & H explained that any further action by ADEQ pending the appeal would be null and void, because ADEQ did not have jurisdiction to act on the Reg. 5 Permit application after the Reg. 5 Appeal was

filed. *See Transcript*, pp. 25-26. In support of its argument, C & H cited to the Court the case of *Myers v. Yingling*, 369 Ark. 87, 251 S.W.3d 287 (2007), which held that an order of a circuit court following a notice of appeal and lodging of the record in the appellate court was without jurisdiction and void. *See Transcript*, pp. 27-28.¹ In the *Myers* opinion, the Court noted that “Once the record is lodged in the appellate court, the circuit court no longer exercises jurisdiction over the parties and the subject matter in controversy. Certainly, circuit courts have continuing jurisdiction to correct records . . . however, the circuit court loses jurisdiction to *act further* in the matter once the record is lodged in the appellate court.” *Myers*, 369 at 89 (2007) (citations omitted) (emphasis in original).

23. In its oral ruling, the Circuit Court made the following statements regarding the jurisdictional issue as to whether ADEQ could act following the Court’s stay order:

COURT: So I’m going to continue the stay. I’m not going to directly say that ADEQ is affected by the stay. But if you ask me to say what the order would say – I don’t have an order. Mr. Waddell proposed one. Well, it’s just stayed. And I guess if ADEQ attempts to shut down the C&H, then C&H could join them as a party, and we can address whether they had authority to do that. But apparently no one here is harmed by that. . . . If they’re operating pursuant to something that’s stayed, well, I mean, they could make their arguments, but I don’t see what they’re doing – how that

¹ C & H noted in its reply to response to motion for stay filed in the Reg. 5 Judicial Appeal on September 20, 2017 that this same rule had been applied in Texas to an administrative appeal. *See Raghunath Dass, P.E. v. Texas Bd. of Prof’l Engineers*, 517 S.W.3d 252 (Tex. App. 2017).

would have any effect. But that's for another day. ... Amended Order 18-20, I guess is stayed. ... It's stayed.

DARA HALL: The Commission [is a party]. And if you stay the Commission, then it's like their remand didn't happen.

COURT: Right.

Transcript, pp. 63-64. ADEQ did not have jurisdiction to issue the permit decision, and the decision was null and void. ADEQ's Second Permit Decision purported to shut down C&H's operations effective December 19, 2018, conduct that was in violation of the Judicial Stay.

24. Following a December 4, 2018 hearing on the Commission's Motion to Dismiss the Reg. 5 Appeal, on December 7, 2018 the Court entered an order denying the Motion to Dismiss. (the "Order denying the Motion to Dismiss", see 18-001-P Record, also attached hereto as Exhibit 4). The Judicial Stay, entered on October 17, 2018 and the Order denying the Motion to Dismiss confirmed that the Court obtained jurisdiction over the subject matter of an appeal when the notice of appeal is filed. The Reg. 6 Appeal was filed on August 6, 2018. Accordingly, all issues relating to C&H's continued coverage under the Reg. 6 Permit have been under the exclusive jurisdiction of the Circuit Court in the Reg. 6 Judicial Appeal since August 7, 2018. ADEQ lacks jurisdiction to take action or make findings regarding C&H's coverage under the Reg. 6 Permit, and all such findings and decisions in the Second Permit Decision are null and void.
25. C&H requests that, consistent with the Judicial Stay, the Commission issue a stay as to any actions by ADEQ relating to C&H's continued coverage under the Reg.

6 Permit, and that, consistent with the Judicial Stay, the Commission continue C&H's coverage under the Reg. 6 Permit and stay all matters relating to C&H's continued coverage under the Reg. 6 Permit pending the final resolution of all appeals pending or that may be filed by C&H or any other party to this proceeding.

**ISSUE NO. 2-THE SECOND PERMIT DECISION WAS NULL AND VOID WITH
RESPECT TO DENIAL OF C&H'S APPLICATION FOR A REG. 5 PERMIT
AND A STAY SHOULD BE ISSUED**

26. The contents of paragraphs 1-25 are incorporated herein.
27. ADEQ did not have jurisdiction to issue the Second Permit Decision, and the decision was null and void. ADEQ's conduct was in violation of the Court's exclusive jurisdiction over C&H's application for a Reg. 5 Permit, and the Judicial Stay.
28. The Judicial Stay entered on October 17, 2018 and the Order denying the Motion to Dismiss confirmed that the Court "acquired jurisdiction over C&H's application for a Regulation 5 permit on September 6 [sic September 7], 2018, when C&H filed its notice of appeal. By order of this court filed on October 17, 2018, Minute Order 20-18, including the remand and instructions stated therein, were stayed." Accordingly, all issues relating to C&H's application for a Reg. 5 Permit have been under the exclusive jurisdiction of the Circuit Court since September 7, 2018. ADEQ lacks jurisdiction to take action or make findings regarding C&H's application for a Reg. 5 Permit, and as a result, the Second Permit Decision is null and void.

29. C&H requests that, consistent with the Judicial Stay, the Commission issue a stay as to any actions by ADEQ with respect to C&H's application for a Reg. 5 Permit until further order of the Commission and that the Commission stay all matters herein pending the final resolution of all appeals pending or that may be filed by C&H or any other party to this proceeding.

ISSUE NO. 3-THE DECISION TO NOT ISSUE THE REG. 5 PERMIT WAS PROCEDURALLY FLAWED BECAUSE ADEQ FAILED TO IDENTIFY DOCUMENTS IT RELIED UPON, AND FAILED TO COMPLY WITH THE FREEDOM OF INFORMATION ACT DURING THE COMMENT PERIOD

30. The contents of paragraphs 1-19 are incorporated herein.
31. When ADEQ issued the Draft Permit, fundamental due process required ADEQ to identify in the notice the documents it relied upon to make the decision. ADEQ failed to identify all of the documents it relied upon in the Notice of its Draft Permitting Decision. ADEQ was required by Reg. 8.208(E) to comply with the Arkansas Freedom of Information Act ("FOIA") during the comment period. C&H filed a Freedom of Information Act request during the comment period to obtain documents critical to allow C&H to prepare comments on the Draft Permitting Decision. ADEQ failed to comply with its obligations under the FOIA, and the FOIA Appeal was filed, now pending in Pulaski County Circuit Court, to obtain the requested documents.
32. C&H further requests that any comment period on C&H's application for Reg. 5 permit be re-opened and continued for at least thirty (30) days following ADEQ's full and complete response to C&H's FOIA request.

ISSUE NO. 4-ADEQ ERRED BY FINDING THAT THE APPLICATION WAS DEFICIENT

33. The contents of paragraphs 1-19 and 63-72 are incorporated herein.
34. When ADEQ issued the initial Draft Permit granting the Reg. 5 Permit, C&H's application was administratively and technically complete. Because the C&H facility had been constructed pursuant to the Reg. 6 Permit, following ADEQ's review and approval of the site investigation and the Pond design and construction, and because the facility has been operating for over five (5) years with no evidence of leakage or discharge to waters of the state or the United States, undertaking an additional geological investigation of constructed facilities is not only inconsistent with the applicable regulatory requirements, it also presents unique challenges that require coordination between C&H and ADEQ. ADEQ erred by finding in the Second Permit Decision that the application was deficient; ADEQ erred by not providing C&H with a full and fair opportunity to address any regulatory deficiencies through an approved work plan; and ADEQ was estopped to find that the application was deficient without providing C&H with a full and fair opportunity to address any regulatory deficiencies through an approved work plan. C&H objects to the factual findings contained in the responses to comments, as well as the legal conclusions presented in these responses to comments which purport to support ADEQ's decision to deny the Reg. 5 Permit.
35. During oral argument before the Circuit Court on December 4, 2018, the Attorney General, on behalf of the Commission, conceded that the procedure ADEQ followed when initially denying the Reg. 5 Permit deprived C&H (and the public)

of due process. ADEQ has continued to defend the unconstitutional procedure it implemented as being entirely appropriate. In the face of the ALJ's Recommended Decision in Docket 18-001-P, Order No. 14, ADEQ urged the Commission to affirm its rejection of C&H's Reg. 5 permit with no remand and no notice and comment procedure whatsoever. 18-001-P Record. Individual Commissioners stated that C&H should be provided an opportunity to address the deficiencies in the Reg. 5 permit application during the remand proceedings, but that never occurred. The only action ADEQ took was to repackage its prior decision to deny the Reg. 5 Permit as a draft decision. ADEQ never believed that additional notice and comment was necessary, but it did reluctantly implement the Commission's remand by rushing through public notice and comment to again deny the Reg. 5 Permit, thereby implementing its plan to put C&H out of business as quickly as possible.

36. The Second Permit Decision is again based on perceived deficiencies in the geological investigation associated with the facility's two Ponds. This finding is contrary to ADEQ's decisions on the Reg. 6 Permit, which included approval of the site investigation and Pond construction design before C&H spent \$4 million to construct its facility. Furthermore, C&H submitted the required geological test results conducted as part of the Pond construction to ADEQ in 2013, and ADEQ sponsored additional geological testing during its review of the Reg. 5 Permit Application which did not find any leakage from the Ponds. On May 5, 2016 ADEQ determined, pursuant to Reg. 8, Section 8.205, that C&H's Reg. 5 application was complete (including its geological investigation), and on February

15, 2017 ADEQ determined that C&H's Reg. 5 application was technically complete. ADEQ has made other representations that the site investigation and Pond design and construction were adequate. C&H reasonably relied upon such representations.

37. On June 6, 2018, when Order No. 12 was entered in Docket 18-001-P and it became apparent that the Original Permit Decision would be remanded to ADEQ, C&H immediately sought to meet with ADEQ and address any concerns ADEQ might have with its Reg. 5 Permit application. ADEQ delayed scheduling a meeting until August, then unilaterally cancelled it; the stated reason being that ADEQ did not want to discuss a work plan to address any remaining regulatory deficiencies. ADEQ avoided meeting with C&H and its geological consultants until September 5, 2018. During the meeting, C&H offered to have its consultants prepare a comprehensive work plan to address any remaining regulatory deficiencies, as well as any additional concerns ADEQ had with the documentation it had available, and to engage in routine discussions to prepare a work plan in a form that would resolve any remaining regulatory deficiency issues. ADEQ responded that it was preparing to start the comment period, and that there was no time to engage in that type of discussion.
38. To provide some context to this response, ADEQ previously represented that the site had been properly investigated and the Ponds had been properly designed and constructed, and that there is no evidence of Pond leakage. Nonetheless, C&H offered to spend well in excess of \$100,000 to re-investigate the site geology, to re-engineer the Ponds with synthetic liners, and to compile such other

documentation as may be necessary to resolve any remaining issues regarding regulatory deficiencies. C&H merely wanted to ensure that its proposed work was adequate and would resolve ADEQ's concerns. ADEQ refused to engage in that type of discussion. ADEQ had its own agenda, which was to fast track to another decision to deny the Reg. 5 Permit. C&H firmly believes that ADEQ had no intention of working with C&H in good faith to address its concerns. It became obvious to C&H that ADEQ was intent on putting C&H out of business. C&H filed an appeal of the Second Permit Decision on September 7, 2018, immediately following the September 5, 2018 meeting with ADEQ.

39. C&H advised ADEQ of this Court's Judicial Stay, and in an abundance of caution (and under protest) C&H filed comments which included a work plan representing C&H's best efforts to describe the additional work it believed to be required, if that additional work would satisfy ADEQ. 5264-W Record. C&H received no feedback from ADEQ until Second Permit Decision, which again relied upon so-called "deficiencies" in the application, and in the additional work plan, principally related to the site geological investigation. C&H had sought to obtain that type of feedback months earlier, so the work plan could be properly tailored to address ADEQ's concerns. But that did not fit into ADEQ's plan to keep C&H in the dark so it could quickly deny the application for "deficiencies."
40. To provide some context to the expedited remand undertaken by ADEQ, it took ADEQ nearly a year (9 months) to issue the Draft Permit after the Reg. 5 application was deemed complete, and it took nearly another year (11 months) after the comment period closed to issue the Original Permit Decision. For the

Second Permit Decision that is the subject of this Appeal, ADEQ initiated public comment just twenty-four (24) days after the Commission's August 24, 2018, remand decision, and ADEQ's decision came just thirty-three (33) days after the comment period closed. ADEQ's November 19, 2018, decision had nothing to do with conducting a remand proceeding designed to provide C&H with a full and fair opportunity to address ADEQ's concerns regarding regulatory deficiencies. ADEQ never participated in the type of routine discussions between ADEQ and a permit applicant that are typically conducted to address concerns that ADEQ might have over an application. Rather, the remand was rushed to implement ADEQ's pre-conceived plan to reissue its denial decision as quickly as possible.

ISSUE NO. 5: ADEQ ERRED BY DETERMINING THAT THE C&H FACILITY REPRESENTS A "VERY HIGH RISK"

41. The contents of paragraphs 1-19, 33-40 and 63-72 are incorporated herein.
42. The Statement of Basis for the Second Permit Decision states that "the record demonstrates that this AWMS [animal waste management system] presents a very high risk."
43. The AWMFH defines a "very high risk" facility in Table 10-4 as less than 1500 feet from a public drinking water supply wells or less than 100 feet from a domestic well or a Class 1 stream. The C&H facility does not meet the definition of a very high risk AWMS.
44. The C&H facility is not a "very high risk" AWMS. ADEQ erred by concluding that the C&H AWMS presents a very high risk.

ISSUE NO. 6: ADEQ ERRED BY DETERMINING THAT THE C&H APPLICATION WAS DEFICIENT WITH RESPECT TO WATER QUALITY IMPACTS AND IMPAIRMENT

45. The contents of paragraphs 1-19, 33-40 and 63-72 are incorporated herein.
46. The Statement of Basis for the Second Permit Decision states that “ADEQ denies issuance of the permit after determining, based upon the information provided, that the permit application does not demonstrate full compliance with the permitting requirements. The record lacks necessary and critical information to support granting of the permit, and the record contains information that the operation of this facility may be contributing to water quality impairments of waters of the state.”
47. The information submitted by C&H is sufficient to demonstrate full compliance with the Reg. 5 permit requirements, and to the extent that additional documentation is necessary to meet regulatory requirements, C&H has committed to compile that information pursuant to an approved work plan, and present that information to ADEQ.
48. A Reg. 5 permit is a non-discharge permit and by definition cannot have any impact on water quality as that term is used in 40 CFR 122.44(d)(1)(i) and identified by ADEQ in its Second Permitting Decision. The record does not support any hydrological connection between the C&H facilities and any waters of the United States for which water quality impairment, as that term is used in 40 CFR 122.44(d)(1)(i) and as identified by ADEQ in its Second Permitting Decision, applies. 40 CFR 122.44(d)(1)(i) applies to federal NPDES permits, not state no discharge permits, and provides that “(i) Limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a

level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality.” To the extent that 40 CFR 122.44(d) applies to a Reg. 5 Permit, C&H’s operations under a Reg. 5 Permit would be no discharge operations which could not cause, contribute to or have a reasonable potential to cause, or contribute to an excursion above any water quality standard, including those identified by ADEQ in its Second Permitting Decision. Furthermore, C&H’s operations under the Reg. 6 Permit do not cause, contribute to or have a reasonable potential to cause, or contribute to an excursion above any water quality standard, including those identified by ADEQ in its Second Permitting Decision. ADEQ’s findings and the information relied upon to infer a hydrological connection between C&H’s operations and any water of the state or the United States are insufficient and not supported by a preponderance of the evidence, including but not limited to nitrate-N in the ephemeral stream and house well, and the findings of ADEQ in this regard in the Second Permit Decision are not supported by generally accepted scientific knowledge and engineering practices, and are in error.

ISSUE NO. 7: ADEQ ERRED BY DETERMINING THAT THERE ARE DEFICIENCIES IN THE GEOLOGICAL INVESTIGATION

- 49. The contents of paragraphs 1-19, 33-40 and 63-71 are incorporated herein.
- 50. ADEQ erred by stating in Statement of Basis for the Second Permit Decision that the geologic investigation undertaken by C&H is deficient.
- 51. The geologic investigation for the Ponds and land application fields is adequate and complies with the requirements of the AWMFH.

52. The Emergency Action Plan is adequate and complies with the requirements of the AWMFH.
53. The NMP follows and correctly implements the Arkansas Phosphorus Index (API) to identify land application rates and ADEQ erred by making findings regarding the land application sites and application rates that are not consistent with the API. Such findings include, but are not limited to findings regarding limiting land application to agronomic rates or to fields with soil test phosphorus in excess of 50 ppm.
54. ADEQ erred by concluding that a boring in the Hydrogeology Report supports a finding of epikarst in the relevant area of the ponds. The area beneath the Ponds was excavated and an engineered clay liner was installed. The relevant area beneath the Ponds was engineered and the soils installed for the Ponds are not "epikarst." There is no epikarst in the relevant area beneath the Ponds. Furthermore, C&H has submitted a work plan to install synthetic liners in the Ponds to provide additional protection that will address any regulatory deficiencies or legitimate concerns with respect to "epikarst."
55. Sufficient information was provided and is otherwise available to satisfy the AWMFH provisions regarding groundwater flow direction. Additionally, C&H has submitted a proposed work plan to further address groundwater flow, and to supplement the work plan to the extent that there are any regulatory deficiencies in the information available to ADEQ with respect to groundwater flow direction.
56. Sufficient information is available to satisfy the AWMFH provisions regarding borings within the pool areas. Additionally, C&H has submitted a proposed work

plan to further address the pool areas as part of the installation of synthetic liners, and to supplement the work plan to the extent that there are any regulatory deficiencies in the information available to ADEQ with respect to borings within the pool areas.

57. Sufficient information is available to satisfy the AWMFH provisions regarding Pond foundations and the lack of large voids. Additionally, C&H has submitted a proposed work plan to install synthetic liners that will further address Pond foundations and the lack of large voids, and to supplement the work plan to the extent that there are any regulatory deficiencies in the information available to ADEQ with respect to Pond foundations and lack of large voids.
58. Sufficient information is available to satisfy the AWMFH provisions regarding berm integrity. Additionally, C&H has submitted a proposed work plan to install synthetic liners and enhance the berms that will further address berm integrity, and to supplement the work plan to the extent that there are any regulatory deficiencies in the information available to ADEQ with respect to berm integrity.
59. Sufficient information is available to satisfy the AWMFH provisions regarding Pond construction quality assurance. Additionally, C&H has submitted a proposed work plan to install synthetic liners that will further address Pond construction quality assurance, and to supplement the work plan to the extent that there are any regulatory deficiencies in the information available to ADEQ with respect to Pond construction quality assurance.
60. Sufficient information is available to satisfy the AWMFH provisions regarding the assessment of land application sites, including the identification of high risk

areas. To the extent that there are any regulatory deficiencies in the information available to ADEQ with respect to the assessment of land application sites, C&H has offered to include that information in a work plan, and to supplement the work plan to the extent that there are any regulatory deficiencies in the information available to ADEQ with respect the assessment of land application sites.

61. Sufficient information is available to satisfy the AWMFH provisions regarding an adequate Operations and Maintenance Plan for the pond levees. Additionally, C&H has submitted a proposed work plan which addresses the Operations and Maintenance Plan for the pond levees, and has proposed to supplement the work plan to the extent that there are any regulatory deficiencies in the information available to ADEQ with respect to Operations and Maintenance Plan for the pond levees.
62. Sufficient information is available to satisfy the AWMFH provisions regarding an adequate Emergency Action Plan, and to the extent applicable a Pond levee integrity inspection schedule, and additional soil survey information. C&H has submitted an Emergency Action Plan, which also addresses a Pond levee integrity inspection schedule, and has proposed to supplement the Emergency Action Plan to the extent that there are any regulatory deficiencies in the Emergency Action Plan, and/or the Pond levee integrity inspection schedule, and soil survey information available to ADEQ.

ISSUE NO. 8-CERTAIN STATEMENTS CONTAINED IN THE RESPONSIVE SUMMARY DO NOT REFLECT THE RATIONALE FOR THE PERMIT DECISION AND SHOULD NOT BE CONSIDERED IN THIS APPEAL, BUT TO THE EXTENT THAT ANY OF THE

**RESPONSES TO COMMENTS ARE CONSIDERED, THEY ARE
INAPPROPRIATE TO SUPPORT THE PERMIT DECISION, THEY ARE
INCORRECT, AND RESPONDENT OBJECTS TO SUCH RESPONSES**

63. The contents of paragraphs 1-19 and 33-62 are incorporated herein.
64. The Second Permit Decision was based on alleged deficiencies in the application. To the extent that a response to comment does not relate to the Second Permit Decision, it is irrelevant to the this Appeal of the Second Permit Decision, and to the extent that a response to comment purports to make a substantive finding on any issue that purports to support the Second Permit Decision, C&H objects and disputes such finding as being incorrect and not supported by generally accepted scientific and engineering knowledge and practices. To the extent that the responses to comments are considered a substantive part of the Second Permit Decision, these responses are not appropriate to support the Second Permit Decision. The following are examples of issues addressed in the responses to comments that are incorrect.
65. The Responsive Summary states, in response to many comments, including comments from C&H, that the application was deficient because “the necessary geological investigations have not been performed at this facility in accordance with the AWMFH Section 651.0704(b)(4), Section 651 Table 10-4, and Appendix 10D.” AWMFH Section 651.0704(b)(4) states that “For foundations of earthfill structures, use at least four test borings or pits on the proposed embankment centerline, or one every 100 feet, whichever is greater.” C&H opened the entire proposed structure of the Ponds and observations did not reveal any underlying voids, fractures or anomalies. Table 10-4 provides “Criteria for siting,

investigation, and design of liquid manure storage facilities” and therefore applies to new facilities. ADEQ had previously permitted the siting, investigation, design and construction of the Ponds. Furthermore, based on the site investigation, the risk as identified in Table 10-4, and the criteria for clay liners in Appendix D, the Ponds were sited, designed and installed appropriately. Additionally, C&H proposed to add synthetic liners as a condition of approval of the Reg. 5 Permit, to the extent that ADEQ desired or required synthetic liners for the Ponds to address any additional perceived risk.

66. The Responsive Summary states, in response to many comments, including comments from C&H, that the application was deficient because “the necessary geotechnical investigations have not been performed at all land application sites in accordance with AWMFH 651.0504(a)-(n) and Table 5-3.” Chapter 5 of the AWMFH states: “Agricultural waste management systems should not be implemented without adequate and complete soil maps or soil interpretive information. If soil data or maps are inadequate or unavailable, soil survey information must be obtained before completing an agricultural waste management system plan.” The planner who prepared the NMP had sufficient soil interpretive information to comply with the AWMFH, to assess the criteria of Table 5-3, and to prepare a NMP that complies with the AWMFH.
67. The Responsive Summary states, in response to many comments, including comments from C&H, that the application was deficient because “The Emergency Action Plan did not address possible failure of the liner resulting from potential damage, such as pumping and agitation, liner desiccation, or any other

site-specific operational risks are not addressed, in accordance with AWMFH 651.0204(a), (b).” Subsection (a) states: “Development of an emergency action plan should be considered for waste impoundments where there is potential for significant impact from breach or accidental release. In addition, consideration should be given to actions to minimize damage from breach. Actions would include wellhead protection, dikes, and diversion channels. These actions should be taken to augment, not replace the measures to reduce the risk.” Prior to the Original Permit Decision, ADEQ approved the Emergency Response Plan and removed that item from the list of potential deficiencies. As part of its proposed work plan, C&H provided an enhanced Emergency Response Plan that included items to address the enhanced synthetic liner design of the liquid animal waste storage ponds. At no time prior to the Second Permit Decision has ADEQ indicated that its prior approval of the Emergency Response Plan was inadequate or needed to address additional items. The Emergency Response Plan is not deficient. To the extent that ADEQ believes that the Emergency Response Plan could be improved to address any regulatory deficiencies, C&H offered to work with ADEQ to make such improvements to the Emergency Response Plan through discussions on the work plan.

68. The Responsive Summary states, in response to comments from C&H, that the application was deficient because comments filed on behalf of C&H did not include engineering or geological stamps from professional engineers or geologists. None of the responsive summary statements in the Second Permit Decision are stamped by a professional engineer or professional geologist. Many

of the documents relied upon by ADEQ for its decision are not stamped by a professional engineer or professional geologist. Just prior to the initiation of the comment period ADEQ met with one of C&H's professional engineers, David McCormick and C&H's professional geologist, Quin Baber, both of whom are well known to ADEQ as a registered professional engineer and a registered professional geologist, respectfully, with considerable expertise in geological investigations and waste/wastewater storage pond design. Additional information has been provided by another of C&H's registered professional engineers, Dennis Carmen. Mr. Carmen, Mr. McCormick and Mr. Baber offered to work with ADEQ to develop a comprehensive work plan that would address ADEQ's concerns, and have proposed a work plan to address any regulatory deficiencies, including an additional geological site investigation, and appropriate documentation of the design and construction of the proposed synthetic liners for the Ponds, and have agreed to supplement the work plan as needed to address any regulatory deficiencies. ADEQ's refusal to engage in such discussions to develop an approved work plan was contrary to their obligations as a permitting agency.

69. The Responsive Summary cites information from the BCRET Quarterly Reports regarding nitrate-N and chloride data in ephemeral stream (BC4), and nitrate-N data in house well (W1) as "suggesting a hydrological connection to farm activities." The Responsive Summary also refers to algal blooms that "cause concern" on the Buffalo River, but that causation is being studied by USGS and others. USGS has recently reported that it has reviewed all of the available information, including that cited in the Responsive Summary, and has concluded

that there is not an identifiable connection between the C&H CAFO operations and water quality in Big Creek or the Buffalo River.

70. ADEQ misapplies the requirements of the AWMFH, which presents guidelines and recommendations for AWMFs. Chapter 7 of the AWMFH, Geologic and Groundwater Considerations, states that “This chapter provides guidance in a wide variety of engineering geologic issues and water quality considerations that may be found in investigation and planning of an AWMS.” With respect to 651.072, Engineering and Geology Considerations in Planning, the AWMFH states “This section provides guidance in determining what engineering geology considerations may need to be investigated for various waste management components (table 7–2).” With respect to the expertise of the individuals who implement Chapter 7 of the AWMFH, Chapter 7 states that: “The planners of agricultural waste management practices should be familiar with the principles of groundwater.” With respect to permeability, the AWMFH states: “Permeability can be measured in the laboratory or estimated based on the characteristics of the material.” With respect to the type and scope of geological investigation required, the AWMFH states: “The purpose of a preliminary site investigation is to establish feasibility for planning purposes. A preliminary site investigation also helps determine what is needed in a detailed investigation. A site investigation should be done only after local regulations and permit requirements are known. The intensity of a field investigation is based on several factors including:

- quality of information that can be collected and studied beforehand
- previous experience with conditions at similar

Sites

- complexity of the AWMS or site

Clearly defined objectives for investigation are essential in this phase. Table 7-2 may be useful in defining objectives. . . . For many sites the preliminary investigation and experience in the area are adequate to determine the geologic conditions, engineering constraints, and behavior of the geologic materials. Hand-auger borings and site examination often provide adequate subsurface information so that a detailed subsurface investigation is not required. A detailed investigation must be scheduled if reliable information for design cannot be obtained with the tools available during the preliminary investigation phase.” These requirements clearly apply prior to siting, design and construction of the AWMF. When a detailed investigation is warranted, the AWMFH states: “The purpose of a detailed geologic investigation is to determine geologic conditions at a site that will affect or be affected by design, construction, and operation of an AWMS component. Determining the intensity of detailed investigation is the joint responsibility of the designer and the person who has engineering job approval authority. Complex geology may require a geologist. Detailed investigations require application of individual judgment, use of pertinent technical references and state-of-the-art procedures, a timely consultation with other appropriate technical disciplines.” The geological investigation previously undertaken and approved by ADEQ meets these and all requirements of the AWMFH, and the enhanced geological investigation and enhanced berm and liner system proposed go far beyond the requirements of the AWMFH. Nonetheless, C&H has offered to

work with ADEQ to develop a comprehensive work plan that would address ADEQ's concerns regarding the geological investigation, and have proposed a work plan to address any regulatory deficiencies, including an additional geological site investigation, and have agreed to supplement the work plan as needed to address any regulatory deficiencies.

71. The Responsive Summary includes the following statement in response to many comments: "The Department made this permitting decision in accordance with state laws and APC&EC Regulation 5, Liquid Animal Waste Management Systems. Upon consideration of the completed permit application, the public comments on the record, and additional data and information submitted during the permitting process, the Department denies issuance of the permit." This response, and other environmental standards cited in the Responsive Summary and relied upon for the Second Permitting Decision are not supported by generally accepted scientific knowledge and engineering practices as required by Regulation 8, Section 8.211(A)(2).
72. The Responsive Summary states "While the applicant may have styled the application as an administrative change, the Department does not have any available statutory or regulatory mechanism to administratively change the coverage issued pursuant to an APC&EC Regulation 6 general permit to an individual permit under APC&EC Regulation 5." The Reg. 5 Permit application was submitted as an application to administratively change from the Reg. 6 Permit to a Reg. 5 Permit, it was accepted by ADEQ and processed as an application to administratively change from the Reg. 6 Permit to a Reg. 5 Permit,

consistent with prior procedures for transferring from a general permit to an individual permit. See, 18-001-P Record, C&H's *Brief in Support of Request for Oral Argument and Alternative Minute Order*, Docket 18-001-P, and exhibits attached thereto. ADEQ's statement that it could not process C&H's application as an application to administratively change from the Reg. 6 Permit to a Reg. 5 Permit is incorrect.

ISSUE NO. 9: ADEQ ERRED BY FAILING TO RESPOND TO ALL COMMENTS

73. The contents of paragraphs 1-19 are incorporated herein.
74. ADEQ is required, by Regulation No. 8, Section 8.211(A)(2) to include in its final decision "a response to each issue raised in any public comments received during the comment period, if any." ADEQ failed to respond to all of the issues raised in the comments filed by Jimmy Kegs, Mark Weathers, Ken and Virginia Hulsey, Joey Rhoda, Mitchel McCutchen, Bob Shofner, Dustin Corvell, Cassie Davis, Pam Schmick, Stuart Brasel, Fawn Kurtzo, Charles Denver, the Arkansas Pork Producers, C&H Hog Farms, Inc. and the Arkansas Farm Bureau.
75. The Permit Decision should be reversed and remanded with instructions that ADEQ fulfill its responsibility to address all issues raised in the above enumerated comments.

WHEREFORE, to the extent that ADEQ had jurisdiction or authority to make the Second Permit Decision, C&H requests an adjudicatory hearing and the opportunity to present evidence and oral argument before the Arkansas Pollution Control & Ecology Commission with respect to the Second Permit Decision that the Commission find that ADEQ's decision to not issue Individual No-Discharge Permit No. 5264-W was inappropriate, was arbitrary, capricious, not in

accordance with state and federal law, was in violation of the Arkansas and United States Constitution, and was not supported by generally accepted scientific knowledge and engineering practices, and was contrary to past practices; and that the Second Permit Decision be stayed to the extent that it would require C&H to cease operations on December 19, 2018; that, consistent with the Judicial Stay, all matters relating to C&H's application for a Reg. 5 permit be stayed pending the final resolution of all appeals pending or that may be filed by C&H or any other party to this proceeding; and for such other relief to which it may be entitled. Furthermore, pursuant to Reg. 8.612(C), C&H requests that the Chairman of the Commission issue a stay that will continue until the next regularly scheduled Commission meeting.

Respectfully submitted,



WILLIAM A. WADDELL, JR.
ARK. BAR ID NO. 84154
FRIDAY, ELDREDGE & CLARK, LLP
400 West Capitol Avenue, Suite 2000
Little Rock, AR 72201
(501) 370-1510 (telephone)
(501) 244-5342 (facsimile)
waddell@fridayfirm.com

AND

Charles R. Nestrud
ARK. BAR ID NO. 77-095
BARBER LAW FIRM, PLLC.
425 W. Capitol Ave., Suite 3400
Little Rock, Arkansas 72201
(501) 372-6175

Attorneys for C & H Hog Farms, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing pleading upon the following attorneys of record by U.S. Mail, postage prepaid, this 13th day of December, 2018:

Becky Keogh, Director

via

Michael McAlister

Attorney Supervisor

ARKANSAS DEPARTMENT OF

ENVIRONMENTAL QUALITY

5301 Northshore Drive

North Little Rock, AR 722118-5317


WILLIAM A. WADDELL, JR.