

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

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

**DOCKET NO. 18-001-P**

**MOTION TO INTERVENE AND REQUEST FOR HEARING**

Comes now the Ozark Society, Inc., Dr. Alan Nye, Robert Cross and Dr. David Peterson (Movants), and for their Motion to Intervene and Request for Hearing state:

1.       The Ozark Society was founded in 1962 by Dr. Neil Compton of Bentonville and a group of associates for the immediate purpose of saving the Buffalo River from dams proposed by the U. S. Army Corps of Engineers. Ozark Society founding members, working with elected officials, helped get the National Park Service to survey the Buffalo River area and then began to campaign for the creation of the “Buffalo National River” as an alternative to the dams. It took ten years, but Congress passed legislation to create the nation’s first “national river” in 1972 and it is now one of mid-America’s most outstanding river-oriented attractions. Since its designation as a National River, the Ozark Society has worked to preserve the Buffalo River’s pristine water quality and wild and scenic nature from all threats: agricultural and human waste, unneeded or poorly designed road building, haze, odors, and other air quality issues, fracking intrusion, overdevelopment and over-use in the park itself. The Ozark Society has a three-fold mission of conservation, education, and recreation. The Ozark Society has approximately 1,008 dues paying members, approximately 80 percent of whom are from Arkansas. Members of the Ozark Society enjoy all forms of recreation allowed on the Buffalo River.

2.       Dr. Alan Nye is a toxicologist who resides at 12 Platte Drive, Maumelle, Arkansas 72113. His telephone number is 501-258-7137. Dr. Nye is an adjunct faculty member of the UAMS Fay W. Boozman College of Public Health. Dr. Nye has been a member of the Ozark

Society for over 30 years and is a past president of the Ozark Society. Dr. Nye and his wife own property near the Buffalo River. Dr. Nye has canoed the Buffalo River on many single-day and multi-day trips with his family and friends since the late 1980s and has also day hiked and backpacked many times on the Buffalo River Trail. Dr. Nye enjoys and seeks to preserve the unique characteristics of the Buffalo River, including recreational and aesthetic values associated with this Outstanding National Resource Water. Water quality of the Buffalo River is of paramount importance to Dr. Nye.

3. Robert Cross is an Emeritus Professor of Chemical Engineering at the University of Arkansas in Fayetteville. He resides at 315 North Fletcher Avenue in Fayetteville, Arkansas 72701, and his telephone number is 479-466-3077. He was previously a Research Professor of Chemical Engineering at the U of A and before that was the President and Technical Director for many years of Romicon, Inc., a subsidiary of the Rohm and Haas Company, located in Boston. He was involved in the development, manufacture, and sale of advanced separations equipment including membrane technology for water and waste treatment. He is currently working on the development of a more economical and reliable process to produce drinking water for households in third-world countries. His education includes a B.S.Ch.E. from the U of A and a M.S.Ch.E. from M.I.T. He has been a member of the Ozark Society for 20 years and has served as Vice President for six years and President for six years. He is currently a State Director for Arkansas. He has hiked for many years in the Buffalo National River area as well as the Upper and Lower Buffalo National Wilderness and has canoed most sections of the Buffalo River.

4. Dr. David Peterson is a retired math professor from UCA, who lives at 56 Ridge Drive, Greenbrier, Arkansas 72058. His telephone number is 501-679-2935. He and his family have been involved with the Ozark Society since 1978. Dr. Peterson is the immediate past

president of the Pulaski Chapter of the Ozark Society and currently is president of the Ozark Society. He and his wife have hiked and canoed the entire length of the Buffalo River, and explored many tributaries as well. As an avid fisherman, Dr. Peterson admires the native smallmouth bass in the watershed and realizes that water quality is paramount in preserving this resource. Given his avocation as a statistician, he has spent many hours modeling nutrient flow in the Buffalo River, its tributaries, and Big Creek in particular.

5. Movants submitted detailed, timely technical comments on the draft permit on April 6, 2017, at 2:35 pm. Exhibit "1." Movants' comments total 99 pages with reference to thousands of pages of technical documents that support their request that ADEQ deny the application for a Regulation No. 5 "no discharge" permit for the C&H swine concentrated animal feeding operation (CAFO). Movants each have an interest that would be adversely affected by a ruling in favor of C&H Hog Farms, Inc. (C&H).

6. On January 10, 2018, the ADEQ issued a Notice of Final Permitting Decision denying the application of C&H Hog Farms, Inc. for a permit under APC&EC Regulation 5 for Permit No. 5264-W, AFIN 51-00164.

7. On January 18, 2018, C&H Hog Farms, Inc. filed with the Secretary of the Commission a Request for Adjudicatory Hearing and Commission Review of the decision of ADEQ to deny the abovementioned permit. Such Request was assigned the Docket number set forth above.

8. In addition to the reasons set forth in ADEQ's decision to deny C&H's application for a Regulation No. 5 permit, Movants provided other legal, scientific, practical and technical reasons supporting permit denial. Unless allowed to participate as parties to this proceeding, these

additional reasons for denying C&H's permit application may not be developed or considered by the Commission.

9. Reg. 8.601 provides in part that:

**Reg. 8.601 PARTIES**

The following persons shall, as applicable, be made a party to any adjudicatory proceeding initiated pursuant to this Regulation:

\* \* \*

(C) In a proceeding following issuance of a final permitting decision, any person who has submitted public comments on the record during the public comment period and timely filed a Request for Hearing with the Commission Secretary; (emphasis added)

10. Movants satisfy the requirements of Reg. 8.601 in that they submitted comments during the public comment period and are filing a timely request for hearing on ADEQ's final permitting decision.

11. In addition to the basis for participation available to Movants under Reg. 8.601, Reg. 8.604 provides for Movants' intervention:

**Reg. 8.604 PERMISSIVE INTERVENTION**

- (A) Any person who submitted comments during the public comment periods may petition in a timely manner for permissive intervention in an adjudicatory hearing.
- (B) If no public comment period is provided, any person who reasonably considers himself or herself injured in his or her person, business, or property by any decision issued by the Director may also timely petition for permissive intervention in an adjudicatory hearing on the matter.
- (C) The contents of a petition for Intervention shall be the same as that set forth in Reg. 8.603(C)(1)(a), (b), (c), (d), and (e).
- (D) A Petition for Intervention may be denied if it is not filed in the form and manner set out in Reg. 8.603(C)(1).

(E) The Administrative Hearing Officer's denial of a Petition to Intervene shall stand unless a written objection is filed with the Commission Secretary within ten (10) business days of the ruling. The Commission Secretary shall place the objection for oral argument before the Commission.

12. Movants meet the requirements of Reg. 8.604 for intervention

13. Movants submitted comments during the public comment period.

14. Reg. 8.604(B) is inapplicable.

15. This motion satisfies the applicable requirements of Reg. 8.604(C) in that it contains the information required in Reg. 8.603(C)(1)(a), (b), (c), (d), and (e), where applicable.

16. The action for which intervention is sought is C&H's Request for Adjudicatory Hearing and Commission Review of ADEQ's final decision to deny C&H Hog Farms' application for a no discharge permit filed January 18, 2018.

17. The date of the final permitting decision C&H requested Commission review of is January 10, 2018.

18. Per Reg. 8.603(C)(1)(c), Movants will rely on the following facts and legal issues to support ADEQ's final permitting decision to deny C&H's application for a Regulation No. 5 permit, by showing that:

a. The decision to deny the permit is proper for the reasons contained in the Statement of Basis, Response to Comments and Final Permitting Decision issued January 10, 2018;

b. The decision to deny the permit is proper for the reasons contained in Movants' public comments which are supported by the List of References that were attached;

c. The decision to deny the permit is correct under APC&EC Regulation No. 5. C&H failed to comply with the mandatory requirements of Reg. 5.402 (See "Detailed

Comments of Ozark Society, Dr. Alan Nye, Dr. David Peterson and Mr. Robert Cross,” pp. 36-82).

d. Section 5.402 of Reg. 5 states:

(A) Designs and waste management plans shall be in accordance with this Chapter and the following USDA Natural Resource Conservation Service technical publications:

- Field Office Technical Guide, as amended
- Agricultural Waste Management Field Handbook, as amended. (Emphasis added);

e. The designs of the C&H CAFO and its waste management plans were not in accordance with the requirements of Reg. 5.402. An agency must follow its own regulations. *Stueart v. Ark. State Police Comm’n*, 329 Ark. 46, 945 S.W.2d 377 (1997). Regulation No. 5 requires CAFOs to be designed in accordance with the Agricultural Waste Management Field Handbook, as amended. C&H’s CAFO is not designed in accordance with the Agricultural Waste Management Field Handbook, as amended. For this reason alone, the decision to deny the permit must be upheld.

f. The issues raised by C&H in its Request for Hearing are insufficient to support a decision to overturn the final permitting decision.

**(1) C&H Issue No. 1: (Denial of the Permit was Not an Option).**

***Movants’ Response:***

(a) In its “Issue No. 1,” C&H makes the novel and unsupported claim that, “When a timely application has been filed, ADEQ lacks authority to refuse to issue a new permit to a facility that has a permit, and has timely applied for renewal of that permit.” See C&H Hearing Request at p. 6. No authority is cited to support this argument and it is without merit.

(b) Reg. 6.201, cited by C&H in its Request for Hearing and Commission Review, only authorizes the holder of an expired NPDES permit to continue to operate under that expired permit if two conditions have been met: (i) the permittee has filed a timely and complete application for a new permit prior to the expiration date; and (ii) the Director of ADEQ has not issued a new permit prior to the expiration date of the previous permit.

(c) The C&H CAFO was initially granted coverage (ARG590001) under a general NPDES permit (ARG590000). This permit expired on October 31, 2016.

(d) ADEQ's authority to issue general permits is pursuant to Ark. Code Ann. § 8-4-203(m), which also requires ADEQ to "publish its final decision to renew or not renew a general permit at least one hundred and eight (180) days before the expiration date of the general permit."

(e) Prior to expiration of ARG590001, C&H submitted an application to renew coverage under this permit. It also submitted an application for a Regulation No. 5 individual permit.

(f) ADEQ informed C&H on May 4, 2016, that it was not renewing the general permit. Ark. Code Ann. § 8-4-203(m)(5)(D) provides that "in the event the department makes a decision to not renew the general permit, existing coverage under the general permit shall continue under the terms of the expired permit until a final decision is reached for an individual permit."

(g) Based on the fact that C&H had applied for an individual permit under Reg. 5, C&H was allowed to continue operations under the expired Reg. 6

permit during the pendency of the Reg. 5 application. Because ADEQ terminated the Reg. 6 general permit that had been the authority for C&H's operations, no Reg. 6 general permit was available to C&H.

(h) Reg. 6.201 does not require ADEQ to issue a new permit to the holder of a permit that has expired, even if the permit applicant submits a timely and complete application for a new permit pursuant to Reg. 6.201. ADEQ may, in its judgment, deny any permit application. C&H's allegation that Reg. 6.201 deprives ADEQ of authority to refuse to issue a new permit to a facility that has had a previous permit when a timely application for a new permit has been filed is without legal justification or support.

(i) Ark. Code Ann. § 8-4-203(m)(5)(D) clearly contemplates permit denial. It states that coverage under an expired general permit that is not renewed only lasts "until a final decision is reached for an individual permit." It does not state that coverage exists until an individual permit is issued or that ADEQ lacks authority to deny a permit application that does not meet the requirements of the Commission's regulations. The statutory language terminating coverage when "a final decision is reached for an individual permit" clearly gives ADEQ the authority to deny a permit application for an individual permit (notwithstanding the fact an earlier permit was issued). When ADEQ denied C&H's Reg. 5 permit application, coverage under the CAFO general permit terminated. C&H conceded this when it sought a stay of the permit denial and permission to continue operating under the terminated permit on January 17, 2018.



(j) C&H's authority to operate its swine CAFO under the Reg. 6 general permit terminated when ADEQ made its final decision to deny an individual permit to C&H on January 10, 2018. C&H is authorized to continue operating its CAFO by the Commission's January 17, 2018 decision allowing it to continue operating under the expired Reg. 6 permit pending appeal of ADEQ's final permitting decision. Once ADEQ's final permit decision is affirmed, C&H's authority to operate will cease.

(k) If C&H is seeking review of ADEQ's decision to not renew the general Reg. 6 permit, the time for appealing that decision (30 days from May 4, 2016) has expired. Any attempt to appeal ADEQ's decision not to renew permit ARG590000 is untimely. Ark. Code Ann. § 8-4-205(a).

**(2) C&H Issue No. 2: (The Decision Was Procedurally Flawed Due to Failure to Provide Notice and Comment)**

***Movants' Response:***

(a) ADEQ is required by law and regulation (Reg. 8.207) to provide public notice and opportunity for public comment on a draft permitting decision. That public notice and opportunity for public comment was provided in this case, and extensive public comments were received.

(b) The purpose of public notice and comment is to obtain information from the public as well as the permit applicant regarding the sufficiency of the application and whether, considering all legal, scientific, technical and factual issues, the permit should be granted or denied. The public's comments are available to the permit applicant during the review process. Here, C&H was granted over

three months of additional time after the public comment period closed to submit additional information to ADEQ in an attempt to support its application.

(c) There is no statutory or regulatory requirement that a separate or subsequent public notice and opportunity to comment be made available by ADEQ in the event that, as here, ADEQ determines to deny a permit after ADEQ's review and consideration of the public comments. Reg. 8.211(A)(1) provides in relevant part that "The Director's decision shall be made upon consideration of the completed application, *the public comments on the record*, if any, and any other materials provided by law or regulation applicable to the application or other matter to be considered in the decision."

(d) Any due process claim that C&H may have has been satisfied by ADEQ's extending it an opportunity to submit additional information to ADEQ to support its application after the close of the public comment period.

(e) ADEQ complied with all applicable laws and regulations in making its final permitting decision, and its denial of the permit is supported in the Response to Comments, Final Permitting Decision and Statement of Basis. There is no requirement for a second round of public notice and comment when the final decision is to deny a permit.

**(3) *C&H Issue No. 3: (The Permit Decision Was Arbitrary and Capricious and ADEQ Should Be Estopped From Denying the Permit for the Reasons Stated in the Statement of Basis)***

***Movants' Response:***

(a) C&H's characterization that "When ADEQ issued the Draft Permit, it represented that it has all the information required to do so, ... ." is erroneous.

ADEQ's issuance of a Draft Permit was based upon its review and understanding of the information submitted to it by C&H, without consideration of public comment. The purpose for public comment is to inform the agency regarding the adequacy of the application and its proposed decision on that application. ADEQ is required by law to respond to comments in a manner that "manifest reasoned consideration of the issues raised by the public comments and shall be supported by appropriate legal, scientific, or practical reasons for accepting or rejecting the substance of the comments in the department's permitting decision." Ark. Code Ann. § 8-4-203(e)(2)(A)(i). If ADEQ cannot change a proposed decision based on public comments, the opportunity for public comment would be meaningless.

(b) In Paragraph 19 of its Request for Adjudicatory Hearing that C&H claims that, "Within days of issuing the Permit Decision, ADEQ represented that it had all of the additional information it required, and without providing any notice or an opportunity to respond, ADEQ denied the permit for the purported reason that information was lacking." This argument ignores the history of this permit. ADEQ gave C&H an opportunity to supplement its application and address the deficiencies that existed in its application as demonstrated by the following events:

(i) The period for public comment on C&H's permit opened on February 15, 2017, and ended on April 6, 2017 (including a 20-day extension), and included a public meeting and hearing on March 7, 2017.

(ii) Six months later, on September 19, 2017, ADEQ issued a Supplemental Information Request to C&H, and provided a period of 90 days until December 18, 2017, to respond.

(iii) C&H provided additional information on December 6, 2017 (nine months after the close of the public comment period), and requested 90 more days to provide additional information.

(iv) ADEQ replied to C&H's request on December 14, 2017, by extending the deadline for providing additional information another two weeks (to December 29, 2017.) C&H then provided additional information to ADEQ by this deadline.

(v) During this approximately nine month period from the close of the public comment period to the final permitting decision on January 10, 2018, ADEQ was reviewing the submissions of information and data by C&H and the thousands of comments received from the public. C&H had ample opportunity to provide the additional information that was required by Regulation No. 5 (and as noted in the public comments, not present in the permit application) that was needed to meet its obligations to submit an application that complies with the requirements of Regulation No. 5 (and requested by ADEQ). As noted in the Response to Comments, Statement of Basis and Final Permitting Decision, C&H failed to overcome the deficiencies described in public comments and on which ADEQ based its final permitting decision.

(vi) C&H attempts to shift the burden of collecting all necessary data and information to support the permit decision to ADEQ. The burden of preparation and support of the permit application is, in all cases, on the permit applicant. (See Memorandum to Applicant for Permit Number

5264-W, from Robert E. Blanz, Ph.D. P.E., ADEQ Chief Technical Officer, appearing on ADEQ website relative to this Permit).

(vii) The technical information required to be submitted in support of an application for a Reg. 5 permit is contained in Reg. 5.401 to 5.407. While ADEQ may be requested to provide information or advice (which C&H acknowledges that it requested in considerable amount), the ultimate responsibility for developing and providing the information is upon C&H, and it cannot claim estoppel against ADEQ if that responsibility is not met.

**(4) *C&H Issue No. 4: (The 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 the Responses to Comments Are Considered, They Are Inappropriate to Support the Permit Decision.)***

***Movants' Response:***

(a) C&H seems to argue that ADEQ's Response to Comments, Statement of Basis and Final Permitting Decision are not sufficiently detailed to support denial of the permit. C&H acknowledges in Paragraph 21 of its Request for Hearing and Commission Review that ADEQ provides "vague references" to information that is lacking in its application, such as:

- (i) a groundwater flow study;
- (ii) geologic investigation of the waste storage ponds and berms;
- (iii) compaction test and permeability analysis;
- (iv) inadequate documentation of compliance with the Agricultural Waste Management Field Handbook with respect to the presence of karst;

- (v) application of waste in excess of agronomic need;
- (vi) the impact of sudden breach or accidental release for waste impoundments;
- (vii) an emergency action plan for waste impoundments;
- (viii) application of waste on flood prone and sloping 8-15% fields;
- (ix) the use of injection or incorporation; and
- (x) proximity of a waste impoundment to sensitive ground water areas.

(b) Reg. 8.211 provides that “The Director’s final decision shall include a response to each issue raised in any public comments received during the public comment period, if any.” Further specific information is required in the event of any discharge limit, emission limit, environmental standard, analytical method or monitoring requirement, none of which are applicable to this issue. Standards and requirements contained in Reg. 5.401 *et seq.* are contained in the regulation, and the response to comments regarding such matters are satisfied by reference to the regulation, as C&H acknowledges was done when ADEQ stated in its Response to Comments that “The Department made this permitting decision in accordance with state laws and APC&EC Regulation 5, Liquid Animal Waste Management Systems.”

(c) Further, C&H acknowledges that ADEQ responded to comments by reference to items listed in subparagraph (a) above. These include ten substantive and significant deficiencies in C&H’s permit application (which C&H is obligated

to prepare and support with proper and adequate documentation). C&H complains that ADEQ failed to make any “substantive findings” about those deficiencies. It is unclear what “substantive findings” C&H would have ADEQ make on any of those issues, particularly where inadequate information was provided. However, it is sufficient that ADEQ determined that adequate information had not been presented upon those issues and that the information required by Regulation 5 is missing.

g. Movants will demonstrate through expert witness testimony, scientific studies, expert reports and other admissible evidence, that C&H’s failure to conduct a hydrogeological investigation and to use such an investigation to design its waste management system in a manner that takes into account the hydrogeology of the facility’s location violates APC&EC Regulation No. 5 because it is not in accordance with the requirements of Regulation No. 5 and the USDA Natural Resource Conservation Service’s technical publications listed in Regulation No. 5, the Field Office Technical Guide, as amended, and the Agricultural Waste Management Field Handbook, as amended.

h. The decision to deny the permit should be upheld based on the fact that the operation of the C&H CAFO is causing or contributing to water quality degradation in Big Creek, the Buffalo River and the karst aquifer that feeds these two streams. (See “Detailed Comments of Ozark Society, Dr. Alan Nye, Dr. David Peterson and Mr. Robert Cross,” pp. 1-27). Water quality monitoring demonstrates that C&H has caused or contributed to a measurable increase in nutrients in the receiving streams and degradation in water quality as a result. Causing or contributing to water quality degradation violates the Clean Water Act’s anti-degradation provisions. In addition, the discharge of pollutants to “Waters of

the State” (both surface and groundwater) violates the no-discharge provisions of APC&EC Regulation No. 5.

i. The decision to deny the permit should be upheld based on the fact that C&H did not address deficiencies in its facility design and waste management plan identified by the 2014 review by a panel of experts. (See “Detailed Comments of Ozark Society, Dr. Alan Nye, Dr. David Peterson and Mr. Robert Cross,” pp. 28-35).

j. The decision to deny the permit should be upheld based on the fact that C&H’s permit application, if granted, would violate Reg. 5.901’s prohibition on increasing the size of a swine CAFO in the Buffalo River Watershed. (See “Detailed Comments of Ozark Society, Dr. Alan Nye, Dr. David Peterson and Mr. Robert Cross,” pp. 55-57).

k. The decision to deny the permit should be upheld for all the reasons contained in the Detailed Comments of the Ozark Society, Dr. Alan Nye, Dr. David Peterson and Mr. Robert Cross, as well as for the reasons contained in public comments submitted by other commenters, including, without limitation, the Buffalo River Watershed Alliance, Mr. Gerald Delevan, Ms. Carol Bitting and Mr. Ray Quick. These legal and factual objections are incorporated herein by reference and will be raised in support of Movants’ position that the permit was properly denied.

19. Subsection (C)(1)(d) of Reg. 8.603 is not applicable to this request.

20. A copy of this pleading is being served on all appropriate parties identified in Reg. 8.601.

21. ADEQ does not oppose Movants’ participation in this proceeding.

22. Allowing Movants to participate in this proceeding will not cause delay or prejudice to any party. Movants are represented by experienced counsel who will coordinate with counsel



for ADEQ and C&H and present evidence to support the permit decision that is neither cumulative nor redundant to ADEQ's decision to deny the permit. Denying this request will prejudice the rights of Movants to participate in upholding permit denial which, if successfully challenged, will impact the Buffalo National River, a resource that, as shown above, Movants have a substantial interest in preserving.

23. This motion is timely.

24. It is a "basic jurisprudential assumption that the interest of justice is served when all parties interested in the controversy are afforded an opportunity to be heard." *UHS of Arkansas, Inc. v. Sherwood*, 296 Ark. 97, 105, 752 S.W.2d 36 (1988). Here, Movants' history with protecting and preserving the Buffalo River is such that the interests of justice are served by allowing their participation in this matter.

25. Movants' interests may not be adequately represented by the parties to this proceeding. C&H's interests are adverse to Movants' interests. While Movants anticipate that their interests will be aligned with ADEQ in its decision to deny the permit, the interests of ADEQ and Movants may not be completely aligned in that Movants set forth grounds for permit denial in their public comments that ADEQ does not appear to support. This includes, without limitation, the issues raised in paragraph 18, subparagraphs i., j., & k. of this Motion, which were either rejected or ignored by ADEQ.

26. C&H's Request for Adjudicatory Hearing and Commission Review should be dismissed for failure to comply with Reg. 8.603(C)(1)(c) in that its hearing request fails to set forth "A complete and detailed statement identifying the legal issues and factual objections being appealed."

For the reasons set forth herein, Movants pray that they be granted party status and allowed to intervene in this permit appeal.

Respectfully submitted,

By: 

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### **CERTIFICATE OF SERVICE**

I, Samuel E. Ledbetter, hereby certify that a true and correct copy of the Motion to Intervene and Request for Hearing was sent via electronic mail this 26th day of January, 2018, to the following:

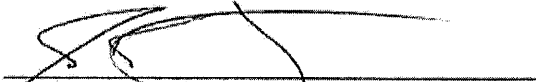
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