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

**IN THE MATTER OF BELLA VISTA VILLAGE PROPERTY OWNERS ASSOCAITION, INC.** **DOCKET NO. 19-004-MISC**

**THOMAS FREDERICKS'S AND FREDERICKS CONSTRUCTION COMPANY, INC.'S JOINT REPLY TO THE BELLA VISTA PROPERTY OWNERS ASSOCIATION'S RESPONSE TO MOTIONS TO DISMISS**

Come now Respondents Thomas Fredericks ("Mr. Fredericks") and Fredericks Construction Company, Inc. ("Fredericks Construction"), a dissolved entity under the laws of Arkansas, by and through their attorneys PPGMR Law, PLLC, and submit this joint reply to the Bella Vista Property Owners Association, Inc.'s ("POA") Response Mr. Frederick's and Frederick Construction's Motions to Dismiss.

The POA's Response is long in argument but short on meaningful explanation. Much of the POA's Response is a diversion, at one point even claiming that stumps constitute hazardous waste under state law. Nothing contained with the POA's filings identifies any new, material piece of evidence that Director Keogh failed to consider when executing Mr. Frederick's CAO. *See* Ark. Code Ann. § 8-4-103(d)(4)(A-B). The POA agrees that it must shoulder this burden. *See* POA Response at 2. The Commission should dismiss the POA's appeal since it has failed such a straightforward hurdle.

## I. Most of the POA's Arguments are Patently Meritless

Mr. Fredericks's Motion to Dismiss explained that every date mentioned in the POA's Request for Hearing regarding a specific piece of evidence was prior to the day when DEQ executed Mr. Frederick's CAO (September 11, 2019). Director Keogh had knowledge of these items when executing Mr. Frederick's CAO. The POA does not dispute this reality. Instead, it now

claims that Director Keogh failed to "consider" this evidence even though she had knowledge of these documents.

Such an argument is difficult to comprehend. At one point, the POA claims that Director Keogh "was aware of the POA's administrative order, but she did not actually consider it as required by Regulation 8." POA Response at 5-6. This argument cannot be taken as true. Not only does Mr. Frederick's CAO reference the POA's CAO, but it also quotes from that document. *See* Ex. 1 to POA's Req. for Hearing at ¶ 10. Director Keogh signed both CAOs. The POA is really arguing that Director Keogh does not read the things that she signs. The Commission is well-versed with Director Keogh's work and can plainly see this nonsense for what it is.

## II. Pieces of Evidence Identified by the POA

The POA has identified only 4 items that it claims meet the "material evidence" burden imposed by state law and APC&EC Reg. 8.611: (1) a September 5 report by ADEQ identifying "black plastic pieces on the soil at the Stump Dump"; (2) ADEQ's own correspondence with BTS Equipment's counsel; (3) a January 2019 report by DEQ's contractor identifying certain nonhazardous materials on site; and (4) "inorganic materials that the POA uncovered at the Stump Dump… including tires, trace amounts of metals, and a mattress which the POA has evidence was dumped by Fredericks."[1] *See* POA Response at 6.

DEQ and Director Keogh were aware of this evidence on September 11, 2019. None of it is "new." Ark. Code Ann. § 8-4-103(d)(4)(A-B). No explanation has been provided why any of it is "material" to Mr. Frederick's CAO. *Id*. This "evidence" is simply not sufficient to meet the required pleading standard. Ark. R. Civ. P. 8(a).

[1] While the POA repeatedly references "inorganic materials," that term is not contained within RATFA and is not relevant to the Fredericks CAO in any manner whatsoever.

The legislative and gubernatorial actions referenced by the POA all occurred prior to September 11, 2019. While the POA references DEQ emergency orders, all of these occurred prior to September 11 and Director Keogh is well-aware of DEQ's official conduct. Director Keogh considered all of this information when executing Mr. Frederick's CAO; most of it is referenced within the CAO itself. *See* Fredericks CAO, Ex. 1 to Req. for Hearing, at Finding of Facts and Conclusions of Law ¶¶ 8 & 10; POA CAO, Ex. 2 to Req. for Hearing at generally and Recitals & Premises Paragraph. Importantly, the POA has no evidence to the contrary and it bears the burden at this point. Ark. Code Ann. § 8-4-103(d)(4)(A-B).

The POA knows that it is grasping at straws. Tellingly, it has promised to "supplement the record with additional unconsidered evidence to further support this contention before the Commission." POA Response at 6. Arkansas law requires the POA to satisfy its pleading burden *within* the Request for Hearing in order to even appear before the Commission. Ark. R. Civ. P. 8(a); Ark. Code Ann. § 8-4-103(d)(4)(A-B); *Country Corner Food and Drug, Inc. v. First State Bank and Tr. Co. of Conway, Arkansas*, 332 Ark. 645, 652, 966 S.W.2d 894, 897 (1998) (claimant "must plead sufficient facts to support all [] elements" of a claim); *see also* Minute Order No. 19-10, *In Re Great Lakes Chemical Co.*, APC&EC Doc. No. 19-003-MISC (June 28, 2019). A claimant cannot sidestep a failure to state sufficient facts by promising to produce some unidentified piece of evidence at a later, unidentified time.[2] Since the POA has failed to identify any material evidence that Director Keogh failed to consider, the Commission should dismiss its Request for Hearing.

[2] Should this be allowed, it would render Arkansas Rule of Civil Procedure 12(b)(6) meaningless and encourage frivolous suits.

### III. The POA's CAO Was Considered by Director Keogh

The POA appears to center much of this appeal on a claim that its CAO contradicts Mr. Frederick's CAO. While such an argument depends heavily on a legal interpretation that does not jive with Arkansas law,[3] the POA's interpretation of its CAO is irrelevant under the pertinent regulation and state law as it concerns Mr. Frederick's CAO. *See* APC&EC Reg. No. 8.406. The record is clear that Director Keogh knew the terms of the POA's CAO and considered it when executing Mr. Frederick's CAO in September. *See* Ex. 1 to POA's Req. for Hearing. According to state law, that is the beginning and end of this matter. Ark. Code Ann. § 8-4-103(d)(4)(A-B).

While the POA disagrees with Director Keogh's characterization of its CAO, that is a question of interpretation appropriate only for judicial review.[4] It has nothing to do with the question of whether Mr. Frederick's CAO was properly issued, which is the pertinent standard for this appeal. *See* APC&EC 8.406.

### IV. The POA's Use of FOIA Only Highlights Their Pleading Deficiency

The POA has made use of the Arkansas Freedom of Information Act to obtain communications between DEQ and Mr. Frederick's counsel about CAO negotiations. As a procedural point, the FOIA disclosure cannot be considered by the Commission at this point since it was not attached to, or referenced in, the POA's Request for Hearing or associated materials. *See Thomas v. Pierce*, 87 Ark. App. 26, 28, 184 S.W.3d 489, 490 (2004) ("In determining whether to dismiss [an action] under Rule 12(b)(6), it is improper for the trial court to look beyond the

[3] *See, e.g.*, *Great Lakes Chem. Corp. v. Bruner*, 368 Ark. 74, 83, 243 S.W.3d 285, 291–92 (2006) (basic rule of construction that "seemingly conflicting" language from a single public entity "should be read in a harmonious manner where possible" and potentially inconsistent statements "are to be reconciled to make them consistent, harmonious, and sensible").

[4] Should the POA feel the need to have a court interpret the terms of its own CAO, it has that option. The APC&EC, however, does not possess the subject matter jurisdiction to issue declaratory judgments since it is not a court. Ark. Code Ann. § 16-111-103.

[petitioner's pleading] to decide the motion to dismiss."). Mr. Fredericks requests that the Commission disregard these materials since Arkansas law holds that it would be clear error to consider them under the present circumstances. *Id*.

Should the Commission disagree with Mr. Fredericks over the FOIA document and nevertheless consider it, the FOIA disclosure itself digs the POA's hole deeper and undermines its argument. The FOIA disclosure reveals no "new" or "material" evidence that Director Keogh failed to consider; instead, it definitively proves that DEQ **actually considered** all of the information identified in those negotiations. Every communication in the FOIA disclosure occurred prior to September 11, 2019, when Director Keogh signed Mr. Frederick's CAO. This is not new information and the disclosure proves that Director Keogh actually considered it because the points were negotiated.

The POA also claims that DEQ was "required to keep all public records of" DEQ's consideration of evidence regarding the Frederick's CAO. The POA argues that since DEQ has not provided a list of materials that Director Keogh considered (when executing the Fredericks CAO) in response to its FOIA request, the Division has either violated FOIA or did not consider *any* such materials. POA Response at 6. This argument is absurd since such a list does not exist in a tangible document and is not legally required to be maintained.

The Freedom of Information Act only requires that an agency retain tangible items its employees create and provide them upon proper request. Director Keogh is not required to create a new list of every piece of evidence she considers when executing a CAO. *See* Ark. Code Ann. § 8-1-202(b)(2)(B); Ark. Code Ann. § 8-4-103(d)(4)(A-B). That would impose a prohibitive standard upon DEQ, which has historically never created such lists for CAOs. While the POA implies this is required, the only thing that the Arkansas FOIA requires is disclosure of relevant

documents that are in existence, *not* that DEQ be forced to create new documents it would not normally draft. *See Legis. Jt. Auditing Comm. v. Woosley*, 722 S.W.2d 581, 582 (Ark. 1987) ("For a record to be subject to the FOIA and available to the public, it must be possessed by an entity covered by the act, fall within the act's definition of public record, and not be exempted by the act or other statutes.") (emphasis added).

## V. The POA's Appeal is A Collateral Attempt to Save its RATFA Claim Pending in a Separate Jurisdiction

The POA freely admits that it is appealing this CAO in order to bolster a separate lawsuit (currently pending in Benton County) for contribution under the Remedial Action Trust Fund Act. *See* POA Response at 9. It desperately wants to tie Mr. Fredericks to a hazardous substance at the Stump Dump site and, indeed, this appears to be the entire point of the current appeal. In order for the POA to ever gain contribution for funds spent in remedying the site, state law requires that a hazardous substance must be found on-site. Ark. Code Ann. 8-7-520(a).

Not only has no hazardous substance been found at the Stump Dump, the POA has **admitted** *on its very own website* that it has not found any "hazardous substances or hazardous wastes."[5] This contradicts numerous claims the POA has made in front of this Commission. *See, e.g.*, POA Response at 8-10. Either the POA is deceiving this Commission or POA members about hazardous substances being on-site; both statements cannot be true. The POA is attempting to take

[5] A copy of this statement is attached as Exhibit 1 to Reply; *see* page 7 of Exhibit 1 ("June 18, 2019: No hazardous substances or hazardous wastes were identified to date"). The same statement from the POA appears on pages 9, 11, 13, 15, 17, 19, 23, 24, 26, 27, 29, 30, 31, 32, 33, 34, 35, 37, and 38 of Reply Exhibit 1 (which reflects multiple POA statements made in May and June 2019). The POA's remediation contractor, ERM, declared that the fire was extinguished on or about June 4, 2019. The POA's affirmative statement that no hazardous substances or hazardous waste were found at the Stump Dump and the date the fire was put out are both well before the Director's decision regarding the Fredericks CAO.

a wholly inconsistent position in front of this Commission than it is telling the citizens of Bella Vista.[6]

The Arkansas doctrine against inconsistent positions directly prohibits the POA from claiming that a hazardous substance has been discovered on the Stump Dump site (and could be subject to RATFA) since its website claims otherwise, much less appear and dispute a CAO that reflects this reality. *Dupwe v. Wallace*, 355 Ark. 521, 531, 140 S.W.3d 464, 470 (2004) ("Judicial estoppel prohibits a party from manipulating the courts through inconsistent positions to gain an advantage… The doctrine against inconsistent positions may also apply to positions taken outside litigation."). This inconsistency alone requires dismissal. *Carlock v. City of Blytheville*, 2019 Ark. 302, at *5, 586 S.W.3d 155, 159 (2019).

## VI. Conclusion

There is no grand conspiracy unfolding before the Commission as the POA has claimed. The POA's CAO is entirely consistent with the Fredericks CAO. The truth of the matter is that the POA executed a CAO and undertook firefighting efforts with the expectation that a hazardous substance would turn up. Fortunately for the citizens of Arkansas (but unfortunately for the POA's desire to treat the Stump Dump as a RATFA site), no hazardous substance was ever discovered.[7] That was a risk the POA willingly took on because it believed it could fight the fire at a lower cost than DEQ. It does not mean that DEQ acted inconsistently, arbitrarily, or in violation of Arkansas

[6] Mr. Fredericks contends the POA's website is necessarily embraced by the pleadings (because it lays out POA fact allegations *directly* contrary to the same party's claims here) and thus is proper for review under the circumstances. Additionally, the AHO can freely take judicial notice of the POA's own website at https://bellavistapoa.com/members/trafalgarfire/. *See, e.g.*, Ark. R. Evid. 201(c).

[7] The POA claims that logs and stumps are hazardous materials. *See* POA Response at 8. DEQ has never taken this position, nor has the Commission. EPA has never taken this position. It quite simply has no basis whatsoever in environmental law. *See, e.g.*, 40 C.F.R. §§ 261.30-261.35 (RCRA-defined hazardous wastes); APC&EC Reg. No. 23; Ark. Code Ann. § 8-7-503(6). While the POA claims that the wood's flammability renders it hazardous, the same argument could be extended to literally every kind of material on earth that is flammable.

law by executing a separate CAO with Mr. Fredericks that reflects the truth. More importantly, there is no evidence that the Director failed to consider any new, material piece of evidence when executing Mr. Frederick's CAO. Ark. Code Ann. § 8-4-103(d)(4)(A-B).

The Commission is charged to confront the POA's Request for Hearing squarely and to focus on the allegations of fact therein. When the Commission does so, it will see that the POA has made no attempt to identify new, material evidence or explain how Director Keogh failed to consider such evidence. It has failed the most basic pleading burden imposed by Arkansas law and the Commission should dismiss this appeal.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

The undersigned does hereby certify that on January 3, 2020, I did serve a copy of the above Motion to Dismiss the Request for Hearing on the following individuals by e-mail:

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