

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

IN THE MATTER OF        )  
C & H HOG FARMS        )

**DOCKET NO. 18-004-P**

**MOTION TO INTERVENE AND REQUEST FOR HEARING  
BY THE BUFFALO RIVER WATERSHED ALLIANCE, INC.,  
THE ARKANSAS CANOE CLUB, THE OZARK SOCIETY, INC.,  
GORDON WATKINS, MARTI OLESEN, DR. ALAN NYE, ROBERT CROSS  
AND DR. DAVID PETERSON, INTERVENORS,  
AND  
MOTION TO DISMISS C&H HOG FARMS'S REQUEST FOR HEARING**

Comes now the **Buffalo River Watershed Alliance, Inc. ("BRWA")**, the **Arkansas Canoe Club ("ACC")**, the **Ozark Society, Inc.**, **Gordon Watkins, Marti Olesen, Dr. Alan Nye, Robert Cross and Dr. David Peterson** (collectively referred to herein as "**the Intervenors**") and for their Motion to Intervene in the above entitled and numbered cause, their Request for Hearing, and their Motion to Dismiss C&H's Request for Hearing, state:

*The Intervenors*

1. The BRWA is a non-profit corporation founded in 2013 with long-term goals of preserving and protecting the scenic beauty and pristine water quality of the Buffalo National River by opposing and preventing the construction and operation of industrial confined animal feeding operations (CAFOs) within the Buffalo River watershed through public outreach, education, advocacy, and direct actions. BRWA's immediate goals are to advocate for the closure of C & H Hog Farm and support a moratorium on any future hog CAFOs within the Buffalo River watershed. BRWA is governed by an all-volunteer Board of Directors, and over two thousand supporters throughout the country who are dedicated to preservation of the integrity of the Buffalo River.

2. The ACC is a non-profit recreational organization with more than 600 member households representing seven chapters in Arkansas, Louisiana, Oklahoma, and Texas. ACC's address is P.O. Box 1843, Little Rock, Arkansas 72203. ACC is dedicated to participating in and promoting the sport of paddling, including through river cleanups and advocacy related to conservation and river access issues. ACC and its members serve as advocates on conservation matters by working with other organizations and state and federal government agencies to preserve and promote the health and natural beauty of streams and rivers in Arkansas. ACC members enjoy paddling the rivers, streams, bayous, and lakes of Arkansas and beyond, including the Buffalo River and its tributary Big Creek.

3. The Ozark Society ("OS") is a non-profit organization 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.

4. Gordon Watkins (“Watkins”) is a farmer and small business owner who resides at HCR 72 Box 34, Parthenon, Arkansas 72666. He has been actively farming along the Little Buffalo River, the largest tributary of the Buffalo National River, for over 40 years and his family was selected as the Newton County Farm Family of the Year in 1987. In addition to farming, Mr. Watkins has been involved in the tourism sector for the past 11 years as owner of a cabin rental business, My Blue Heaven Cabins, also located along the Little Buffalo River. His tourism business is entirely dependent on the attraction of the Buffalo National River. Mr. Watkins moved to his current location in 1973 specifically because of his love for the Buffalo and he and his family have canoed, camped, hiked, fished and enjoyed the river many times over the past 45 years. Mr Watkins is co-founder and current President of the Buffalo River Watershed Alliance.

5. Marti Olesen, BA, MLS (“Olesen”), is a retired public school teacher and library media specialist, and co-owner of a small family business who resides in Newton County, Arkansas, P.O. Box 104, Ponca, AR 72670. Mrs. Olesen has been a member of the Buffalo River Watershed Alliance since 2014, and has volunteered in educating the public about the Buffalo National River and its unique karst landscape for the past thirty years. She helped to establish the Ecotourism Project for the Newton County Resource Council in the 1990s that enabled local residents to guide hikes sharing their own stories and knowledge of the Buffalo River while enhancing their incomes, and has served as board chair on the Council. She has canoed and hiked along the Buffalo River with her family and friends since 1987. Mrs. Olesen’s family owns property adjacent to the National River, and conducts a tourism and National Park

Concessionaire business that is highly dependent upon a healthy Buffalo River, as well as serving as a local community gathering place. Mrs. Olesen loves and works to preserve this American treasure and Outstanding National Resource Water. The water quality of the Buffalo River is important to Mrs. Olesen and the four generations of her family whose livelihood has been dependent upon it for the past 30 years.

6. Dr. Alan Nye ("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.

7. Robert Cross ("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 Co., 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 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 the Massachusetts Institute of Technology. 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.

8. Dr. David Peterson ("Peterson") is a retired mathematics professor from University of Central Arkansas, who lives at 56 Ridge Drive, Greenbrier, Arkansas 72058. 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.

#### *Procedural History of the Case*

9. This case has had a long and complicated procedural history, much of which is not directly relevant to the issues involved in this current proceeding. That procedural history is contained in the proceedings of this Commission entitled In the Matter of C&H Hog Farm, Inc., Docket No. 18-001-P.

10. Regarding matters relevant to the immediate proceedings, on August 24, 2018, the Commission adopted Minute Order No. 18-20 remanding this matter to the Arkansas Department of Environmental Quality with instructions to issue a public notice of ADEQ's denial of C&H's

Regulation No. 5 permit application as a draft denial and accept public comment on that draft decision for a period of at least 30 days.

11. On September 17, 2018, the Arkansas Department of Environmental Quality issued a public Notice of Final Permitting Decision announcing its intention to deny the application of C&H Hog Farms, Inc. for a permit under APC&EC Regulation 5 for Permit No. 5264-W, AFIN 51-00164, and that it would accept public comments on that proposed decision for a period of thirty (30) days from the date of the Notice. ADEQ subsequently extended the public comment period for an additional seven (7) days. C&H submitted additional information on October 23, 2018, and the comment period on the draft decision to deny the permit closed on October 24, 2018. A Final Permitting Decision to deny the permit was issued by ADEQ on November 19, 2018.

12. On December 13, 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 in the heading of this Motion. C&H also filed in this Docket a separate Motion that the Commission Stay the Final Permitting Decision of ADEQ, to which Intervenors will file a separate Response.

13. In addition, in its Request for Adjudicatory Hearing and Commission Review, C&H also asked the Commission to stay these proceedings that are now before the Commission in this Docket pending resolution of other proceedings in the Circuit Court of Newton County, Arkansas, claiming that such a stay is "consistent with the Judicial Stay" issued by said Circuit Court. Intervenors will respond to that request for a stay of these proceedings herein and in Intervenors' Response to the separate Motion for Stay of C&H filed herein.

***Intervention of Right***

14. The Intervenors are entitled as a matter of right to intervene in this proceeding. Regulation 8.601 of the Arkansas Pollution Control & Ecology Commission (APC&EC) provides in relevant part as follows:

**Reg. 8.601 PARTIES**

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

- (A) ...
- (B) ...
- (C) In a proceeding following the 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;  
...

8. The Intervenors submitted detailed comments on the draft permit during the time allotted for public comment on the draft proposed permit. The dates on which those comments were submitted are listed below, and the comments appear in ADEQ's Permit Data System under Permit No. 5264-W. They are a part of the record of ADEQ in this case, and are incorporated by reference. Those comments also reference therein thousands of additional pages of technical documents that support their request that ADEQ deny C&H's application for a "no discharge" permit for this swine CAFO, which technical documents are also incorporated herein by reference.

9. The Intervenors are also persons who have timely filed a Request for Hearing with the Commission Secretary within the meaning and scope of Reg. 8.601(C), and are entitled to be made a party to these proceedings.

10. In addition to the reasons set forth in the ADEQ's decision to deny C & H's application for a permit, all of which are sufficient to justify denial of the permit application, the Intervenors submitted additional legal and technical justification for permit denial. Unless allowed to intervene, these additional reasons for denying C&H's permit application may not be developed or considered by the Commission.

*Permissive Intervention*

11. In the alternative, Intervenors are entitled to an Order of Permissive Intervention in this matter. Reg. 8.604 provides as follows:

**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) [Not applicable -- public comment provided]

(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. All Intervenors satisfy the requirements of Reg. 8.604(A) in that they or organizations of which they are members submitted comments during the public comment period as alleged above, and this Motion for Intervention is filed with the time limits prescribed by Reg. 8.603(B)(2).

13. In satisfaction of the applicable requirements of Reg. 8.604(C), which incorporate those contained in Reg. 8.603(C)(1)(a), (b), (c), (d), and (e), the Intervenor state the following:

- a. The action for which intervention is sought is ADEQ's Final Permitting Decision dated November 19, 2018, to deny C&H Hog Farms' application for a Regulation 5 no-discharge permit, as contained in the attached Notice of Final Permitting Decision attached hereto as Exhibit No. 1.
- b. The date of the Director's final decision to deny the application of C&H Hog Farm for a Regulation 5 permit was November 19, 2018.
- c. Intervenor will support the Director's final decision to deny the permit. The legal issues and factual objections involved in the appeal relate to the failure of C&H to support its permit application by providing the required geological, hydrological and other information and data to establish that it met the requirements of Regulation 5, and by failing to demonstrate that the granting of a permit was in the best interest of the State of Arkansas. Among others, Intervenor will rely on the following facts and legal issues to support the Commission's affirmation of ADEQ's final permitting decision:
  - (i) The factual and legal rationale contained in the Statement of Basis of ADEQ issued November 19, 2018;
  - (ii) The factual and legal rationale contained in ADEQ's Response to Comments issued November 19, 2018;
  - (iii) (The factual and legal rationale contained in the public comments of the Intervenor and other person or organizations that were filed with ADEQ, and in the References and Appendices that were attached to such comments, including, without limitation:
    - (a) The Comments submitted by BRWA filed 10-16-18; 10-08-18;
    - (b) The Comments submitted by Arkansas Canoe Club filed 10-22-18; 10-08-18;

- (c) The Comments submitted by Gordon Watkins filed 10-15-18; 10-05-18;
- (d) The Comments submitted by Marti Olesen filed 10-23-18; 10-08-18;
- (e) The Comments submitted by The Ozark Society filed 10-22-18; 10-16-18;
- (f) The Comments filed by Dr. David Peterson filed 10-09-18;
- (g) The Intervenor also may adopt by reference the relevant comments of any other person or entity submitted during the comment period who oppose the proposed C&H Permit.
- (h) C & H failed to comply with the mandatory requirements of Reg. 5.402, which 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).

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); *City of Benton v. Ark. Soil & Water Comm'n*, 345 Ark. 249, 45 S.W.3d 805 (2001). 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.

- (i) The Intervenor has demonstrated through expert witness testimony, scientific studies, expert reports, deposition testimony (including that of Jason Henson) and other admissible evidence, that C & H's failed to conduct a geological and hydrogeological investigation of the Facility site, and to use such investigation to design a waste management system in a manner that takes into account the hydrogeology of the facility's location. Such failure violates APC&EC Regulation 5

because it is not in accordance with Regulation 5 and the USDA Natural Resource Conservation Service's technical publications listed in Regulation 5, the Field Office Technical Guide, as amended, and considerations in AWMFH that were not addressed.

- (j) The operation of the C&H concentrated animal feeding operation (CAFO) is causing or contributing to measurable water quality degradation in Big Creek, the Buffalo River and the karst aquifer that feeds these two streams. (See e.g., Comments of BRWA, Ozark Society, Dr. Alan Nye, Dr. David Peterson and Mr. Robert Cross, the expert opinions of Dr. Michael Smolen, Dr. Burt Fisher, Dr. Tom Aley attached to the comments of the Intervenor). 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.
- (k) C&H did not address deficiencies identified by the 2014 review by a panel of experts.

d. This provision is not applicable to this Motion to Intervene.

e. A certificate of service is set forth below.

14. Allowing this Motion for Intervention will not cause delay or prejudice to any party. Intervenor are represented by experienced counsel who will coordinate with counsel for ADEQ and present evidence to support the permit decision that is neither cumulative nor redundant to ADEQ's justification for its decision.

15. This Motion to Intervene is timely.

16. The Intervenor have a long history of direct involvement in the proceedings before ADEQ and the Commission leading up to ADEQ's permitting decision that is the subject of this appeal. They have been allowed to intervene in the previous appeal of the denial by ADEQ of the &H permit application to the Commission, and have been granted leave to

intervene in the judicial appeals that arose from that previous appeal. Intervenors would bring information, knowledge and perspective to these proceedings that would serve the parties, the Administrative Law Judge and the Commission by allowing their participation in this matter. Denying intervention will also prejudice the rights of Intervenors to participate in upholding permit denial which, if successfully challenged, will impact the Buffalo National River, a resource that, as shown above, Intervenors have a substantial interest in preserving.

17. Intervenors interest will not be adequately represented by the remaining parties to this proceeding. C & H's interests are completely adverse to Intervenors' interests. While Intervenors will be aligned with ADEQ in its decision to deny the permit, the interests of ADEQ and Intervenors are not completely aligned in that Intervenors established grounds for permit denial in their public comments that ADEQ does not address or may not affirmatively support.

#### **MOTION TO DISMISS**

##### ***Portions of C&H'S Request for Hearing and Commission Review Fail To Comply With Reg. 8.603 (C)(1), And Should Be Dismissed***

18. Ark. Code Ann. §8-4-205 (Permit Hearings) provides in relevant part that "A Request for Hearing shall identify the permit action in question and its date and *must include a complete and detailed statement identifying the legal and factual objections to the permit action.*" (emphasis added) The same requirement for the contents of a Request for Hearing is contained in Regulation 8.603(C)(1)(c). This is a mandatory requirement.

19. Some of the objections to the denial of the permit raised by C&H in its Request for Hearing are insufficient to meet the requirements of Ark. Code Ann. §8-4-205 and Reg. 8.603(C)(1)(c), or to overturn the final permitting decision of ADEQ. The following addresses each of such objections and discusses the reasons they should be dismissed:

***Issue No. 1: The Second Permit Decision (November 19, 2018) Was Null and Void With Respect to C&H's Continued Coverage Under the Reg. 6 Permit And a Stay Should be Issued***

***Intervenor's Response:***

20. C&H contends that the Final Permitting Decision of ADEQ of November 19, 2018 (from which this appeal was taken) was null and void. The undisputed factual basis for this argument is that, on September 6, 2018, C&H appealed Minute Order 18-20 of the Commission dated August 24, 2018 (remanding ADEQ's final decision of January 10, 2018, back to ADEQ for publication of a Notice of Intent to deny the permit) to the Circuit Court of Newton County, in which appeal C&H made the Commission a defendant, but not ADEQ. C&H filed a Motion for Stay in the Circuit Court on September 7, 2018, and a hearing was held on October 17, at which time the Circuit Court issued an Order stating that it had obtained jurisdiction over C&H's application for a Regulation 5 permit on September 6, 2018 (when C&H filed its Notice of Appeal), and that Commission Minute Order No. 18-20 was stayed. The Order also continued a stay of the termination of C&H's Regulation 6 general permit granted by the Commission on January 17, 2018. A copy of the Circuit Court's Interim Order and Stay Pending Appeal ("the Judicial Stay") is attached hereto as Exhibit No. 1 to this Motion.

21. This argument fails on its face. At the time of the issuance of the Judicial Stay of October 17, the Commission no longer had jurisdiction over C&H's application for a Regulation 5 permit, having remanded the application back to ADEQ by Minute Order 18-20 on August 24, several weeks before C&H appealed that Minute Order to the Circuit Court on September 7.

22. It is essential to remember that ADEQ and the Commission are two separate statutorily-created entities. See Ark. Code Ann. §8-4-104, -105, -202 and -203, among other statutes, for the separate existence of the Commission and Agency and their separate duties. It is

also essential to remember that, while the Commission was made a party to the Newton County appeal by C&H, ADEQ was not, although C&H had ample opportunity to join ADEQ as a party.

23. Although the Circuit Court issued its Interim Order and Stay to the Commission on October 17, the Commission had, before that time, remanded C&H's application back to ADEQ by Minute Order 18-20 on August 24, 2018, and had closed the docket in which the Minute Order was entered. The Commission no longer had jurisdiction over the application by virtue of the Order of remand. ADEQ had reacquired jurisdiction of the application, but it was and is not a party to the Circuit Court proceedings and was not bound by the Circuit Court's Order of October 17.

24. C&H was well aware of this sequence of events, but failed to join ADEQ as a party in its appeal. As a general rule, a nonparty is not bound by a court's judgment. *See Valois Dynasty, LLC v. City National Bank*, 2016 Ark. App. 140, 486 S.W.3d 205; *In re \$3,166,199*, 337 Ark. 74, 987 S.W.2d 663 (1999); *First State Bank of Eureka Springs v. Cook*, 192 Ark. 213, 90 S.W.2d 510 (1936) The Judicial Stay in this case is essentially an injunction that C&H is attempting to extend to ADEQ. The law is clear that a judgment or decree for injunction is usually *in personam* and as such binding only upon the parties to the litigation. Persons who are not parties to the injunction or in privity with them, and whose rights have not been adjudicated therein, are not bound by the decree and cannot be held liable for acts done contrary thereto even though the decree assumes to bind them. *Taylor v. Zamone Properties*, 342 Ark. 465, 30 S.W.3d 74 (2000); *Chase National Bank v. City of Norwalk*, 291 U.S. 431, 54 S.Ct. 475, 78 L.Ed. 894; *Kean v. Hurley*, 179 F.2d 888 (8<sup>th</sup> Cir., 1950).

25. Because of C&H's failure to join ADEQ, it cannot complain that ADEQ is not bound by the Stay Order. Further, there has been no authority or reason cited by C&H to justify its position that ADEQ is bound as a non-party by the Stay Order issued by the Circuit Court. To the contrary, C&H has largely ignored the distinction between the Commission and ADEQ, preferring to treat them as the same entities.

26. C&H does claim that ADEQ was aware of the appeal and of the Stay that had been issued by the Circuit Court. Such knowledge, however, does not make ADEQ a party nor obligate it to the stay. It is well settled in Arkansas that actual knowledge of a proceeding does not validate a defective process. *Tucker v. Johnson*, 275 Ark. 616, 28 S.W.2d 281 (1982); *Carruth v. Design Interiors, Inc.*, 324 Ark. 373, 921 S.W.2d 944 (1996); *DeSoto, Inc. v. Crow*, 257 Ark. 882, 520 S.W.2d 307 (1975); *McIntosh v. Ponder*, 222 Ark. 701, 262 S.W.2d 277 (1953). The defective process here was that C&H did not join ADEQ as a party, being a separate entity from the Commission.

27. Finally, the record of the hearing before the Hon. John Putman, Circuit Judge of Newton County, Arkansas, held on October 17, 2018, indicated that the Judge himself was uncertain about whether ADEQ would be bound by his Stay Order. At page 63 of the transcript of that hearing, Judge Putman issued the following oral ruling on C&H's Motion for Stay:

... Apparently, nobody here is going to be harmed by continuing a stay. 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 attempted to shut down the C&H, then C&H could join them as a party, and we can address whether they had the authority to do that.

28. It was not clear, even to the judge who issued the stay, what was being stayed. The law of Arkansas requires that an injunction (which was the effect of the stay) be clear and definite in its terms to be binding and effective. Although a court may exercise discretion in fashioning injunctive relief, that discretion is not unlimited. *See EEOC v. HBE Corp.*, 135 F.3d 543, 557 (8th Cir.1998). An injunction, including a stay, must provide a person of ordinary intelligence a reasonable opportunity to understand what is prohibited. That was not done in this case.

***Issue No. 2: The Second Permit Decision Was Null and Void With Respect to Denial of C&H's Application For A Regulation 5 Permit.***

***Intervenor's Response:***

29. C&H's second issue is essentially the same as Issue No. 1, based on the claim that, upon the filing of C&H's Notice of Appeal in the Newton County Circuit Court, "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." C&H's argument fails to recognize that, prior to the filing of the Notice of Appeal by C&H with the Circuit Court, the Commission had entered Minute Order 20-18, remanded the permit application back to ADEQ, and closed its docket on the matter. Thus, the Commission did not have jurisdiction of the application at the time the Notice of Appeal was filed, and certainly not at the time of the issuance of the Circuit Court's Stay Order of October 17, 2018. In fact, at that time, ADEQ had already issued its Notice of Intent to Deny Permit, it had been published, two public hearings had been held, and public comments were being submitted.

30. Again, C&H also ignores the fact that ADEQ and the Commission are separate entities. Nowhere in its Request for Adjudicatory Hearing and Commission Review and Stay

does C&H address this important issue. Instead, C&H treats both entities as if they were the same, without citing any authority for doing so.

31. A case directly on point on this issue is that of *Taylor v. Zanone Properties*, 342 Ark. 465 30 S.W.3d 74 (2000), a suit between landowners abutting a lake over actions the defendant landowners had taken to control the lake level to the detriment of the plaintiffs' properties. The State of Arkansas was made a defendant because it owned the lake bed. In fashioning the remedy, the chancery court ordered both the Arkansas State Game and Fish Commission and the Arkansas Soil and Water Conservation Commission to monitor the lake levels, although neither Commission had been joined as a party. The commissions appeared to object to the order on the basis that, not being parties, they were not bound by the court's order.

32. On appeal, the Supreme Court upheld that objection, stating:

Governmental agencies are independent entities who must be joined as parties even if the governmental entity is a party to the action. *See Pulaski County v. Jacuzzi Bros. Div.*, 317 Ark. 10, 875 S.W.2d 496 (1994) (holding that, although the county itself was a proper party to the suit, the official who would be charged with carrying out the order of the court should have been joined as a necessary party to the action); *IBM Credit Corp. v. Pulaski County*, 316 Ark. 580, 873 S.W.2d 161 (1994) (noting that failure to join either assessor or board of equalization left void in ability to effect the court's order).

All judgments, orders, sentences, and decrees made, rendered, or pronounced by any of the courts of the state against anyone without notice, actual or constructive, and all proceedings had under judgments, orders, sentences, or decrees shall be absolutely null and void.

[T]he chancery court erred by assuming jurisdiction over the agencies merely because the State of Arkansas was a party to the action. We hold that the orders of the chancery court directed toward the Arkansas Game and Fish Commission and the Arkansas Soil and Water Conservation Commission are null and void.

342 Ark. at 473-474.

33. The Court also relied upon Ark. Code Ann. § 16-65-108 (1987), which provides:

All judgments, orders, sentences, and decrees made, rendered, or pronounced by any of the courts of the state against anyone without notice, actual or constructive, and all proceedings had under judgments, orders, sentences, or decrees shall be absolutely null and void.”

34. It is undisputed that ADEQ was not made a party to the Newton County Circuit Court appeal. C&H contends, however, that ADEQ was and is aware of the appeal and of the Stay that had been issued by the Circuit Court. But, as noted in the discussion of Issue No. 1, above, actual knowledge of a proceeding does not validate a defective process. *Tucker v. Johnson, supra; Carruth v. Design Interiors, Inc., supra; DeSoto, Inc. v. Crow, supra; McIntosh v. Ponder, supra*. ADEQ’s knowledge of the Newton County Circuit Court proceedings is irrelevant to the issues involved in this Motion to Dismiss.

***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***

***Intervenor’s Response:***

35. There are two separate and distinct issues contained in C&H’s Issue No. 3.

***ADEQ Failed To List the Documents Relied Upon  
In Its Notice of Intent to Deny Permit***

36. The first issue is that ADEQ failed to identify the documents it relied upon in making its decision to not issue the Regulation 5 permit. In support of this issue, C&H states only that “ADEQ failed to identify all of the documents it relied upon in the Notice of its Draft Permitting Decision.” C&H cites no legal requirement that ADEQ include a list of all documents in that Notice, and Commission Regulation 8.207(B), which specifies the contents of such Notice, does not require a listing of the documents relied upon by ADEQ.

37. C&H also overlooks that ADEQ did include the following language in its public Notice of Intent to Deny the permit:

ADEQ proposes to deny this permit application for the storage and land application of liquid waste from a swine facility in accordance with APC&EC Regulation No. 5 *for the reasons set out in the Statement of Basis*. For those with internet access, *a copy of the Statement of Basis for the proposed permitting decision to deny the permit application and other documents related to this draft denial may be obtained on ADEQ's website at:*

[https://www.adeq.state.ar.us/home/pdssql/p\\_permit\\_details\\_water\\_spb.aspx?AFINDash=51-00164&AFIN=5100164&PmtNbr=5264-W](https://www.adeq.state.ar.us/home/pdssql/p_permit_details_water_spb.aspx?AFINDash=51-00164&AFIN=5100164&PmtNbr=5264-W)

*Copies of the Statement of Basis are also available for public inspection during normal business hours at the ADEQ headquarters building located at 5301 Northshore Drive in North Little Rock.*

(Emphasis added)

38. ADEQ more than complied with the applicable requirements in publication of the Notice.

***ADEQ Failed To Comply With C&H's Freedom of Information Act Request***

39. The second separate and unrelated issue that C&H incorporates into Issue No. 3 is that ADEQ allegedly failed to adequately respond to a Freedom of Information Act (FOIA) request that C&H submitted to ADEQ during the comment period for various communications and other documents described in general terms. It should be noted that C&H's FOIA request was dated October 10, 2018, only seven (7) days before the initial comment period ended, and fourteen (14) before the extended comment period ended. C&H has had months in which to submit this FOIA request, but waited to do so in hopes of further delaying the permit decision.

40. ADEQ responded to the FOIA request by an undated email from Raeanne Gardner of ADEQ, explaining that the FOIA request was "voluminous and broad category of records that the Arkansas Department of Environmental Quality cannot locate and identify

potentially responsive records with reasonable effort.” It also referred to ADEQ’s website, where many of the documents are located and may be accessed by the public.

41. C&H then filed a lawsuit against ADEQ in the Circuit Court of Newton County, Docket No. 51cv-18-68, claiming the ADEQ response to its letter violated the FOIA. That case has been transferred to the Circuit Court of Pulaski County. C&H has not asserted in its Request for Adjudicatory Hearing and Commission Review and Stay that ADEQ’s response caused C&H any prejudice, or if so, in what way, and how ADEQ’s decision on the Regulation 5 permit application would have been different.

***C&H Issue No. 4: ADEQ Erred by Finding That the Application Was Deficient***

***Intervenor’s Response:***

42. C&H’s characterization that “When ADEQ issued the Draft Permit granting the Reg. 5 Permit C&H’s application was administratively and technically complete.” This is an attempt to claim that ADEQ is now, at the end of the permitting process, estopped to deny issuance of a Final Permit, without consideration of factors raised in comments by the public. Obviously, the purpose of public comments is to submit information that may not be presented to the agency by the permit applicant that may influence the agency’s ultimate decision about the adequacy of the information submitted by the permit applicant. Agencies may modify their preliminary decisions on permit applications based on public comments; otherwise, public comment would be superfluous.

43. However, C&H goes further to claim that, because C&H had received a Regulation 6 general permit some five years earlier, and constructed its facility based upon the standards applicable to that general permit, it cannot now be denied a permit under a completely different regulation with specific standards that did not apply under the Regulation 6 permitting

program. There is no exemption in Arkansas law or the applicable Commission regulations that allow a facility to change between regulatory programs without meeting the requirements of the program to which the facility seeks to obtain a permit.

44. C&H claims in Paragraph 34 of its Request for Commission Review that, with its five years of operation under the Regulation 6 general permit, “undertaking an additional geological investigation of constructed facilities is not only inconsistent with the applicable regulatory requirements (without specifying which regulatory requirements to which it refers, not how an additional geological investigation is inconsistent with them), but it also presents unique challenges that require cooperation between C&H and ADEQ.” C&H does not describe those “unique challenges,” nor what cooperation is required other than that already extended by ADEQ to C&H. “Unique challenges” and “cooperation” are not recognized in Arkansas law as being grounds for reversing an ADEQ final decision.

45. Intervenors presume that one of those “challenges” is C&H’s constant complaint that “ADEQ is not providing C&H with a full and fair opportunity to address any regulatory deficiencies through an approved work plan.” (See ¶34 of C&H Request for Commission Review). This is a common thread of a complaint that runs through the Request. C&H even accuses ADEQ of deliberate intent to deprive C&H of due process and the permit. See, for example, page 18 of the Request, where C&H states: “ADEQ had its own agenda, which was to fast track to another decision to deny the Reg. 5 Permit;” and “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.’”

46. C&H’s complaint on this issue boils down to the premise that it expected ADEQ to issue the Reg. 5 permit to C&H as a routine matter; that when ADEQ issued its Notice of Intent to Deny the permit in January, 2018, C&H became alarmed and, fearing loss of the permit,

tried to place ADEQ in the position of committing to write the permit application for C&H so that ADEQ could not deny it. ADEQ has been extremely considerate of C&H and has met with it on numerous occasions to discuss the application. However, it is not ADEQ's responsibility to write C&H's permit application, or even to advise C&H of what should be in the application beyond the information that is in Regulation 5, and C&H does not cite any authority that ADEQ has such responsibility.

47. Regulation 5, especially the documents named in Reg. 5.402 (Design Requirements), specify what is required to be included in Reg. 5 permit applications and waste management plans. C&H's problem is not that it was not aware of or didn't understand the requirements; its problem is that it cannot meet the standards because it is sited at a location that cannot be approved under those standards.

48. The remaining allegations contained in C&H's Request for Adjudicatory Review Commission Hearing are not "legal issues," but are allegations of error on the part of ADEQ that require factually-intense inquiry, and are not subject to a Motion to Dismiss.

49. The portions of C&H's Request for Adjudicatory Review and Commission Hearing that are based on legal argument and subject to this Motion to Dismiss should be dismissed for failure to comply with Ark. Code Ann. §8-4-205 and Rule 8.603(C)(1)(c).

**WHEREFORE**, the Intervenors named above pray that their Motion to Intervene and Request for Hearing be granted; that their Motion to Dismiss the Request for Hearing of C&H Hog Farm, Inc., be granted; and for all other legal, equitable and proper relief.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on the date set forth below, a true and correct copy of the foregoing was sent to the following attorneys of record for the parties to this proceeding via certified United States mail, return receipt requested, postage prepaid:

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Dated: December 18, 2018.

/s/ Richard H. Mays  
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