

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

**IN THE MATTER OF:**

**C & H Hog Farms**

**DOCKET NO. 18-004-P  
Permit No. 5264-W**

**MOTION TO CONTINUE PRELIMINARY HEARING**

Comes the appellant, C & H Hog Farms, Inc. ("C & H"), and for its Motion to Continue Preliminary Hearing, states:

On July 27, 2018 the Commission adopted Minute Order 18-16, which approved a finding from the Recommended Decision in Docket No. 18-001-MISC that C&H lost coverage under NPDES General Permit No. ARG590001 when the Director denied C&H's application for a Regulation No. 5 Permit No. 5264-W (the "Reg. 6 Coverage Matter"). C&H appealed the Commission's Decision in the Reg. 6 Coverage Matter to Newton County Circuit Court where it remains pending as Case No. 51CV-18-48 (the "Reg. 6 Judicial Appeal").

On August 24, 2018 the Commission adopted Minute Order 18-20, in Docket No. 18-001-P, which remanded ADEQ's decision to deny C&H's application for a Reg. 5 Permit (the "Permit Matter") for failure to provide notice and comment. The Commission failed to reverse the Director's decision in the Permit Matter, and failed to include remand instructions to insure that the remand of the Permit Matter would be conducted fairly and appropriately. C&H appealed the Commission's decision in the Permit Matter to Newton County Circuit Court where it remains pending as Case No. 51CV-18-58 (the "Reg. 5 Judicial Appeal").



Exclusive jurisdiction over the Reg. 6 Coverage Matter, and over the Permit Matter vested in the Circuit Court of Newton County on the day that the respective judicial appeals were filed. See Ark. Code Ann. § 8-4-222 *et seq.* No person and no agency, including the Commission and ADEQ have had subject matter jurisdiction to take any action on the Reg. 6 Coverage Matter or the Permit Matter. See, *Myers v. Yingling*, 369 Ark. 87, 251 S.W.3d 287 (2007), (voiding a lower court order filed after an appeal was filed because when the appellate court obtains jurisdiction, the lower tribunal “no longer exercises jurisdiction over the parties and the subject matter in controversy” and “loses jurisdiction to *act further* in the matter”) (emphasis in original).

The Reg. 5 Judicial Appeal was accompanied by a Motion for Stay, and the earliest date that the Court could take up the Motion for Stay was October 17, 2018. In its oral ruling following the October 17, 2018 hearing, the Court made the following statements regarding the jurisdictional issue:

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 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.



Immediately following the October 17, 2018, hearing, the Court entered an Interim Order and Stay, which confirmed that “this court obtained jurisdiction over C&H’s application for a Regulation No. 5 permit for a liquid animal waste management system permit in Mt. Judea, Arkansas, the subject matter of this appeal, on September 7, 2018, when C&H filed its notice of appeal (the “Permit Matter”).” (See, Exhibit 3 to the Request for Adjudicatory Hearing and Commission Review) The Interim Order and Stay, entered by this Court on October 18, 2018, also stayed “the remand and instructions stated therein.”

On information and belief, ADEQ was made aware of the Interim Order and Stay immediately after it was entered. C&H also advised ADEQ that a stay had been entered, provided ADEQ a copy of the stay, and warned ADEQ that it should not proceed. (See, Exhibit \_\_\_ to Request for Adjudicatory Hearing and Commission Review). ADEQ proceeded anyway, ignoring the Interim Order and Stay, and in spite of exclusive jurisdiction residing in Newton County Circuit Court.

On November 19, 2018, ADEQ purported to issue a “final decision” in the Permit Matter, which also made findings related to the Reg. 6 Coverage Matter. (Exhibit 1 to Request for Adjudicatory Hearing and Commission Review). In particular, ADEQ’s purported “final decision” stated that C&H’s continued coverage under the NPDES General Permit No. ARG5900001 terminated immediately (on November 19, 2018), and further ordered C&H to cease operations at its facility within thirty (30) days (by December 19, 2018). ADEQ’s November 19, 2018 decision was made without jurisdiction and in violation of the Interim Order and Stay that had been issued.



On November 20, 2018, the day after ADEQ's purported "final decision," C&H filed a Motion for an Order to Show Cause in the Reg. 5 Judicial Appeal, requesting that ADEQ be held in contempt of Court for violating the terms of the Interim Order and Stay. On December 20, 2018 Newton County Circuit Judge John Putman entered an Order to Show Cause, which ordered ADEQ Director Becky Keogh and ADEQ Water Division Chief Caleb Osborn to appear in Newton County Circuit Court on January 9, 2019 and show cause why they should not be held in contempt of Court for violating the Interim Order and Stay. (Exhibit 1, attached hereto)

Because ADEQ, its Director and its Water Division Chief have refused to recognize the jurisdiction and authority of the Newton County Circuit Court, and C&H was waiting on a hearing on its Motion for an Order to Show Cause, C&H was compelled to file a protective appeal of ADEQ's November 19, 2018 decision with the Commission and requested a stay. This appeal was taken because it appeared that the only thing that would stop ADEQ from shutting C&H down completely on December 19, 2018 would be a stay issued by the Commission. A finding that ADEQ's December 19, 2018 purported "final decision" is null and void or an alternative finding of contempt could not occur until a hearing, now scheduled for January 9, 2019. On December 14, 2018 the Chairman of the Commission issued a stay authorizing C&H's continued operations until the next regularly scheduled meeting of the Commission, on January 25, 2018.

On December 19, 2018 the Administrative Hearing Officer entered Order No. 1 in this matter, scheduling a Preliminary Hearing for January 4, 2019. The Administrative Hearing Officer and the Commission are well aware that the Newton County Circuit Court has jurisdiction over the Reg. 6 Coverage Matter and the Permit Matter, that the Newton County Circuit Court has confirmed its exclusive jurisdiction over the objection of the Commission.





(Exhibit 2, attached hereto) The Administrative Hearing Officer and the Commission are well aware of the Interim Order and Stay, which stays the remand and the issue of remand instructions. C&H objects to the Commission and its Administrative Hearing Officer taking any further action in this matter and requests that the Preliminary Hearing be continued until the Reg. 5 Judicial Appeal and the Reg. 6 Judicial Appeal are resolved and the Interim Order and Stay is dissolved. In the event the Preliminary Hearing is not continued, C&H will take this matter up with the Newton County Circuit Court.

WHEREFORE, C & H Hog Farms, Inc. requests that the Preliminary Hearing be continued until the Reg. 5 Judicial Appeal and the Reg. 6 Judicial Appeal are resolved and the Interim Order and Stay is dissolved; and for all other proper relief to which it may be entitled.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that I have served a copy of the foregoing pleading upon the following by electronic mail on this 27<sup>th</sup> day of December, 2018:

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