

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

IN THE MATTER OF:

C & H Hog Farms

**DOCKET NO. 18-001-P
NPDES Permit No. Permit No. 5264-W**

**AMENDED REQUEST FOR ADJUDICATORY
HEARING AND COMMISSION REVIEW and REQUEST FOR DECLARATORY
JUDGMENT**

Pursuant to Ark. Code Ann. 8-4-205 and APCEC Regulation No. 8, Reg. 8.603, C&H Hog Farms (“C&H”), by its attorneys, Friday, Eldredge & Clark, LLP and Barber Law Firm, PLLC, hereby requests an adjudicatory hearing and the opportunity to present evidence and oral argument before the Arkansas Commission on Pollution Control and Ecology (the “Commission”) regarding the decision of the Director of the Arkansas Department of Environmental Quality (“ADEQ”) to deny Permit No. 5264-W, with related implications for Arkansas State NPDES Permit Number ARG590001 (the “Reg. 6 Permit”), and requests a declaratory judgment for the reasons enumerated below (the “Appeal”).

General Background: Factual and Legal Matters Applicable to All Issues

1. C&H owns and operates a concentrated animal feeding operation (“CAFO”) in Mt. Judea, Arkansas. C&H operates two waste storage ponds and a process wastewater land application system pursuant to Arkansas State NPDES Permit Number ARG590001. The Reg. 6 permit was initially issued August 3, 2012, and modified on June 5, 2014, May 12, 2015 and March 21, 2016. A copy of the Reg. 6 Permit, as modified on March 21, 2016, is attached as Exhibit A and incorporated herein.

2. On April 7, 2016 C&H filed an application for a No-Discharge Permit pursuant to Regulation No. 5, which was deemed complete by ADEQ.
3. On April 20, 2016 C&H timely filed an application to renew the Reg. 6 Permit.
4. On May 3, 2016 ADEQ issued notice of its decision to not renew NPDES General Permit No. ARG590000 (the Reg. 6 Permit). A copy of the decision to not renew is attached hereto as Exhibit B and incorporated herein.
5. ADEQ unilaterally returned C&H's application for renewal of the Reg. 6 Permit and advised C&H that it was considering C&H's application for a No-Discharge Permit as the application to "replace coverage under ARG590000 (the Reg. 6 Permit)." A copy of ADEQ's letter returning the renewal application is attached hereto as Exhibit C and incorporated herein.
6. On September 2, 2016, ADEQ notified C&H by letter that its permit application was technically incomplete and suspended review of the application pending a drilling study. A copy of ADEQ's letter returning the renewal application is attached hereto as Exhibit D and incorporated herein. As set forth hereinbelow, in denying the Reg. 6 Permit, ADEQ deviated from this course of dealing with C&H and neither gave C&H notice of technical incompleteness of its permit application nor an opportunity to provide information that ADEQ later contended was necessary.
7. On February 15, 2017 ADEQ made a proposed decision to issue a permit to C&H and issued its Statement of Basis and draft permit, including all of the terms and conditions for the permit, for public comment (the "Draft Permit"). A copy of the Draft Permit is attached hereto as Exhibit E and incorporated herein. In

particular, the Statement of Basis and Draft Permit states: “This Statement of Basis is for information and justification of the permit monitoring requirements as well as other conditions in the permit only and is not enforceable. This draft permit decision is for issuance of a no-discharge facility under draft permit number 5264-W and AFIN 51-00164.” The decision to issue the Draft Permit is stated as follows in the Statement of Basis: “The permittee submitted a permit issuance application for a no-discharge permit, which was received on April 7, 2016 with additional information received on June 29, 2016. The facility is applying for an administrative change in coverage from under NPDES General Permit ARG590000 for Concentrated Animal Feeding Operations to a no-discharge permit. It is proposed that the water no discharge permit be issued.” Furthermore, the Statement of Basis described the issues for comment as follows: “During a 30-day period, any interested persons may submit written comments on the permit and may request a public hearing to clarify issues involved in the permitting decision.” The Draft Permit stated that ADEQ’s decision was that “C&H Hog Farms, Inc. is authorized to store and land apply liquid waste from a swine facility on sites listed in Condition No. 7 of Part II of the permit for a facility located at HC 72 Box 2 Vendor, Arkansas 72683 in Newton County . . .”

8. The Comment Period on the Draft Permit ended on April 6, 2017.
9. Following the close of the comment period, ADEQ requested C&H to provide additional information, and by December 29, 2017 ADEQ confirmed that all requested additional information had been submitted and received. Attached

hereto as Exhibit F and incorporated herein is the exchange of communication between counsel for ADEQ and C&H.

10. On January 10, 2018 ADEQ issued its Final Permitting Decision and revised Statement of Basis (the “Permit Decision”). Attached hereto as Exhibit G and incorporated herein is a copy of the Permit Decision. The Permit Decision was to deny the permit. The revised Statement of Basis was not only substantially different from the draft Statement of Basis, but it was in direct contradiction to the draft Statement of Basis. In particular, the Statement of Basis for the Permit Decision states: “ADEQ denies issuance of the permit after determining that the record lacks necessary and critical information to support granting of the permit. The record fails to include the requisite geological, geotechnical, groundwater, soils, structural, and testing information specified in Reg. 5.402. Without the detailed geophysical and engineering data required by the Agricultural Waste Management Field Handbook, as amended, ADEQ is unable to ascertain compliance with Reg. 5.402.” ADEQ had not requested the information which it contends was not provided and, without giving C & H the opportunity to address such issues, determined that certain information that was not required was now necessary. For example, and without limitation to other issues that ADEQ did not permit C & H to address before issuing its permitting decision, in response to Comment 74, ADEQ stated, “The permit application does not contain a groundwater flow direction study as *recommended* by AWMFH Chapter 7. The Department has determined that a groundwater direction study is *necessary* due to the specific siting of this facility.” (Emphasis added in italics) *See also* ADEQ’s

responses to Comments 320 & 352. Similarly, ADEQ stated in response to Comments 209, 324, 346, 359, 405, and 417 that “[t]he geologic investigation of the waste storage ponds does not comply with AWMFH Chapter 7,” but it never raised this issue with C & H before denying the permit application for lack of information and did not give C & H an opportunity to address the issue. Related examples concerning the “compaction test and permeability analysis” (Responses to Comments 348, 417) and the “geologic investigation of the berms” (Response to Comment 424) were never raised by ADEQ before the denial of the permit application for lack of information, and C & H was never allowed to address the issues. Moreover, as stated in the responses to comments in the Reg. 6 Permit (Exhibit A hereto) (e.g., Response to Comment 6 regarding the liners in the ponds), ADEQ has previously approved compliance with the NRCS Agricultural Management Field Handbook regarding the construction of the waste ponds.

11. This Appeal is taken from the Permit Decision of the Director, as more particularly described below.
12. Through this action, C&H requests an adjudicatory hearing and Commission review with respect to the Permit Decision, as more particularly described in the specific issues enumerated below and based upon the process followed by ADEQ as described above. C&H requests that the Commission find that the Permit Decision is arbitrary, capricious, not supported by substantial evidence, that a preponderance of the evidence (as well as the Commission’s rules and the governing statutory authority) supports a resolution of the issues presented herein in favor of C&H. C&H requests that the Commission find that ADEQ has failed

to include in the written record of this proceeding a written explanation of the rationale for the Permit Decision, that ADEQ has failed to provide an adequate written explanation of the rationale for the Permit Decision, and that ADEQ has failed to demonstrate that the Permit Decision was based upon generally accepted scientific knowledge and engineering practices, all as required by Regulation No. 8, Section 8.211(A)(2). Further, C&H requests the Commission to find that ADEQ is estopped to deny the permit application for the reasons stated in its Statement of Basis due to the reliance of C&H on ADEQ's requests for information and its responses thereto. *Foote's Dixie Dandy, Inc. v. McHenry*, 270 Ark. 816, 607 S.W.2d 323 (1980). Further, C&H requests the Commission to find that the Reg. 6 Permit is, and remains in effect until ADEQ issues a permit that satisfies the requirements of Regulation No. 6.

13. C&H is currently operating under the terms of NPDES General Permit No. ARG590000, issued pursuant to Reg. 6, Regulations for State Administration of the National Pollutant Discharge Elimination System (NPDES) ("Reg. 6").
14. NPDES General Permit No. ARG590000 was issued on October 6, 2011, with an expiration date of October 31, 2016. On August 3, 2012 ADEQ issued notice of coverage under NPDES General Permit No. ARG590000 to C&H, issued as NPDES Permit No. ARG590001. ADEQ published Notification of Renewal of NPDES General Permit No. ARG590000 on October 31, 2015, and ADEQ prepared a draft renewal permit and issued public notice of the draft renewal permit on March 15, 2016. On March 21, 2016 ADEQ approved a third substantial change to the C&H facility and NPDES Permit No. ARG590001,

which involved the installation of synthetic liners to Waste Storage Ponds 1 and 2, as well as the installation of a methane flare system and cover on Waste Storage Pond 1. On April 20, 2016 C&H timely filed an application for renewal of coverage under NPDES General Permit No. ARG590001 which administratively continued C&H's authority to operate under NPDES General Permit No. ARG590000, as issued to C&H through NPDES Permit No. ARG590001. On May 4, 2016 ADEQ decided to not renew NPDES General Permit No. ARG590000 and issued a notice of its decision. On April 7, 2016 C&H also filed an application for a No-Discharge Permit, and on February 15, 2017 ADEQ prepared a draft of No-Discharge Permit No. 5264-W to issue to C&H, and published notice of its intent to issue No-Discharge Permit No. 5264-W to C&H. At no time did ADEQ issue a public notice and request comment of its intent to not renew NPDES General Permit No. ARG590000, NPDES Permit No. ARG590001, or to terminate C&H's coverage under ARG590000, and its authority to operate pursuant to NPDES Permit No. ARG590001.

15. ADEQ has taken the position that the denial of the Individual No-Discharge Permit No. 5264-W was the "final decision for an individual permit," which terminated C&H's coverage under ARG590000, and its authority to operate pursuant to NPDES Permit No. ARG590001 ("the "ADEQ Position"). The ADEQ Position is presumed to be based upon Ark. Code Ann 8-4-203(m)(5)(D), which 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.”

16. The ADEQ Position ignores the important procedural requirements found in Reg. 6 relating to decisions that terminate a permittee’s authority to operate under an NPDES permit such as ARG590000/ARG590001.
17. C&H has appealed ADEQ’s decision to deny the Individual No-Discharge Permit No. 5264-W, and the Commission has stayed that decision. C&H objects to and disagrees with the ADEQ Position. C&H interprets the applicable rules as authorizing C&H to continue to operate under NPDES General Permit No. ARG590000/ARG590001 until ADEQ terminates C&H’s coverage under NPDES General Permit No. ARG590001, pursuant to the applicable substantive and procedural rules outlined in state and federal law.
18. As part of EPA’s delegation of NPDES permitting authority to ADEQ, APCEC incorporated into Reg. 6 by reference federal regulations that apply to state delegated NPDES programs, and substituting ADEQ for EPA and substituting Director of ADEQ for Administrator or Regional Administrator. Federal Regulations incorporated by reference into Reg. 6, which are relevant to the ADEQ Position, include, without limitation, the following portions of Title 40 of the Code of Federal Regulations: Part 122 (including 122.64 and 122.28), and 124.5(d).
19. 40 CFR 122.28(b)(3)(ii-iv), incorporated by reference into Reg. 6, provides as follows:
 - (ii) *For EPA issued general permits only*, the Regional Administrator may require any owner or operator authorized by a general permit to apply for an

individual NPDES permit as provided in paragraph (b)(3)(i) of this section, only if the owner or operator has been notified in writing that a permit application is required. This notice shall include a brief statement of the reasons for this decision, an application form, a statement setting a time for the owner or operator to file the application, and a statement that on the effective date of the individual NPDES permit the general permit as it applies to the individual permittee shall automatically terminate. The Director may grant additional time upon request of the applicant.

(iii) Any owner or operator authorized by a general permit may request to be excluded from the coverage of the general permit by applying for an individual permit. The owner or operator shall submit an application under § 122.21, with reasons supporting the request, to the Director no later than 90 days after the publication by EPA of the general permit in the Federal Register or the publication by a State in accordance with applicable State law. The request shall be processed under part 124 or applicable State procedures. The request shall be granted by issuing of any individual permit if the reasons cited by the owner or operator are adequate to support the request.

(iv) When an individual NPDES permit is issued to an owner or operator otherwise subject to a general NPDES permit, the applicability of the general permit to the individual NPDES permittee is automatically terminated on the effective date of the individual permit.

20. ADEQ did not notify C&H in writing that a permit application was required pursuant to 40 CFR 122.28(b)(3)(iii). Because C&H was not provided notice, it was not provided a brief statement of the reasons for this decision, an application form, or a statement setting a time for C&H to file the application, and a statement that on the effective date of the individual NPDES permit the general permit as it applies to the individual permittee shall automatically terminate. The ADEQ Position is incorrect because NPDES Permit No. ARG590001 remains in effect until an individual permit is issued, and that has not occurred.

21. The applicable Part 124 procedures for terminating a general permit, as specified in 40 CFR 122.28(b)(1) are found in 40 CFR 124.5(a) and (d), both of which have been incorporated into Reg. 6, and provides as follows:

§ 124.5 Modification, revocation and reissuance, or termination of permits.

(a) *(Applicable to State programs, see §§ 123.25 (NPDES), 145.11 (UIC), 233.26 (404), and 271.14 (RCRA).)* Permits (other than PSD permits) may be modified, revoked and reissued, or terminated either at the request of any interested person (including the permittee) or upon the Director's initiative. However, **permits may only be modified, revoked and reissued, or terminated for the reasons specified in § 122.62 or § 122.64 (NPDES), 144.39 or 144.40 (UIC), 233.14 or 233.15 (404), and 270.41 or 270.43 (RCRA).** All requests shall be in writing and shall contain facts or reasons supporting the request.

* * *

(d) *(Applicable to State programs, see §§ 123.25 (NPDES) of this chapter, 145.11 (UIC) of this chapter, and 271.14 (RCRA) of this chapter.)* (1) If the Director tentatively decides to terminate: A permit under § 144.40 (UIC) of this chapter, a permit under §§ 122.64(a) (NPDES) of this chapter or 270.43 (RCRA) of this chapter (for EPA-issued NPDES permits, only at the request of the permittee), or a permit under § 122.64(b) (NPDES) of this chapter where the permittee objects, he or she shall issue a notice of intent to terminate. A notice of intent to terminate is a type of draft permit which follows the same procedures as any draft permit prepared under § 124.6 of this chapter.

(2) For EPA-issued NPDES or RCRA permits, if the Director tentatively decides to terminate a permit under § 122.64(a) (NPDES) of this chapter, other than at the request of the permittee, or decides to conduct a hearing under section 3008 of RCRA in connection with the termination of a RCRA permit, he or she shall prepare a complaint under 40 CFR 22.13 and 22.44 of this chapter. Such termination of NPDES and RCRA permits shall be subject to the procedures of part 22 of this chapter.

(3) In the case of EPA-issued permits, a notice of intent to terminate or a complaint shall not be issued if the Regional Administrator and the permittee agree to termination in the course of transferring permit responsibility to an approved State under §§ 123.24(b)(1) (NPDES) of this chapter, 145.25(b)(1) (UIC) of this chapter, 271.8(b)(6) (RCRA) of this chapter, or 501.14(b)(1) (sludge) of this chapter. In addition, termination of an NPDES permit for cause pursuant to § 122.64 of this chapter may be accomplished by providing written notice to the permittee, unless the permittee objects.

22. 40 CFR 122.64, which sets out the substantive and additional procedural requirements for termination of a permit, or denial of a permit renewal application, provides as follows:

§ 122.64 Termination of permits (applicable to State programs, see § 123.25).

(a) The following are causes for terminating a permit during its term, or for denying a permit renewal application:

- (1) Noncompliance by the permittee with any condition of the permit;
- (2) The permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee's misrepresentation of any relevant facts at any time;
- (3) A determination that the permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or termination; or
- (4) A change in any condition that requires either a temporary or permanent reduction or elimination of any discharge or sludge use or disposal practice controlled by the permit (for example, plant closure or termination of discharge by connection to a POTW).

(b) The Director shall follow the applicable procedures in part 124 or part 22 of this chapter, as appropriate (or State procedures equivalent to part 124) in terminating any NPDES permit under this section . . .

23. At no time prior to ADEQ's January 10, 2018 decision to not approve No-Discharge Permit No. 5264-W did ADEQ make any of the findings required by "the applicable procedures in part 124." At no time prior to ADEQ's January 10, 2018 decision to not approve No-Discharge Permit No. 5264-W did ADEQ issue a "notice of intent to terminate" as required by the applicable procedures in part 124. At no time prior to ADEQ's January 10, 2018 decision to not approve No-Discharge Permit No. 5264-W did ADEQ file a complaint, or notice of violation, to initiate an adjudication of the findings required to terminate C&H's coverage under NPDES General Permit No. ARG590000, NPDES Permit No.

ARG590001. C&H specifically objects to, disputes and challenges each of ADEQ's responses to public comments that now appear to be the basis of the denial of the permit application, including, but not limited to, the following Responses to Comments 74, 209, 320, 324, 346, 348, 352, 359, 405, 417, and 424:

Response to Comment 74: The Department made this permitting decision in accordance with state laws and APC&EC Regulation 5, Liquid Animal Waste Management Systems. Upon consideration of the completed permit application, the public comments on the record, and additional data and information submitted during the permitting process, the Department denies issuance of the permit. The permit application does not contain a groundwater flow direction study as recommended by AWMFH Chapter 7. The Department has determined that a groundwater flow direction study is necessary due to the specific siting of this facility.

Response to Comment 209: The Department made this permitting decision in accordance with state laws and APC&EC Regulation 5, Liquid Animal Waste Management Systems. Upon consideration of the completed permit application, the public comments on the record, and additional data and information submitted during the permitting process, the Department denies issuance of the permit. The geologic investigation of the waste storage ponds does not comply with AWMFH Chapter 7.

Response to Comment 320: The Department made this permitting decision in accordance with state laws and APC&EC Regulation 5, Liquid Animal Waste Management Systems. Upon consideration of the completed permit application, the public comments on the record, and additional data and information submitted during the permitting process, the Department denies issuance of the permit. The permit application does not contain a groundwater flow direction study as recommended by AWMFH Chapter 7. The Department has determined that a groundwater flow direction study is necessary due to the specific siting of this facility.

Response to Comment 324: The Department made this permitting decision in accordance with state laws and APC&EC Regulation 5, Liquid Animal Waste Management Systems. Upon consideration of the completed permit application, the public comments on the record, and additional data and information submitted during the permitting process, the Department denies issuance of the permit. The geologic investigation of the waste storage ponds does not comply with AWMFH Chapter 7.

Response to Comment 346: The Department made this permitting decision in accordance with state laws and APC&EC Regulation 5, Liquid Animal Waste Management Systems. Upon consideration of the completed permit application, the public comments on the record, and additional data and information submitted during the permitting process, the Department denies issuance of the permit. The geologic investigation of the waste storage ponds does not comply with AWMFH Chapter 7.

Response to Comment 348: The Department made this permitting decision in accordance with state laws and APC&EC Regulation 5, Liquid Animal Waste Management Systems. Upon consideration of the completed permit application, the public comments on the record, and additional data and information submitted during the permitting process, the Department denies issuance of the permit. The geologic investigation of the waste storage ponds does not comply with AWMFH Chapter 7. The compaction test and permeability analysis does not comply with the AWMFH Chapter 10.

Response to Comment 352: The Department made this permitting decision in accordance with state laws and APC&EC Regulation 5, Liquid Animal Waste Management Systems. Upon consideration of the completed permit application, the public comments on the record, and additional data and information submitted during the permitting process, the Department denies issuance of the permit. The geologic investigation of the waste storage ponds does not comply with AWMFH Chapter 7. The permit application does not contain an emergency action plan as recommended by AWMFH Chapter 2. The Department has determined that an emergency action plan is necessary due to the specific siting of this facility. The permit application does not contain a groundwater flow direction study as recommended by AWMFH Chapter 7. The Department has determined that a groundwater flow direction study is necessary due to the specific siting of this facility.

Response to Comment 359: The Department made this permitting decision in accordance with state laws and APC&EC Regulation 5, Liquid Animal Waste Management Systems. Upon consideration of the completed permit application, the public comments on the record, and additional data and information submitted during the permitting process, the Department denies issuance of the permit. The geologic investigation of the waste storage ponds does not comply with AWMFH Chapter 7.

Response to Comment 405: The Department made this permitting decision in accordance with state laws and APC&EC Regulation 5, Liquid Animal Waste Management Systems. Upon consideration of the completed permit application, the public comments on the record, and additional data and information submitted during the permitting process, the Department denies issuance of the permit. The geologic investigation of the waste storage ponds does not comply with AWMFH Chapter 7.

Response to Comment 417: The Department made this permitting decision in accordance with state laws and APC&EC Regulation 5, Liquid Animal Waste Management Systems. Upon consideration of the completed permit application, the public comments on the record, and additional data and information submitted during the permitting process, the Department denies issuance of the permit. The geologic investigation of the waste storage ponds and berms does not comply with AWMFH Chapter 7. The compaction test and permeability analysis does not comply with the AWMFH Chapter 10.

Response to Comment 424: The Department made this permitting decision in accordance with state laws and APC&EC Regulation 5, Liquid Animal Waste Management Systems. Upon consideration of the completed permit application, the public comments on the record, and additional data and information submitted during the permitting process, the Department denies issuance of the permit. The geologic investigation of the berms does not comply with AWMFH Chapter 7.

24. As further support for the Appeal, C&H submits herewith and incorporates herein as Exhibits H and I hereto, respectively, the study, report and findings of the University of Arkansas Big Creek Research and Extension Team and ADEQ's contractor, Harbor Drilling.

ISSUE NO. 1-DENIAL OF THE PERMIT WAS NOT AN OPTION

25. The contents of paragraphs 1-24 are incorporated herein.
26. Reg. 6.201 Status and Continuation of Permits, provides as follows: "Conditions of a National Pollutant Discharge Elimination System permit issued by the Arkansas Department of Environmental Quality will continue in effect past the expiration date pending issuance of a new permit, if: (1) The permittee has submitted a timely and complete application as described in 40 C.F.R. § 122.21; and (2) The Director, through no fault of the permittee, does not issue a new permit prior to the expiration date of the previous permit."

27. C&H submitted a timely and complete application for renewal of the Reg. 6 Permit, and through no fault of C&H, ADEQ did not issue a new permit prior to the expiration date of the previous permit. 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.
28. Accordingly, the Reg. 6 Permit remains in effect until such time as ADEQ issues a new permit, or the Permit has been duly revoked through an enforcement action pursuant to Regulation 8, Section 8.402, and the Permit Decision should be remanded to ADEQ with directions to issue a new permit.

ISSUE NO. 2-THE DECISION WAS PROCEDURALLY FLAWED DUE TO FAILURE TO PROVIDE NOTICE AND COMMENT

29. The contents of paragraphs 1-28 are incorporated herein.
30. ADEQ was required by law, regulation, and constitutional due process to provide public notice of its proposed decision and provide an opportunity for comment upon its proposed decision prior to issuing a final decision. The Permit Decision to deny the permit was not noticed in the Draft Permit, was not noticed as a draft for the Permit Decision, was not supported in the Statement of Basis for the Draft Permit, was not supported in a Statement of Basis for the Permit Decision, and as a result the Permit Decision must be remanded to ADEQ so that a draft of the decision can be issued for public notice and comment.
31. C&H is currently operating under the terms of NPDES General Permit No. ARG590000, issued pursuant to Reg. 6.
32. NPDES General Permit No. ARG590000 was issued on October 6, 2011, with an expiration date of October 31, 2016. On August 3, 2012 ADEQ issued notice of

coverage under NPDES General Permit No. ARG5900000 to C&H. ADEQ published Notification of Renewal of NPDES General Permit No. ARG5900000 on October 31, 2015, and ADEQ issued public notice of the draft renewal permit on March 15, 2016. On March 21, 2016 ADEQ approved a third substantial change to the C&H facility, which involved the installation of synthetic liners to Waste Storage Ponds 1 and 2, as well as install a methane flare system and cover on Waste Storage Pond 1. On April 20, 2016 C&H timely filed an application for renewal of coverage under NPDES General Permit No. ARG5900000 which administratively continued C&H's authority to operate under NPDES General Permit No. ARG5900000 . On May 4, 2016 ADEQ decided to not renew NPDES General Permit No. ARG5900000 and issued a notice of its decision. On April 7, 2016 C&H also filed an application for a No-Discharge Permit, and on February 15, 2017 ADEQ prepared a draft No-Discharge Permit No. 5264-W, and published notice of its intent to issue No-Discharge Permit No. 5264-W. At no time did ADEQ issue a public notice and request comment of its intent to not renew NPDES General Permit No. ARG5900000, or to terminate C&H's authority to operate pursuant to NPDES General Permit No. ARG5900001.

33. ADEQ has taken the position that the denial of the Individual No-Discharge Permit No. 5264-W was the "final decision for an individual permit," which terminated C&H's authority to continue operating under NPDES General Permit No. ARG5900001 ("the "ADEQ Position"). The ADEQ Position is presumed to be based upon Ark. Code Ann 8-4-203(m)(5)(D), which 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.”

34. The ADEQ Position ignores the important procedural requirements found in Reg. 6 relating to decisions that terminate a permittee’s authority to operate under an NPDES permit.
35. C&H has appealed ADEQ’s decision to deny the Individual No-Discharge Permit No. 5264-W, and the Commission has stayed that decision. C&H objects to and disagrees with the ADEQ Position. C&H interprets the applicable rules as authorizing C&H to continue to operate under NPDES General Permit No. ARG590000 until ADEQ terminates C&H’s coverage under NPDES General Permit No. ARG590001, pursuant to the applicable substantive and procedural rules outlined in state and federal law.
36. As part of the delegation of NPDES permitting authority, APCEC incorporated into Reg. 6 by reference federal regulations that apply to state delegated NPDES programs. Federal Regulations incorporated by reference into Reg. 6, which are relevant to the ADEQ Position, include, but are not limited to, the following portions of Title 40 of the Code of Federal Regulations: Part 122 (including 122.28, 122.64), and 124.5(d).
37. The applicable Part 124 procedures for terminating a permit are found in 40 CFR 124.5(a) and (d), both of which have been incorporated into Reg. 6, and provide as follows:

§ 124.5 Modification, revocation and reissuance, or termination of permits.

(a) *(Applicable to State programs, see §§ 123.25 (NPDES), 145.11 (UIC), 233.26 (404), and 271.14 (RCRA).)* Permits (other than PSD permits) may be modified, revoked and reissued, or terminated either at the request of any interested person (including the permittee) or upon the Director's initiative. However, permits may only be modified, revoked and reissued, or terminated for the reasons specified in § 122.62 or § 122.64 (NPDES), 144.39 or 144.40 (UIC), 233.14 or 233.15 (404), and 270.41 or 270.43 (RCRA). All requests shall be in writing and shall contain facts or reasons supporting the request.

* * *

(d) *(Applicable to State programs, see §§ 123.25 (NPDES) of this chapter, 145.11 (UIC) of this chapter, and 271.14 (RCRA) of this chapter.)* (1) If the Director tentatively decides to terminate: A permit under § 144.40 (UIC) of this chapter, a permit under §§ 122.64(a) (NPDES) of this chapter or 270.43 (RCRA) of this chapter (for EPA-issued NPDES permits, only at the request of the permittee), or a permit under § 122.64(b) (NPDES) of this chapter where the permittee objects, he or she shall issue a notice of intent to terminate. A notice of intent to terminate is a type of draft permit which follows the same procedures as any draft permit prepared under § 124.6 of this chapter.

(2) For EPA-issued NPDES or RCRA permits, if the Director tentatively decides to terminate a permit under § 122.64(a) (NPDES) of this chapter, other than at the request of the permittee, or decides to conduct a hearing under section 3008 of RCRA in connection with the termination of a RCRA permit, he or she shall prepare a complaint under 40 CFR 22.13 and 22.44 of this chapter. Such termination of NPDES and RCRA permits shall be subject to the procedures of part 22 of this chapter.

(3) In the case of EPA-issued permits, a notice of intent to terminate or a complaint shall not be issued if the Regional Administrator and the permittee agree to termination in the course of transferring permit responsibility to an approved State under §§ 123.24(b)(1) (NPDES) of this chapter, 145.25(b)(1) (UIC) of this chapter, 271.8(b)(6) (RCRA) of this chapter, or 501.14(b)(1) (sludge) of this chapter. In addition, termination of an NPDES permit for cause pursuant to § 122.64 of this chapter may be accomplished by providing written notice to the permittee, unless the permittee objects.

38. 40 CFR 122.64, which sets out the substantive and additional procedural requirements for termination of a permit, or denial of a permit renewal application, provides as follows:

§ 122.64 Termination of permits (applicable to State programs, see § 123.25).

(a) The following are causes for terminating a permit during its term, or for denying a permit renewal application:

- (1) Noncompliance by the permittee with any condition of the permit;
 - (2) The permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee's misrepresentation of any relevant facts at any time;
 - (3) A determination that the permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or termination; or
 - (4) A change in any condition that requires either a temporary or permanent reduction or elimination of any discharge or sludge use or disposal practice controlled by the permit (for example, plant closure or termination of discharge by connection to a POTW).
- (b) The Director shall follow the applicable procedures in part 124 or part 22 of this chapter, as appropriate (or State procedures equivalent to part 124) in terminating any NPDES permit under this section . . .

**ISSUE NO. 3-THE DECISION TO NOT ISSUE THE PERMIT WAS WRONG,
AND ADEQ SHOULD BE ESTOPPED FROM DENYING THE PERMIT FOR
THE REASONS STATED IN THE STATEMENT OF BASIS**

39. The contents of paragraphs 1-38 are incorporated herein.
40. When ADEQ issued the Draft Permit, it represented that it had all the information required to do so, and it did not request comment upon the issue of whether complete information was available to support the decision reflected in the Draft Permit. It would be inappropriate to deny the same permit for the purported reason that information was lacking. 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. The Permit Decision was inappropriate, and ADEQ is estopped from denying the permit on this basis and under these circumstances. Further, C&H contends that ADEQ has now stated that information is required without stating the legal and regulatory basis for requiring the information. The Permit Decision should be reversed and

remanded to ADEQ with instructions to advise C&H as to what additional information is required, the legal and regulatory basis for requiring the additional information, and to provide C&H an opportunity to provide such additional information, and upon receipt and review of that information to provide public notice and an opportunity to comment on whatever decision might result.

ISSUE NO. 4-CERTAIN STATEMENTS CONTAINED IN THE RESPONSIVE SUMMARY DO NOT REFLECT THE RATIONALE FOR THE PERMIT DECISION AND SHOULD NOT BE CONSIDERED IN THIS APPEAL, BUT TO THE EXTENT THE RESPONSES TO COMMENTS ARE CONSIDERED, THEY ARE INAPPROPRIATE TO SUPPORT THE PERMIT DECISION, AND RESPONDENT OBJECTS TO SUCH RESPONSES

41. The contents of paragraphs 1-40 are incorporated herein.
42. The Responsive Summary includes the following statement in response to many comments: “The Department made this permitting decision in accordance with state laws and APC&EC Regulation 5, Liquid Animal Waste Management Systems. Upon consideration of the completed permit application, the public comments on the record, and additional data and information submitted during the permitting process, the Department denies issuance of the permit.” See, e.g. Response to Comments 74, 209, 320, 324, 346, 348, 352, 359, 405, 417, 424). ADEQ goes on to provide vague references to information that is lacking, such as a groundwater flow study, the geologic investigation of the waste storage ponds and berms, the compaction test and permeability analysis, inadequate documentation of compliance with the Agricultural Waste Management Field Handbook with respect to the presence of karst, application of waste in excess of agronomic need, the impact of sudden breach or accidental release for waste impoundments, an emergency action plan for waste impoundments, application of

waste on flood prone and sloping 8-15% fields, the use of injection or incorporation, and proximity of a waste impoundment to sensitive ground water areas. None of these responses to comments makes any substantive findings on any of these issues, but rather just states that adequate information has not been presented and, in some cases, transforms recommendations of the AWMFH into requirements that were not communicated to C&H before the denial of the permit application. Under the circumstances, these responses to comments are not supported by generally accepted scientific and engineering knowledge and practices, and to the extent that these responses to comments are part of the Permit Decision, these responses are not appropriate to support the Permit Decision.

43. Respondent objects to the factual findings contained in these findings and the legal conclusions presented in these findings.
44. The Permit Decision should be reversed and remanded so that any additional information actually necessary to address these issues can be submitted, and so that ADEQ can actually review the information and determine whether it should proceed to issue the Draft Permit as written, or provide additional limitations and conditions as may be appropriate. Alternatively, the Commission should find that the Permit Decision was inappropriate, that an Individual Permit should be issued to Respondent, and that NPDES General Permit No. ARG150000/ARG150001 will remain in effect until an Individual Permit is issued to Respondent.
45. ADEQ has agreed to meet with C&H to review the reasons for the denial. Accordingly, in addition to its general right to amend this Request for

Adjudicatory Hearing and Commission Review, C&H expressly reserves the right to amend the request after the completion of the meeting with ADEQ.

REQUEST FOR DECLARATORY ORDER

46. The contents of paragraphs 1-45 are incorporated herein.
47. Regulation 8, Section 8.622 provides that “Any permittee or person subject to regulation by the Commission or the Department may petition the Commission for a Declaratory Order as to the applicability of any rule, statute, permit, or order enforced by the Commission or the Department. The petition shall be processed in the same manner as a Request for Hearing.”
48. The ADEQ Position improperly seeks to apply Ark. Code Ann 8-4-203(m)(5)(D) to its January 10, 2018 decision to not approve No-Discharge Permit No. 5264-W, and as a result terminate C&H’s authority to operate under NPDES General Permit No. ARG590000 and NPDES Permit No. ARG590001. C&H states that its authority to operate under NPDES General Permit No. ARG590000 and NPDES Permit No. ARG0001 continues until an individual permit is issued, or until ADEQ follows the procedures outlined in state and federal law, including documenting and making the findings required by Reg. 6 and 40 C.F.R. 124.5 and 122.64, including publishing a notice of intent to terminate, as required by Reg. 6 and 40 C.F.R. 124.5 and 122.64, and including filing a complaint or notice of violation to initiate an procedure to adjudicate the findings required by Reg. No. 6 and 40 C.F.R. 124.5 and 122.64, as required by Reg. 6 and 40 C.F.R. 124.5(d)(2), and until a final decision is made that complies with the proper procedures for

terminating C&H's authority to operate under NPDES General Permit No. ARG590000 and NPDES Permit No. ARG0001 .

49. Accordingly, C&H requests a declaratory order that

(a) ADEQ's decision to not approve No-Discharge Permit No. 5264-W did not terminate C&H's authority to operate under the terms of NPDES General Permit No. ARG590000 and ARG590001;

(b) Reg. 6 and 40 C.F.R. 123.28, 124.5 and 122.64, incorporated by reference into Reg. 6 apply to any termination of C&H's authority to operate under the terms of NPDES General Permit No. ARG590000 and ARG590001; and

(c) C&H's authority to operate under the terms of NPDES General Permit No. ARG590000 and ARG590001 continues until ADEQ issues an individual permit to C&H which authorizes continued operations, or follows the substantive and procedural requirements of state and federal law, including making the findings required by Reg. 6 and 40 C.F.R. 124.5 and 122.64, including publishing a notice of intent to terminate, as required by Reg. 6 and 40 C.F.R. 124.5 and 122.64, and including filing a complaint or notice of violation to initiate a procedure to adjudicate the findings required by Reg. 6 and 40 C.F.R. 124.5 and 122.64, as required by Reg. 6 and 40 C.F.R. 124.5(d)(2), and until a final decision to terminate C&H's authority to operate under the terms of NPDES General Permit No. ARG590000 and ARG590001 is made, following compliance with the proper procedures.

WHEREFORE, C&H requests an adjudicatory hearing and the opportunity to present evidence and oral argument before the Arkansas Pollution Control & Ecology Commission; that the stay entered herein on January 17, 2018 remain in place pending the exhaustion of any and all appeals in this matter, including appeals to circuit and appellate courts; that the Commission find, by a preponderance of the evidence, that ADEQ's decision to not issue Individual No-Discharge Permit No. 5264-W was inappropriate; that ADEQ's Permit Decision was arbitrary, capricious, not in accordance with state and federal law, in violation of the Arkansas and United States Constitution, and not supported by generally accepted scientific and engineering knowledge and

practices; for a declaratory decision as set forth hereinabove; and for such other proper and just relief as identified hereinabove and 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 attorneys of record by U.S. Mail, postage prepaid, this 7th day of February, 2018:

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