

IN THE CIRCUIT COURT OF NEWTON COUNTY, ARKANSAS
CIVIL DIVISION

CAROL BITTING, LIN WELLFORD
and NANCY HALLER, M.D.

APPELLANTS

VS.

NO. 51CV-17-10

ARKANSAS POLLUTION CONTROL
AND ECOLOGY COMMISSION and
ELLIS CAMPBELL d/b/a EC FARMS

APPELLEES

ORDER

This case concerns a non-discharge water permit issued by the Arkansas Department of Environmental Quality (ADEQ) to Ellis Campbell, d/b/a EC Farms ("EC Farms"). To put the matter in context, a brief history is required. In 2015, EC Farms received permit No. 3540-WR-6 ("WR-6") by way of transfer of a permit previously held by Richard Campbell, d/b/a C&C Hog Barn. Permit WR-6 allowed EC Farms to operate a 300 sow farrowing hog farm and use a land application area of 606.6 acres to receive up to 6.6 million gallons of waste from the sow farrowing operation.

In April of 2015, EC Farms submitted an application to modify Permit WR-6 into a land application only operation through a minor permit modification. Land application of liquid animal waste is subject to the regulations of the Arkansas Pollution Control and Ecology Commission (the Commission), specifically Regulation 5. After review of the EC Farms' application, ADEQ determined that the requested modification was a major modification pursuant to Regulation 5. A difference Regulation 5 makes between a minor modification and a major modification is that a minor modification may be made to a permit without public notice. Pursuant to applicable regulations, notices of EC Farms' application for modification and draft

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Permit No. 3540-WR-7 ("WR-7") were published. On June 29, 2016, ADEQ made its decision to issue Permit WR-7, a land application only permit, to EC Farms. Appellants¹ filed Requests for Hearing with the Commission seeking review of the Permit WR-7. (Ms. Bittings request, the relevant request, is found at Admin. Rec. pages 722-723). An Administrative Law Judge (ALJ) presided over the proceedings regarding the review and a lengthy record was made.

The ALJ considered all arguments and issues raised by the parties, but the controlling issue was whether the Commission could grant Permit WR-7 by modifying WR-6 or whether EC Farms was required to request a new land application only permit pursuant to the procedures of Regulation 8 of the Commission. After a thorough review, the ALJ wrote a lengthy, well-written Recommended Decision (Order No. 9), which was submitted for the Commission's consideration. The Recommended Decision stated that Permit No. 3540-WR-7 was affirmed, except that it was remanded to the ADEQ with the following directions: "ADEQ must issue a separate tracking number for Permit No. 3540-WR-7 as required by Reg. 5.601" and "ADEQ shall receive the appropriate permit fee for a separate permit as required by Reg. 5.601." On January 27, 2017, the Commission issued Minute Order No. 17, adopting and affirming without modification the ALJ's Recommended Decision (Order No. 9). (Admin Rec. Page 635)

The finding by the ALJ was, in effect, that ADEQ should issue EC Farms a new permit, but that EC Farms should not be required to go through the regulatory process to obtain a new permit. The ALJ apparently thought that requiring EC Farms to commence proceedings to

¹ Dr. Haller passed away prior to the hearing in circuit court. Counsel for Appellants stated that Dr. Haller's claim would not be revived.

obtain a new permit would be putting form over substance. The ALJ basically fashioned a remedy to the particular facts of the case before him.

The Appellants bring this appeal contending that the findings in Order No. 9 are inconsistent with Commission Regulation 5. They contend that the Commission should have voided Permit WR-7 and remanded the matter to ADEQ for commencement of new proceedings for a land only application.

Because ADEQ processed EC Farms's application as a modification, the commission was only required to consider public comments on the conditions subject to modification. See Ark. PC&E Reg. 5.305. If the application had been processed as a request for a new land only application permit, the public would have been allowed to review and comment on the new permit as entirely a land application only permit. Appellants contend that by only being allowed to comment on modifications, they were deprived of due process.

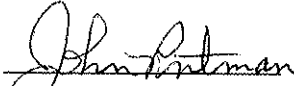
The court agrees that if EC Farms is to be issued a new permit, it should be required to go through the process required by the regulations to obtain a new permit. However, this issue should have never been before the Commission. Ark. Stat. Ann. § 8-4-205(b)(3) states as following: "A request for a hearing 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 by the court). The request for hearings filed by Appellants do not include a complete and detailed statement regarding the issue of whether EC Farm's application could be processed by modification rather than through proceedings for a new permit. Appellees raised this issue in motions to dismiss. The ALJ found the issue was waived by ADEQ when ADEQ brought up the issue in its motion to dismiss, and also waived by EC Farms when it

adopted ADEQ's motion to dismiss. Further the ALJ found that the purpose behind Reg. 8.603 (C)(1)(c) (promulgated to implement Ark. Stat. Ann. § 8-4-205(b)(3)), was to simply apprise the ALJ and ADEQ of the legal and factual objections a Petitioner intends to raise during a hearing.

By mentioning the issue in its motion regarding whether EC Farms's application could be processed by modification, ADEQ didn't waive the issue. Ark. Stat. Ann. § 8-4-205(b)(3) clearly and precisely states what Appellants were required to include in their requests for hearing. The court recognizes that Reg. 8.603 (C)(2) states: "Failure to file a Request for Hearing in the form and manner set out in Reg. 8.603(C)(1) may result in the dismissal of the Request for Hearing." However, the word "may" in Reg. 8.603 (C)(2) is contrary to the word "must" in Ark. Stat. Ann. § 8-4-205(b)(3). An administrative regulation cannot be contrary to a statute. *Yamaha Motor Corp., U.S.A. v. Richard's Honda Yamaha*, 344 Ark. 44, 38 S.W.3d 356 (2001).

EC Farm's application for a land application only permit was processed as a modification by ADEQ and that process was not properly legally challenged by Appellants. This matter should be, and hereby is, remanded with directions that EC Farms be issued Permit No. 3540-WR-7, and no separate tracking number or permit fee shall be required. All other provisions of Adopted Order No. 9 which are not inconsistent with this Order are affirmed.

IT IS SO ORDERED.


Circuit Judge

Date: January 8, 2018