

IN THE CIRCUIT COURT OF NEWTON COUNTY, ARKANSAS
CIVIL DIVISION

CAROL BITTING,
LIN WELLFORD &
NANCY HALLER

FILED
CLERK OF THE CIRCUIT CLERK
NEWTON COUNTY ARKANSAS

VS.

CASE NO. 51CV-17-10

JAN 25 2018

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

11:55 A.M. P.M.

APPELLEES

MOTION FOR RECONSIDERATION

The Arkansas Pollution Control and Ecology Commission (Commission), by and through its attorneys, Jamie L. Ewing and Dara A. Hall, do hereby respectfully request that this Court reconsider its decision as set forth in the Order entered in this docket on January 10, 2018. The Commission submits the following arguments as support for its request for reconsideration:

1. The Commission was not given a chance to address the Court's interpretation of Ark. Code Ann. § 8-4-205(b)(3) and Reg. 8.603(C)(1) & (2) before the Order was entered. The Commission asks the Court to reconsider these sections and find that those provisions are not in conflict but, rather, work together to support the conclusion of

the Administrative Law Judge (ALJ) and the decision of the Commission.

2. The Court is correct in noting that Ark. Code Ann. § 8-4-205(b)(3) sets forth the required contents of a request for hearing. However, the statute is silent as to the consequences for filing a deficient request for hearing.

3. Pursuant to Ark. Code Ann. § 8-1-203(b)(3), the Commission has the power to “promulgat[e]...rules and regulations governing administrative procedures for challenging or contesting department actions.”

4. Many administrative actions that challenge or contest an action of ADEQ are initiated by *pro se* clients, as was the situation in this matter. By using the term “may” in Reg. 8.603(C)(2), the Commission’s regulation offers flexibility in the consequences for failure to meet the statutory requirements based on the facts of each case. For example, the Commission may request that a Request for Hearing be amended within a certain period of time to offer a more definite statement of issues raised. At other times, dismissal may be appropriate.

5. In the present matter, there is substantial evidence in the record to support the ALJ's determination that the Appellant's Request for Hearing was sufficient to raise the issue of whether Reg. 5 required a separate permit for land application-only or allowed an existing operating permit to be modified for land application-only. As the ALJ found and the Court does not dispute, ADEQ readily identified this issue in its Motion to Dismiss based on the contents of the Requests for Hearing. The record supports the Commission's decision to uphold the ALJ's Recommended Decision and to take up this issue.

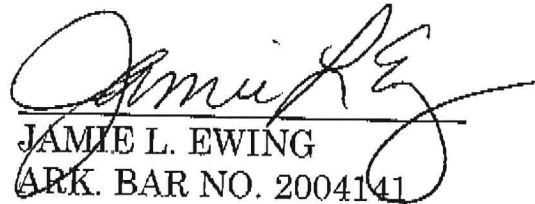
6. Furthermore, despite the focus of the Appellant's Notice of Appeal, the issue before the ALJ and the Commission was not the process but the form of the necessary permit – either a separate permit for land application-only or modification of an existing operating permit. After determining that a separate permit was required, neither the ALJ nor the Commission directed ADEQ on the process for issuing that permit. That is not the role of the Commission; that is solely within the permitting authority of ADEQ.

7. As argued before this Court, if the Appellants disagreed with the process chosen by ADEQ in issuing the separate permit, that

decision could have then been challenged before the Commission. A challenge to the process for issuing a separate permit could have been properly raised after ADEQ issued Permit No. 5282-W on February 28, 2017.

8. The standard of review of a Commission decision is whether there is substantial evidence to support the decision. See Ark. Code Ann. § 8-4-227(d); *Tri-County Solid Waste Dist. v. Ark. Pollution Control & Ecology Comm'n*, 365 Ark. 368, 230 S.W.3d 545 (2006). The reviewing court should not substitute its judgment for that of the Commission. *In re Sugarloaf Mining Co. v. Ark. Dep't of Pollution Control & Ecology*, 310 Ark. 772, 840 S.W.2d 172 (1992).

For the foregoing reasons, the Commission respectfully requests that this Court reconsider its Order and find that Ark. Code Ann. § 8-4-205(b)(3) and Reg. 8.603(C)(2) are not in conflict, that substantial evidence supports the Commission's decision not to dismiss the issue of whether a separate land application-only permit was needed, and that substantial evidence also supports the decision that a separate permit was required under Reg. 5.601.



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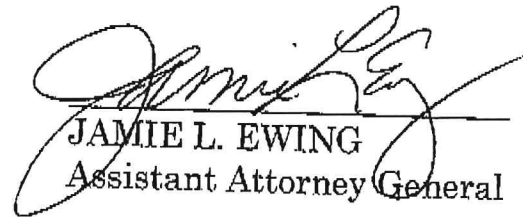
*Attorneys for Arkansas Pollution Control &
Ecology Commission*

CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2018, I served the foregoing document via United States Mail, postage prepaid, and electronic mail on the following:

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