

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

IN THE MATTER OF C & H HOG FARMS, INC.

AFIN 51-00164; PERMIT NO. 5264-W

RESPONSE TO MOTION FOR STAY OF PERMITTING DECISION

Comes the Buffalo River Watershed Alliance, Inc., an Arkansas not-for-profit corporation, and for its Response to the Motion of C&H Hog Farm for a Stay of the Permitting Decision, states:

There is No Appeal Filed In Which To Stay the Permitting Decision

1. The filing of a Motion for Stay is premature in that there has been no petition for review of the permitting decision of ADEQ relative to the C&H Hog Farm permit application. Reg. 8.612 (A) provides that “During the pendency of a Commission review: (1) the denial of a permit shall stand;” Subsection (B) provides that notwithstanding the provisions of subsection (A), the Commission may provide for a stay to avoid substantial prejudice to any party. However, such stay is predicated upon the pendency of a Commission review.

BRWA Has Standing to Object to a Stay

2. The Buffalo River Watershed Alliance, Inc. (“BRWA”) is an entity consisting of over 2,000 individuals and businesses who oppose the granting of a permit to C&H Hog Farm under Regulation 5 of the Arkansas Pollution Control & Ecology Commission (“APC&EC”), and that submitted extensive comments to the Arkansas Department of Environmental Quality (“ADEQ”)

on its behalf and on behalf of its supporters during the period for submission of comments in opposition to the draft permit.

3. On January 10, 2018, the ADEQ issued its final permitting decision on Permit No. 5264-W, denying the application of C&H Hog Farm, Inc. for a permit pursuant to Regulation 5. BRWA concurs in the findings of fact and conclusions of law contained in the final permitting decision.

***The Statement of Basis Clearly Shows C&H Failed to
Provide Sufficient Information to Support its Application***

4. Contrary to the contention contained in C&H Hog Farm's Motion for Stay, the Statement of Basis provided by ADEQ for the denial of the permit plainly states that the basis for the denial of the permit was:

- (a) Reg. 5.402 states that "design and waste management plan shall be in accordance with" the U.S. Department of Agriculture Natural Resources Conservation Field Office Technical Guide, as amended, and the Agricultural Waste Management Field Handbook as amended.
- (b) that "the record fails to include the requisite geological, geotechnical, groundwater, soils, structural, and testing information specified in Reg. 5.402;" and
- (c) that "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.

5. The burden is on C&H Hog Farm to provide the information and documentation necessary to support its application for permit. Based upon the Statement of Basis issued by ADEQ, C&H failed to provide such information to the satisfaction of ADEQ.

C&H Has Not Produced Evidence to Support a Stay of the Decision

6. BRWA denies the allegation contained in Paragraph 3 of C&H's Motion for Stay that there is no risk of harm to the public if a stay of the permitting decision is granted. The presence and operation of the C&H hog confined animal feeding operation, with its extensive waste storage ponds and waste spreading operation in the Buffalo River watershed, has been the subject of great controversy since its permitting and construction in 2012. BRWA and other organizations representing the public interest have maintained and continued to maintain that there is a continuous and on-going risk of harm to the public health and the environment by the operations of C&H. C&H has not shown that any risk of its operations has been reduced.

7. BRWA denies the allegations contained in Paragraph 4 of C&H's Motion for Stay that "C&H is likely to succeed on the merits of its request for hearing and administrative review." C&H provides nothing other than general statements to support that conclusion, and does not attempt to present any arguments on which it will appeal or to quantify the relative merits of such argument to show why it believes that it is likely to succeed on the merits of an appeal. Indeed, all it argues is that it does not know why the permit was denied by ADEQ. Further, the fact that the waste storage ponds and the confined animal feeding facility were constructed in compliance with Reg. 6 regulations, and that there has been no change in the ponds or the farm since that time does not have any relevance to the merits of the denial of C&H's Regulation 5 permit application by ADEQ. In other words, the reasons provided by C&H for stay of the permitting decision are irrelevant to whether C&H may prevail on appeal of the permitting decision.

8. Under A.C.A. § 8-4-205 (c)(6)(C) and Commission Regulation 8.612, the Commission

may provide for a stay of a permitting decision to avoid “substantial prejudice” to any party. A.C.A. § 8-4-205 (c)(6)(C)(ii) defines “substantial prejudice” to mean that the following will occur to the party seeking a stay, a modification of the terms of a stay, or the termination of a stay if the request is denied:

- (a) Actual harm to health; or
- (b) Adverse economic impact, including without limitation interruption, curtailment, or deferral of business or increased cost of construction or operation;

9. C&H has not provided information to support a claim that “substantial prejudice” would result to it as defined by A.C.A. § 8-4-205 (c)(6)(C)(ii), and the Motion for Stay should be denied.

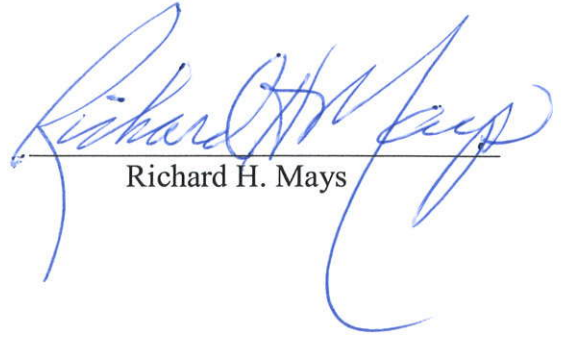
10. Further, C&H’s reliance on the theory of estoppel to prevent ADEQ from denial of the permit is misplaced. The case of *Foote’s Dixie Dandy, Inc. v. McHenry*, 270 Ark. 816, 607 S.W.2d 323 (1980) is not applicable to the facts of this case. Based on the evidence presented by C&H in support of its Motion for Stay, ADEQ did not mislead C&H into failing to submit sufficient data to support its application.

C&H Should Be Required to Post Security for Damages and Closure

11. The Commission should require C&H to provide to ADEQ reasonable security for payment of any costs of remediation of any damages that may occur during an appeal of the permitting decision, and of the costs of closure of the facility and waste management ponds if the appeal is unsuccessful. See A.C.A. § 8-4-228 (Conditions for Granting Stay in Circuit Court). The Commission should obtain an opinion from ADEQ of an amount that would be fair and reasonable for such security.

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January 16, 2018



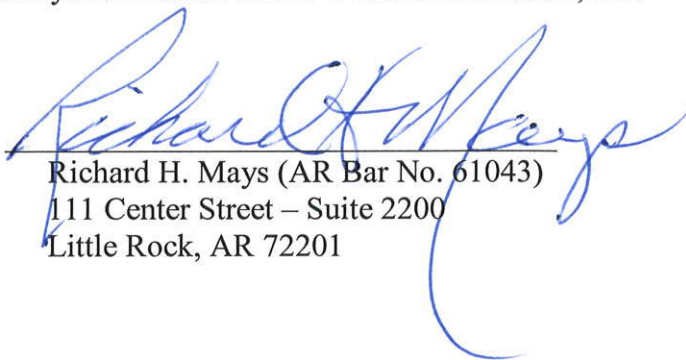
Richard H. Mays

WHEREFORE, Buffalo River Watershed Alliance, Inc. prays that the Motion for Stay of C&H Hog Farm be denied; that the operations of the hog farm be required to cease and terminate during any appeal of the denial of the permit by ADEQ. BRWA prays that C&H be required to post with ADEQ an amount to be determined by ADEQ that would be reasonable security for any damages that may occur during an appeal of the permitting decision, and of the costs of closure of the facility and waste management ponds if the appeal is unsuccessful.

Respectfully submitted,

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By:


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CERTIFICATE OF SERVICE

The undersigned certifies that on the date set forth below he served a copy of the above and foregoing Response upon counsel of record in the above entitled and numbered case by electronic mail addressed to:

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