

with Regulation 5 by modifying the EC Farms confined animal feeding permit to a land-application disposal only permit, instead of issuing a new land application disposal only permit, the ALJ did not continue that decision to its logical conclusion that ADEQ should reissue EC Farms' application for a new permit for public notice and comment pursuant to Regulation 8.

That issue is presented by the following facts.

Factual Background¹

At the time Ellis Campbell d/b/a EC Farms applied for authority to land dispose hog wastes generated by C&H Hog Farm on lands that Ellis Campbell controlled through leases or other written authority from the landowners, he was the owner of a permit issued by ADEQ numbered 3540-WR-6 (hereafter, WR-6). Permit WR-6 was a confined animal feeding operation permit issued under Regulation 5 that authorized Ellis Campbell to operate a 300 sow farrowing hog farm. However, before Ellis Campbell acquired WR-6, the previous owner of the facility had ceased hog farrowing operations and closed the waste holding pond and settling basin. Consequently, live swine could not be kept at the facility as it exists. However, that previous owner did not formally terminate his permit, thereby allowing it to subsequently be transferred to Ellis Campbell.

Ellis Campbell is related to the owners/operators of C&H Hog Farm, and he applied to ADEQ to modify Permit WR-6 on April 8, 2015 to change the operations permitted from on-site confined animal feeding to land disposal of hog wastes generated off-site by hogs at the C&H Hog Farm, a facility that is authorized to have up to 6,000 hogs on site at any time. ADEQ was

¹ The history of this permit is set forth in detail by the ALJ in the Decision's Findings of Fact on pages 3 and 4. The facts summarized in this Petition are deemed by Appellant to be those most relevant to the issue raised by this Request for Hearing.

of the opinion that it could convert or modify a confined animal feeding operation permit to a land disposal only permit, and advised Ellis Campbell that such conversion could be done as a major modification to the existing permit under Regulation 5.305.

ADEQ issued a draft modified permit (Permit WR-7), public notice was issued, and public comments received. Ninety (90) person submitted comments on the draft permit, and in its responses to those comments, ADEQ grouped them into 66 comments of similar content. A number of those comments were to the effect that, instead of modifying Permit WR-6 (a confined animal feeding operation permit), ADEQ should have issued a separate new permit for a land disposal only permit under Regulation 5.601. ADEQ's position was that the two permits authorized by Regulation 5 were interchangeable, and a new permit was not required. The ALJ found in his Recommended Decision that Regulation 5 provides for two separate and distinct permits, and that one cannot be modified to the other. Instead, a new permit must be issued to change the operations from confined animal feedings operations to land-disposal operations only, and vice-versa. However, he did not find that the complete permitting process, including public notice and opportunity to comment, should be required, but only the assignment of a new permit number and payment of the applicable fee for a new permit. It is this last portion of the Decision to which Appellant objects.

Argument Regarding Appellant's Proposal To Modify the ALJ's Recommended Decision

Whether Regulation 5 authorizes two permits, whether they are separate and distinct, and whether one can be converted to the other by a modification procedure were at the heart of this appeal. In his Decision, the ALJ conducted a detailed analysis of Regulation 5 as a whole, and came to the following conclusion:

Regulation 5.601 was adopted to provide ADEQ with the authority to issue land-application only permits. The ALJ finds that the permits, not just the facilities, require separation under Reg. 5.601. And when Reg. 5.601 is read in conjunction with Reg. 5.102 which states that the purpose of Regulation 5 is to provide two types of permits – one for confined animal operations and the other for land application sites – the most logical reading of Regulation 5 as a whole is that a separate permit is required for land application sites, and that a permit for a confined animal operation cannot be modified into a land-application only permit, or vice-versa.

The ALJ also wisely noted that this separation of the two types of permits authorized by Regulation 5 – the confined animal feeding operations permit and the land application only permit – is important from the perspective of public notice, writing: “The Reg. 5.601 requirement that CAFO permits and land-application only permits must be tracked and kept separate is also important from the perspective of public notice.” (Decision, p. 18) The ALJ also noted that it was his opinion that “[O]ne of the Commission’s motives in adopting Reg. 5.601 was to guarantee that public notice would occur if a farm production operation converted to a land-application only operation, and vice-versa.”

It has long been recognized by the courts that the opportunity of the public and interested parties to comment on significant governmental actions that have the potential to impact their lives and welfare or their use and enjoyment of the environment is an important public right, and that such right helps to safeguard against unwise or hasty government action. The Arkansas General Assembly recognized this in enacting requirements for public notice and opportunity to comment on new permits and major modifications of existing permits in Arkansas Code Ann. §8-4-203(d) and (e), and Commission Regulation 8.207 implements that statute. Failure to provide notice to the public of a proposed action and the opportunity to comment on that action can result in the action being held invalid.

Having stated in his Decision that public notice of and opportunity to comment on new permits or significant changes to permits is important, and that the interchanging of the two permits authorized by Regulation 5 as proposed by ADEQ and Ellis Campbell “could potentially jeopardize the public’s participation in the permitting process if those changes were deemed minor modifications by future ADEQ management,” the ALJ did not recommend that the permit be remanded to ADEQ to commence the process for a new permit for Ellis Campbell in accordance with Regulation 8. That process would include the issuance of new draft permit viewed entirely as a land-application only permit, and the opportunity for public review of and comment upon the new permit, without regard to the issue of whether the permit was a modification of an existing permit for a different function (confined animal feeding). Instead, the ALJ ordered only that ADEQ issue a new permit tracking number, and collect the appropriate permit fee for a new permit.

It appears that, because public notice was given of and comments received upon the proposed “modification” of Permit WR-7 in 2016, the ALJ was concerned that it would be unduly burdensome to require ADEQ and Ellis Campbell to repeat that process for a “new” permit that is required under the ALJ’s Decision, and that to require additional notice and opportunity to comment would place “form over substance.” If so, this is based on the presumption that any comments that were made by the public on the proposed “modification” of Permit WR-7 would be the same as those that would be made on a proposed “new” permit. However, that is not necessarily a valid presumption.

There is a significant difference in the scope of comments that can be made by the public to a proposed new permit and a proposed “modification” of a permit. One of the Commission’s rules relating to the submission of comments on modifications of existing permits is that

comments are restricted to the areas of the permit that are being modified, and not to all of the terms of a permit. (Regulation 5.305: “When a permit is modified, only the conditions subject to modification are reopened.”) However, where a “new” permit is being proposed by ADEQ, all terms and conditions and factual basis of the proposed permit are open for public comment. Thus, the only comments submitted by persons commenting on the proposed “modifications” to Permit WR-7 that were considered by ADEQ were those that applied to *the provisions being modified*, and not comments that applied to other of its terms and provisions. One need only review ADEQ’s response to the comments submitted on the proposed modification of WR-7 to see that ADEQ did not consider a large number of them because they were “outside the scope of the modifications to the permit.” (See ADEQ Response to Public Comments attached to Permit WR-7)

For example, Permit WR-7 authorized EC Farms to operate a 300 hog operation, and to use a land application area of 606.6 acres to receive up to 6.6 million gallons of waste from that farm. Under the “modification” of that Permit, comments on whether the vast increase in the land application of waste from the number of hogs (300) formerly at the facility to 6,000 at the C&H facility (whose waste is to be disposed of over the acreage) would present environmental problems, would be considered outside the scope of the proposed modifications, and not a valid subject of comment. Other related comments regarding the scientific and legal basis of the permit contained in Reg. 5.601 and other sections were not considered by ADEQ because Permit WR-7 was a “modified” permit, and comments could be made only on the proposed modified provisions.

It is clear from reading the Decision that the ALJ was concerned about compliance with the letter of the law, including all of the provisions of Regulation 5, but, at the same time, of putting “form over substance.” To quote the ALJ in his Decision (p. 20):

As discussed during the November 16, 2016, and December 5, 2016, hearings the ALJ believes that issue of a separate permit under Reg. 5.601 against the backdrop of this particular permitting decision is form over substance. But the ALJ finds that *the public has a right to have the form, as well as the substance, correct and in compliance with all facets of Regulation 5.* (Italics added)

The public does indeed have a right to have its public agencies – including ADEQ – comply with the form as well as the substance of the laws. We are a nation that is governed by laws that contain both form and substance, both of which are important to our legal system. When form is disregarded, it becomes easier to disregard the substance of the laws. The form and procedure for issuance of new permits is set forth in Regulation 8, and that form should be followed as a natural, legal and logical consequence of the ALJ’s decision.

3. *Specific Relief Sought From The Commission*

Pursuant to Reg. 8.618 of the Commission’s regulations, the Commission should modify the Recommended Decision of the ALJ to require that this matter be remanded to ADEQ to commence proceedings to issue a new permit to Ellis Campbell d/b/a EC Farms, for a land-application only permit under Regulation 5.601, including issuance of any draft permit for public notice and comment, in conformity with Regulation 8. As modified, the Commission should approve the said Recommended Decision.

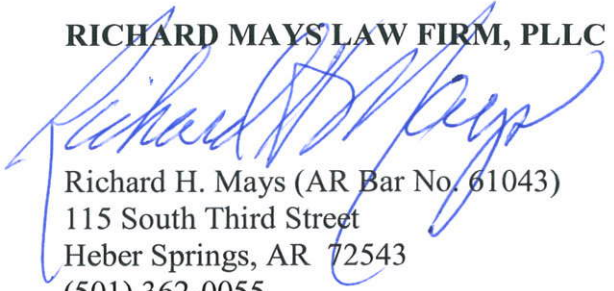
4. *Proposed Minute Order*

A proposed Minute Order for the Commission’s consideration is attached to this Petition.

Appellant requests an opportunity to present oral argument to the Commission at its regular meeting on February 24, 2017, or at such other time as the Commission may designate, as provided in Reg. 8.619(H).

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the date set forth below, he served a copy of the above and foregoing Brief in Support of Motion for Summary Judgment filed in the captioned case upon counsel of record for the parties by depositing a copy of the same in the U.S. Postal Service, and by electronic mail, addressed to:

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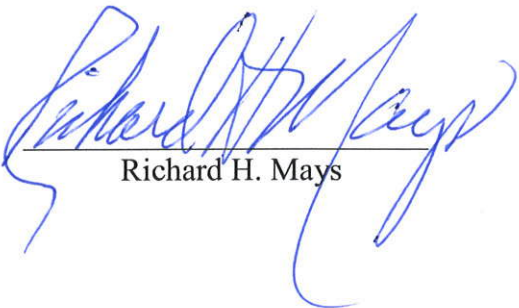
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Dated: January 23, 2017.


Richard H. Mays

**ARKANSAS POLLUTION CONTROL
AND ECOLOGY COMMISSION**

**IN THE MATTER OF
ELLIS CAMPBELL
D/B/A EC FARMS**

**CONSOLIDATED DOCKET
NO. 16-002-P**

MINUTE ORDER NO. 17- _____

On January 5, 2017, Charles Moulton, Administrative Law Judge (ALJ) issued Order No. 9 (Recommended Decision) in Consolidated Docket No. 16-002-P, which is a case styled In the Matter of Ellis Campbell d/b/a EC Farms.

In Order No. 9, the ALJ found that Permit No. 3540-WR-7 issued by the Director of the Arkansas Department of Environmental Quality (ADEQ) did not comply with Commission Regulation 5, in that Regulation 5 provides for two separate permits: one for confined animal feeding operations, and the other for land application operations only; and that one such permit cannot be modified to the other permit. Instead, a new permit must be applied for and issued. However, the ALJ also found that in this case, a new permit may be issued by the Director upon the assignment of a new permit number to the permit, and the payment of the applicable fee for a new permit. The Appellant, Carol Bitting, timely requested oral argument on a portion of that Recommended Decision.

This matter is presented to the Commission at its regularly-scheduled meeting on February 24, 2017 on the documents constituting the Director's decision to issue the permit; all pleadings, motions and intermediate rulings; exhibits admitted during the hearings on the permit before the Administrative Law Judge (ALJ); the Recommended Decision of the ALJ; and the Request for Oral Argument of the Appellant, Carol Bitting.

The Commission heard oral argument regarding the alleged factual objections and legal errors contained in the Recommended Decision made by Appellant, asking that the Recommended Decision of the Administrative Law Judge be modified to order that the Permit be remanded to ADEQ to commence proceedings to issue a new permit to Ellis Campbell d/b/a EC Farms, for a land-application only permit under Regulation 5.601, including issuance of any draft permit for public notice and comment, in conformity with Regulation 8, Sections 201 to 211.

After consideration of the matters before the Commission and the oral arguments, the Commission agrees with the proposed modifications to the Recommended Decision. The Commission therefore orders that the Recommended Decision be modified to provide that the permit be remanded to the Director with instructions to commence proceedings to issue a new permit to Ellis Campbell d/b/a EC Farms in accordance with the requirements of Regulation 8, including those for issuance of public notice of a draft permit, and receipt and consideration of public comments upon the terms and provisions of the draft permit.

As modified, the Recommended Decision is approved, and is hereby remanded with further proceedings in accordance with this Order.

PROMULGATED THIS ___ TH DAY OF FEBRUARY, 2017, BY ORDER OF THE ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION.

By: Swan "Rusty" Moss, Jr., Chair

COMMISSIONERS:

_____ Joseph Bates	_____ Lawrence Bengal	_____ Jeffery Crow
_____ John Chamberlin	_____ Miles Goggans	_____ Bekki White
_____ Bruce Holland	_____ Ann Henry	_____ Ann Henry
_____ Robert Reynolds	_____ Dr. Wesley Stites	_____ Joe Fox

Submitted by: Richard H. Mays