

ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION

IN THE MATTER OF EC FARMS)	DOCKET NO. 16-002-P ORDER NO. 9
IN THE MATTER OF EC FARMS)	DOCKET NO. 16-003-P ORDER NO. 9
IN THE MATTER OF EC FARMS)	DOCKET NO. 16-004-P ORDER NO. 9
IN THE MATTER OF EC FARMS)	DOCKET NO. 16-005-P ORDER NO. 9

RECOMMENDED DECISION

Appearances: Mr. Basil Hicks and Ms. Tracy Rothermel for the Arkansas Department of Environmental Quality; Mr. William A. Waddell, Jr. for EC Farms; Mr. Richard Mays for Petitioners Carol Bitting, Lin Wellford, and Dr. Nancy Haller.

1. INTRODUCTION

On June 29, 2016, the Arkansas Department of Environmental Quality ("ADEQ" or "Department") issued a non-discharge water permit, Permit No. 3540-WR-7 ("WR7"), pursuant to the Arkansas Water and Air Pollution Control Act, Ark. Code Ann. § 8-4-101 et seq. and Arkansas Pollution Control and Ecology Commission ("Commission") Regulation No. 5 to Ellis Campbell, d/b/a EC Farms ("EC Farms").

Dr. Nancy Haller, Carol Bitting, and Lin Wellford ("Petitioners" or "Appellants") filed timely Requests for Hearing with the Commission seeking review of permit WR7. On October 20, 2016, ADEQ filed a Motion to Dismiss. On October 27, 2016, EC Farms filed its own Motion to Dismiss. On November 2, 2016, Petitioners filed a Response to ADEQ's Motion to Dismiss and on November 8, 2016, Petitioners filed their Response to EC Farm's Motion to Dismiss. On November 16, 2016, the ALJ held a hearing on ADEQ's and EC Farm's

Motions to Dismiss. At the close of that hearing the ALJ requested that the parties brief one issue - whether the provisions of Chapter 6 of Regulation No. 5 required ADEQ to issue a separate permit to EC Farms for its land application facility rather than modify EC Farms' existing CAFO permit. On November 29, 2016, the parties submitted their supplemental briefs and on December 5, 2016, the ALJ held an additional hearing on the issue of a separate permit. During the December 5, 2016, hearing one witness testified and five (5) exhibits were admitted into evidence. After reading the parties' pleadings, listening to the arguments of counsel, listening to and reviewing the witness' testimony, and reviewing the entire case file in light of the applicable law the ALJ finds as follows:

2. JURISDICTION

The Commission has jurisdiction over this matter pursuant to Arkansas Code Annotated § 8-4-311(b)(4).

3. BURDEN OF PROOF

The standard of proof in a Commission administrative hearing is the preponderance of the evidence. *Johnson v. Ark. Bd. of Examiners in Psychology*, 305 Ark. 451, 455, 880 S.W.2d 766 (1991). Petitioners bear the burden of proving, by a preponderance of the evidence, the allegations of fact and law contained in their Requests for Hearing.

4. FINDINGS OF FACT

1. ADEQ first issued a permit in 1987 for the property at issue in this appeal. This original permit was identified as AFIN No. 51-00020 and authorized a hog farm at the site.

2. Another precursor to permit WR7, permit No. 3540-WR-5 ("WR5"), was issued to Richard Campbell, d/b/a C&C Hog Barn, in March of 2012. Permit WR5 authorized the operation of a 300 sow farrowing hog farm.

3. Richard Campbell ceased sow operations at the C&C Hog Barn under permit WR5 and the holding pond and settling basin associated with permit WR5 and the sow operation were officially deemed closed in March of 2014.

4. Permit WR5 was modified in 2015 when ownership of the facility was transferred to Ellis Campbell d/b/a EC Farms.

5. Permit WR5 was modified into Permit No. 3540-WR-6 ("WR6") and authorized a permit transfer to EC Farms with an effective date of March 1, 2015.

6. Although the sow facility was not in active operation at the time of the permit transfer, EC Farms was still authorized by permit WR6 to operate a 300 sow farrowing hog farm in compliance with the transferred permit. EC Farms was permitted to operate the facility and use a land application area of 606.6 acres to receive up to 6.6 million gallons of waste in association with the sow farrowing operation permitted for the site.

7. EC Farms subsequently submitted another application to modify permit WR6 on April 8, 2015. EC Farms sought to modify the sow farrowing operation into a land application only operation through a minor permit modification.

8. After review, the Department notified EC Farms on April 17, 2015, that the requested modification qualified as a major

modification pursuant to Reg. 5.305.

9. EC Farms submitted additional information to the Department on August 17, 2015, September 16, 2015, and December 10, 2015, regarding its proposed land application operation.

10. EC Farms requested the following modifications of permit WR6:

- a. Allow the facility to receive waste for land application from C&H Hog Farm
- b. Remove the conditions of permit WR6 regarding operating the facility's storage components for liquid and solid wastes because those storage components had previously been closed
- c. Update the former Comprehensive Waste Management Plan ("CWMP") to a Site Management Plan ("SMP") that would permit EC Farms to land apply waste from C&H Hog Farms to the sites previously covered by EC Farms' permit WR6

11. On September 16, 2015, the Notice of Application for Modification of WR6 was published.

12. Notice of the draft permit WR7 was published in accordance with Reg. 5.302 and Reg. 8.205 on March 9, 2016.

13. ADEQ made its final decision to issue permit WR7 to EC Farms on June 29, 2016, with an effective date of July 29, 2016.

14. Part II, Condition 1 of permit WR7 states that EC Farms shall only receive liquid swine waste from C&H Hog Farms.

15. Condition 8 of Part II of permit WR7 identifies the sites approved for land application.

16. The land application sites in WR7 have remained unchanged since EC Farms was issued its first permit - AFIN No. 51-00020 - back in 1987.

5. DISCUSSION AND CONCLUSIONS OF LAW

Incorporation By Reference

The ALJ incorporates by reference the discussion, conclusions of law, and holdings set forth in Order No. 7 and Order No. 8.

Regulation No. 5 Background

On May 16, 1990, Governor Bill Clinton announced the formation of the Governor's Task Force on Animal Waste. The stated objective of the Animal Waste Task Force was to initiate solutions to Arkansas' animal waste disposal concerns. The Task Force's work resulted in the adoption, on July 24, 1992, of Regulation No. 5. According to Reg.5.102 the purpose of Regulation No. 5 is to establish minimum guidelines for 1) permits for confined animal operations using liquid animal waste management systems, and 2) permits for land application of liquid animal wastes.

Chapter 6 of Regulation No. 5 is titled "Alternative Permitting and Waste Management Provisions." Section 5.601 of Chapter 6, titled "Permit for Land Application Site Only" states:

A separate permit may be issued for a land application site if the operator submits an application which includes a site management plan for the land application site and a plan detailing nutrient application rates; the timing of waste application with respect to the nutrient uptake cycle of the vegetation found on the land application site(s); and waste storage and distribution method(s) prepared in accordance with the requirements of this regulation. The applicant for such a permit shall notify the Department of any contractual agreement for the use of the land as a land application site by submitting a copy of the agreement. Records of waste/wastewater application shall be kept as specified in Reg. 5.407 and shall include information regarding the source of the waste, including location and permit number if applicable. Sampling, analysis and annual reporting as specified in Reg. 5.407 are required.

Chapter 6 of Regulation No. 6 was further amended in 2007 to allow "operators" of sites to land apply animal waste instead of limiting "owners" of sites to the land application of animal waste.

Compliance With Reg.8.603(C) (1) (c)

Regulation No. 8 governs the Commission's administrative procedures and Reg.8.603(C) (1) addresses the content of a Request for Hearing. According to Reg.8.603(C) (1) every Request for Hearing shall include:

- (a) A statement identifying the permit action or subject matter being appealed
- (b) The date of the Director's final decision
- (c) A complete and detailed statement identifying the legal issues and factual objections being appealed
- (d) A request for the issuance, modification, or termination of a stay, if desired, as provided in Reg. 8.612(C)
- (e) Certification that a copy of the Request for Hearing has been served on all appropriate parties identified in Reg.8.601

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. In her hearing request Petitioner Bitting made the following claim:

Reg.5.601 the term Operator specifically states may submit an application. Ellis Campbell is no operator since there is no active facility. Reg.5.601 a separate permit may be issued for a land application site if the operator submits an application which includes a site management plan for the land application site and a plan detailing nutrient application rates; the time of the waste application with respect to the nutrient uptake cycle of the vegetation found on the land application site(s); and waste storage and distribution method(s) prepared in accordance with the requirements of this regulation. The applicant for such a permit shall notify the Department of any contractual

agreement for the use of the land as a land application site by submitting a copy of the agreement. Records of waste/wastewater application shall be kept as specified in Reg.5.407 and shall include information regarding the source of the waste, including location and permit number if applicable. Sampling, analysis and annual reporting as specified in Reg.5.407 are required. Reg.5.407 states all records must be kept at facility.

EC Farms contends that other than referring to the term "operator" Bitting's statement in her Request for Hearing regarding Reg. 5.601 merely restates the regulation and does not allege that Bitting objects to the issuance of WR7 on the basis that a separate permit was required. *EC Farms Supplemental Brief at p. 2.* According to EC Farms, because Petitioner Bitting's Request for Hearing does not clearly state the need for a separate permit pursuant to Reg.5.601, the Request for Hearing falls short of a sufficiently "detailed statement identifying the legal issues and factual objections being appealed" and the issue of a separate permit should be dismissed pursuant to Reg.8.603(C)(1)(c). After reviewing all the pleadings filed in this case the ALJ disagrees with EC Farm's assertions concerning compliance with Reg.8.603(C)(1)(c) and rests this decision primarily on the Department's Motion to Dismiss.

On page 3, paragraph 9, of its Motion to Dismiss ADEQ alleges the following:

Petitioner Carol Bitting asserted that the underlying permit could not be modified because it was not a valid permit, EC Farms was ineligible for this permit, *land application only permits require a separate permit to be issued pursuant to Reg.5.601*, and many of the land application sites are along an impaired waterway. (Emphasis added). Ms. Bitting's challenge to WR7 should be dismissed because her assertions challenge permit conditions not modified from WR6 to WR7 and therefore [are] not eligible for appeal pursuant to Reg.5.305. *Reg.5.601*

does not require a new and separate permit for a land application-only permit. (Emphasis added)

Furthermore, on page 9 of its Brief in Support of its Motion to Dismiss ADEQ maintained that:

Ms. Bitting's next assertion is that EC Farms is required to seek a new and separate land application permit instead of modifying WR6. No regulatory basis exists for this assertion. Reg.5.601 does not require a new and separate permit for a land application only permit.

And on page 1 of its Motion to Dismiss EC Farms stated:

EC Farms adopts and reasserts the motion to dismiss and brief of ADEQ

In past appeals the ALJ has held that the purpose behind Reg.8.603(C)(1)(c) is to apprise the ALJ and the Department of the legal and factual objections a Petitioner intends to raise during a hearing. *In the Matter of Seeco, Inc., Docket No. 13-004-P, (Order No. 4); In the Matter of Edward Motor Company, Docket No. 16-001-NOV, (Order No. 3).* Based upon the Department's Motion to Dismiss, and EC Farms adoption of that Motion, the ALJ concludes that the Department and EC Farms were sufficiently apprised by Bitting that she intended to raise the issue that Reg. 5.601 requires a separate permit, rather than a modification of an existing permit.

Use Of The Word "May" in Reg.5.601

As noted previously, Chapter 6 of Regulation No. 5 is titled "Alternative Permitting and Waste Management Provisions." The first line of Reg.5.601 states that a "separate permit *may* be issued for a land application site if the operator submits an application which includes a site management plan for the land application site and a

plan detailing nutrient application rates” EC Farms has focused on the use of the words “may” and “alternative” in Chapter 6 to argue that Reg.5.601 is not mandatory when an operator wishes to only land apply animal waste apart from operating a Confined Animal Feedlot Operation (“CAFO”). EC Farms asserts that it is clear that ADEQ had the authority to modify permit WR6 to the land-application only activity authorized in permit WR7; that the modification of an existing permit pursuant to Reg.5.305 is not limited in any way by that regulation; and that the lack of express limitation in Reg.5.305 means that a Regulation 5 sow operation permit may be modified pursuant to Reg.5.305 into a land application only permit.

The drawback to EC Farms’ claim that Reg.5.601 is not mandatory for a land-application permit is the fact that the Department has repeatedly stated that permit WR7 was issued pursuant to Reg.5.601. During the first motion hearing held on November 16, 2016, the following colloquy took place between the ALJ and counsel for ADEQ:

JUDGE MOULTON: I don’t disagree with that at all. The amount of land is the same. The waste is actually less, but, again, procedurally, you converted one permit into a different type of permit through a modification, did you not?

MS. ROTHERMEL: It became a 5.601 permit.

November 16, 2016, Tr. p. 57. Likewise, permit WR7’s language also demonstrates that it was issued pursuant to Reg.5.601. *WR7 Permit, Page 3 of Part II, paragraph 21.* And on April 17, 2015, Mr. John Bailey, former Permits Branch Manager for ADEQ’s water division, wrote the following to Mr. Ellis Campbell regarding the modification of permit WR6:

A minor modification request dated April 8, 2015, was received by the Department for the above referenced permit. After review of the requested modification, the Department has deemed the proposed change would be a major modification to the permit in accordance with APC&EC Regulation 5.305(C) due to the fact that the waste management plan needs to be modified to meet Regulation 5.601. The current permit does not include the additional recordkeeping requirements pertaining to other waste sources which is required as part of the land application site only permit. *Petitioner's Exhibit 1.*

The ALJ finds that EC Farms' claims that Reg.5.601 is not mandatory, and the Department relied only on Reg.5.305 when it modified WR6 into WR7, are unavailing when it is undisputed that the Department utilized Reg.5.601 to issue permit WR7.

The Department's approach to the term "may" in Reg.5.601 differs from EC Farms. The Department agrees that a land-application only permit under Regulation 5 must be issued under Reg.5.601, but maintains that the Department is not obligated to require an applicant to obtain a separate permit for land application under Reg.5.601. Instead, the Department argues that the "may" in Reg.5.601 provides the Department with complete discretion to determine whether an applicant should obtain a separate land-application only permit. This perspective is borne out by a public comment to WR7 and ADEQ's response. Specifically, Page 27 of permit WR7 states, in pertinent part:

Comment 45:

This regulation [5.601] which spells out the requirements for a separate permit was clearly intended to address the situation for which EC Farms is instead seeking a permit modification. A modification, major or minor, is not appropriate and instead, as Regulation 5.601 states, ADEQ should have required EC Farms to request a *separate* permit for land application sites only. (Emphasis own)

Response:

The Department acknowledges the comment. APC&EC Regulation 5 does not prohibit a facility from modifying their permit to update the management practices, unless the modification violates APC&EC Regulation 5.901. A separate permit may be issued for land application only for an operation with storage and land application, depending on the circumstances of that facility. An existing facility is not prohibited from modifying their permit coverage to land application only if the storage facility is certified closed, and they wish to receive waste from other permitted facilities.

Finally, the Petitioners posit a completely different rationale for the interpretation of "may" in Reg.5.601 - that well-established Arkansas law holds that "may" can mean "shall" depending on the context of the statute or regulation and the goal to be achieved.

According to the Petitioners the case of *Arkansas State Racing Commission v. Southland Racing Corp.*, 226 Ark. 995, 295 S.W.2d 617 (1956) is instructive and involved a similar question to the one in this case. What does the word "may" mean within the context of permitting statute or regulation? In *Southland* the Arkansas Supreme Court was called upon to interpret a statute that provided that the State Racing Commission "may" grant a racing license when legal requirements were met by an applicant. The applicant, Southland Racing Corporation, met those legal requirements but the Racing Commission argued that the word "may" provided it with unfettered discretion to deny or grant a license, even if all legal requirements were met. The Arkansas Supreme Court discussed the flexibility of the meaning of the word "may" and concluded:

The controversy centers upon the statutory provision that the Commission *may* grant the license: is the word 'may' used in its permissive or in its mandatory sense? It is of course a familiar

rule of statutory construction that 'may' is to be construed as 'shall' when the context of the statute so requires. *Washington County v. Davis*, 162 Ark. 335, 258 S.W. 324; *Viking Freight Co. v. Keck*, 202 Ark. 656, 153 S.W.2d 163, 167. Indeed, this interpretation is so well known that it is uniformly recognized in dictionary definitions of 'may.' See *Webster's New International Dictionary* (2d Ed.); *Funk & Wagnalls New Standard Dictionary* (1949).

After reviewing the parties' pleadings, supplemental briefs, cited case law, and the transcripts of the hearings held on November 16, 2016, and December 5, 2016, the ALJ finds the Arkansas Supreme Court's analysis in the *Southland* decision compelling. The Department focuses on the first few words of Reg.5.601 "[a] separate permit may be issued for a land application site" but there is more to Reg.5.601 than just the first eleven (11) words. Regulation 5.601 goes further by providing that:

if the operator submits an application which includes a site management plan for the land application site and a plan detailing nutrient application rates; the timing of waste application with respect to the nutrient uptake cycle of the vegetation found on the land application site(s); and waste storage and distribution method(s) prepared in accordance with the requirements of this regulation. (Emphasis added)

The words "may" and "if" in Reg.5.601 cannot be read in isolation from one another as urged by the Department. The basic canons of statutory and regulatory construction require the ALJ to construe Reg.5.601 just as it reads so that no word is left void, superfluous or insignificant. *Brown v. State*, 375 Ark. 499, 292 S.W.3d 288 (2009). The ALJ concludes that Reg.5.601 provides the Department with the authority to issue a land-application only permit to an applicant *if* the applicant meets the other stated requirements of Reg.5.601. By the same token, if an applicant fails to provide a

land site application that includes "a site management plan for the land application site and a plan detailing nutrient application rates; the timing of waste application with respect to the nutrient uptake cycle of the vegetation found on the land application site(s); and waste storage and distribution method(s) prepared in accordance with the requirements of this regulation" then the Department may deny the permit. But if the Department were to deny a land-application only submittal by relying on the word "may" - even though a prospective permittee met all other requirements contained in Reg.5.601 - the Arkansas Supreme Court's decision in the *Southland* case would be controlling. The ALJ concludes that a preponderance of the evidence demonstrates the word "may" in Reg.5.601 provides the Department with the authority to grant or deny a permit as the factual circumstances of an application dictate. The ALJ next turns to the word "separate" as it appears in Reg.5.601.

Use Of The Word "Separate" In Reg.5.601

As stated above, the first rule in considering a statutory meaning is to construe the statute exactly as it reads, giving the words their ordinary and usually accepted meaning. See, e.g., *Bob Cole Bail Bonds, Inc. v. Howard*, 307 Ark. 242, 819 S.W.2d 275 (1991). The doctrine of statutory interpretation is equally applicable to interpreting a regulation. *Arkansas Dep't of Human Servs. v. Hillsboro Manor Nursing Home, Inc.*, 304 Ark. 476 (1991). It is also important to note that, in considering the administrative intent behind a regulation an agency should not engage in interpretations

that defy common sense and produce absurd results. *See, e.g., Green v. Mills*, 339 Ark. 200, 4 S.W.3d 493 (1999).

ADEQ maintains that the word "separate" in Reg.5.601 does not mean a different type or class of permit - that a CAFO permit and a land-application permit are both Regulation 5 permits and are therefore capable of being altered via a modification. ADEQ states that the term "separate" does not mean that a facility that already holds a Regulation 5 permit, as EC Farms did in this case, is required to terminate that permit and obtain a brand new permit. The Department claims that to decide otherwise would necessitate the creation of an entirely new permitting process that does not currently exist. *ADEQ Supplemental Brief at pp. 2-3.* According to ADEQ the term "separate" means that the operator of a facility that only land applies animal waste does not have to operate under a CAFO permit. ADEQ also argues that converting a sow farrowing facility into a land application only facility via a permit modification has occurred previously and cites a December 7, 2004, Notification Letter to Tyson Foods. *ADEQ Supplemental Brief, Exhibit B.* In that case Tyson Foods closed their CAFO storage facilities and sought to retain their permits with the land application conditions only, effectively converting it to a permit that only regulated land application. ADEQ granted this modification and Tyson Foods now operates under a modified permit for land application only. *ADEQ Supplemental Brief, Exhibit B.* EC Farms goes in a different direction and avers that "a modification of an existing permit is a separate permit, resulting in all previous permits being listed as 'voided' in ADEQ's records." EC

Farms Supplement Brief at p. 7.

Petitioners declare that Reg.5.102 plainly contemplates two separate and distinct types of permit that can be issued under Regulation 5; that the use of the conjunction "and" in Reg.5.102 indicates that "the minimum qualifications, standards and procedures" referred to at the beginning of the paragraph would be established not only for confined animal operations, but also separately for land application sites; and that Reg.5.601 specifically provides for a separate permit for a land application site and prescribes the contents of the application for that permit, just as Chapter 3 prescribes the requirements for obtaining a permit for a confined animal operation permit. *Petitioners Supplemental Brief at p. 3.*

First, the ALJ finds that the Tyson decision, while illustrative, is not controlling on the ALJ or the Commission because it was not appealed. Second, the ALJ rejects ADEQ's argument that requiring a Regulation 5 sow farrowing facility to convert into a land application facility via a separate permit would "create an entirely new permitting process that does not currently exist." *ADEQ Supplemental Brief at pp. 2-3.* Upon questioning by the ALJ, Mr. Jamal Solaimanian, Engineer Supervisor with ADEQ's Office of Water Quality, testified:

JUDGE MOULTON: In other words, if EC Farms had applied for a new permit, you would have informed EC Farms that they had -- would have had to have applied for a separate -- a new permit as opposed to modification, what would have been different in their application package?

MR. SOLAIMANIAN: Application package, really nothing, you know. We have the same application public notice, draft public notice, the fee, the same \$200, no different there.

The review process would have been the same. You know, we needed to have the new, updated base management plan, new updated nutrient management plan, site management plan. The only difference would be it would have a new number, that's it.
December 5, 2016, Tr. p. 87.

The ALJ finds, by a preponderance of the evidence, that requiring the Department to process a land-application only permit separately, instead of via a modification, will not create a new permitting regime. Requiring a separate permit under Reg.5.601 will only result in an additional permit fee and a new permit tracking number, not a novel application or review process not currently contemplated by Regulation No. 5 and carried out by the Department.

The ALJ next considers the word "separate" as it appears in Reg.5.601. The ALJ's analysis of the word "separate" is similar to the Arkansas Supreme Court's examination in *Arkansas State Racing Commission v. Southland Racing Corp.*, 226 Ark. 995, 295 S.W.2d 617 (1956) above, and like the Arkansas Supreme Court the ALJ starts with the dictionary to shed light on the word "separate" in Reg.5.601. According to *Webster's New International Dictionary (4th Ed.)* the word "separate" means:

to set or keep apart, to make a distinction between, sever an association, to become divided or detached

As noted above, EC Farms claims that "a modification of an existing permit is a separate permit, resulting in all previous permits being listed as 'voided' in ADEQ's records." *EC Farms Supplement Brief at p. 7.* On its face this argument has merit - but ultimately the Department disagreed with EC Farms regarding this

contention. Questioning by the ALJ on this topic during the December 5, 2017, hearing resulted in the following:

JUDGE MOULTON: But there's a few comments from the department that indicate that EC Farms started off as a sow farrowing operation and they converted into a land application operation through this modification. Would you agree that that's what took place?

MR. SOLAIMANIAN: Yes. I mean, they converted from a sow operation to a land application permit, yes. I mean, yeah, they had permit that converted from a sow operation to finishing operation, but they are the same permit, the same permit number, the same name, same everything.

JUDGE MOULTON: And I don't disagree that it's the same permit, but it's the same permit - but would you agree with this Jamal? It's the same permit for two different types of operations?

MR. SOLAIMANIAN: Well, yes, this one is not a sow, but yes, that's correct.

December 5, 2016, Tr. pp. 89-90. The ALJ concludes that a preponderance of the evidence demonstrates, from a permitting regime perspective, that WR6 and WR7 are the same permit and not separate as EC Farms contends.

The ALJ agrees with ADEQ that a land-application only venture and a sow farrowing operation are, as a practical matter, separate entities. But Reg.5.601 was not adopted to provide formal acknowledgment that land-application facilities and farm production operations are distinct facilities, as ADEQ suggests. 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 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. This is illustrated by the Department's responses during the December 5, 2016, hearing and Exhibit B attached to its supplement brief. During the December 5, 2016, hearing the issue of how flexible the Department perceived modifications under Regulation No. 5 to be was discussed.

JUDGE MOULTON: And so I heard you argue about you can modify from an animal feedlot operation into a land farm only. And the question I've got for you is the converse.

Suppose I came in and I just have a land farm, can I modify that into an animal feedlot operation?

MR. SOLAIMANIAN: You mean, produce animals?

JUDGE MOULTON: Correct.

MR. SOLAIMANIAN: Yes. I mean, you can modify that, but you have to completely submit the design for the ponds, how many hogs you're going to have. It's going to completely develop a new waste management plan, new site management, new nutrient management plan.

Oh, yes, but you can modify that if you want to do that, yes.

December 5, 2016, Tr. pp. 80-81. As mentioned previously, in 2004 Tyson Foods closed their concentrated animal operations and storage facilities and sought to retain their permit as a land

application permit only. ADEQ granted this modification, but as a minor modification. See *ADEQ Supplemental Brief, Exhibit B*. Under Reg.5.305 minor modifications are not subject to public notice. The ALJ believes that one 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.

Admittedly permit WR7 was processed by the Department as a major modification, and was subject to public notice and comment. But the precedent of ADEQ's Exhibit B attached to its Supplemental Brief is troubling. The Department's claim that permits issued under the umbrella of a particular regulation are somehow fungible - that a CAFO Regulation 5 permit and a land-application only Regulation 5 permit are both Regulation 5 permits and are interchangeable and therefore capable of being modified - could potentially jeopardize the public's participation in the permitting process if those changes were deemed minor modifications by future ADEQ management. The mandate of a separate permit in Reg.5.601 removes all doubt about the necessity of public notice. The ALJ finds, by a preponderance of the evidence, that Reg.5.601 requires a separate permit and that permit WR6 could not be modified into permit WR7.

6. CONCLUSION

This was an issue of first impression. The ALJ wishes to document the fact that the Department, and particularly EC Farms, did not attempt to deceive the public, or carry out anything duplicitous during the permitting process by modifying WR6 into WR7. On the

contrary, ADEQ processed EC Farms' application to convert its sow farrowing operation into a land-application only operation in a similar manner that it had processed previous requests from other animal production operations. EC Farms followed the instructions of ADEQ when it applied to modify WR6 to WR7. Substantively, the ALJ finds that ADEQ and EC Farms followed Regulation 5 during the application and review process. 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 No. 5.

IT IS THEREFORE ORDERED:

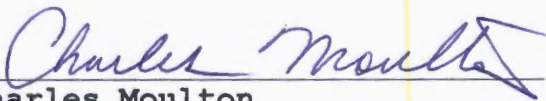
That Permit No. 3540-WR-7 is affirmed, except for the following matters that are remanded to the ADEQ with the following directions:

2. ADEQ must issue a separate tracking number for Permit No. 3540-WR-7 as required by Reg.5.601; and

3. ADEQ shall receive the appropriate permit fee for a separate permit as required by Reg.5.601 and Regulation No. 9.

RECOMMENDATION

It is the recommendation of the administrative law judge that the Arkansas Pollution Control and Ecology Commission adopt and affirm, without modifications, the findings of fact and conclusions of law set forth in this Recommended Decision.


Charles Moulton
Administrative Law Judge

CERTIFICATE OF SERVICE

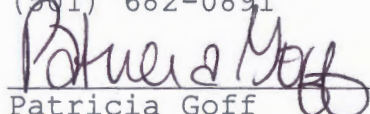
I, Patricia Goff, Commission Secretary, hereby certify that a copy of the foregoing Order No. 9, In the Matter of EC Farms; Consolidated Docket No. 16-002-P, has been mailed by certified mail or by first class mail, postage prepaid, to the following parties of record, this 5th day of January 2017.

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