

BEFORE THE ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION

**IN THE MATTER OF
ISSUANCE OF FINAL PERMIT DECISION FOR
PULASKI COUNTY PROPERTY OWNERS' MULTIPURPOSE
IMPROVEMENT DISTRICT NO. 2021-2**

PERMIT NO. AR0053210

Docket No. 23-_____-P

**PINNACLE MOUNTAIN COMMUNITY COALITION AND
CHRISTINA CENTOFANTE'S
REQUEST FOR HEARING AND ADJUDICATORY REVIEW**

1. Pinnacle Mountain Community Coalition ("PMCC") and Christina Centofante (together "the Petitioners") request a hearing before the Arkansas Pollution Control and Ecology Commission (APCEC or the Commission) regarding the final permitting decision by the Arkansas Division of Environmental Quality ("ADEQ") on the issuance of a discharge permit for a nonmunicipal domestic wastewater treatment facility ("package plant"), AFIN 60-05010 intended to serve a residential development in rural Pulaski County, Arkansas.
2. The facility permittee, at the time of the issuance of the permit, is Pulaski County Property Owner's Multipurpose Improvement District No. 2021-2 ("Improvement District").
3. Petitioners bring this petition pursuant to APCEC Regulation No. 8.

PROCEDURAL HISTORY

4. On September 2, 2020, PMI, Inc. submitted an initial permit application listing "Southwest Equity Investments, LLC" as the applicant, and "Saddle Ranch Subdivision WWTP" as the facility name.
5. That permit application seeks approval to discharge from a package plant to an unnamed tributary of Mill Bayou, then into Mill Bayou, from 200 homes, at a rate of 30,000 to 50,000 gpd, though later information from the subsequent applicants seeks a permit to serve 300 homes and larger flow amounts.

6. ADEQ issue public notice of an initial public comment period for a draft permit on July 11, 2021.

7. After receiving post-comment period input from the public, the applicant's representatives, including Rick Ferguson, formed the Improvement District.

8. In a document signed November 23, 2021, Southwest Equity Investments completed a Permit Transfer Form purporting to transfer the AR0053210 application to the Improvement District.

9. After again receiving additional information from the applicant and the Permit Transfer Form, ADEQ issued a second public notice for a comment period beginning March 6, 2022.

10. ADEQ then held a May 18, 2022, public hearing on the draft permit.

11. After receiving public comment and additional information from the applicant, ADEQ initiated a third public comment period on November 13, 2022, with a second public hearing held April 5, 2023.

12. ADEQ issued the permit which is the subject of this appeal on June 16, 2023.

13. Pursuant to APCEC Regulation No. 8, Reg. 8.211(B)(1) and Reg. 8.603(C)(1)(b), the date of the final permitting decision appealed from is June 16, 2023.

14. This appeal is timely filed pursuant to APCEC 8.603(B)(1).

STATEMENT OF INTEREST OF PETITIONERS

15. PMCC is an Arkansas nonprofit corporation.

16. Petitioner Christina Centofante is a PMCC member and resident of Roland, Arkansas, who lives adjacent to the proposed subdivision.

17. The record pertaining to this matter contains comments submitted by PMCC through its attorney and officers.

18. PMCC, PMCC members, and Petitioner Christina Centofante, submitted comments on the record.

19. The comments submitted overwhelmingly oppose issuance of the permit which is now on appeal.

STATEMENT OF LEGAL ISSUES AND FACTUAL OBJECTIONS

APCEC Rule 2, Chapter 2 and 40 C.F.R. § 131.12 Antidegradation Violations

20. ADEQ fails to conduct antidegradation review when issuing water discharge permits under its federally delegated Clean Water Act permitting powers, resulting in one of the three legs of water quality standards (in addition to designated uses and water quality criteria) missing from ADEQ's permitting program.

21. Each permit ADEQ issues includes essentially the same language, as does this permit:

D. Anti-Degradation

The limitations and requirements set forth in this permit for discharge into waters of the State are consistent with the Anti-degradation Policy and all other applicable water quality standards found in APC&EC Rule 2.

22. This is not an antidegradation analysis.

23. ADEQ fails to:

a. Determine the tiered status of the water.

b. Perform antidegradation review for any tiered status to determine if the permit protects existing uses, is necessary to accommodate an important economic or

social development, or should not be allowed at all due to the presence of outstanding resource waters.

- c. Implement its antidegradation policy as required by applicable federal regulations.
- d. Consider cumulative impacts to waterbodies resulting from multiple permitted discharges from distinct facilities.

24. ADEQ fails to perform any antidegradation analysis, thus obviating one-third of its delegated water quality standards duties.

APCEC Rule 8.211(A)(2): ADEQ Fails to Properly Respond to Comments

25. ADEQ fails to respond to substantive comments made on the record, and fails to respond to some comments made during the public comment period.

26. Examples of substantive comments ADEQ fails to respond to are concerns raised regarding antidegradation, by PMCC's attorney and others, as well as concerns regarding existing uses, including swimming, made by Kristy Eanes and others.

27. The responses to these substantive comments do not constitute a legal analysis, determination of the impact of the resolution on the permitting process, or acknowledge the specific role local government entities have in approving expansion of solid waste disposal facilities.

28. ADEQ also fails to address several comments, as those comments are not included in the responsive summary. Examples include comments made by Jeff Jenkins, Cheryl Killingsworth, T. Dillon, R. Millerich, and K. Motsinger. Others may be missing as well.

29. ADEQ fails to comply with APCEC Reg. 8.211(A)(2), which requires "a response to each issue raised in any public comments," and in the "case of any" "environmental standard,"

that response must include a “written explanation of the rationale” based on “generally accepted scientific knowledge and engineering practices.”

APCEC Rule 2 Unaddressed Water Quality Criteria/Specific Terms

30. The draft permit fails to contain several permit limits or terms required by APCEC Rule 2, including:

- a. Temperature limit, as required by APCEC Rule 2.502 and APCEC A-19 eco-region standards.
- b. Dissolved Oxygen limits in accordance with eco region limits, specifically APCEC A-19 and APCEC 2.505 establish a 2 mg/L, limit, while the permit terms allow a Critical Season Limit of 3 mg/L.
- c. Minerals, chlorides, and sulfates limits are not present in the permit, as required by APCEC 2.511(B).
- d. Ammonia-Nitrogen is not properly controlled in the permit. As noted by Rick Barger in his May 18, 2022, letter, residences are close to the proposed site, with ground water as low as 21 feet below grade. 10 mg/L of ammonia-nitrogen for the period of November through March is too high to protect those resources and surrounding residences. Furthermore, as pointed out by other commenters, it is unclear from the record how ADEQ reached each of the ammonia-nitrogen limits in the permit, and if those limits meet EPA standards. Additionally, commenter Dr. Laura Ruhl, citing APCEC Rule 2.409, points out that, due to the low or no-flow nature of the receiving stream, the proposed permitted levels of ammonia-nitrogen will be toxic to

aquatic organisms while exceeding EPA's ambient water quality criteria for total ammonia in some instances.

- e. Monitoring Frequency and technology, as also discussed by Mr. Barger, is not frequent enough to protect downstream uses, users, and aquatic and human life.
- f. Fecal coliform bacteria is not properly controlled by the permit. Multiple commenters raise this issue, including Mr. Barger, who states that a 1000 colonies/100ml monthly and 2000 colonies/100ml daily limit is not protective of potential usage downstream, thus suggesting a revised limit is necessary. Mr. Drinkwater also raises issues pertaining to fecal coliform limits and existing uses, including swimming, of the waterbody.
- g. Phosphorus is not controlled in the permit, despite public comment explaining phosphorus will negatively impact the receiving stream, causing toxic conditions to aquatic life, as prohibited by APCEC Rule 2.509(A).

31. Failure to include proper permit limits for these pollutants, as required by APCEC Rule 2, is a violation of water quality standards and grounds to reverse the permit decision.

Ark. Code Ann. § 8-4-203 Financial Planning

32. Commenters, ADEQ, and the Arkansas Department of Health have all raised concerns regarding the applicants' failure to present a full and proper financial plan for operation of the package plant.

33. Ark. Code Ann. § 8-4-203(B)(1)(D) requires "each application for the initial permit...for a nonmunicipal domestic sewage treatment works...shall be accompanied by an

assessment” which includes a five-year estimate of operating costs, list of capital expenditures, and a financial plan.

34. Each and shall are mandatory requirements.

35. The initial permit application certainly did not contain a financial plan, and even after multiple modifications and opportunities, the record contains no complete financial plan satisfying Ark. Code Ann. § 8-4-203 requirements.

Ark. Code Ann. § 8-4-203(B)(1)(A) Trust Fund, 5 Year Plan, and Local Planning

36. Ark. Code Ann. 8-4-203(B)(1)(A) requires an applicant to address several important matters prior to submitting an application:

(A) The division shall not issue, modify, renew, or transfer a National Pollutant Discharge Elimination System permit or state permit for a nonmunicipal domestic sewage treatment works without the permit applicant first:

(i) Paying the trust fund contribution fee required under subdivision (b)(4) of this section;

(ii) Submitting the assessment required by subdivision (b)(1)(D) of this section; and

(iii) Certifying that the permit applicant has complied with applicable local ordinances and regulations, including without limitation:

(a) Local zoning ordinances;

(b) Local planning authority regulations; and

(c) Local permitting requirements.

37. The applicant here fails to meet each of these requirements prior to submitting an application.

38. First, as discussed by Rick Barger in his comment, the proposed trust fund fee is insufficient, by a factor of two, to assure proper operations in the event the applicant becomes insolvent. This fee will simply not cover operating costs of the facility for any necessary amount of time.

39. Second, there is no five-year financial plan in the record (as stated above).

40. Third, planning, including flood plain permit, plat, and permittee issues.

a. The floodplain permit is:

- i. Prematurely issued the floodplain fill permit in violation of Pulaski County's Flood Damage Prevention Code.
 - ii. Missing required attachments.
 - iii. Expired.
- b. The plat approved by Pulaski County:
 - i. Is not the current plat for the proposed subdivision, and thus the Planning Board has never reviewed it. Two different plats are circulating amongst different agencies.
 - ii. Did not show the Improvement District as the applicant.

41. The Improvement District does not possess the proper Ark. Code Ann. 8-4-203(B)(1)(A) approvals.

APCEC Rule 8.204(A) and (D)(4) Compliance History

42. Consistent non-compliance is grounds for denial of a new permit under APCEC Rule. 8.204(A) and (D)(4).

43. Rick Ferguson is a constant throughout the permitting process in this Docket.

44. Mr. Ferguson has a history of noncompliance at a nearby development, Waterview Estates, under NPDES Permit No. AR0050393 operating a package plant, demonstrates his history of noncompliance.

45. Mr. Ferguson's history, and ongoing stormwater issues throughout the Waterview Development, including as documented in inspections associated with permit ARR150142, also demonstrate failure to comply.

46. Mr. Ferguson should not be given another permit due to his history of noncompliance.

The Permit Transfer is a Nullity

47. On November 29, 2021, Doug Ford submitted a permit transfer form to ADEQ seeking to transfer the subject application from Southwest Equity Investment to Pulaski County Property Owners Multipurpose Improvement District No. 2021-2.

48. The purported permit transfer is improper for several reasons.

49. First, the Improvement District did not exist at that time. Judge Hyde did not sign the Order creating the district until January 12, 2022. You cannot transfer legal obligations to an entity which does not exist.

50. Second, ADEQ rules, and the transfer form, do not contemplate transfer of a permit application, only a permit.

51. Third, the applicant executed the purported Permit Transfer without then going back to again seek approval from Pulaski County and the Arkansas Department of Health, which both reviewed an application from Southwest Equity Investment. It is impossible to know what comments Pulaski County or the Arkansas Department of Health may have had at earlier stages had the Improvement District been listed as the applicant.

52. Fourth, the permit transfer is incomplete as it fails to include Rick Ferguson's permit noncompliance history.

53. Fifth, APCEC Rule 6.205 prohibits ADEQ from issuing, renewing, or transferring a NPDES permit for a package plant "without the permit applicant first demonstrating its financial ability to cover the estimated costs of operating and maintaining" the plant for five years. The district did not exist when it sought transfer, and, as discussed above, there is no financial plan in place.

54. For each of these reasons, the purported permit transfer is a nullity, and no permit application exists for ADEQ to approve.

APCEC Rule 3.403(A)(1) Operator Licensing

55. The purported permit transfer document lists Arlo Jason Cyz as the Class III licensed wastewater treatment operator for the facility.

56. APCEC Reg. 3.403(A)(1) requires a minimum of twenty-four hours of approved wastewater training during every two year renewal period, which records indicate he did not perform during his 7/1/19 to 6/30/21 training cycle.

57. An operator may renew their license without reexamination if APCEC Rule 3.403(A)(1) requirements are met, but is required to seek approval from the Licensing Committee or take a second exam if the APCEC 3.403(A)(1) requirements are not met for a cycle.

58. It is unclear from the record available whether or not Mr. Cyz is presently properly licensed after failing to complete mandatory training in a previous training cycle.

59. If Mr. Cyz failed to comply with licensing, training, and relicensing requirements, the permit application and purported transfer are incomplete and invalid.

Discharge to Low or No-Flow Streams

60. This permitting process fails to account for the fact the receiving stream has no assimilative capacity because it is a low or no flow stream most of the year.

61. Discharges to low or no flow streams essentially dominate the receiving stream, resulting in inherent water quality standards violations and toxicity at even low levels of discharge.

62. Dr. Ruhl discusses this scenario in regards to ammonia-nitrogen in her comment, stating that the permit limits will allow a toxic environment due to the low flow of the stream.

63. Included in the comments is an example from Pennsylvania of how to properly consider discharges to low or no flow streams.

64. ADEQ implements no such standard.

APCEC Rule 6.202 Operational Plan

65. The current permit application and operation plan have undergone multiple revisions during this permit consideration process. This has occurred as the application continually changed, most notably from proposing to serve 200 homes to planning to serve 300.

66. During this time, several issues have arisen which are not properly addressed by the continually changing service target.

67. Chief amongst those is a failure in the record to properly and finally determine how many gallons per day of wastewater the facility is expected to treat.

68. Comments on the record indicate that the applicant provided estimate of 50,000 gallons per day is too low because that amount underestimates the number of individuals per household to be served, underestimates the number of gallons of wastewater each of those individuals will produce daily, and fails to include proper inflow and infiltration numbers.

69. All of these improper estimates leads to an inadequate, though often changing, operational plan, which is grounds to deny this permit.

Existing Uses

70. Existing uses are mentioned above in regards to antidegradation and specific water quality standards, but to be clear, Petitioners state here this permit is not protective of existing uses.

71. Comments submitted by Al Drinkwater and Kristy Eanes discuss why the presumption against primary contact recreation (due to watershed size) and other existing uses is improper here.

72. Protecting existing uses is a necessary element of a permit proceeding not met here by ADEQ.

IDENTIFICATION OF AVAILABLE EVIDENCE

73. Petitioners designate the administrative record compiled by ADEQ beginning with the permit application submitted by the applicant through today.

74. This record includes public comments submitted in written and oral form by Petitioners, and others in both written and oral format.

75. The ADEQ responsiveness summary is also pertinent evidence to the claims asserted here.

76. This identification of evidence is not exhaustive, but rather a guide to the facts and record relied on in this appeal.

REQUEST FOR RELIEF

77. Petitioners request:


a. Commission review and an adjudicatory hearing on the decision issuing Permit No. AR0053210;

b. That the Administrative Hearing Officer conduct a preliminary hearing;

c. That this matter be submitted to the Commission for final Commission action as soon as possible, but no more than 120 days following the preliminary hearing as provided by Ark. Code Ann. § 8-4-205(c)(5) and APCEC Regulation 8.614(A);

- d. That the Commission deny the permit, or remand the permit to the Director of the ADEQ for denial, further analysis, or additional public comment in accordance with the issues raised herein; and
- e. For all other legal, equitable and appropriate relief.

Respectfully submitted,

By: 

Ross Noland (AR Bar # 06334)
Noland Law Firm P.A.
P.O. Box 251402
Little Rock, AR 72225
ross@nolandfirm.com
501-541-7374


CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the date set forth below, I did serve a copy of the above and foregoing Request for Hearing on the following individuals by certified mail, return receipt requested, pursuant to APCEC Reg. 8.601 and 8.603:

Director, Division of Environmental Quality
Department of Energy and Environment
c/o Chief Legal Counsel
5301 Northshore Dr.
North Little Rock, AR 72118

Pulaski County Property Owners'
Multipurpose Improvement District No. 2021-2
Paradise Valley WWTP
P.O. Box 23670
Little Rock, AR 72221

Dated: July 13, 2023



Ross Noland