

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ARKANSAS
CIVIL DIVISION

IN THE MATTER OF
ISSUANCE OF FINAL PERMIT DECISION FOR ECO-VISTA, LLC
CLASS 1 LANDFILL

APPEAL FROM A DECISION OF THE ARKANSAS POLLUTION
CONTROL AND ECOLOGY COMMISSION, PERMIT NO. 0290-S1-R4

NOTICE OF APPEAL

Appellants Mayor Angie Russell and the City of Tontitown state the following for their Notice of Appeal pursuant to Ark. Code Ann. § 8-4-223:

1. **Action Appealed From:** Arkansas Pollution Control and Ecology Commission (“APCEC”) Docket 23-013-P.
2. **Order Appealed From:** The Minute Order signed June 28, 2024, which adopts Orders No. 6 and 5 of the Administrative Law Judge (“ALJ”) previously entered.
3. **Jurisdiction and Venue:** Ark. Code Ann. § 8-4-223 grants the Circuit Court “of the county in which the business...involved is situated” jurisdiction over permit appeals.
4. **Statement of Case:** Appellants appealed the Department of Environmental Quality’s (“DEQ”) decision to issue final permit No. 0290-S1-R4 for the expansion of the Eco-Vista Class I landfill. The matters on appeal fall into three broad categories. First, Order No 5 as it pertains to Tontitown’s efforts to withdraw any and all local approvals or support required by state law and APCEC Rule 22. Second, Order No. 6 as it pertains to substantive matters tried at the administrative trial of this matter, including emergency communications, fire preparedness, and groundwater monitoring and modeling. Third, during the June 28, 2024, oral argument, both counsel for permittee and Commissioner Melton raised issues and evidence outside the administrative record, in violation of APCEC Rules 8.618 and 8.619(I).

5. **Grounds for Appeal:**

- *Order No. 5:*
 - APCEC Rule 22.203 and 22.204: Order No. 5 fails to apply Arkansas law to find that APCEC Rule 22.203 or 22.204 municipal approval granted by resolution may, in turn, be withdrawn by resolution. The City of Tontitown withdrew any APCEC Rule 22.203 and 204 approval previously granted by operation of its November of 2022, January of 2023, and August of 2023, resolutions denying APCEC Rule 22.203 and 204 approval. That which a municipal government may do by majority vote, it may undo by majority vote. *City of Ward v. Ward Water and Sewer System*, 280 Ark. 177, 655 S.W.2d 454 (1983).
 - APCEC Rule 8.211(A)(2): Order No. 5 fails to direct DEQ to comply with its legal duty to satisfy APCEC Rule 8.211(A)(2)'s requirement to provide a “response to each issue raised in any public comment.” DEQ failed to provide substantive responses to comments submitted by Appellants and others pertaining to municipal resolutions passed by the City of Tontitown withdrawing any legal support or agreement to Class I landfill expansion by Eco-Vista. Simply acknowledging the agency is “aware” of comments is not a APCEC Rule 8.211(A)(2) response. DEQ is required to provide a response to comments pursuant to APCEC Rule 8.211, which it failed to do.
- *Order No. 6. Recommended Decision:*
 - APCEC Rule 22.411 and 416: Appellants provided testimony at trial from Mr. Todd Thalhamer establishing the emergency communications and fire response plans in the Eco Vista Class I permit are inadequate and do not meet the minimum

required by rule. In section C of the Conclusions of Law in of Order No. 6, the Recommended Decision rules to the contrary, relying in part on the testimony of Mr. Blake Small pertaining to matters outside the administrative record upon which the agency based its decision. APCEC Rules 22.411 and 416 call for additional measures for communicating the public, planning for a fire disaster, and conducting proper training. Order No. 6 renders these rules meaningless, in violation of law.

- APCEC Rule 22.1101 *et seq.*: Mr. Steve Hart testified at trial no comprehensive conceptual site model exists for the subject site. The permittee and agency repeatedly ignore data regarding groundwater flow, both direction and volume, developed in past studies. The last site model in the record prior to this permit application contained incorrect statements regarding groundwater flow. Despite these facts, Section D of the Conclusions of Law in the Recommended Decision does not require the permittee to develop a comprehensive conceptual site model using all data available to inform its permit decision. This is a violation of law.
- APCEC Rule 22.1201 *et seq.*: Mr. Steve Hart also testified at the administrative trial that the permit's groundwater monitoring provisions are inadequate to detect a release of pollutants as soon as possible. While Order No. 6 does require a few new testing points, these points are not informed by a comprehensive conceptual site model. Sections F and G of the Conclusions of Law in the Recommended Decision do not go far enough in requiring the additional monitoring testified to by Mr. Hart. The agency and permittee do not fully account for groundwater flow, both direction and volume, in their permitting decision, and thus have not

implemented an adequate monitoring plan in the permit. Additional dye tests, groundwater monitoring points (such as wells and seeps), and frequency of monitoring is needed to comply with APCEC Rule 22.1201 and its pollution detection requirements.

- *Oral Argument:*

- Failure of Commissioner Melton to Follow APCEC Rule 8.618, 8.619, and Due Process:

- APCEC Rule 8.618 states that Commission may “affirm, modify, or reverse the Recommended Decision” of the ALJ. Here, Commissioner Melton based his vote on groundwater modeling on his past personal experiences, as shown on page 25 of the oral argument record, a matter not found in the record.
- Commissioner Melton also based his vote on emergency communications and preparedness on his purported belief that Mr. Thalhamer committed an illegal act in testifying in this matter, as shown on page 26 of the oral argument record. This issue is found nowhere else in the record.
- Only a vote upon the record before the Commission, specifically the Recommended Decision, is proper. A reviewing court cannot adequately review legal decisions not contained in the Recommended Decision. This implicates basic due process. A Commissioner cannot decide an issue on a matter where no opportunity to brief or argued it existed. Appellants cannot adequately address arguments not known to them. Remand to the Commission for a vote on the Recommended Decision alone is proper.
- These comments also violate APCEC Rule 8.619(I)’s prohibition on additional evidence at the oral argument.

- Failure of Opposing Counsel to abide by APCEC Rule 8.619(I):
 - Counsel for the Permittee and Commissioner Melton again violate APCEC Rule 8.619(I)'s prohibition on additional evidence at pages 28-31 of the record. There, Commissioner Melton asks why more is not being done outside the permitting process to address emergency communications and response, to which undersigned counsel responds the permit appeal is the venue for change.
 - Counsel for Eco-Vista then makes statements pertaining to settlement discussions which are outside the record, constituting additional evidence in response to Commissioner's Melton's line of questions. This is a violation of APCEC Rule 8.619(I).
- Remand is proper to direct a vote in compliance with APCEC Rules 8.618, 8.619, and due process, specifically a vote constrained to the administrative record—an act which did not occur here.

6. **Address For Appellant:** Counsel for the Appellants, Ross Noland, Noland Law Firm, P.O. Box 251402, Little Rock, AR 72225.

Respectfully submitted,

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