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Carney Bates & Pulliam PLLC

May 15, 2013

Teresa Marks, Director
ARKANSAS DEPARTMENT OF ENVIRONMENTAL
QUALITY
5301 Northshore Drive
North Little Rock, AR 72118-5317

Dear Director Marks:

I am writing on behalf of the Ozark Society, Buffalo River Watershed Alliance, National Parks Conservation Association and the Arkansas Canoe Club.

As you have recognized in recent public statements and media interviews, the most important component of a CAFO hog farm permit application is the Nutrient Management Plan ("NMP"). This is the document that is *intended to* demonstrate that the hog waste from the facility can be applied to the chosen fields so that the nutrients (phosphorus and nitrogen) do not run off the field into nearby waterways or percolate downward through the karst geology. In the Ozarks, the nutrient of primary concern is phosphorus. It is what causes the growth of nuisance algae. Accordingly, as ADEQ, the University of Arkansas, and the CAFO general permit recognize, the NMP in a CAFO permit application *must* be premised on a phosphorus analysis.

Cargill-supplied C&H Hog Farms' NMP is woefully inadequate and contains significant omissions, errors and misrepresentations requiring ADEQ to revoke the permit in accordance with Ark Code § 8-4-204 and Part 6.3 of the CAFO General NPDES Permit. A close look at the foundational information upon which the NMP is based demonstrates that C&H Hog Farms is proposing to dump additional phosphorus-laden hog waste onto fields that already have all, *or more than*, the phosphorus they need. Accordingly, if ADEQ permits C&H Hog Farms to proceed with its industrial hog farm and waste application, significant amounts of phosphorus will be available for runoff into groundwater, Big Creek and downstream to the Buffalo River, causing nuisance algae and significantly altering the ecology of the stream system.

A NMP should meet the minimal requirements under *any* circumstances, no matter what the nearby waterways. However, the public expects and deserves heightened vigilance of its public officers when the receiving waters are the Buffalo River and its watershed.

The Permit raises a number of concerns, but we forward this letter focusing on the phosphorous analysis in NMP in the interest of time. What follows is an outline of some of the fundamental shortcomings, errors, misrepresentations, and omissions in the NMP submitted with C&H Hog Farms' permit application.

www.CBPLaw.com

11311 Arcade Drive, Suite 200, Little Rock, AR 72212
p. 501-312-8500 f. 501-312-8505 tf. 888-551-9944

For your convenience, a complete copy of the NMP is enclosed along with attachments highlighting the specific sections noted in the analysis.

I. SIGNIFICANT ERRORS, OMISSIONS AND MISREPRESENTATIONS IN THE C&H HOG FARMS' NUTRIENT MANAGEMENT PLAN.

1. The foundation of any NMP is the soil tests conducted by the University of Arkansas' Department of Agriculture. In this instance, those soil tests show that 15 of 17 fields¹ – 87% of *the hog-waste application area* – already have “optimum” or “above optimum” levels of phosphorus. Attachment 1. This means that even before any hog waste is applied, 87% of the fields have all (optimum) or more than (above optimum) the phosphorus the fields need to grow pasture or hay. Not surprisingly, it follows that in the soil test results, the University of Arkansas recommends that *no* additional phosphorus be applied to *any* of these 15 fields.
2. One would think that given the soil tests, Cargill-supplied C&H Hog Farms would have searched out another location to place its hog farm and dump its hog waste. Instead, C&H Hog Farms misrepresented in its permit application that “[b]ased on current soil tests results, there are no fields at this time that are identified as having high and/or very high soil phosphorus (P) levels”. Attachment 2. *This is simply not true.* Again, the soil testing shows that 15 fields (87% of the application area) have all or more than the phosphorus they need and that *no* more phosphorus should be applied. Attachment 1.
3. Another confounding issue obscured by C&H Hog Farms' permit application is the susceptibility of the application fields to flooding by Big Creek during the application time period. Based on soil maps, 7 of the 17 fields (43% of the application area) are “occasionally flooded” by Big Creek and its tributaries. Attachment 3. C&H Hog Farms obscures this information by denoting “#N/A” for Fields 5, 6, 7 & 9 (64% of the flooded fields) under the “flooding frequency” column of its “Arkansas Nutrient Management Planner” table. Attachment 4 (Fields 1-10 at p. 2). C&H Hog Farms does not explain under what circumstances flooding would not be an “applicable” consideration. Compounding the problem, all 7 of these “occasionally flooded” fields already have all or more than the phosphorus they need. Further compounding, the application time period proposed in the NMP is March through June, when flooding is most likely. Attachment 4 (Fields 1-10 at p. 5; Fields 11-17 at p. 5).
4. To further obscure the phosphorus problem, for Fields 5, 6 7 & 9 – all “occasionally flooded” fields adjacent to Big Creek that already have all or more than the phosphorus they need – the NMP improperly switches from a phosphorus-based analysis to a nitrogen-based analysis, with no explanation. Attachments 4 & 5. Of course, switching the basis of the analysis does not change the characteristics of the hog waste. It still contains phosphorus. But it does provide C&H Hog Farms an opportunity to obscure and ignore the phosphorus problem. *However, this switch to a nitrogen-based analysis violates Section 3.1 of the General Permit, which requires the NMP to be developed in accordance with the Arkansas Phosphorus Index*

¹ Fields 1-12, 14, & 16-17.

2010. Indeed, you and Mr. Bailey stressed the phosphorus requirement in your PowerPoint presentation at the public meeting in Jasper on May 8, 2013. Attachment 6.

5. In addition, C&H Hog Farms' "Arkansas Nutrient Management Planner" misrepresents the nutrient recommendations for phosphorus for 15 of the 17 fields (*87% of the hog-waste application area*). For each of these fields (#1-12, 14, & 16-17), C&H Hog Farms' NMP misrepresents that the nutrient recommendation for phosphorus is 57 lb/ac (Tab 4), when in truth the recommended application level is *zero*, as set forth above. *Compare* Attachment 4 (Fields 1-10 at p. 3; Fields 11-17 at p. 3) *with* Attachment 1.

6. All the above begs the question -- why do the misrepresentations, sleights of hand and obfuscations converge around Fields 5, 6, 7 & 9? All four of these fields share the following characteristics:

- All are adjacent to Big Creek and therefore of critical concern when it comes to the danger of phosphorus runoff into the Buffalo River watershed;
- All have "above optimum" soil test results, which means they all *already* have *more* phosphorus than they need;
- All are "occasionally flooded" by Big Creek;
- All are large, comprising 28% of the proposed application area;
- All are flat and located in closest proximity to the Hog Farm operation, making them the most economically viable fields for applying hog waste.

In short, the significant problems with the NMP converge on the fields of greatest concern (closest to Big Creek, prone to flood and already overloaded with phosphorous) and most likely to bear the brunt of the hog waste application from an economic perspective because they are the cheapest and easiest for the operator to access.

7. Finally, C&H Hog Farms reports that 80% of the phosphorus is "lost" during "storage" before it is applied on the fields. Attachment 4 at p. 1. What this really means is that the phosphorus is absorbed into the sludge that falls to the bottom of the waste disposal ponds. However, the NMP goes on to say that this sludge – and the *enormous* amount of phosphorus it contains – is going to be regularly pulled out of the ponds and disposed of by land application. Attachment 7. But nowhere does the NMP explain where or how the sludge will be applied or how fields that are already overloaded with phosphorus are expected to absorb even more phosphorous.

II. ADEQ IS CHARGED WITH THE DUTY TO REVOKE C&H HOG FARMS' PERMIT BECAUSE IT WAS OBTAINED BY MISREPRESENTATION AND FAULURE TO DISCLOSE ALL RELEVANT AND REQUIRED FACTS.

Ark Code § 8-4-204 (Permits—Revocation) (Attachment 8) provides:

The Arkansas Department of Environmental Quality or its successor is given and charged with the power and duty to revoke, modify, or suspend, in whole or in part, for cause any permit issued under this chapter, including, without limitation:

- (1) Violation of any condition of the permit;
- (2) Obtaining a permit by misrepresentation or failure to disclose fully all relevant facts; or
- (3) A change in any applicable regulation or a change in any preexisting condition affecting the nature of the discharge that requires either a temporary or permanent reduction or elimination of the permitted discharge.

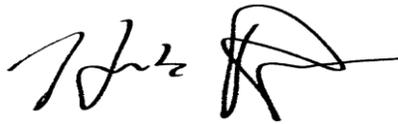
Similarly, Part 6.3 of the CAFO general permit (Attachment 9) provides:

This permit may be modified, revoked and reissued, or terminated for cause including, but not limited to the following:

- a. Violation of any terms or conditions of this permit; or
- b. Obtaining this permit by misrepresentation or failure to disclose fully all relevant facts; or
- c. A determination that the permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or termination.

At the Jasper public meeting, you committed that if there were misrepresentations or significant omissions of relevant facts in C&H Hog Farms' permit application you would revoke, modify, or suspend the permit. As shown above, C&H Hog Farms' NMP fails to disclose fully all relevant facts. Indeed, it fails to disclose all *required* facts and to conduct the *required* analysis. Moreover, it includes significant misrepresentations. Based upon the forgoing, I respectfully ask you to stand by your public commitment, honor the duty you are charged to perform, and revoke C&H Hog Farms' permit.

Sincerely,

A handwritten signature in black ink, appearing to read 'Hank Bates', with a stylized flourish at the end.

Hank Bates

HB/jcg
Enclosures