

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF ARKANSAS  
WESTERN DIVISION**

BUFFALO RIVER WATERSHED ALLIANCE,	)	
et al.,	)	
	)	
Plaintiffs,	)	
	)	Civil Action No. 4:13-CV-450 DPM
v.	)	
	)	
UNITED STATES DEPARTMENT OF	)	
AGRICULTURE, et al.,	)	
	)	
Defendants,	)	
	)	

**PLAINTIFFS’ RESPONSE TO DEFENDANTS’ RULE 56.1 STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE DISPUTE**

Pursuant to Local Rule 56.1(b), Plaintiffs respond as follows to Defendants’ statement of material facts as to which there is no genuine dispute, ECF No. 39.

**1.** In 1986, the United States Environmental Protection Agency (“EPA”) transferred authority to the State of Arkansas under the Clean Water Act to administer the National Pollution Discharge Elimination System (“NPDES”) permit program in the State.

**RESPONSE:** Not disputed except as to materiality of fact.

**2.** The Arkansas Department of Environmental Quality (“ADEQ”) administers the State’s NPDES permitting program.

**RESPONSE:** Not disputed except as to materiality of fact.

**3.** In October 2011, after considering public comment and holding public hearings, the ADEQ issued a general NPDES permit for Concentrated Animal Feeding Operations (“CAFOs”) in the State of Arkansas. FSA-1071; FSA-730 (Permit #ARG590000).

**RESPONSE:** Not disputed except as to materiality of fact and that the NPDES General Permit ARG590000 has an effective date of November 1, 2011. FSA-730. Plaintiffs note that public notice of ADEQ's preliminary determination that a facility has completed the Notice of Intent for coverage under the General Permit is made available only on ADEQ's website. FSA-749.

4. In May 2012, ADEQ amended its Regulation No. 5 governing liquid animal waste management systems to exempt CAFOs that have obtained coverage under the CAFO General Permit from having to also obtain a Regulation No. 5 permit. ADEQ explained that the purpose of the amendment was to eliminate the dual requirement that CAFOs obtain a permit under Regulation No. 5 and a NPDES permit. *See* ADEQ Petition to Initiate Rulemaking to Amend Regulation No. 5, Docket No. 11-0004-R, Exhibit B (Legislative Questionnaire) at 2. ADEQ stated that eliminating double permitting for CAFOs would have no environmental effect, because the "proposed rule essentially continues current levels of protection." *See* ADEQ Petition to Initiate Rulemaking to Amend Regulation No. 5, Docket No. 11-0004-R, Exhibit E (Economic Impact/Environmental Benefit Analysis) at 3.

**RESPONSE:** Not disputed except as to the last sentence. ADEQ stated that the amendment "essentially continues current levels of protection," but did not state that it "would have no environmental effect." *See* ADEQ Petition to Initiate Rulemaking to Amend Regulation No. 5, Docket No. 11-004-R, Exhibit E (Economic Impact/Environmental Benefit Analysis), [http://www.adeg.state.ar.us/reg/drafts/reg05\\_draft\\_docket\\_11-004-R/reg05\\_draft\\_docket\\_11-004-R\\_exhibit\\_e\\_economic\\_impact\\_environmental\\_benefit\\_analysis.pdf](http://www.adeg.state.ar.us/reg/drafts/reg05_draft_docket_11-004-R/reg05_draft_docket_11-004-R_exhibit_e_economic_impact_environmental_benefit_analysis.pdf).

4. Under the ADEQ's General Permit, applicants must prepare a Comprehensive Nutrient Management Plan ("CNMP") which must meet all the requirements of the EPA's

CAFO regulations found at 40 C.F.R. § 122.23 and 40 C.F.R. § 412. FSA-733 (Permit ¶ 1.5.1.2); FSA-739 (Permit ¶ 3.2).

**RESPONSE:** Not disputed except as to materiality of facts.

5. Arkansas' CAFO General Permit imposes restrictions on land application of animal waste generated by CAFOs, including specified set back distances from waterbodies, property lines and occupied buildings (FSA-746 (Permit ¶ 4.2.1.5)), and prohibits application of manure to fields that are saturated, frozen, or covered with snow, or when it is raining or likely to rain (*id.* ¶ 4.2.1.6).

**RESPONSE:** Not disputed except as to materiality of facts.

6. Arkansas' CAFO General Permit imposes recordkeeping and inspection requirements on CAFOs. FSA-746 to FSA-748 (Permit ¶¶ 4.4, 4.5). *See also* FSA-756 (Permit ¶ 8.7) (inspection and entry); FSA-757 to FSA-758 (Permit ¶¶ 9.3-9.7) (reporting requirements); FSA-360 (record keeping requirements for application of manure); FSA-215 (annual soil and nutrient testing requirements).

**RESPONSE:** Not disputed except as to materiality of facts.

7. Arkansas' CAFO General Permit prohibits, with one exception, all discharge of manure or process wastewater from a CAFO's production facilities into the waters of the State. FSA-736 (Permit ¶¶ 2.1, 2.2). The CAFO General Permit makes an exception for discharges resulting from an overflow caused by precipitation, so long as the facility has been designed and constructed with the capacity to hold all effluent generated by the facility as well as the water generated by a once-every 25-year, 24 hour rainfall event. FSA-736 (Permit ¶¶ 2.1, 2.2).

**RESPONSE:** Plaintiffs dispute the characterization of the General Permit as prohibiting discharge with a single exception. The General Permit allows the release of pollutants from the

CAFO to waters of the State from both the CAFO's production area and its land application areas. FSA-736. With respect to production areas, the General Permit allows discharge “[w]henver rainfall events cause an overflow of process wastewater from a facility designed, constructed, operated, and maintained to contain all process-generated wastewaters plus the runoff from a 25-year, 24-hour rainfall event at the location of the point source.” *Id.* With respect to land application areas, the General Permit allows storm water from the land application areas to be discharged to waters. *Id.* Plaintiffs dispute any suggestion that the environmental impacts of such a permitting regime are negligible or insignificant.

8. Arkansas' CAFO General Permit governs land application of animal waste from a CAFO. FSA-736 (Permit ¶ 2.2.2). Under the permit, land application must be conducted in a manner which will prevent a discharge or drainage of manure into the ground or surface waters of the State. FSA-233-235. The General Permit provides that so long as the CAFO conducts land application in compliance with an approved CNMP, any precipitation-related runoff from land application areas is considered “agricultural storm water,” and not discharge from a point source. FSA-736 (Permit ¶ 2.2.2.3).

**RESPONSE:** Plaintiffs do not dispute that the CAFO General Permit specifies terms for land application of animal waste. Plaintiffs dispute the characterization of the General Permit as preventing releases to or impacts on ground or surface waters. Plaintiffs do not dispute that the General Permit allows precipitation-related runoff from land application areas to reach waters of the State. Plaintiffs dispute any suggestion that this so-called “agricultural storm water” does not have harmful environmental impacts when it enters waters of the State.

9. To obtain coverage under the CAFO General Permit, a facility must submit to ADEQ a Notice of Intent (“NOI”) and a CNMP. FSA-730. ADEQ is responsible for ensuring

that an applicant's CNMP meets the requirements of the EPA regulations (40 C.F.R. § 122.42(e)) and the effluent limitations established in 40 C.F.R. part 412. *See* 40 C.F.R. § 122.23(h).

**RESPONSE:** Not disputed except as to materiality of facts.

**10.** After making a preliminary determination that the NOI is complete, the ADEQ makes the NOI and CNMP available for 30-day public review and comment. FSA-749 (Permit ¶¶ 5.1 to 5.3).

**RESPONSE:** Not disputed except as to materiality of fact. Plaintiffs note that ADEQ provides notice only on the following website:

[http://www.adeq.state.ar.us/water/branch\\_permits/general\\_permits/default.htm](http://www.adeq.state.ar.us/water/branch_permits/general_permits/default.htm). *See* FSA-749.

**11.** After the close of the public process, and after assuring itself that the CNMP complies with the State regulatory requirements, the ADEQ issues a notice of coverage, granting the facility coverage under the State's general permit for a period of five years. FSA-730.

**RESPONSE:** Plaintiffs do not dispute that after the close of the public process, ADEQ issued a notice of coverage granting C&H coverage under the State's general permit for a period of five years.

**12.** The terms of the CNMP become incorporated as enforceable terms and conditions of the facility's permit. FSA-730; 40 C.F.R. § 122.23(h).

**RESPONSE:** Not disputed except as to materiality of fact.

**13.** The ADEQ retains authority to inspect and monitor the CAFO for compliance with permit conditions, FSA-755 (Permit Part 8), and to approve modifications of the facilities' CNMP. FSA-742 (Permit ¶ 3.2.6).

**RESPONSE:** Not disputed except as to materiality of fact.

14. On June 13, 2012, C&H Hog Farms submitted to the ADEQ an application for coverage under the State's CAFO General Permit. FSA-1071; FSA-41.

**RESPONSE:** Not disputed.

15. On June 25, 2012, ADEQ made C&H's application materials, including the CNMP, available for a 30-day public comment period. FSA-728, FSA-1071.

**RESPONSE:** Plaintiffs have insufficient information and knowledge to dispute or confirm this statement.

16. On August 3, 2012, after receiving no comments, the ADEQ issued a Notice of Coverage for the C&H facility. FSA-728, FSA-729, FSA-1071.

**RESPONSE:** Plaintiffs do not dispute that ADEQ issued a Notice of Coverage for the C&H facility on August 3, 2012.

17. The C&H facility is located in Newton County, west of Mt. Judea, Arkansas. FSA-140, FSA-135. The farm is approximately 2000 feet from Big Creek, and approximately six river miles from the Buffalo River. FSA-160, FSA-138.

**RESPONSE:** Plaintiffs do not dispute that C&H is located in Newton County approximately six stream miles from the Buffalo National River. Plaintiffs note that C&H is located in Mount Judea, Arkansas. Plaintiffs dispute the characterization of C&H as being "approximately 2000 feet from Big Creek." Nine of C&H's waste application fields lie along Big Creek. *See* ECF No. 18-2.

18. The farm includes two barns capable of holding a total of 6,503 swine, including three boars, 2,100 gestation sows, 400 lactating sows and 4,000 ten pound nursery pigs. FSA-70.

**RESPONSE:** Plaintiffs do not dispute that C&H's two barns confine three boars with an average weight of 450 pounds each; 2,100 gestation sows with an average weight of 375 pounds

each; 400 lactating sows with an average weight of 425 pounds each; and 4,000 nursery pigs with an average weight of ten pounds each. FSA-70.

**19.** C&H's two barns are constructed on slat floors over shallow concrete pits in which waste and wash water is collected. This effluent is then drained from the barns into two waste holding ponds. FSA-58. The holding ponds have 18 inch thick compacted clay liners designed to exceed ADEQ requirements. *See* FSA-146 (discussing liners); FSA-191 to 192 (liner compaction standards). The seepage rate of water from the storage ponds is below the ADEQ's 5,000 gallon/acre/day limit. FSA-146.

**RESPONSE:** Plaintiffs do not dispute that C&H's two barns have slat floors over shallow concrete pits in which waste and wash water is collected, and that this effluent drains from the barns into two open air waste storage ponds. Plaintiffs do not dispute that the waste storage ponds have 18-inch thick compacted clay liners. FSA-146. Plaintiffs note that ADEQ requires "a minimum of 18 inches of well compacted low permeable soil" as liner material for the ponds. FSA-191. Plaintiffs do not dispute that the estimated 3,448 and 4,064 gallons per acre pre day seepage rates for C&H's two waste storage ponds are below ADEQ's seepage limit, but dispute the materiality of this fact.

**20.** Pre-construction boring found no karst on the site of the facility. FSA-147, FSA 150, FSA-151.

**RESPONSE:** Plaintiffs dispute this mischaracterization of the "geologic investigation" included in C&H's Notice of Intent for coverage under the General Permit. The "[p]re-construction boring" referenced by Defendants was conducted for purposes of designing the clay liner for C&H's two waste storage ponds and did not test for karst. *See* FSA-146. The soil sampling for the pond liners could not have tested for karst because karst is present and

indicative not in *soil* but in the underlying bedrock. See Merriam-Webster, <http://www.merriam-webster.com/dictionary/karst> (defining karst as “an irregular limestone region with sinkholes, underground streams, and caverns”). The U.S. Geological Survey confirms that the bedrock in Newton County is the Boone Formation, which is primarily comprised of limestone. See <http://tin.er.usgs.gov/geology/state/sgmc-unit.php?unit=ARMB%3B0>. The soil sampling that Defendants point to was conducted with an auger and “auger refusal” was noted at “11½ feet,” FSA-151 – which is the point at which the auger hit solid bedrock and went no further. In other words, this soil sampling did not test for karst.

**21.** The only known bat cave is two and one-half miles (4 km) away from the C&H facility. FSA-1084.

**RESPONSE:** Plaintiffs dispute this statement. Plaintiffs note that this statement was made by FSA in a March 29, 2013, letter, well after the agency had completed its EA and FONSI and approved loan guarantee assistance to C&H. Moreover, the National Park Service has noted that its staff “is aware of *at least one cave* within a normal foraging distance of the [C&H’s] application field area which contains the endangered Gray bat.” FSA-1105 (emphasis added).

**22.** The United States Fish and Wildlife’s (“FWS”) listing decision for the Snuffbox mussel indicates a single small population group of two individuals was found in the lower reach of the Buffalo River in Marion County and that for that population “viability is unknown.” 77 Fed. Reg. 8,632, 8,649 (Feb. 14, 2012).

**RESPONSE:** Not disputed.

**23.** The minimum storage capacity for a facility the size of the C&H facility is 279,436 cubic feet. FSA-71. The C&H facility has a storage capacity of 467,308 cubic feet. FSA-72.



**RESPONSE:** Not disputed.

24. Multiple simulations using weather data collected since 1960, indicate that the holding ponds will not overflow. FSA-74.

**RESPONSE:** Not disputed. Plaintiffs note that C&H apparently ran two simulations.

25. Effluent from the holding ponds is periodically drained and applied to fertilize nearby cropland. C&H has authorization to use 17 fields comprising approximately 670 acres for land application of effluent from the farm.

**RESPONSE:** Plaintiffs do not contest that C&H has represented in its NMP that it is authorized to use 17 fields for waste application.

26. Before land application of waste, the waste in the holding ponds must be tested for nutrient levels, the soils in potential application fields tested, and the appropriate rate of application determined to ensure that nutrients are applied at a rate at which they will be fully consumed by hay and pasture. FSA-68, FSA-353. *See also* FSA-746 (Permit ¶ 4.2.1.3), FSA-378 to FSA-379 (soil and manure sampling).

**RESPONSE:** Plaintiffs do not dispute that manure samples and soil samples are “taken prior to land application to determine land application rates.” FSA-379. Plaintiffs dispute any suggestion that such sampling and the ascertained land application rates allow complete utilization of the nutrients in the waste without the buildup of excess soil phosphorus. Plaintiffs note that the application rates determined for four of C&H’s fields are not accompanied by a Phosphorus Index assessment indicating whether the calculated application rates are appropriate. *See* ECF No. 41 ¶ 16.

27. The C&H facility is projected to generate 31,091 pounds of phosphorus annually. FSA-241. To determine land application rates from the amount of waste generated, elemental

Phosphorus is expressed in terms of  $P_2O_5$ , so that 31,091 pounds of phosphorus is equivalent to 71,198 pounds of  $P_2O_5$ . FSA 242. The amount of  $P_2O_5$  is then adjusted to account for the fact that most of the solid waste and associated nutrients settles to the bottom of the holding pond. FSA-247 (80% storage loss of  $P_2O_5$ ). This yields 14,213 pounds  $P_2O_5$  available for liquid land application. FSA-247.

**RESPONSE:** Plaintiffs do not dispute that C&H's NMP estimates that the swine confined at its facility will generate 31,091 pounds of phosphorus annually. FSA-241. As to the remaining statements made by Defendants in this paragraph, Plaintiffs have insufficient knowledge and information to either dispute or confirm the accuracy and validity of the alleged calculations. Furthermore, Plaintiffs dispute the materiality of these statements.

**28.** Annual plant uptake of phosphorus is 56.6 pounds per acre. FSA-246. C&H is projected to generate 14,213 pounds of phosphorus ( $P_2O_5$ ) for land application per year. FSA-247.

**RESPONSE:** Plaintiffs have insufficient knowledge and information to either dispute or confirm the accuracy and validity of the statements made in this paragraph, except to note that the figure "56.6" appears in Table 3 on FSA-246 and that 14,213 pounds of  $P_2O_5$  is identified by C&H as the "[e]stimated [p]lant [a]vailable [n]utrients" on FSA-247. Plaintiffs dispute the materiality of these assertions.

**29.** The State of Arkansas has established a monitoring program to be implemented by the University of Arkansas, which will assess potential impacts of the C&H Farm on water quality. *See* Pls' Am. Compl. [ECF No. 18] at ¶ 90.

**RESPONSE:** Not disputed except as to materiality of fact.

**30.** On December 17, 2012, FSA issued a 90 percent guaranty to Farm Credit Services for that bank's \$1,302,000 farm loan to C&H. FSA-1114 to FSA-1116. Prior to issuing the guaranty, the FSA prepared a Class II Environmental Assessment ("EA") and issued a Finding of No Significant Impact ("FONSI"). FSA-1029.

**RESPONSE:** Plaintiffs do not dispute that on December 17, 2012, FSA authorized a 90 percent guarantee for a \$1,302,000 farm ownership loan to C&H for the purchase of land and construction of C&Hs operation, and that prior to December 17, 2012, FSA prepared a Class II EA and issued a FONSI in conjunction with this financial assistance.

**31.** A notice of the availability of the draft EA for public comment ran in the Arkansas Democrat-Gazette on August 6, 7 and 8, 2012, and the FSA accepted public comment on the draft through August 20, 2012. FSA-1011. FSA received no public comment on the draft EA. FSA-1071.

**RESPONSE:** Not disputed.

**32.** FSA published notice of the availability of the final EA and FONSI for public review in the Arkansas Democrat-Gazette on August 25, 26 and 27, 2012. FSA-1031. This notice stated that FSA would accept public comments through September 11, 2012. *Id.* FSA received no public comment on final EA and FONSI. FSA-1072.

**RESPONSE:** Not disputed.

**33.** On October 19, 2012, Farm Credit Services of Western Arkansas applied to the SBA for a guaranty for 75% of a loan to C&H for purposes of constructing and operating the hog farm. P-96.

**RESPONSE:** Plaintiffs do not dispute that on October 19, 2012, Farm Credit Services of Western Arkansas submitted an "application for a 75% SBA guaranty for C & H Hogs Farm

Inc.” and noted in that submission that it “approved this line of credit subject to guaranty.” P-96. Plaintiffs note that the “Lender’s Application for Guaranty or Participation” identifies the “Business Name of Applicant” as “C & H Hog Farms Inc.” P-46. Additionally, C&H filled out and signed on October 17, 2012, an “Application for Business Loan” to SBA that identifies the “Applicant Business” as “C & H Hog Farms Inc.” P-44 to 45.

**34.** On November 16, 2012, after reviewing Farm Credit Service’s application, SBA approved Farm Credit Service’s application for a guaranty of 75% of a \$2,318,200.00 loan which Farm Credit Services intended to extend to C&H. P-17.

**RESPONSE:** Plaintiffs do not dispute that on November 16, 2012, SBA authorized a 7(a) Guaranteed Loan “in the amount of \$2,318,200.00 to assist . . . Borrower . . . C & H Hog Farms, Inc.” P-17.

Respectfully submitted this 19th day of May, 2014,

/s/ Hannah Chang  
Admitted *Pro Hac Vice*  
Attorney for Plaintiffs  
Earthjustice  
48 Wall Street, 19th Floor  
New York, NY 10005  
Telephone: (212) 845-7382  
Email: hchang@earthjustice.org

Marianne Engelman Lado  
Admitted *Pro Hac Vice*  
Attorney for Plaintiffs  
Earthjustice  
48 Wall Street, 19th Floor  
New York, NY 10005  
Telephone: (212) 845-7393  
Email: mengelmanlado@earthjustice.org

Monica Reimer  
Admitted *Pro Hac Vice*  
Attorney for Plaintiffs  
Earthjustice

111 South Martin Luther King Jr. Blvd.  
Tallahassee, FL 32301  
Telephone: (850) 681-0031  
Email: mreimer@earthjustice.org

Kevin Cassidy  
Admitted *Pro Hac Vice*  
Attorney for Plaintiffs  
Eartrise Law Center  
P.O. Box 445  
Norwell, MA 02061  
Telephone: (781) 659-1696  
Email: cassidy@lclark.edu

Hank Bates  
Bar Number 98063  
Attorney for Plaintiffs  
Bates Pulliam PLLC  
11311 Arcade Dr., Suite 200  
Little Rock, AR 72212  
Telephone: (501) 312-8500  
Email: hbates@cbplaw.com

**CERTIFICATE OF SERVICE**

I hereby certify that on May 19, 2014, I electronically filed the foregoing Plaintiffs' Response to Defendants' Rule 56.1 Statement of Material Facts with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all listed counsel of record.

/s/ Hannah Chang  
Admitted *Pro Hac Vice*  
Attorney for Plaintiffs Buffalo River Watershed Alliance, et al.  
Earthjustice  
48 Wall Street, 19<sup>th</sup> Floor  
New York, NY 10005  
Telephone: (212) 845-7382  
Email: hchang@earthjustice.org