

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

BUFFALO RIVER WATERSHED ALLIANCE;)
ARKANSAS CANOE CLUB; NATIONAL PARKS)
CONSERVATION ASSOCIATION; and OZARK)
SOCIETY,)

Plaintiffs,)

V.)

UNITED STATES DEPARTMENT OF)
AGRICULTURE; UNITED STATES SMALL)
BUSINESS ADMINISTRATION; TOM VILSACK, in)
his official capacity as Secretary, United States)
Department of Agriculture; MARIA CONTRERAS-)
SWEET¹, in her official capacity as Administrator,)
Small Business Administration; JUAN GARCIA, in his)
official capacity as Administrator, Farm Service)
Agency; LINDA NEWKIRK, in her official capacity as)
Arkansas State Executive Director, Farm Service)
Agency; and LINDA NELSON, in her official capacity)
as Arkansas District Director, Small Business)
Administration,)
Defendants.)

Civil No. 4:13-cv-0450 DPM

**FEDERAL DEFENDANTS' RULE 56.1 STATEMENT OF MATERIAL FACTS AS TO
WHICH THERE IS NO GENUINE DISPUTE**

¹ Maria Contreras-Sweet has succeeded Defendant Jeanne Hulit and is automatically substituted pursuant to Federal Rule of Civil Procedure 25(d).

In compliance with Local Rule 56.1 Federal Defendants submit this Statement of Material Facts in support of their cross-motion for summary judgment.²

The Arkansas Department of Environmental Quality’s CAFO Permitting Process

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.³

2. The Arkansas Department of Environmental Quality (“ADEQ”) administers the State’s NPDES permitting program.⁴

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.⁵ FSA-1071; FSA-730 (Permit #ARG590000).⁶

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 2.⁷ ADEQ

² As set forth more fully in Defendants’ Response to Plaintiffs’ Statement of Facts, Defendants respectfully submit that, in this Administrative Procedure Act (“APA”) case, the facts are those set forth in the administrative record, and the role of the Court is to review the agency’s decision on that record, not decide the facts. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985). This Statement of Facts is not meant to fully represent all the relevant facts found in the administrative records provided in this case.

³ http://cfpub.epa.gov/npdes/statestats.cfm?program_id=45&view=specific

⁴ <http://www.adeq.state.ar.us/water/default.htm>

⁵ http://www.adeq.state.ar.us/water/branch_permits/general_permits/default.htm (click on Response to Comments for Permit Number ARG590000)

⁶ Citations to the Farm Service Agency’s administrative record begin with the prefix “FSA” followed by the appropriate page number, and citations to the Small Business Administration’s administrative record begin with the prefix “P” followed by the appropriate page number.

⁷ http://www.adeq.state.ar.us/regs/drafts/reg05_draft_docket_11-004-R/reg05_draft_docket_11-004-R.htm (click on 10/14/2011 - Legislative Questionnaire).

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.

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).

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).

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).

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).

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).

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).

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).

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.

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).

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).

The C&H Hog Farms Facility

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.

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.

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.

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.

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.

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.

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

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

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).

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.

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

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.⁸

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).

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 P₂O₅, so that 31,091 pounds of phosphorus is equivalent to 71,198 pounds of P₂O₅. FSA 242. The amount of P₂O₅ 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 P₂O₅).⁹ This yields 14,213 pounds P₂O₅ available for liquid land application. FSA-247.

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 (P₂O₅) for land application per year. FSA-247.

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.

FSA and SBA's Loan Guaranties

⁸ After factoring in the set-back requirements in the permit, there are approximately 630 acres available for land application. FSA-227

⁹ Accumulated solids in the holding ponds must be periodically removed and applied to land at an appropriate rate. FSA-236. If the available acreage does not allow for land application, the solids must be taken off site.

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

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.

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.

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.

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.

Respectfully submitted this 28th day of April, 2014.

ROBER G. DREHER
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CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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