

WILLIAMS & ANDERSON PLC

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NOTICE OF INTENT TO FILE SUIT

June 7, 2019

Jason Henson, General Manager
C&H Hog Farm, Inc.
HC 72 Box 2
Vendor, Arkansas 72683

Re: Notice Of Intent To Sue Over Violations Of The Clean Water Act (a/k/a Federal Water Pollution Control Act) at C&H Hog Farm, Inc. in Newton County, Arkansas.

Dear Mr. Henson:

We are writing on behalf of the Buffalo River Watershed Alliance, Inc. and the Arkansas Canoe Club, Inc. to provide to you notice of violations of the Clean Water Act ("CWA"), 33 U.S.C. §§1251-1387, by the C&H Hog Farm, Inc. ("C&H"), owner and operator of a swine confined animal feeding operation (CAFO) in Newton County, Arkansas, whose address is HC 72, Box 2, Vendor, Arkansas.

C&H has violated the CWA at the times and in the manner more specifically described herein, and such violations should be immediately terminated.

I. VIOLATIONS OF THE CLEAN WATER ACT

The fundamental purpose of the CWA is to protect the waters of the United States from degradation by prohibiting the discharge of contaminants into the waters of the United States except in limited circumstances. Limited discharges of contaminants may be made into the waters of the United States through the issuance of National Pollution Discharge Elimination System (NPDES) permits by the U.S. Environmental Protection Agency (EPA) or a state authorized by EPA to administer the NPDES program. NPDES permits contain limitations on the amounts and concentrations of contaminants in waste discharges from specific point sources at permitted facilities, and the Clean Water Act prohibits the discharge of other pollutants from a facility without having a permit to do so. 33 U.S.C. § 1311(a).

Specifically, C&H is violating §1311 of the Clean Water Act by the following acts and omissions:

1. *Seepage from Waste Holding Ponds.*

C&H is a swine Large CAFO, and is a “point source” under the Clean Water Act pursuant to 42 U.S.C. §1362(14) and 40 C.F.R. §122.23.(b)(2) and (4).

C&H is discharging swine wastes from its two (2) waste holding ponds through seepage of such wastes through the soil liners of the ponds. Such discharges commenced in 2013, the year in which C&H commenced operation, continues to the present and will continue in the future for an indeterminable period of time. The precise amount of discharge through such seepage is not measured by C&H or any other entity, but is estimated by C&H’s design engineers and by the Agricultural Waste Management Field Handbook to be approximately 5,000 gallons/day/acre from the two wastewater holding ponds, which consist of approximately 1.4 acres, or approximately 7,000 gallons per day. That number could be substantially more due to erosion cracks that have been observed in the lining of the ponds.

The seepage is not authorized by the NPDES general permit ARG000001 issued to C&H by the Arkansas Department of Environmental Quality (ADEQ), and under which C&H operated the facility until the denial of its application for an individual permit under APC&EC Regulation 5. That NPDES general permit does not authorize any discharge from C&H’s facility other than a release from the spillway of Pond No. 2 caused by overflow from a 25-year or greater storm event. However, the releases that are the subject of this letter are not through that outlet.

Discharge from the seepage migrates through karst geology underlying the C&H facility to the waters of the United States. The migration of such seepage is evidenced by elevated levels of nutrients and E-coli bacteria found in samples taken from Big Creek, the Buffalo River, an ephemeral stream bed downgradient of the aforementioned ponds, from water in a well on the facility, and other waters that enter Big Creek and/or the Buffalo River downgradient and downstream of the C&H facility.

Such elevated contaminant levels have caused portions of Big Creek and the Buffalo River to be placed on the Clean Water Act Section 303(d) list of impaired water bodies in Arkansas.

2. *Improper Discharge of Swine Slurry*

After agitating the waste holding/treatment ponds mentioned above to mix sludge and liquids (“slurry”), C&H discharges swine slurry on designated fields in the

vicinity of the Facility through “honeywagons” with spray pipes/nozzles used for spreading and disposal of liquid swine slurry. This activity is permitted by ADEQ *provided* the slurry is not applied to fields that have shown through testing to be high in phosphorous. If a field tests “high” in phosphorous and additional slurry is applied to it, the soil and vegetation on the field will not be absorb the phosphorous, and the excess phosphorous will leach through or across the thin layers of soil or exposed rock on the fields, and then to the waters of the Buffalo River or its tributaries.

The migration of the overapplication of swine slurry to the application fields is evidenced by elevated levels of nutrients and E-coli bacteria found in samples taken from Big Creek and the Buffalo River, and by soil test results showing that, in 2012, all but three (3) of the application fields were “Above Optimum” for phosphorus, and in 2017, all but one (1) of the application fields were “Above Optimum,” with the one exception being tested at “Optimum.” The University of Arkansas Extension Service recommended that no further phosphorus be applied to those fields.

C&H has, from 2013 to the present, applied swine slurry to fields whose plant cover and soils have demonstrated through scientific tests as containing Above Optimum levels of phosphorous, and as a result, excess phosphorous has leached and will continue to leach from such plants and soils for an indeterminable period of time through the soil or across the rock on the surface of the fields to Big Creek and the Buffalo River or its other tributaries, all waters of the United States.

This is evidenced by elevated levels of nutrients and E-coli bacteria found in samples taken from Big Creek, the Buffalo River, and other waters that enter Big Creek and/or the Buffalo River, and by soil test results showing the application fields are “Above Optimum” or at “Optimum” in phosphorus (as related above), with recommendations by the University of Arkansas that no further phosphorus be applied.

Such discharges have contributed to the placement of portions of Big Creek and the Buffalo River to be placed on the Clean Water Act Section 303(d) list of distressed rivers for the State of Arkansas.

3. *C&H Is Disposing of Swine Slurry in a Floodplain*

C&H is discharging swine slurry described in Section 2, above, by spreading and disposal of such swine wastes on fields located in the floodplain of Big Creek. Big Creek is a tributary of the Buffalo River that is subject to rapid fluctuations in elevation due to rainfall which causes flooding over the fields on which swine slurry is applied by C&H, and which then is discharged by flooding across the surface of such fields into Big Creek and the Buffalo River. The discharge of swine slurry and its constituents has occurred during flooding over fields in the Big Creek flood plain to which C&H has land applied swine slurry beginning in 2013 to the current time,

and is evidenced by elevated levels of nutrients and E-coli bacteria found in samples taken from Big Creek and the Buffalo River, both waters of the United States.

Such discharges have contributed to the placement of portions of Big Creek and the Buffalo River to be placed on the Clean Water Act Section 303(d) list of distressed rivers for the State of Arkansas.

4. *The NPDES General Permit Has Lapsed and C&H Has Not Obtained An Individual Permit*

The permit coverage of the NPDES General Permit ARG590001 under which C&H operated has lapsed and terminated as a result of the non-renewal by the Arkansas Department of Environmental Quality (ADEQ) of Arkansas' NPDES General Permit ARG59000, by the authority of which C&H was operating the facility; the denial by ADEQ of C&H's application for a Regulation 5 (State Liquid Animal Waste Management Systems) individual permit; and the failure on the part of C&H to obtain an individual permit after the lapse of the abovementioned General Permit. Consequently, C&H is currently operating the Facility without a valid permit.

C&H is attempting to extend coverage of its now-expired General Permit coverage by delaying actions such as appealing decisions of the Commission that are favorable to C&H to the Circuit Court of Newton County, Arkansas, and by initiating frivolous litigation against ADEQ. Such actions are solely for the purposes of delay, and to attempt to indefinitely perpetuate coverage of the General Permit.

5. *The General Permit Was Obtained Upon Misrepresentation of Facts Relative to Operation, and Any Remaining Coverage Should Be Terminated.*

In its Application/Notice of Intent for authority to operate C&H Hog Farm under Arkansas' NPDES General Permit ARG59000, C&H submitted a Nutrient Management Plan (NMP) that was an integral and instrumental component of the Application/Notice. That NMP contained a phosphorus storage loss factor of 80%.

Because the waste storage ponds are designed to store waste until it can be pumped out and applied to an agricultural crop, phosphorus is not lost from the system during the time the swine waste is contained in the ponds. The waste system presented in the NOI specifies that the ponds will be mixed prior to pumping, and the contents will be pumped out over the course of a year. As phosphorus is not volatile, the only loss is due to settling of solids that will be removed eventually. For this application, a reasonable and prudent assumption would be zero loss, rather than 80%.

The use of an 80% storage loss factor in the Application/Notice is a misrepresentation of the conditions of operation of C&H Hog Farm, and leads to the overapplication of phosphorus from the ponds to the land application fields. The NPDES General Permit ARG59001 General Permit of C&H was issued in reliance upon that misrepresentation and any coverage of that permit that may be remaining should be revoked, rescinded and terminated.

II. CONCLUSION

C&H is violating the Clean Water Act in the ways described above. The undersigned organization hereby gives notice that if the Clean Water Act violations described above are not corrected within sixty (60) days of the date of this Notice, it may file suit in the appropriate United States District Court against C&H Hog Farms, Inc., to enjoin its continued operation of the hog farm, request assessment of penalties based upon such violations, and for attorney fees.

Sincerely,

WILLIAMS & ANDERSON PLC



Richard H. Mays
Senior Counsel

Attorney for:
**BUFFALO RIVER WATERSHED
ALLIANCE, INC. and
ARKANSAS CANOE CLUB, INC.**

RHM/nj

CERTIFIED MAIL NO. 7018 1830 0000 7673 1127
RETURN RECEIPT REQUESTED

A copy of the foregoing Notice is also being provided to:

Director, Arkansas Department of Environmental Quality
Administrator, United States Environmental Protection Agency
Regional Administrator – Region 6, United States Environmental Protection Agency
Attorney General, United States of America