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Date: April 14, 2016

FACSIMILE COVER SHEET

PLEASE TRANSMIT THE ATTACHED (7) PAGES TO:

NAME

Caleb Osborne
Associate Director, Office of Water Quality
ADEQ

FAX NUMBER

501-682-0880

Re: Arkansas Environmental Defense Alliance Comments

Dear Mr. Osborne:

Attached please find the comments on the permit renewal for construction and operation of CAFOs.

Sincerely,
Cornelia Estey
Assistant to Mr. Richard H. Mays
cestey@richardmayslawfirm.com

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Arkansas Environmental Defense Alliance

*A watchdog organization whose goal is to preserve and enhance Arkansas' natural resources
using effective, proactive approaches to address environmental issues through collaborative, political, and legal means.*

April 14, 2016

Richard H. Mays,
President
Heber Springs

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Vice-President
Little Rock

Rob Leflar,
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Lance Lee
Texarkana

Richard Mason
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Don Richardson
Clinton

Robert Thompson
Paragould

Steve Wilson
Norfolk

Arkansas Department of Environmental Quality
5301 Northshore Drive
North Little Rock, AR 72118-5317

Attn: Office of Water Quality

Re: Comments of the Arkansas Environmental Defense Alliance, Inc.
on Draft Renewal of General Permit ARG590000 -
Construction and Operation of Concentrated Animal Feeding
Operations

Dear Ladies and Gentlemen:

This in in response to your Notice of Draft Renewal Permit published March 15, 2016, in which you express the intent of the Arkansas Department of Environmental Quality to renew general permit ARG590000 for the construction and operation of concentrated animal feeding operations (CAFOs).

The following comments are submitted on behalf of the Arkansas Environmental Defense Alliance, Inc. (AEDA), an Arkansas not-for-profit organization whose mission, among others, is to serve as a watchdog organization to preserve and enhance Arkansas's natural resources, and to serve as a spokesman for those who want to participate in the environmental decision-making process.

We are aware of the effect that CAFOs have had in other states, and are deeply concerned of the potential that CAFOs have to adversely impact the environment of Arkansas and its surface and subsurface waters. We strongly believe that the proposed general permit is inadequate to prevent deterioration of the state's environment, and urge that you seriously consider our comments contained herein.

The Department is better aware than anyone of the highly-controversial C&H Hog Farm that was permitted to be constructed and operate in the ecologically-sensitive Buffalo River watershed under general permit ARG590000. It is AEDA's opinion that permitting the construction and operation of that facility in that location, and under a general permit, was a great mistake and lapse of regulatory judgment, and that it holds significant potential for environmental harm to Big Creek and the Buffalo River. It is unfortunate that it will apparently require an environmental incident to occur before anything is done to correct that error. One can only hope that the incident will not be catastrophic.

AEDA recognizes that the draft renewal of general permit ARG590000 contains a prohibition against the issuance of any additional general permits for CAFOs in the Buffalo River watershed for a period of five (5) years. That is but a Band-Aid® on the problem of permitting CAFOs in the State of Arkansas generally. The fact of the matter, which few reasonable people dispute, is that CAFOs – particularly of the swine variety – presents the potential for environmental harm to any part of the state, and should be as highly regulated as any other facility that has such potential. Most people would prefer to live near a well-regulated factory with individual permits for air and water emissions, than near a hog farm.

With that background and context, AEDA submits the following specific comments on the draft renewal of general permit ARG590000.

1. ***Medium and Large CAFOs should require individual permits.***

Historically, general permits are issued for a category or categories of activities that are similar in nature and *cause only minimal individual and cumulative adverse impacts*, or to avoid unnecessary regulatory control exercised by another federal, state, or local agency, *and the environmental consequences of the activity would be individually and cumulatively minimal*. As the United States District Court for the Eastern District of Arkansas stated in *Hall v. U.S. Army Corps of Engineers*, 2008 WL 5058986, 68 ERC 2145 (Not Reported in F.Supp.2d.) (2008):

General permits are issued, after notice and opportunity for public hearing, on a state, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the COE determines that *the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment*. 33 U.S.C.A. §

1344; 33 C.F.R. § 323.2(4); *National Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d at *1275. (Emphasis added)

Rather than permitting medium and large swine CAFOs by general permit, such facilities should be subject to individual permitting because of their generation of massive quantities of animal wastes that are toxic to aquatic environments, their potential for inflicting significant harm to the environment in the event of a release, the individual differences between such facilities and the wastes they produce, and the importance of the geological location of each facility.

Furthermore, the public is given less notice and opportunity to participate regarding the agency's intent to issue a general permit than in the issuance of an individual permit. As a result, the public is less likely to participate in the permitting of facilities under a general permit regime than under the processes required for individual facility permitting. Lack of participation can result in lack of transparency, distrust of agency action and damage to the facility's community relations.

AEDA recognizes that Ark. Code Ann. §8-4-203 authorizes the Director of ADEQ to require a CAFO facility to apply for an individual permit where the facility's discharge is a significant contributor of pollutants, considering (1) the location of the discharge with respect to waters of the United States; (2) the size of the discharge; (3) the quantity and nature of the pollutants discharged to waters of the United States; and (4) other relevant factors. All of those are important factors, and should be considered in issuance of an individual permit. However, leaving the decision to require a facility to seek an individual permit puts too great a burden on the Director. For consistency and to ensure the best protection of the environment, individual permits should be required of all swine CAFOs.

The Clean Water Act and regulations promulgated under it encourage public participation in the issuance of permits. While the facility seeking the CAFO permit would undoubtedly prefer to minimize the amount of public participation, the less-conspicuous notice under the general permit procedures results in the situation with which C&H Hog Farms and ADEQ are currently faced on an almost daily basis. The public is highly attuned and reactive to CAFOs being located in environmentally-sensitive areas, and their reaction to the permitting of such a facility without adequate public notice and opportunity to be heard creates the public indignation and animosity that currently exists.

2. *Additional Factors For Locating Facilities Should Be Added*

In the fact sheet, there are five factors that are listed as criteria for a general permit. Even assuming that a mid-to-major CAFO is a suitable subject for a general permit (which, as stated above, it is not) there is no mention of conditions unique to the site (*i.e.*, geology, presence of sensitive areas) among the criteria.

It would seem apparent that, with any mid-to-major CAFO storing large amounts of animal wastes in ponds that are subject to overflow or leakage through natural or artificial liners (which is a not uncommon occurrence), the geology underlying the facility, the topography of the area, and any environmentally-sensitive areas in the watershed or that are otherwise exposed to risk of overflow or leakage should be considered. In particular, large areas in north Arkansas are known to be underlain with karst geology, which would facilitate the dispersion of swine wastes should they leak from holding ponds or result from overflows. An especially enlightening discussion of the effect of karst geology on migration of contamination is contained in the following publication: Katarina Kotic, Carol L. Bitting, John Van Brahana & Charles J. Bitting, "Proposals for Integrating Karst Aquifer Evaluation Methodologies into National Environmental Legislations." *Sustainable Water Resources Management* 1(4):363-374 (Dec. 2015).

In this same vein, an assessment should be conducted by a certified professional engineer paid by the applicant, subject to public review and comment, and subject to agency approval, of the risk of significant environmental harm to the environmentally-sensitive areas in the watershed or that are otherwise exposed to risk of overflow or leakage. The public, in comments on the draft permit, should be allowed to submit their own risk assessment. Such an assessment, if properly conducted and given the proper attention, should help prevent the location of facilities such as the C&H Hog Farm in inappropriate areas.

3. *A Separate Construction Permit Should Be Required*

A number of types of facilities that apply for individual permits are required to obtain permits for construction of those facilities, and a separate permit for operations. That should also be applicable to swine CAFOs. Due to the volume of wastes processed and stored by such CAFOs, it is critically important that the waste management, storage and disposal systems of the facility be carefully and professionally designed and installed to protect against failure, leakages and releases to the greatest extent possible. This would be best done by requiring a separate and initial construction permit. It would also serve to help assure the public that such systems are professionally designed and installed.

4. *Monitoring Requirements Should Be Added*

The fact sheet states that facilities covered under this permit should not have frequent monitoring. To the contrary, experience has shown that even facilities proclaimed to be state-of-the-art and that are monitored do not always function properly. Liners and levees fail, and when they do, they cause significant damage. Arkansas, with its natural beauty of which we boast in our promotional advertising, should be foresighted enough to anticipate failure of facilities and equipment, and require the most stringent standards for maintaining them. CAFOs should be monitored frequently, and depending on geology, should have monitoring wells downgradient of the facilities as do RCRA facilities.

5. *The Conditions For Overflow and Releases Should Be Strengthened*

The draft permit requires that waste storage facilities be capable of containing a 25-year, 24-hour rainfall event. A 25-year rainfall event is not an exceptional rainfall event, and is not sufficient to prevent overflow of the storage facilities under the larger rainfall events that may reasonably be anticipated to occur. Further, the ponds should be lined with an artificial liner in addition to clay, and be capable of containing a 50-year, 24-hour rainfall event. Any overflow from waste storage facilities should be orally reported immediately upon discovery and no later than 12 hours after occurrence.

The draft general permit provides that any process wastewater pollutants in overflow from the waste storage facilities may be discharged into Waters of the State. Responsibility for the facility owner-operator should not end there, however. If there is an overflow from a rain event of any size, the owner-operator of the facility should be responsible for:

- (i) Anticipate potential overflow or releases based upon forecasts of severe rainstorms;
- (ii) taking immediate action to prevent, stop or diminish the overflow;
- (iii) sampling analyzing the effects of such overflow throughout the watershed to the furthestmost reach of the pollutants;
- (iv) remediation to the greatest extent possible using best available technology of the effects of the release; and
- (v) payment of the costs to ADEQ, its contractors, and other public agencies of responding to such release, without regard to the rights of third parties and other agencies to recover for damages to their properties and interests.

Requiring these responsibilities would serve as incentives to the facility operator to use the utmost care in constructing and maintaining the levees and liners that hold the waste liquids.

6. *Swine CAFO Facilities Should Be Required To Fund Periodic Monitoring Of Waterbodies Into Which Runoff From Application Fields May Discharge*

Discharges from holding ponds are not the only significant threat to the environment in swine CAFO operations. While contamination to surface waters from runoff from fields where swine wastes are applied may not pose the same magnitude of catastrophic threat that a breach of the holding ponds may present, the cumulative impact of such runoff from application fields over a period of years can result in a slow but certain deterioration of water quality and damage to aquatic life. The gradual build-up of nutrients and other contaminants from such run-off should be closely monitored.

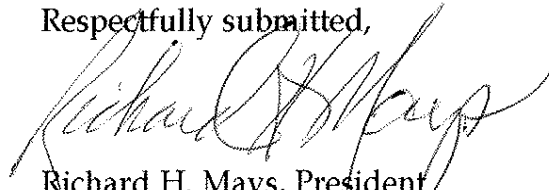
The owner-operator of a swine CAFO should be required to fund (but not conduct) periodic (*e.g.*, quarterly) assessments of the watershed into which runoff from waste application fields is or may be discharged. Such assessments, which should be conducted by a professional registered engineer, would consist of sampling and analysis of water and soil in the watershed of the receiving stream, and observations regarding buildup of algae and other evidence of nutrient loading of the stream. Reports of such assessments should be filed with ADEQ and made available to the public immediately upon filing.

The comments contained herein are those that have been developed by AEDA to this date from a review of the draft general permit ARG590000 and accompanying materials. Additional review of the draft general permit and comments from other persons, firms or organizations may disclose additional areas of concern. The failure to include any such matters in these comments does not prohibit AEDA from raising any such matters in subsequent comments or proceedings relative to the draft general permit.

Also, AEDA does hereby adopt the comments of the Buffalo River Watershed Alliance and the Arkansas Chapter of the Sierra Club, and may adopt comments of other persons, firms or organizations on the draft general permit that are consistent with the views contained herein that oppose the reissuance of the draft general permit insofar as the same relates to CAFOs for construction and operation of swine facilities, or that propose additional restrictions on the facilities that may be covered by the draft general permit.

Thank you for the opportunity to comment on the proposed renewal of the general permit for CAFOs. We welcome the opportunity for further participation in this important matter.

Respectfully submitted,



Richard H. Mays, President
*Arkansas Environmental
Defense Alliance, Inc.*

cc: AEDA Board Members