




July 1, 2014

TO: Arkansas Department of Environmental Quality  
Attn: Mr. Doug Szenher  
Public Outreach and Assistance Division  
5301 Northshore Drive  
North Little Rock, AR 72118

FROM: Arkansas Farm Bureau Federation  
Mr. Evan A. Teague, P.E.   
Director, Environmental & Regulatory Affairs  
Director, Swine Division  
P.O. Box 31  
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RE: Third Party Rulemaking on APCEC Regulations 5 & 6

Mr. Szenher:

The Arkansas Farm Bureau Federation welcomes the opportunity to submit comments regarding the proposed amendments to the Arkansas Pollution Control & Ecology Commission's (the Commission) Regulations 5 and 6. These comments have been prepared after personal visits with more than ten county Farm Bureau boards of directors across North central and Northwest Arkansas, and after numerous updates to county Farm Bureau boards throughout Arkansas, the Arkansas Farm Bureau Federation State Board of Directors, the Environmental Issues Committee, and the Swine Division.

The overwhelming response of these Farm Bureau members, especially those in Newton, Searcy and Marion Counties, was that these proposed amendments are an infringement on the right-to-farm, private property rights, are potentially contrary to existing state statutes, and lack scientific justification. Based on this direct feedback from our county Farm Bureau organizations, the Arkansas Farm Bureau strongly opposes these amendments, and we urge the Department and the Commission to deny the proposed rulemaking.

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## General

### Previous Studies of Hog Farms in the Buffalo River Watershed

In 1995 Director Randall Mathis and the Arkansas Department of Environmental Quality's (the Department) Environmental Preservation Division initiated the Buffalo River Swine Project. The Arkansas Pork Producers Association, the Newton County Conservation District and Cooperative Extension Service were also collaborative partners in the study.

The study included a 5-year evaluation of hog farms in the Buffalo River watershed. Full disclosure, at the onset of the study there were issues found, not with the locations of the farms, but with how some farmers were managing their manure. However, after working with and educating these farmers on proper manure management practices in-stream water quality samples collected from an adjacent stream showed initial nutrient load reductions of 90%. The study also included groundwater monitoring around the lagoons and in the application fields. The groundwater study showed that those lagoons "exhibited little to no leakage" and that groundwater showed "minimal impacts from onsite waste ponds."

The participants of this study were awarded EPA's Environmental Excellence Award of 1998. (see Appendix A) Director Mathis applauded these efforts and noted the ceremony in his Director's report during the January 1999 commission meeting. (see Appendix B) The EPA again recognized these efforts by publishing the Buffalo River Swine Study as one of their 2002 EPA 319 Success Stories. (see Appendix C) The study concluded, "Swine farmers in the Buffalo River watershed have successfully changed their waste management practices and are using the fertilizer benefit of the manure generated at their facilities while minimizing their impact on the environment." (Emphasis added)

Why is this important? Those farms were actually built in the 1970s. Engineering design standards for lagoons as well as the nutrient management plans that farmers are required to comply with today are much more stringent/restrictive than they were 20 years ago when those studies were performed. If those farms were able to minimize their impact on the environment, then what is the justification for limiting new farms that must meet much more stringent engineering design standards and restrictive NMP requirements? Adopting these proposed amendments would be contrary to the very conclusions that the Department itself reached and that the EPA recognized. We encourage the Department and the Commission to deny this rulemaking.

### Ongoing Studies of C&H Hog Farms

The petitioners also argue that C&H Hog Farms is not relevant to the discussion of the proposed amendments. We argue the exact opposite. This rulemaking is a direct result

of the permitting of C&H Hog Farms and the extreme overreaction by the petitioners and their supporters. C&H Hog Farms is integral to this discussion, especially in light of the fact that the Governor provided funding through the General Assembly to the Department to oversee the Big Creek Research Team (BCRT). The BCRT is studying the surface and groundwater water quality in and around C&H Hog Farms barns and land application fields. This research is the most extensive performed on any farm in Arkansas, and likely the country. It is attempting to address the very concerns raised by the petitioners and others opposed to C&H Hog Farms and has yet to show anything to cause alarm. This rulemaking would essentially preempt this work that was supported by both the Governor and the General Assembly. We ask the Department and the Commission to deny this rulemaking, let the research take its course and generate the science and data needed to make informed decisions. If the ongoing research on C&H Hog Farms shows current regulatory requirements are not adequate, then the regulations can be modified to include additional permit requirements. This is a scientific approach. An outright prohibition based on the "potential" or "threat" is not a scientific approach.

#### EPA and ADEQ Inspections of C&H Hog Farms

On April 15-17, 2014, EPA Region VI's Compliance Assurance and Enforcement Division conducted an unannounced inspection of C&H Hog Farms. (see Appendix D) The report stated, "No areas of concern were noted at this facility." The inspection was extremely thorough and included record keeping, lagoons, collection of soil samples from the land application fields, collection of water samples up-gradient and down-gradient from the farm, etc. As is typical with most all EPA inspections, an exit interview is conducted with the permittee. While not part of the official written record, the inspector told Mr. Henson that their farm was one of the best they have ever inspected and that he "nitpicked" them trying to find something wrong and couldn't.

The inspectors' report even noted that, "The farm has planted approximately 1,000 loblolly pine trees around the perimeter of the facility. While these trees are only 12"-14" tall they may, in the future, provide a measure of odor control." This shows a good faith effort on behalf of the owners of C&H Hog Farms to address concerns related to odors even though there are not specific permit parameters associated with odors.

The EPA also collected soil samples from the land application fields. The average soil phosphorus level was 13% LESS than the original sample results used to draft C&H Hog Farms NMP. That means their NMP has an additional built-in safety factor. This is just an average and not a weighted average.

ADEQ enforcement has also performed numerous inspections of this facility, the vast majority of which have been based on frivolous complaints. On more than one occasion the inspector was already onsite at the time a complaint was received and it was obvious that the complaint was baseless and fabricated.

While there are no near term plans to do so, in light of such a positive EPA inspection and repeated ADEQ inspections that reveal little to nothing, what is the petitioner's justification for limiting the ability of C&H Hog Farms to expand its operation? Furthermore, assuming C&H Hog Farms continues its stellar operational record, why would the petitioners, the Department, or the Commission choose to limit the ability of a proven environmental steward from expanding their operation?

### National Park Service (NPS) Agriculture Special Use Permits

The Buffalo River NPS has Agriculture Special Use Permits (AgSUPs) through which it leases fields to local farmers to cut hay.(see Appendix E) These permits require the lessees to fertilize these fields at minimum rates predetermined by the NPS. This has been a common practice since the Buffalo River National Park was created. The petitioners and their supporters have repeatedly stated that the high, excellent, even pristine, water quality of the Buffalo River must be "protected", so there has obviously been minimal impact to water quality as a result of these activities. Therefore, the following comments in no way should be construed to suggest that these activities are detrimental or should cease. With that said . . . these fields represent 1,260 acres and the NPS requires that more than 93,000 lbs of N and 45,000 lbs of P be applied. This is more than C&H Hog Farms generates on an annual basis AND these fields are right next to the Buffalo River. The fields that C&H Hog Farms apply to are more than 5 miles from the Buffalo River. So, if it is okay for the NPS to apply nutrients to fields right next to the Buffalo River that are underlain by Karst, why is it not okay for C&H Hog Farms to do the same?

Furthermore, the Buffalo River Watershed is not considered a Nutrient Surplus Area as designated by Ark. Code Ann. § 15-20-1104; therefore, the NPS and local landowners are not required to follow Nutrient Management Plans (NMPs) based on the Arkansas Phosphorus Index (AR P-Index). However, because C&H Hog Farms generates liquid animal waste it is required to apply ALL of its nutrients according to the AR P-Index. The landowners that C&H Hog Farms has lease agreements with have fertilized these fields just as the NPS has fertilized theirs. The petitioners and their supporters continually remind us about the high, excellent, even pristine, water quality of Big Creek. This is supported by water samples collected upstream and downstream from the land application fields by the Big Creek Research Team and a recent EPA inspection. However, now that these landowners have agreed to accept manure from C&H Hog Farms these fields are now subject to the requirements of the AR P-Index. As a result, nutrient application rates will be significantly reduced compared to historical application rates. So . . . an activity that has been done according to BMPs, but essentially unregulated, is now subject to NMP requirements based on the AR P-Index. The following conclusion will be completely unfathomable by the petitioners and their supporters, but that doesn't change the fact that it is logical and reasonable. The very fact that C&H Hog Farms has located near Mt Judea and landowners are now applying hog manure (organic liquid fertilizer) instead of commercial fertilizer or poultry litter may actually improve the already high, excellent, even pristine, water quality in Big

Creek and the Buffalo River. Furthermore, assuming other similar farms locate in the Buffalo River watershed and landowners switch from commercial fertilizer to hog manure, it isn't an unreasonable assumption that water quality in the areas surrounding those farms may also improve. This reasonable and logical conclusion itself should serve as justification for the Department and the Commission to deny this rulemaking.

### Protecting the Buffalo River

If the petitioners are sincere about protecting the Buffalo River then all "potential threats" need to be considered. Recreation and tourism should not be given a free pass to pollute. Tourism proponents dismiss the impacts of recreation and floating. In recent comments submitted to the Department the NPS touted the collaborative effort between itself and the Department as it related to monitoring at nine sites on the Buffalo River and its tributaries. The NPS just last year announced that it was increasing its monitoring at the confluence of Big Creek and the Buffalo River. Hog farm owners in the 1990s subjected their farms to intense monitoring and scrutiny. Now, the owners of C&H Hog Farms have put their farm and livelihood on the line by opening it to even more intense monitoring. Yet, there has been no similar study to evaluate the impacts of recreation and floating on the Buffalo River, even as the number of visitors has grown to nearly 1.5 million with more than 6,000 per day floating the Buffalo River.

### Applicable Laws

#### Ark. Code Ann. § 8-4-203

The amendments proposed by the petitioners are not directly tied with emissions, runoff, or water quality. Their adoption would mean that the Commission is not authorized to issue any new Regulation 5 and 6 permits in the Buffalo River Watershed, irrespective of water quality, to swine farms that meet the medium and large CAFO thresholds. Ark. Code Ann. § 8-4-203 allows the Commission to "issue, continue in effect, revoke, modify, or deny permits, under such conditions as it may prescribe . . . to prevent, control, or abate pollution." If adopted, the Commission's own amended regulation would not afford the Commission any discretion to consider whether a permit in a given circumstance was warranted. The Commission would be prohibiting itself from exercising its statutory authority as commanded by the General Assembly.

Furthermore, the proposed amendments also remove the Director's discretion to award or deny permits which is a responsibility given to the Director by the General Assembly. The Commission's refusal to allow the Director to issue any new permits will not be related to documented negative water quality impacts from any hog farms above a certain size or the Commission's Regulation 2 which defines Arkansas water quality standards. Even if the petitioners could show a direct connection between the presence of medium and large hog farms in the watershed and the amount of nutrient runoff or pathogen concentrations, which they have not and cannot, they still have no scientific

basis for requesting a prohibition on the issuance of any new permits under any circumstances.

Amended Petition, Applicable Law, Ark. Code Ann. § 8-2-205, §§ 8-4-203 and -207

It could be argued that the Commission lacks authority to amend Reg. No. 5 in the manner in which it intends, because by doing so, the Commission would be abdicating, if not entirely abrogating, the authority prescribed to the Director by statute. Pursuant to Ark. Code Ann. §§ 8-4-203 and -207, the Director is to consider each permit application, and if the Director denies the request, the decision may be appealed to the Commission for consideration. In this scenario, the proposed amendments would remove the Director's discretion to issue or deny permit requests, as well as the Commission's discretion to affirm or overturn the director. It could then be argued that the Commission's decision is ultra vires.

Amended Petition, "Facts", Nos. 17-21

The petitioners claim that the Buffalo River is under "threat" from a "potential" massive expansion of swine production. Yet, the petitioners have presented no evidence to support those claims. Over the past decade swine production in Arkansas has declined by more than 85%. The overall number of animals in the Buffalo River Watershed itself has decreased over the last 15-20 years from more than 3,600 to 2,500. Since 2006 there have been only four new farms permitted in Arkansas that house 1500 sows or more. These numbers do not constitute a massive expansion of swine production in Arkansas. To the contrary, even with the addition of these new farms, hog numbers are still significantly less than ten and even five years ago. The probability of the Buffalo River being populated with hog farms is very low, especially when considering the amount of controversy the petitioners and their supporters have successfully generated.

The petitioners may argue that if there is little chance of hog farms populating the Buffalo River Watershed then what harm is there in prohibiting an activity that is not likely to happen anyway. Our response to this misguided logic is because of the precedence it sets and the abrogation of the Commission to use the authority given to it by the General Assembly.

Rulemaking based on the "Precautionary Principle". The 3<sup>rd</sup> Party Rulemaking is regulation based on the "precautionary principle" and not objective science. The language in the rulemaking uses the words "threat" and "potential." The requirements in the CAFO permit have undergone intense scientific scrutiny and have been heavily litigated over the past decade. The Supreme Court has reinforced that the requirement to obtain a permit cannot be based on the "threat" or "potential" of a discharge occurring. It could be argued that the failure to issue a permit or to make a permit available, or not, based purely on the size of the facility alone without adequate scientific justification could be considered arbitrary.

Waste Storage Lagoons. The petitioners and their supporters continually raise the “potential” of the “threat” of a catastrophic lagoon failure. They cite the failure of a lagoon on a North Carolina hog farm that released 22 million gallons of treated waste into the New River. What they fail to mention is this lagoon failure came after what was determined to be a 500 year storm event and was largely due to an unauthorized dam alteration and improperly maintained land application equipment. In Arkansas’ long history of hog production there has never been a catastrophic lagoon failure.

Karst Geology. Much has been made of the location of C&H Hog Farms and the land application of liquid fertilizer on fields next to Big Creek. The National Park Service applies more nutrients through its Agriculture Special Use Permitting program than C&H Hog Farms generates annually. The NPS fields are adjacent to the Buffalo River and are underlain by Karst. If land application to fields underlain by karst is so detrimental then why is it okay for the National Park Service to fertilize fields that are adjacent to the Buffalo River but it isn’t okay for C&H Hog Farms to do the same under an actual permit on fields more than 5 miles from the Buffalo River? What about the other hog farms that have been in the watershed? What about poultry farms? What about other landowners who use commercial fertilizer? This is not a scientific approach and does not support this rulemaking.

Precedent Setting. The petitioners claim that these amendments are not precedent setting because the Department and the Commission have modified Regulation 6 to prohibit surface discharges of wastewater in the Lake Maumelle Watershed. However, when this prohibition was implemented the NPDES General CAFO permit did not yet exist in Arkansas. This prohibition did not impact Regulation 5 because it is a no-discharge permit. The fact that the petitioners are now requesting a prohibition on new Regulation 5 permits for hog farms that meet arbitrarily set thresholds for medium and large farms is, in fact, precedent setting. Regulation 5 has a long and positive history in its oversight of hog farms in Arkansas. There is no justification for these proposed amendments, and we request that the Department and the Commission deny this rulemaking.

#### Exhibit A, Regulations 5 & 6, Reg. 5.901 & 6.602, Buffalo National River Watershed

The petitioners have repeatedly stated this rulemaking only applies to the Buffalo River Watershed. As it relates to this specific rulemaking the petitioners are correct. This rulemaking only addresses hog farms above a certain size in the Buffalo River watershed. However, the Department and the Commission should be wary of the petitioner’s true intentions. For the petitioners to say that they will be satisfied if these amendments are adopted is disingenuous. During the 2013 legislative session the petitioners and several other groups attempted to have legislation introduced that prohibited the Department from issuing, “. . . a general permit for a CAFO in a watershed of an Extraordinary Resource Water . . .” Had they been successful, this legislation would not have only affected hog farms but dairies and maybe even poultry farms across nearly half the state. These same groups were also successful in convincing

the Commission to create a task force to consider a prohibition of and additional permitting requirements for hog farms in the Buffalo River watershed and Extraordinary Resource Waters. There should be no doubt that if they are successful in this rulemaking effort they will be back before the Commission attempting to have similar prohibitions implemented in watersheds throughout Arkansas. If the Department recommends and the Commission adopts these amendments without adequate scientific evidence, a precedent will be set and there will be little justification to deny future similar petitions should they come before the Commission.

#### Exhibit A, Regulations 5 & 6, Reg. 5.901(B) & 6.602(B)

Small hog farms not limited. The petitioners limit their prohibition to medium and large hog farms without any scientific justification. We believe this is an arbitrary threshold not based in science, but in ideology. An ideology that is opposed to larger farms not because they are a true environmental threat but because the petitioners just don't like larger modern farms. To put this in perspective, what the petitioners are arguing is it is okay to permit 20 hog farms that meet the small category. While this is an extremely unlikely scenario, this would equate to 14,980 sows in the Buffalo River Watershed. Are we to believe that the petitioners believe this is acceptable?

Rather than arbitrary numerical thresholds determining the allowable size of farms, the soil's ability to assimilate nutrients should determine the size and ultimately the location of farms. The soil's ability to assimilate nutrients is governed by the nutrient management plan and the Arkansas Phosphorus Index. The nutrient management plan will dictate the amount of acreage required for nutrient application. If there is not adequate acreage to assimilate the nutrients generated by a farm, then the farm will be forced to consider either scaling down in size or moving to an alternate location with the acreage required to meet its land application requirements. This serves as a built-in limit on the size of farms able to locate within a specific area. This is also a scientific approach and not one based on an arbitrary numerical threshold.

#### Exhibits C, Financial Impact Statement

We believe the financial impact statement is inadequate and underestimates the cumulative financial impacts of this proposed rulemaking. Since the petitioners believe that these amendments are justified based on the "potential" water quality impacts to the Buffalo River and the "potential" impacts to recreation and tourism revenues, they should also be willing to evaluate the "potential" lost revenues to the affected counties as a result of the limitations being placed on agricultural development by these amendments. We encourage the Department and the Commission to require the petitioners to perform a detailed economic analysis that represents the cumulative costs of this proposed rulemaking.



## Exhibits D, EIEB, Section 2A., Economic Impact

There are five farms besides C&H Hog Farms with active Regulation 5 permits in the Buffalo River Watershed whose ability to expand beyond a certain size will be limited by these amendments. These proposed amendments would prevent the owners of C&H Hog Farms from expanding their farm based on arbitrary numerical thresholds.

## Exhibits D, EIEB, Section 2B. Environmental Benefit

Question 1 – Nutrient Loading: We would argue that the introduction of new farms could actually reduce nutrient loading. Liquid animal waste will replace the use of commercial fertilizers and poultry litter. There are increased regulatory requirements associated with the application of liquid animal waste.

Question 3 – Odor or Human Health: Arkansas has a long history of hog production with many families who own and operate these farms living in very close proximity to them. We are unaware of any significantly different health impacts as a result.

Question 3 – Public Perception: The petitioners reference the “public’s perception of this important resource.” The petitioners and their supporters claim that as the public learns of the existence of C&H Hog Farms, it is damaging the public’s perception of the Buffalo River and is hurting tourism. These claims are rather ironic since the petitioners and their supporters are **solely** responsible for generating all the negative press and publicity surrounding this issue. They have only themselves to blame. There have been hog farms in the Buffalo River watershed for decades and tourism has thrived as evidenced by the nearly 1.5 million visitors to the Buffalo River National Park each year.

Question 4 – Catastrophic Lagoon Failure: In Arkansas’ long history of hog production we are not aware of a single catastrophic lagoon failure.

Question 4 – Groundwater Contamination: Previous studies conducted on hog farms in the Buffalo River Watershed have shown they pose minimal risk when land application is performed according to NMP requirements.

Attachments:

Appendix A

Appendix B

Appendix C

Appendix D

Appendix E