

- 5) Karst underlies the Buffalo River watershed.
- 6) The Newton County Times is a local publication that covers the Newton County area.

INTRODUCTION

Each of these six adjudicative facts can be ascertained from sources identified below and provided to this Court.

- 1) The following sources together support the fact that: Prior to May 2012, ADEQ had a dual permitting program in which it required all confined animal operations with liquid waste management systems to obtain no-discharge permits under the state's Regulation No. 5, in addition to any NPDES permit that was also required.
 - a. Exhibit 1 (EPA, State Compendium – Region 6: Programs and Regulatory Activities Related to Animal Feeding Operations 31-38 (May 2002), *available at* <http://www.epa.gov/npdes/pubs/region6.pdf>). This document is also available on USDA's website at <http://www.ars.usda.gov/sp2UserFiles/Place/19020500/PhosphorousImages/compendium.pdf>.
 - b. Exhibit 2 (Ark. Pollution Control & Ecology Commission, ADEQ, Statement of Basis and Purpose for Adoption of Amendments to Regulation No.5 (Docket No. 11-004-R) (May 11, 2012), *available at* http://www.adeq.state.ar.us/regs/drafts/reg05_draft_docket_11-004-R/reg05_draft_docket_11-004-R.htm (click on "05/11/2012 - Statement of Basis"))).
- 2) The following sources together support the fact that: In May 2012, ADEQ exempted CAFOs holding NPDES permits from compliance with Regulation No. 5, including the no-discharge prohibition.
 - a. Exhibit 3 (APC&E Comm'n, Petition to Initiate Rulemaking to Amend Regulation No. 5 (Docket No. 11-004-R) (Oct. 14, 2011), *available at* 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 - Petition to Initiate Rulemaking"))).

- b. Exhibit 4 (APC&E Comm'n, Mark-up of Regulation No. 5 submitted to Ark. Pollution Control & Ecology Commission (Docket No. 11-004-R) (Oct. 14, 2011), *available at* 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 - DRAFT Regulation 5 Markup"))).
 - c. FSA-1044 to 1069 (current version of APC&E Comm'n Regulation No. 5 (approved May 24, 2012) providing an exemption at Reg. 5.105 for CAFOs with a NPDES permit).
- 3) The following sources support the fact that: C&H Hog Farms, Inc. is the first and so far only CAFO permitted under Arkansas's NPDES General Permit ARG590000 for CAFOs.
 - a. Exhibit 5 (ADEQ - Database - Permit Data System (PDS) - Facility and Permit Information, <http://www.adeq.state.ar.us/home/pdssql/pds.aspx> (enter "ARG59000" in "Permit Number" field; click "Search") (last visited Mar. 5, 2014)) (showing that C&H, operating under ARG590001, is the first and only active permittee covered by General Permit ARG590000).
 - b. FSA-728 to 765 (C&H's Notice of Coverage under CAFO General Permit ARG590000 and General Permit ARG590000).
- 4) The following source supports the fact that: The Buffalo River watershed is wholly within the state of Arkansas.
 - a. Exhibit 6 (U.S. Env'tl. Prot. Agency, MyWATERS Mapper – Subbasin (HUC8): 11010005, http://watersgeo.epa.gov/mwm/?layer=LEGACY_WBD&feature=11010005&extraLayers=null (last visited Mar. 13, 2014)).
- 5) The following sources support the fact that: Karst underlies the Buffalo River watershed.
 - a. Exhibit 7 (U.S. Geological Survey, Geologic Mapping Studies at Buffalo National River, Northern Arkansas, <http://esp.cr.usgs.gov/projects/buffaloriver/> (last visited Mar. 13, 2014)).
 - b. Exhibit 8 (Nat'l Park Serv., Dep't of Interior, Buffalo National River Water Resources Management Plan xi, 110-11 (2004), *available at* http://www.nature.nps.gov/water/planning/management_plans/buff_final_screen.pdf).

6) The following source supports the fact that: The Newton County Times is a local publication that covers the Newton County area.

- a. Exhibit 9 (Newton County Times, About Us, http://newtoncountytimes.com/site/pages/about_us.html (last visited March 14, 2014)).

Counsel for Plaintiffs conferred with opposing counsel, who indicated that Defendants will review this motion and file a response with their response to Plaintiffs' Motion for Summary Judgment.

BACKGROUND

In the present case, Plaintiffs claim that the Defendants violated the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4371 ("NEPA"), among other laws and regulations. Plaintiffs argue that Defendants failed to take a hard look at the impacts of assisting in the construction of C&H Hog Farms, Inc. in the sensitive Buffalo River watershed, and that such construction was an action "without precedent" that required the Farm Service Agency ("FSA") to publish notice of its Finding of No Significant Impacts ("FONSI") "for 30 days before the agency makes its final determination whether to prepare an environmental impact statement" 40 C.F.R. § 1501.4(e)(2)(ii); *see* Amended Compl. ¶¶ 135-37, ECF No. 18 ("Compl."). Plaintiffs also argue that FSA violated its own regulations by failing to publish notice in a "local or community-oriented newspaper within the proposed action's area of environmental impact," 7 C.F.R. § 1940.331(b). *See* Compl. ¶¶ 131-34. The facts at issue in this motion, together with facts already in the administrative record before this Court, establish the unprecedented nature of the action as well as the particular sensitivity of the Buffalo River watershed. Plaintiffs accordingly request judicial notice of the relevant adjudicative facts identified, *supra*, which are not subject to reasonable dispute.

ARGUMENT

This Court may judicially notice an adjudicative fact “that is not subject to reasonable dispute because it: (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(a)-(b). This Court “must take judicial notice” if, as here, “a party requests it and the court is supplied with the necessary information.” *Id.* 201(c)(2).

I. THE FACTS AT ISSUE ARE NOT SUBJECT TO REASONABLE DISPUTE

Each of the facts that Plaintiffs request this Court to notice are “generally known” within this Court’s territorial jurisdiction and/or “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). Facts 4 and 6 – that the Buffalo River watershed is wholly within the state of Arkansas and that the Newton County Times is a local publication that covers the Newton County area – are “generally known” facts. Additionally, each of the six facts at issue “can be accurately and readily determined” from official state and federal government websites and other sources whose accuracy cannot reasonably be questioned. *See id.*

Facts that are “readily determined” must be “widely available.” *MacGregor v. Mallinckrodt, Inc.*, 373 F.3d 923, 933 (8th Cir. 2004). Here, each of the facts at issue can be ascertained on the internet – making them widely available. Courts commonly take judicial notice of factual information found on websites. *Barron v. S. Dakota*, CIV. 09-4111, 2010 WL 9524819, at *3 (D.S.D. Sept. 30, 2010), *aff’d sub nom. Barron ex rel. D.B. v. S. Dakota Bd. of Regents*, 655 F.3d 787 (8th Cir. 2011); *see also O’Toole v. Northrop Grunman Corp.*, 499 F.3d 1218, 1225 (10th Cir. 2007) (finding that the district court abused its discretion by not taking judicial notice of facts available online); *First Nat’l Bank in Sioux Falls v. First Nat’l Bank S.*

Dakota, SPC, Inc., 655 F. Supp. 2d 979, 992 n.6 (D.S.D. 2009) (taking judicial notice of population growth and geography information presented online).

In addition to being widely available, the facts at issue can be ascertained by resort to “sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). The first five facts can be ascertained by reference to information made available on the official website of state and federal agencies, and the sixth fact can be ascertained by reference to the website of the relevant publication. This court has taken judicial notice of information available on the state government’s website. *See RM Dean Farms v. Helena Chem. Co.*, 847 F. Supp. 2d 1125, 1126 n.2 (E.D. Ark. 2012). Indeed, courts routinely take judicial notice of facts based on public documents produced by a state or federal government agency. *See, e.g., Bacon v. Neer*, 631 F.3d 875, 878 (8th Cir. 2011) (taking judicial notice of fact based on public records); *Funk v. Stryker Corp.*, 631 F.3d 777, 783 (5th Cir. 2011) (upholding district court’s judicial notice of documents produced by Food and Drug Administration and made available to public); *Gent v. CUNA Mut. Ins. Soc’y*, 611 F.3d 79, 84 n.5 (1st Cir. 2010) (taking judicial notice of information about Lyme disease taken from the Center for Disease Control and Prevention’s website); *Or. Natural Desert Ass’n v. BLM*, 625 F. 3d 1092, 1112 n.14 (9th Cir. 2010) (taking judicial notice of public documents produced by the Bureau of Land Management); *Coleman v. Dretke*, 409 F.3d 665, 667 (5th Cir. 2005) (taking judicial notice of state agency’s own website). The Newton County Times webpage describing that publication also is a source whose accuracy cannot reasonably be questioned.

II. THE FACTS AT ISSUE ARE ADJUDICATIVE FACTS RELEVANT TO THIS PROCEEDING

Adjudicative facts are “facts relevant to the case currently before the court.” *United States v. Gilkerson*, 556 F.3d 854, 857 n.2 (8th Cir. 2009); *see also* Fed. R. Evid. 201 advisory

committee's note ("Adjudicative facts are simply the facts of the particular case."). The adjudicative facts of which Plaintiffs request judicial notice are relevant to the potential impacts of the C&H facility and whether the "nature of the proposed action is one without precedent." 40 C.F.R. § 1501.4(e)(2)(ii).

Specifically, Facts 1, 2, and 3, together with evidence in the record that the state NPDES General Permit ARG590000 for CAFOs authorizes discharge of effluent to surface waters, *see* FSA-730, is relevant to a conclusion that C&H is the first CAFO in the state of Arkansas to be authorized to discharge to receiving waters. Fact 4 is relevant to a conclusion that C&H also is, by necessary extension, the first CAFO to be authorized to discharge within the Buffalo River watershed. Fact 5 is relevant to the potential significant impacts of siting a CAFO in the Buffalo River watershed. Fact 6 indicates the existence of a local publication in the vicinity of the affected area, which is relevant to Plaintiffs' claim that the Farm Service Agency violated its own regulations in failing to publish notice in a local publication.

CONCLUSION

For all the reasons set forth above, Plaintiffs respectfully request that this Court take judicial notice of the identified facts.

Respectfully submitted this 14th day of March, 2014,

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