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-SWEET[1], 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' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES

REGULATIONS

LEGISLATIVE

MISCELLANEOUS

I. INTRODUCTION

Plaintiffs object to a hog farm constructed near Mt. Judea, Arkansas. The federal agencies they have chosen to sue, however, did not construct the facility nor do they control or regulate the operation of the farm. The sole role of the Defendants, the Small Business Administration ("SBA") and the Farm Service Agency ("FSA"), was the provision of loan guaranties to a private bank, Farm Credit Services of Western Arkansas, to back loans that the bank made to the owner and operator of the farm, C&H Hog Farms (also "C&H"). The farm itself was permitted by, and is subject to the continuing regulatory authority of the Arkansas Department of Environmental Quality ("ADEQ"). While Plaintiffs object to the permitting and siting of the farm, FSA and SBA's loan guaranties did not provide the Agencies a basis for attempting to relocate C&H's business or for usurping the role of local government regulators or land use planners.

As set forth below, Plaintiffs' attempt to hold the FSA and SBA responsible for C&H's facility fails. First, the tenuous connection between the FSA and SBA loan guaranties and the allegedly harmful operations of the farm and the impossibility of alleviating Plaintiffs' injuries through a judgment against the FSA and SBA, require that this case be dismissed under the jurisdictional doctrines of standing and mootness. Second, Plaintiffs' claims under the National Environmental Policy Act ("NEPA") and the Endangered Species Act ("ESA") fail on the merits because C&H's farm was not a federal action triggering obligations under either statute. To the extent that the FSA has taken on obligations under those statutes through its regulations, it complied with both NEPA and the ESA in preparing its Class II Environmental Assessment for the loan guaranty. Finally, neither Agency violated the Buffalo National River Enabling Act, because the farm is not a "water resources project" requiring consultation with the National Park Service. Therefore, Plaintiffs' motion for summary judgment should be denied and Defendants' motion for summary judgment granted.

II. LEGAL BACKGROUND

A. The National Environmental Policy Act

Congress enacted NEPA, 42 U.S.C. §§ 4321-4347, to establish a process for federal agencies to consider the environmental impacts of their actions. *Vermont Yankee Nuclear Power v. NRDC*, 435 U.S. 519, 558 (1978). NEPA imposes procedural, not substantive, requirements. So long as "the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). *See also Sierra Club v. Kimbell*, 623 F.3d 549, 559 (8th Cir. 2010) ("NEPA does not prevent agencies from taking environmentally harmful action" so long as impacts are identified and evaluated).

Under NEPA, a federal agency must prepare an Environmental Impact Statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). To determine whether the impact of a proposed federal action will be significant enough to warrant an EIS, the agency may prepare an Environmental Assessment ("EA"). 40 C.F.R. § 1501.4(b), (c); 40 C.F.R. § 1508.9. If, based on the EA, the agency concludes that the proposed action will not significantly impact the environment, it issues a Finding of No Significant Impact ("FONSI") in lieu of an EIS. 40 C.F.R. § 1508.13; *see generally Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 756-58 (2004).[2]

B. The Endangered Species Act

The ESA contains both substantive and procedural requirements designed to conserve listed species and the ecosystems upon which they depend. 16 U.S.C. § 1531(b). The starting point for species preservation is Section 4 of the Act, which empowers the Secretary of Interior to list species as "threatened" or "endangered," and to designate "critical habitat" for listed

[2] Specific guidance for complying with NEPA is provided by regulations promulgated by the Council on Environmental Quality ("CEQ"). See 40 C.F.R. parts 1500-1508.

species. *See* 16 U.S.C. § 1532(6); (20); (5)(A)(ii). Once a species is listed, Section 7(a)(2) requires each federal agency ("action agency") to ensure that "any action authorized, funded, or carried out" by that agency "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of designated critical habitat. 16 U.S.C. § 1536(a)(2). The action agency makes the initial determination of whether its action may affect listed species or critical habitat. *See* 50 C.F.R. § 402.14(a). If the action agency determines that the action will have no effect, the consultation requirements are not triggered. *See Newton County Wildlife Ass'n v. Rogers*, 141 F.3d 803 (8th Cir. 1998). If the action agency determines that its action "may affect" listed species or critical habitat, it is required to consult with the Fish and Wildlife Service ("FWS") or the National Marine Fisheries Service ("NMFS").[3] 50 C.F.R. § 402.14(a). If the action agency determines through informal consultation that an action "may affect," but is "not likely to adversely affect" the listed species or critical habitat, the agency may seek written concurrence from FWS or NMFS, as appropriate. *See* 50 C.F.R. § 402.13(a). If FWS or NMFS agrees with this conclusion, the consultation process is complete, and formal consultation is not necessary. *Id.*

If either agency determines that the proposed action is "likely to adversely affect" the listed species or critical habitat, the agencies must engage in "formal consultation." 50 C.F.R. §§ 402.14(a), (b). Formal consultation typically begins with a written request by the action agency, 50 C.F.R. § 402.14(c), and may include preparation of a biological assessment by the action agency that evaluates the potential effects of the action on listed species and habitat. 50 C.F.R. § 402.12(a). Formal consultation concludes with the issuance of a biological opinion by FWS or NMFS assessing whether the action is likely to jeopardize listed species or destroy or adversely modify critical habitat; if so, FWS or NMFS must suggest reasonable and prudent alternatives, where available, to the action. *See* 50 C.F.R. §§ 402.14(g), (h).

[3] Whether the consulting agency is NMFS or FWS depends on the species involved. 50 C.F.R. § 402.01(b).

C. Buffalo River Enabling Act

Congress established the Buffalo National River in 1972 for "purposes of conserving and interpreting an area containing unique scenic and scientific features, and preserving as a free-flowing stream an important segment of the Buffalo River in Arkansas." 16 U.S.C. § 460m-8. The Buffalo River Enabling Act provides that "no department or agency of the United States shall assist by loan, grant, license, or otherwise in the construction of any water resources project that would have direct and adverse effect on the values for which [the] river is established, as determined by the Secretary." 16 U.S.C. § 460m-11.

III. FACTUAL BACKGROUND

A. SBA's 7(a) Loan Guarantee Program

The statutory mission of the SBA is to "aid, counsel, assist and protect" small businesses "in order to preserve free competitive enterprise, . . . and to maintain and strengthen the overall economy of the Nation." 15 U.S.C. § 631. One of the ways Congress has directed SBA to fulfill this mission is the 7(a) Guaranteed Loan Program, under which the SBA guarantees up to 85 percent of a loan made by a private lender to an eligible small business. 13 C.F.R. § 120.2(a)(iii). Once SBA approves a guaranty, the private lender funds and services the loan. SBA plays no role in the on-going management or operation of the borrower's small business. Absent a default by the business, the SBA does not provide any federal funding to the lender or the small business. If and when the small business defaults, the SBA pays its guaranty obligation to the lender or subsequent holder of the guaranty, and the lender then undertakes appropriate debt collection actions to recover any loss on the loan. 13 C.F.R. § 120.2(a)(2); §§ 120.600 *et seq.* (discussing secondary market for guaranties).

B. FSA's Loan Guarantee Program

Tracing its origins to President Franklin Roosevelt's New Deal, the Farm Service Agency oversees a variety of Congressionally created agricultural support programs.[4] Among these

[4] *See* http://www.fsa.usda.gov/FSA/webapp?area=about&subject=landing&topic=ham-ah

programs is the Guaranteed Farm Loan Program, under which the FSA guarantees a percentage of a loan made by a qualifying agricultural lending bank for the purposes of acquiring or enlarging a farm or making capital improvements to a farm. *See* 7 C.F.R. § 762.121(b)(1), (2).

Once FSA approves a guaranty, the private lender funds and services the loan; FSA plays no role in the on-going management of the farm. For example, it is the responsibility of the lender to ensure that loan funds are not used for unauthorized purposes (7 C.F.R. § 762.140(b)(1)), and that the borrower is in compliance with all law and regulations related to operations of the farm (7 C.F.R. § 762.140(b)(3)). Absent a default by the farm, the FSA does not provide any federal funding to the lender or the farm. If and when the farm defaults, the lender undertakes proper liquidation activities to recover any loss on the loan, and FSA pays its guaranty obligation to the lender. 7 C.F.R. § 762.149.

C. The Arkansas Department of Environmental Quality's Regulation of CAFOs

The Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, established the National Pollution Discharge Elimination System ("NPDES") permit program to prevent the pollution of the nation's waters. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 650 (2007). The NPDES permitting system allows "point source" polluters to obtain a permit, under which they may discharge pollutants within established limits, called effluent limitations, *see* 33 U.S.C. § 1342, 1362(14), and avoid the civil and criminal penalties that the CWA imposes on unpermitted discharges, *see* 33 U.S.C. § 1319. NPDES permits may be issued to individual point sources, or the regulating agency may develop a general permit, which authorizes a category of discharges within a geographical area. 40 C.F.R. § 122.28.

Under the CWA, the NPDES permitting system may be administered directly by the EPA, or transferred to qualifying states. 33 U.S.C. § 1342. EPA transferred authority to the State of Arkansas to administer the State's NPDES permitting program in 1986.[5] The Arkansas Department of Environmental Quality ("ADEQ") administers the State's NPDES permitting

[5] http://cfpub.epa.gov/npdes/statestats.cfm?program_id=45&view=specific (last visited April 8, 2014).

program.[6] Once authority is transferred to a State, state officials have primary responsibility for reviewing and approving NPDES discharge permits and extending coverage under established General NPDES permits. *See id.*

Concentrated Animal Feeding Operations ("CAFOs"), which are feedlots or other facilities of a specified size that confine animals for 45 days or more in the course of a year in a lot that does not sustain crop growth, are regulated as point sources under the CWA. 33 U.S.C. § 1362(14); 40 C.F.R. § 122.23. Although practices vary, most CAFOs handle the animal waste generated at the facility by collecting it and spreading on fields as fertilizer. The EPA has promulgated regulations which define the types of animal farms that qualify as CAFOs and the general NPDES permitting requirements, including effluent limitations, that apply to the facilities as well as to the land application fields where the facility waste is spread. *See* 40 C.F.R. § 122.42(e) (defining content of CAFO General Permits); 40 C.F.R. pt. 412 (establishing effluent limitations for CAFOs that must be included in CAFO General Permits); § 412.4 (Best Management Practices ("BMPs") for land application of manure).

In October 2011, after an extensive public involvement process, the ADEQ issued a general NPDES permit for CAFOs in the State of Arkansas.[7] FSA-1071; FSA-730 (Permit #ARG590000).[8] The CAFO General Permit tracks the EPA's regulations and imposes a comprehensive series of restraints on CAFO operations to ensure permitted facilities do not pollute the waters of the State. First, to qualify for coverage under the ADEQ's General Permit, applicants must prepare a Comprehensive Nutrient Management Plan ("CNMP"). FSA-733. The CNMP is a facility-specific plan, which must meet all the requirements of the EPA's CAFO

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6 http://www.adeq.state.ar.us/water/default.htm (last visited April 8, 2014).

7 ADEQ maintains an electronic public docket regarding the CAFO General Permit (ARG590000). *See* http://www.adeq.state.ar.us/water/branch_permits/general_permits/default.htm (last visited April 8, 2014).

8 Citations to FSA's administrative record begin with the prefix "FSA" followed by the appropriate page number, and citations to SBA's administrative record begin with the prefix "P" followed by the appropriate page number.

regulations found at 40 C.F.R. § 122.23 and 40 C.F.R. § 412 pt. D. FSA-733 (Permit ¶ 1.5.1.2); FSA-739 (Permit ¶ 3.2). Among other things, the CNMP must include a field-specific assessment which designates the form, source, amount, timing and method of application of manure on each field in order to minimize the possibility of any discharge to surface waters. FSA-745 (Permit ¶ 4.2.1.1). The CNMP also requires testing of both soil and manure prior to field application, so the application rates can be adjusted to insure all nutrients are utilized by plant growth. FSA-233. The permit imposes numerous restrictions on land application, 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.* at ¶ 4.2.1.6). Finally ADEQ's General Permit imposes a rigorous series of recordkeeping and inspection requirements on the CAFOs. FSA-746 (Permit ¶¶ 4.4, 4.5). *See also* FSA-746 (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).

ADEQ's CAFO General Permit prohibits, with a narrow 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). Consistent with the EPA's CAFO regulations (40 C.F.R. § 412.46), the 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). Thus the CAFO General Permit requires the facility to be built to prevent any discharge, and allows discharge by overflow, only under extremely rare circumstances.[9]

[9] The CWA's statutory definition of "point sources" excludes "agricultural stormwater discharges," 33 U.S.C. § 1362(14), and "agricultural stormwater discharges" includes when precipitation causes manure from a spreading field to flow into navigable waters. *See, e.g., National Pork Prod. Council v. EPA*, 635 F.3d 738, 743 (5th Cir. 2011); *Fishermen Against*

The ADEQ's CAFO General Permit also 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 to FSA-235. The General Permit, consistent with EPA's regulations (40 C.F.R. § 122.23(e)), 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 stormwater," and not discharge from a point source. FSA-736 (Permit ¶ 2.2.2.3).

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. pt. 412. *See* 40 C.F.R. § 122.23(h). 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). 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. 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). 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 facility's CNMP, FSA-742 (Permit ¶ 3.2.6).

D. C&H Hog Farms

On June 17, 2012, C&H Hog Farms submitted to the ADEQ an application for coverage under the State's CAFO General Permit. FSA-42. The owners of C&H Hog Farms had

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Destruction of Env't, Inc. v. Closter Farms, Inc., 300 F.3d 1294, 1297 (11th Cir. 2002); *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 120-21 (2d Cir.1994).

successfully operated a smaller swine farm for over 12 years, FSA-62, and proposed to expand their operation to a large swine farrowing (or nursery) facility. Pursuant to ADEQ's regulations, C&H submitted extensive construction plans and a CNMP. 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. On August 3, 2012, after receiving no comments and after considering the contents of the application materials to ensure compliance with applicable requirements, the ADEQ issued a Notice of Coverage for the C&H facility. FSA-728, FSA-729.

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. 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. 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.[10] *See* FSA-146 (discussing liners); FSA-191 to FSA-192 (liner compaction standards). As designed, the C&H facility has approximately 40 percent more liquid waste holding capacity then ADEQ requires for a facility of this size.[11] FSA-40 (storage capacity). Multiple simulations using weather data collected since 1960, show no overflow from the holding ponds. FSA-74. *See* FSA-75 to FSA-134 (monthly rain volume data and simulation results).

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

[10] Plaintiffs emphasize the seepage rate of water from the storage ponds, Pl. Br. at 5, but that rate is below the ADEQ's 5,000 gallon/acre/day limit. FSA-146.

[11] *Compare* FSA-71 (minimum storage requirement is 279,436 cubic feet) *with* FSA -72 (total storage capacity at the C&H facility is 467,308 cubic feet).

application of effluent from the farm.[12] The CNMP contains estimates of application levels for each field (*see* FSA-247to FSA-257), but before waste is actually land applied, 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 and there will be no runoff to surrounding areas. FSA-68, FSA-353. *See also* FSA-746 (Permit ¶ 4.2.1.3), FSA-378 to FSA-379 (soil and manure sampling). C&H needs approximately 251 acres of pasture to dispose of its annual waste production through land application.[13] If necessary ADEQ can amend C&H's CNMP to add new land application areas. FSA-743 (Permit ¶ 3.2.6.3(a)).

Under the CAFO General Permit ADEQ exercises ongoing oversight of the C&H facility. C&H is required to submit annual reports (FSA-740 (Permit ¶ 3.2.4)), and is subject to entry and inspection by ADEQ (FSA-755). Moreover, 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 facility on water quality. *See* Pls' Am. Compl. [ECF No. 18] at ¶ 90.

1. FSA's Loan Guaranty

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, in compliance with its regulations, a Class II Environmental Assessment, which relied heavily on the analysis contained in the C&H's CNMP and the State's review and permitting process. *See* 7 C.F.R. § 1940.312(c)(9). Through its EA process, the FSA also addressed its regulatory obligations under other statutes, including the Endangered Species

[12] After factoring in the set-back requirements in the permit, there are approximately 630 acres. FSA-227

[13] Plant uptake of phosphorus is 56.6 pounds per acre, FSA-246, and C&H is projected to generate 14,213 pounds of phosphorus (P_2O_5) per year, FSA-247. C&H thus needs approximately 251 acres for land application of waste (14,213/56.6 =251). *See also* Defendants' Statement of Material Facts ("Def. SOF") at ¶¶ 27-28.

Act and the Buffalo River Enabling Act. The Agency sought to involve the public, seeking public comment on the draft EA. FSA-1011.

After receiving no comments on the draft EA, on August 24, 2012, the FSA concluded that the Project was not a major federal action significantly affecting the environment, and issued a FONSI. FSA-1029. FSA again sought public input, seeking public comment on the final EA and the FONSI. After again receiving no public comments, the FSA finalized its decision and issued the loan guaranty.

2. SBA's Loan Guaranty

On October 19, 2012, after C&H had developed a CNMP and obtained coverage under ADEQ's CAFO General Permit, Farm Credit Services applied to the SBA for a guaranty for 75% of a loan to C&H for purposes of land acquisition and construction. P-96. As required by SBA, Farm Credit Service's application included substantial information related to C&H Hog Farms' creditworthiness for a section 7(a) loan, including tax records, credit reports, construction plans, the business owners' personal history statements, proof of insurance, and appraisals of the collateral property. On November 16, 2012, after reviewing Farm Credit Service's application, SBA approved Farm Credit Services' 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.

IV. STANDARD OF REVIEW

Plaintiffs allege violations of NEPA, the ESA and the Buffalo River Enabling Act. Judicial review of these claims is governed by the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 500 *et seq*. *See Friends of the Norbeck v. U.S. Forest Serv.*, 661 F.3d 969, 973 (8th Cir. 2011) (NEPA claims are reviewed under the APA); *Voyageurs Nat'l Park Ass'n v. Norton*, 381 F.3d 759, 761 (8th Cir. 2004) (reviewing ESA and NEPA claims under the APA); *Ozark Soc'y v. Melcher*, 229 F. Supp. 2d 896, 903 (E.D. Ark. 2002) (reviewing Buffalo River Enabling Act claim under the APA). Judicial review of agency decisions under the APA is limited to a determination of whether the agency acted in a manner that was "arbitrary, capricious, an abuse

of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

This standard of review is narrow and highly deferential to the agency; indeed, "[i]f an agency's determination is supportable on any rational basis, [the court] must uphold it." *Voyageurs Nat'l Park Ass'n*, 381 F.3d at 763. *See also Friends of the Norbeck.*, 661 F.3d at 969; *Sierra Club v. Envtl. Prot. Agency*, 252 F.3d 943, 947 (8th Cir.2001) (noting courts must give "'agency decisions a high degree of deference.'")(quoting *Mo. Limestone Producers Ass'n v. Browner*, 165 F.3d 619, 621 (8th Cir. 1999)). This standard presumes the validity of agency action, and the burden of demonstrating otherwise falls on the plaintiff. *South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 800 (8th Cir. 2005).

In conducting review under the APA, this Court functions as a court of appeals—acting not as a finder of fact in the first instance, but reviewing the decision made by the agency in light of the administrative record that was before the agency when it rendered its decision. As the Eighth Circuit has emphasized:

> It is well established that judicial review under the APA is limited to the administrative record that was before the agency when it made its decision. That record, not some new record made initially in the reviewing court, becomes the focal point for judicial review.

Voyageurs Nat'l Park Ass'n, 381 F.3d at 766 (quotation marks and internal citations omitted). *See also id.* ("By confining judicial review to the administrative record, the APA precludes the reviewing court from conducting a de novo trial and substituting its opinion for that of the agency."). *Sierra Club v. Robertson*, 784 F. Supp. 593, 601 (W.D. Ark. 1991) ("In such a suit the district court is a reviewing court, like [the appellate] court; it does not take evidence.") (citing *Cronin v. U.S. Dep't of Agric.*, 919 F.2d 439, 443 (7th Cir. 1990)), *aff'd* 28 F.3d 753 (8th Cir. 1994).

V. ARGUMENT

A. Plaintiffs' Claims are not Justiciable

1. Plaintiffs Lack Standing to Challenge the FSA and SBA's Loan Guaranties

A party's standing under Article III of the Constitution is a "threshold jurisdictional question" that a court must decide before it may consider the merits. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998). Because federal courts are courts of limited jurisdiction, the presumption is that a party lacks jurisdiction unless the contrary appears affirmatively from the record. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). The party seeking to invoke jurisdiction bears the burden of establishing standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

To establish Article III standing, a plaintiff must demonstrate that: (1) he or she has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the defendant's challenged action rather than the action of a third party; and (3) that it is likely, as opposed to merely speculative, that a favorable judicial decision will prevent or redress the injury. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). "[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Lujan v. Defenders of Wildlife*, 504 U.S. at 562 (citations omitted).

A plaintiff whose alleged injury hinges on actions taken by one or more third parties must "adduce facts showing that those [third party] choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Id.* at 562 (citing *Warth v. Seldin*, 422 U.S. 490, 505 (1975)); *see also Clapper v. Amnesty Int'l.*, 133 S.Ct. 1138, 1150 (2013) (emphasizing the Court's traditional "reluctance to endorse standing theories that rest on speculation about the decisions of independent actors").

Here, Plaintiffs fall short of demonstrating that they have standing because they cannot show that: (1) their alleged injuries are traceable to the FSA and SBA's loan guaranties to Farm Credit Services, or (2) those injuries would be redressed by a favorable decision by this Court.

a. Plaintiffs Cannot Demonstrate That Their Alleged Injuries Are Fairly Traceable to SBA and FSA's Loan Guaranties

Plaintiffs allege that their interests are harmed by the adverse effects they believe the operation of the C&H facility will have on the water quality of the Buffalo National River and its tributary, Big Creek.[14] The direct cause of Plaintiffs' alleged injury is a facility that is both operated and regulated by parties not before the Court, and Plaintiffs' injury is therefore not "fairly traceable" to the FSA and SBA's guaranties of Farm Credit Service's loan to C&H Hog Farms. *Summers*, 555 U.S. at 493. Where a claim of injury rests on the actions of a third party not before the Court, the plaintiff must demonstrate a "'causal link' between the agency's decision and the third party's action." *Sierra Club v. U.S. Dep't of Energy*, 825 F. Supp. 2d 142, 149 (D.D.C. 2011) (quoting *Nat'l Parks Conservation Ass'n v. Manson*, 414 F.3d 1, 6-7 (D.C. Cir. 2005)). Unless a plaintiff can show that "there is a substantial probability that the substantive agency action . . . created a demonstrable risk, or caused a demonstrable increase in an existing risk, of injury to the particularized interests of the plaintiff, the plaintiff lacks standing." *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 669 (D.C. Cir. 1996) (internal citation omitted).

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[14] *See, e.g.,* Declaration of Robert A. Cross [ECF33-7] at ¶ 5 (adverse impacts of C&H Hog Farm on Buffalo River); Declaration of Debbie A. Doss [ECF 33-8] at ¶ 7 (alleging harm from leakage of C&H waste ponds and runoff from spray fields); Declaration of Jack Stewart [ECF 33-10] at ¶ 6 (alleging harm from runoff to surface waters and leakage of waste into groundwater); Declaration of Robert Allen [ECF 33-11] at ¶ 11 (expressing concern about contamination from C&H Farm on the recreation in the Buffalo River); Declaration of Pamala Fowler [ECF 33-12] at ¶ 9 (expressing concern that C&H Farm will pollute the Big Creek and Buffalo River); Declaration of Janet Nye [ECF 33-13] at ¶¶ 9-10 (expressing concern about contaminants from C&H reaching Buffalo River); Declaration of Laura Timby [ECF 33-14] at ¶¶ 10-11 (expressing concern about waste impacts from C&H Farm); Declaration of Gordon Watkins [ECF 33-15] at ¶ 12 (expressing concern about impact of swine waste from C&H Farm on Big Creek and Buffalo River).

Plaintiffs have not carried their burden of showing a substantial probability that their alleged injury—effects to the Buffalo National River from the operation of the C&H facility—is traceable to the Federal Defendants' loan guaranties to Farm Credit Services. While Plaintiffs do allege in conclusory fashion that without the loan guaranties C&H Hog Farms would not have been able to construct the facility, *see* Pl. Br. at 12-13; that generalized allegation falls short of demonstrating a "substantial probability" that absent the federal guaranties, C&H Hog Farms would not have secured project financing from another source and would not have constructed the facility anyway. As Plaintiffs note, both SBA and FSA require a representation that without the guaranty, the desired credit is not currently available at reasonable rates and terms. *See* 13 C.F.R. § 120.101 (SBA) and 7 C.F.R. § 762.120 (FSA). But that fact does not demonstrate that C&H would not have secured credit at higher rates or other less favorable terms, and constructed the farm in any event.

Courts have readily rejected similar claims of injury directly traceable to decisions of third parties where the federal defendant's influence on that decision is tenuous. In *Applachian Voices v. Bodman* for example, plaintiffs challenged the Department of Energy's ("DOE") failure to comply with NEPA and the ESA in allocating energy tax credits to Duke Energy for construction of a coal power plant. 587 F. Supp. 2d 79, 84 (D.D.C. 2008). Noting that the crucial link in the chain of causation between the federal action (allocation of tax credits) and plaintiffs' alleged injury (harm to the environment caused by the power plant) was "Duke Energy's independent decision to go forward with the [] project," the Court focused its inquiry on whether plaintiffs had shown it was "substantially probable" that Duke Energy would not have constructed the project absent the federal assistance. *Id.* at 88, 89. The Court concluded that although the tax credits accounted for seven percent of the project funding and although Duke Energy itself characterized them as "very important" to the project, plaintiffs had not "'adequately bridge[d] the uncertain ground found in any causal path that rests on the independent acts of third parties,'" and therefore lacked standing. *Id.* at 89 (quoting *Fla. Audubon*, 94 F.3d at 670).

Similarly, in *Sierra Club v. U.S. Dep't of Energy*, 825 F. Supp. 2d 142, 152 (D.D.C 2011), plaintiffs challenged DOE's compliance with NEPA in providing both direct financial assistance and loan guaranties to a private power plant. *Id.* at 147. As do Plaintiffs in this case, plaintiffs in *Sierra Club* challenged the federal financial assistance, but traced their harm to the construction and operation of a facility by a third party: "[t]hat the Sierra Club may be harmed by the [] project, however, is not the same as saying it will be harmed *by the federal funding*, which is what it seeks to enjoin." *Id.* at 152. In *Sierra Club* the Court found that although the loss of federal assistance would disrupt the project and make it more expensive, plaintiffs had not shown that the project would not proceed without federal assistance, and thus plaintiffs lacked standing.

Notably, in both *Applachian Voices* and *Sierra Club* the federal government was providing direct financial support to the third party projects, either through tax credits or direct grants. Here in contrast, the federal nexus to the C&H facility is further attenuated. The FSA and SBA's loan guaranties are issued not to C&H, but to the private lender, and federal money is expended only if C&H defaults on its loans and the lender seeks payment of the guarantee.

Moreover, in this case, any claim of injury that Plaintiffs could muster can, at best, be causally linked only to the actions of regulatory agencies not before this Court. Here, there is a well-established regulatory scheme to protect water resources – the focal point of Plaintiffs' claimed injury. That regulatory scheme is found in the NPDES permitting system established in the Clean Water Act to eliminate harmful discharges into the Nation's waters. 33 U.S.C. § 1251(a)(1). The ADEQ's CAFO General Permit comports with the EPA's extensive CAFO regulations and effluent limitations, and violation of the terms of the permit would constitute a violation of both the federal Clean Water Act and the Arkansas Water and Air Pollution Control Act. FSA-750 (Permit 6.1). Under the permit, CAFOs are subject to ongoing monitoring and inspection, and the ADEQ retains broad authority to modify or revoke permits as needed. FSA-745 (Permit at 4.4); FSA-750 (Permit 6.3); FSA-756 (Permit at 8.7). Finally, the State of Arkansas has established a monitoring program for the express purpose of assessing potential

impacts of the C&H Farm on water quality, *see* Pls' Am. Compl. [ECF No. 18] at ¶ 90, so that the ADEQ will know if permit conditions fail to prevent pollution from the facility. All of the relevant regulatory hooks are outside the control of the SBA and the FSA and, instead, lie solely within the control of third party agencies not before this Court.

It is well established that a plaintiff cannot satisfy the causation prong of the standing inquiry where its asserted injury requires speculation about the acts of third party agencies not before the Court. *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). Here Plaintiffs' alleged injury is traceable – if at all – only to a regulatory structure controlled by a third party State agency not before the Court. An injury resting, as it does, on the alleged and speculative failures of a third party is not "fairly traceable" to the challenged loan guaranties.

Because Plaintiffs' alleged injuries require the Court to both speculate about the choices C&H would have made in the absence of the federal guaranties and to assume the failure of the State's regulatory process, they are not "fairly traceable" to the conduct of the SBA and FSA, and are inadequate for purposes of Article III standing.

b. Plaintiffs Cannot Demonstrate that Any Alleged Injury is Redressable by Relief From this Court

Plaintiffs also fail to demonstrate Article III standing because they have not shown that a favorable decision by this Court is likely to redress their alleged injuries. *See Defenders*, 504 U.S. at 561 (holding it must be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision") (quotation marks and citation omitted). Plaintiffs ask this Court to declare the Agencies in violation of law, to enjoin the federal loan guaranties issued to Farm Credit Services, and to remand the matter to the Agencies to conduct additional environmental review. ECF 33 at 2. But Plaintiffs cannot show that these remedies are likely to alleviate their alleged injuries.

The Eighth Circuit has emphasized that to satisfy the redressability prong of the standing inquiry where the plaintiff's direct injury is caused by the actions of a third party, the plaintiff must show that the "defendant [has] control over the third party's (case-relevant) behavior."

Ashley v. U.S. Dep't of Interior, 408 F.3d 997, 1003 (8th Cir. 2005). *See id.* (holding plaintiffs' injury was not redressable where plaintiffs "seek to change the defendant's behavior *only as a means* to alter the conduct of a third party, not before the court, who is the direct source of the plaintiff[s'] injury.") (citations and alterations omitted).

Plaintiffs' request that the Court enjoin the federal loan guaranties does not satisfy this standard. The direct source of Plantiffs' alleged injuries, C&H Hog Farms, has obtained all necessary permits from the State of Arkansas, received all loan proceeds, been fully constructed and begun operations. The SBA and FSA do not exercise any control over C&H's operations, and enjoining the federal loan guaranties now will not prohibit C&H from continuing to operate, because a Court order invalidating the SBA and FSA guaranties extended to the lender would not deny C&H Hog Farms the use of the land or facilities which it bought or constructed with the funds received from the lender. Nor is there any basis for assuming that C&H would respond to an order from this Court enjoining the loan guaranties by voluntarily ceasing or altering its operations. *See, Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 43 (holding plaintiffs lacking standing where is was "speculative" that a Court order against the federal agency would alter behavior of private hospitals' practice of denying service to plaintiffs); *St. John's United Church v. FAA*, 520 F.3d 460, 463 (D.C. Cir. 2008) (holding plaintiffs' injury was not redressable where petitioners had "not shown a 'substantial probability' that Chicago would scrap the O'Hare project if the court vacated the $29.3 million [federal] grant."); *Sierra Club*, 825 F. Supp. 2d at 151 (plaintiffs' standing doubtful where plaintiffs failed to show that relief sought "would imperil the project.").

Similarly, Plaintiffs' request that the Court declare that the Agencies failed to comply with the law and direct the preparation of a new environmental analysis on remand would not provide effective relief. The Eighth Circuit has noted that sending an Agency back to complete a NEPA analysis for a project already in place would neither serve the purposes of NEPA nor provide relief to the plaintiffs. *One Thousand Friends of Iowa v. Mineta*, 364 F.3d 890, 894 (8th Cir. 2004) (declining to order NEPA analysis of a completed highway project). *See also*

Rattlesnake Coal. v. EPA, 509 F.3d at 1102-03 (holding plaintiffs lacked standing because their injuries would not be redressed by requiring NEPA analysis after project construction was complete and federal funds expended). Declaratory relief under the ESA would likewise be ineffective; indeed, the FWS has already informed the FSA that it will not consult over the completed C&H facility. *See* Declaration of H. Chang, Exh. 2 (ECF No. 33-3).

Because Plaintiffs' injuries will not be redressed by a favorable ruling of this Court, Plaintiffs lack standing and their claims should be dismissed.

2. Plaintiffs' Challenges to the Loan Guaranties are Moot

The same facts that compel the conclusion that Plaintiffs lack standing—the completion of construction and the absence of effective injunctive and declaratory relief—also support dismissal of this action on the alternative grounds of mootness.

The jurisdiction of the federal courts extends only to live cases and controversies. *See* U.S. Const. art. III, § 2. *See Church of Scientology v. United States*, 506 U.S. 9, 12 (1992) (Federal courts lack jurisdiction "'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue before it.'") (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). A case is moot, and no longer presents a justiciable case or controversy, when the action challenged is complete and an order from a court would "serve no purpose and afford plaintiffs no relief." *Neighborhood Transp. Network, Inc. v. Pena*, 42 F.3d 1169, 1172-73 (8th Cir. 1994) (holding NEPA challenge to completed highway project was moot).[15] *See also, Bayou Liberty Ass'n v. U.S. Corps of Eng'rs*, 217 F.3d 393, 399 (5th Cir. 2000) (holding challenge to Corps of Engineers' permit moot after construction authorized by the permit was complete, and noting a declaratory ruling regarding the Corps' treatment of future permits would constitute an impermissible advisory opinion); *Knaust v.*

[15] Courts recognize an exception to the mootness doctrine for disputes "capable of repetition yet evading review." But that exception does not extend to cases where the dispute "became moot before the action commenced." *Renne v. Geary*, 501 U.S. 312, 320 (1991). Here the loan guaranties were issued and construction of the facility was complete before this lawsuit was filed.

Kingston, 157 F.3d 86, 89 (2d Cir. 1998) (holding NEPA challenge to stop construction of business park moot were federal funds had been disbursed and park was complete); *Friends of the Earth v. Bergland*, 576 F.2d 1377, 1379 (9th Cir. 1978) (holding NEPA action moot where mining company had completed challenged exploratory mining); *Karst Envtl. Educ. & Prot. v. EPA*, 403 F. Supp. 2d 74, 82 (D.D.C. 2005) (holding NEPA challenge to agency's grant of funds to private party moot where grant issued before plaintiff brought suit) *aff'd*, 475 F.3d 1291 (D.C. Cir. 2007); *Fund for Animals v. U.S. Bureau of Land Mgmt.*, 357 F. Supp. 225, 230 (D.D.C. 2004) (holding that a NEPA claim is moot once the government completes the actions complained of because "the Court cannot undo what has already been done") *aff'd*, 460 F.3d 13 (D.C. Cir. 2006).[16]

The Eighth Circuit's decision in *One Thousand Friends of Iowa v. Mineta*, 364 F.3d 890 (8th Cir. 2004) is instructive. In that case, plaintiffs alleged the Federal Highway Administration violated NEPA in approving construction of a highway interchange. The Eighth Circuit dismissed the case as moot after the interchange was completed, noting that no effective relief was available. *Id.* at 893. With regard to injunctive relief, the Court found an injunction would not restore the status quo ante. *Id.* As to declaratory relief, the Court concluded that requiring preparation of an additional NEPA review would serve no purpose, because the purpose of NEPA is:

> "[T]o provide assistance for evaluating proposals for prospective federal action in the light of their future effect upon environmental factors, not to serve as a basis for after-the-fact critical evaluation subsequent to substantial completion of the construction." There would be no import to this court's declaration that the EA and FONSI were arbitrary and capricious, nor would any true relief result from an order to write a new EA—the project the new EA would assess is already in place.

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[16] While there are cases where courts have determined completion of a project does not moot a case, those cases typically involve circumstances where the federal agency retains sufficient control over the project that the Court can craft an equitable remedy. *See, e.g. Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1066 (9th Cir. 2002) (finding completion of timber harvest did not moot case because the Forest Service controlled management of the surrounding forest and could impose mitigation on other projects). Here, however, the Agencies do not exercise any control over C&H's operations.

364 F.3d at 894 (quoting *Richland Park Homeowners Ass'n v. Pierce*, 671 F. 2d 935, 941 (5th Cir. 1982)).

The same is true here. Enjoining the challenged loan guaranties would not restore the status quo ante by forcing C&H to stop operations and remove its farm. Similarly, declaratory relief providing that the Agencies have violated the law and are required to go back and complete analysis under NEPA and consultation under the ESA and Buffalo River Enabling Act on loan guaranties already issued would have no "'effect in the real world.'" *Wyoming v. U.S. Dep't of Int.*, 587 F.3d 1245, 1250 (10th Cir. 2009) (quoting 13B Wright & Miller, Federal Practice and Procedure, § 3533.1 (3d ed.)). The funds have already been disbursed, and there is no meaningful relief that can be ordered. Indeed, with regard to the ESA, it is not clear that such post-hoc action is even possible, as FWS has advised the FSA that it "does not consult on 'after-the-fact' actions." Declaration of H. Chang, Exh. 3 (ECF No. 33-6). Under these circumstances, Plaintiffs' challenge to the issuance of loan guaranties by the FSA and SBA is moot and must be dismissed.

B. The SBA Did Not Violate NEPA or the ESA

Plaintiffs seek to hold the SBA responsible for a private company's use of loan proceeds from a private bank to purchase land and construct a hog farm. The only federal nexus to this otherwise fully private transaction is SBA's issuance of a loan guaranty to the bank, Farm Credit Services. SBA does not authorize or in any manner control C&H Hog Farms, and Federal funds will be expended only in the event that C&H defaults on its loan, and even then funds would pass to the bank, not to C&H. Under these specific circumstances, the issuance of the loan guaranty did not trigger obligations to prepare an environmental analysis under NEPA or to consult under the ESA, and SBA's failure to do so here is not a violation of either statute.

Indeed, the only court to have directly considered the question squarely held that SBA's loan guaranties do not trigger obligations under NEPA or the ESA. In *Ctr. for Biological Diversity v. HUD*, plaintiffs alleged that SBA was obligated to prepare NEPA analyses and to

consult under the ESA for loan guaranties in Sierra Vista, Arizona, which plaintiffs believed would lead to construction that would harm endangered species. 541 F. Supp. 2d 1091, 1095 (D. Ariz. 2008), *aff'd,* 359 F. App'x 781 (9th Cir. 2009). The Arizona District Court rejected this claim, finding neither statute attached to SBA's issuance of loan guaranties because the SBA was not directly funding construction, *id.* at 1098, was not exercising "any type of ongoing control over the borrower, []or of the property involved," *id.* at 1099, and did not have any discretionary authority over the construction at issue, *id.* The Ninth Court of Appeals affirmed, noting:

> The agencies' loan guarantees have such a remote and indirect relationship to the watershed problems allegedly stemming from the urban development that they cannot be held to be a legal cause of any effect on protected species for purposes of either the ESA or the NEPA.

359 F. App'x at 783.[17] As set forth below the decision in *Ctr. for Biological Diversity v. HUD* is correct and the same result should obtain here: SBA's issuance of a loan guaranty to Farm Credit Services is not a major federal action under NEPA or a federal action triggering obligations under the ESA.

1. SBA's Loan Guaranty Did Not Render the C&H Facility a Federal Action Subject to NEPA

NEPA applies only to federal actions. 42 U.S.C. § 4332(2)(C). Where, as here, an action involves non-federal parties, the courts have found an action is not federalized—and therefore does not trigger NEPA—unless there is (1) "'significant federal funding'" or (2) federal "'power, authority, or control'" over the project. *See, e.g., Rattlesnake Coal v. EPA,* 509 F.3d at 1101 (quoting *Ka Makani 'O Kohala Ohana Inc. v. Water Supply,* 295 F.3d 955, 960 (2002)); *Atlanta Coal. on the Transp. Crisis v. Atlanta Reg'l Comm'n*, 599 F.2d 1333, 1347 (5th Cir. 1979). The

[17] Plaintiffs object that the Ninth Circuit's decision in *Ctr. for Biological Diversity v. HUD* is not published and therefore, under that Circuit's rules, not precedential. Pl. Br. at 37 n.28. But, of course, out of circuit cases are never binding precedent, and opinions of the District Court and Court of Appeals remain persuasive authority. *See* Fed. R. of App. P. Rule 32.1(a), Advisory Comm. Notes to Subdivision (a), "Under Rule 32.1(a), a court of appeals may not prohibit a party from citing an unpublished opinion of a federal court for its persuasive value or for any other reason."

issuance of loan guaranties to a private bank to back that bank's loans to C&H Hog Farms falls well short of federalizing the C&H facility and requiring that it be treated as a major federal action under both inquiries.[18]

a. SBA Did Not Fund the C&H Facility

To federalize a project on the basis of federal funding, the proportion of federal funds in relation to funds from other sources must be "significant." *See, e.g., Ka Makani*, 295 F.3d at 960 ("While significant federal funding can turn what would otherwise be a state or local project into a major federal action, consideration must be given to a great disparity in the expenditures forecast for the state [and county] and federal portions of the entire program.") (internal quotation marks and citation omitted)*; Friends of the Earth, Inc. v. Coleman*, 518 F.2d 323, 329 (9th Cir. 1975) (holding federal funding amounting to 10 percent of the total project cost not adequate to federalize project under NEPA); *Sancho v. DOE*, 578 F. Supp. 2d 1258, 1266 (D. Haw. 2008) (federal provision of less than 10 percent of project costs not sufficient to federalize project); *Landmark West! v. United States Postal Service*, 840 F. Supp. 994 (S.D.N.Y. 1993) (holding U.S. Postal Service's role in private development of new skyscraper was not sufficient to federalize the project).

In this case, SBA has not provided *any* federal funding to C&H Hog Farms. SBA's participation in the C&H facility was limited to providing a guaranty to the private lender, Farm Credit Services. P-17. No federal money will be expended unless and until C&H defaults on its loans and Farm Credit invokes the guaranty. And, in the event of default by C&H, the guaranty is paid *to the lender*, not to C&H Hog Farms. As the court in *Ctr. v. Biological Diviersity v.*

[18] The SBA has an over 30-year old "Standard Operating Procedure" ("SOP") that categorically excludes loan guaranties from preparation of an EIS or EA and which provides that an environmental assessment "may be required" for loan guaranties of more than $300,000 for construction and/or purchase of land. Pl. Br. at 33. However, SBA, nearly ten years ago, concluded that NEPA analysis of individual Section 7(a) loan guaranties is not warranted. 69 Fed. Reg. 47,971, 47,975 (Aug. 6, 2004).

HUD, explained in holding that SBA's loan guaranties were not major federal actions subject to NEPA:

> Defendants do not directly fund the various projects that are at issue in this case. Rather the Defendants guarantee loans, dispersed to various recipients by private lenders. Therefore the actual funding by Defendants is negligible or non-existent.

541 F. Supp. 2d at 1098. Under these circumstances, the C&H facility plainly lacks the requisite federal funding to render the farm a major federal action.

b. SBA Does Not Exercise "Power, Authority or Control" Over the C&H Facility

The federal "power, authority, or control" prong of the two-prong test for a major federal action requires courts to identify whether a federal agency possesses control or actual decision-making authority over the project. *Rattlesnake Coalition*, 509 F.3d at 1101. *See also id.* at 1102 ("The United States must maintain decisionmaking authority over the local plan in order for it to become a major federal action."); *Ka Makani*, 295 F.3d at 961 ("Because the final decision-making power remained at all times with [the State agency], we conclude that the [federal agency] involvement was not sufficient to constitute 'major federal action') (quoting *Vill. of Los Ranchos de Albuquerque v. Barnhart*, 906 F.2d 1477, 1482 (10th Cir. 1990)); *United States v. S. Fla. Water Mgmt. Dist.*, 28 F.3d 1563, 1572 (11th Cir. 1994) ("[T]he federal agency must possess actual power to control the nonfederal activity.") (citation omitted).

It is not enough to show that "but for" the federal involvement, the project would not have gone forward. *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004). Instead, the federal agency must "possess actual power to control the nonfederal activity." *Vill. of Los Ranchos*, 906 F.2d at 1482 (quoting *Sierra Club v. Hodel*, 848 F.2d 1068, 1089 (10th Cir. 1988)); *Winnebago Tribe of Nebraska v. Ray*, 621 F. 2d 269, 272 (8th Cir. 1980) ("Factual or veto control, however, must be distinguished from legal control or 'enablement'"); *Envtl. Rights Coal., Inc. v. Austin*, 780 F. Supp. 584, 600-01 (S.D. Ind. 1991) (the key test for determining

whether a project is "major federal action" is whether there is significant degree of Federal involvement with and control over subject project)

This stringent requirement of *actual* federal authority ensures proper effectuation of NEPA, which "applies only when there is federal decision-making, not merely federal involvement in nonfederal decision-making." *S. Fla. Water Mgmt.*, 28 F.3d at 1573. As the Fourth Circuit has observed:

> Requiring an EIS for anything less would needlessly hinder the Government's ability to carry on its myriad programs and responsibilities in which it assists, informs, monitors, and reacts to activities of individuals, organizations, and states, but in which the Government plays an insubstantial role.

Sugarloaf Citizens Ass'n v. FERC, 959 F.2d 508, 512 (4th Cir. 1992) (quoting *NAACP v. Medical Ctr.*, 584, F.2d 619, 634 (3d Cir. 1978)).

In this case, SBA does not possess any control or actual decision-making authority over C&H Hog Farms. By the time the Agency was called upon to consider Farm Credit Service's application for a loan guaranty, C&H had developed a Nutrient Management Plan (P-628 to P-946), construction plans (P-379), and had already obtained regulatory coverage under ADEQ's General Permit for CAFOs (FSA-728). The extent of SBA's action was to consider C&H's financial qualifications, but the SBA did not exercise control or actual decision-making authority over the facility's design or location. *See Ctr. for Biological Diversity v. HUD*, 541 F. Supp. 2d. at 1099 (noting the Defendants did not exercise "discretionary authority over development."); *Ringsred v. Duluth*, 828 F.2d 1305, 1038 (8th Cir. 1987) (finding construction of parking ramp was not major federal action where federal agency had no input in the design or construction of the ramp).

Nor does SBA exercise any control or actual decisionmaking authority over operations at the C&H facility. Regulatory authority over C&H Hog Farms is exercised by the State of Arkansas. It is ADEQ, not SBA, which is charged with insuring that C&H operates within the terms of its permit. And it is ADEQ, not SBA, which has the authority to amend, and if warranted to revoke, that permit. FSA-750. Without "actual power" to control the operations at

the C&H facility, the issuance of a loan guaranty to back the private loan made to the private farm is not a federal action subject to NEPA. *See Ctr. for Biological Diversity v. HUD*, 359 F. App'x at 783 ("The agencies guarantee loans issued by private lenders to qualified borrowers, but do not approve or undertake any of the development projects at issue.").

Even assuming that without the federal loan guaranty Farm Credit Services would not have loaned money to C&H Hog Farms and that without the loan the facility would not have been constructed, the Supreme Court has made clear that "a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA." *Public Citizen*, 541 U.S. at 767. The bare ability of a federal agency to prevent a nonfederal project from going forward does not constitute federal involvement sufficient to federalize the project or make the federal agency action a major federal action under NEPA. *See, e.g., Sugarloaf Citizens Ass'n*, 959 F.2d at 514 (holding FERC's "but for" power over certification of facility did not federalize the facility), *Winnebago Tribe of Nebraska*, 621 F. 2d at 272 (holding federal agency's "but for" veto power did not federalize entire project); *Ringred*, 828 F.2d at 1305 (holding agency's "factual veto power" over city project through need to approve contracts with Indian tribe did not make project a major federal action); *Save the Bay, Inc. v. U.S. Army Corps of Eng'rs*, 610 F.2d 322, 326 (5th Cir. 1980) (NEPA did not require the Corps to consider a chemical plant's potential environmental effects when issuing a permit allowing construction of a wastewater pipeline from the plant even though plant could not be constructed without the wastewater pipeline). Instead, the federal agency must exercise "'actual power to control the nonfederal activity'" and that control is simply not present in this case. *Vill. of Los Ranchos d*, 906 F.2d at 1482 (quoting *Sierra Club*, 848 F.2d at 1089).

In sum, the SBA's loan guaranty to Farm Credit Services for that bank's loan to C&H Hog Farms does not federalize the C&H facility such that obligations under NEPA were triggered. Plaintiffs' motion for summary judgment on grounds that the SBA violated NEPA should be denied and Defendants' cross-motion granted.

2. SBA's Issuance of a Loan Guaranty to Farm Credit Services for the C&H Facility did not Trigger Consultation Obligations Under the ESA

Plaintiffs allege that in issuing a loan guaranty to Farm Credit Services for that bank's loan to C&H Hog Farms, SBA failed to comply with the consultation requirements of Section 7(a)(2) of the ESA. This claim fails.

Under Section 7(a)(2), federal agencies must, in consultation with FWS, "insure that any action authorized, funded, or carried out by such agency" is not likely to jeopardize a listed species or result in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(a)(2). Thus, to trigger consultation obligations under Section 7(a)(2), there must be both an "agency action" as defined by the ESA and that action must be one which "may affect" a listed species or designated critical habitat. 50 C.F.R. § 402.14(a). *See generally Karuk Tribe v. U.S. Forest Serv.*, 681 F.3d 1006, 1020 (9th Cir. 2012) (discussing the "agency action" and "may affect" requirements), *cert. denied, New 49'ers, Inc. v. Karuk Tribe*, 133 S. Ct. 1579 (2013).[19]

As explained below, SBA's issuance of a loan guaranty to Farm Credit Services for that bank's loan to C&H for construction of a hog farm was not itself an action or the cause of any actions that "may affect" ESA-listed species or designated critical habitat. Therefore, SBA's action fell below the threshold needed to trigger obligations under Section 7(a)(2) of the ESA.

a. SBA's Loan Guaranty is Not an Agency Action Triggering Consultation Under the ESA

Section 7(a)(2) defines "agency action" as "any action authorized, funded, or carried out" by a federal agency. 16 U.S.C. § 1536(a)(2). Although SBA issued the loan guaranty challenged by Plaintiffs, that action did not give rise to the need to consult under the ESA because it was not an action that "may affect" listed species or critical habitat. Moreover, based on the attenuated link to the construction and operation of the hog farm, SBA's action was not

[19] The standards for determining whether there is an "agency action" under the ESA and a "major federal action" under NEPA are treated similarly by the courts. *See Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1075 (9th Cir. 1996) (citing *Sierra Club v. Babbitt*, 65 F.3d 1502, 1512 (1995)).

the cause of any action that "may affect" listed species. SBA simply did not authorize, fund, or carry out construction of the hog farm: C&H did not require SBA's permission to construct or operate the farm and SBA exercises no control or regulatory authority over the operation of the farm. *Ctr. for Biological Diversity v. HUD*, 541 F. Supp. 2d. at 1099 (noting agencies issuing loan guaranties had no authority over local development). *See also Sierra Club v. Babbitt*, 65 F.3d 1502, 1511 (9th Cir. 1995) (holding agency's "approval" of private road construction was not "authorization" under the ESA where the private party already possessed the right to build the road); *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1074 (9th Cir. 1996) (holding Section 7(a)(2) not triggered where private company did not need federal authorization to cut trees on private land). When Farm Credit Services applied to SBA for a loan guaranty, C&H had a fully developed business plan, which included permit coverage from the ADEQ and a construction contract for the facility. See P-46 (application for Section 7(a) guaranty). C&H needed no "authorization" from the SBA to proceed. The Agency considered whether the business met the regulatory criteria for Section 7(a) loans and whether the applicants had the ability to repay the loan. See P-135 (Eligibility Questionnaire for 7(a) Guaranty); P-13 (Section 7(a) Loan Officers Report). But these reviews do not evidence any control or actual authority over the design or operation of the farm. *See Ctr. for Biological Diversity v. HUD*, 541 F. Supp. 2d at 1100 ("The federal agencies are not involved in choosing the home for the homeowner or advising the business on which structure to purchase and/or renovate"). Further, while both SBA and FSA require a representation that without the guaranty the desired credit is not available at reasonable rates and terms, there is no evidence that C&H would not have secured credit at higher rates or less favorable terms and constructed the farm in any event.

Nor do the loan guaranties constitute federal funding. As noted in the NEPA discussion above, neither FSA nor SBA has provided *any* federal funding to C&H Hog Farms. *Id.* at 1098 ("[T]he actual funding by the Defendants [in issuing guaranties] is negligible or non-existent."). And, even in the event of a default, federal funds would be paid *to the lender* not C&H Hog

Farms.[20] This conditional provision of financial backing to the lender falls well short of federal funding of the C&H Hog Farms.

b. SBA's Loan Guaranty is Not the Cause of Any Effect that the C&H Facility May Have on Threatened or Endangered Species

The obligation to insure that its actions do not "jeopardize" listed species or result in destruction or adverse modification of critical habitat applies only to agency actions that are authorized, funded or carried out by that federal agency: harms for which the agency itself—rather than a non-federal third-party—is the legal cause.[21]

Here, Plaintiffs contend that operation of the C&H facility "may affect" listed species. But the causal link between that harm and SBA's issuance of the loan guaranty—which passes through the private conduct of both the lender and the hog farm—is far too attenuated to make the loan guaranty the cause of that harm under the ESA.[22] The Agency does not control local land use decisions or regulate the siting or operation of CAFOs in the State of Arkansas. Nor does the Agency have the authority to prevent the operations of the C&H facility. Given the

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[20] Section 7(a)(2) also refers to actions "carried out" by the agency. Unlike "funded" and "authorized," "carried out" refers to a direct agency action: for example, when the agency itself is building a dam. 16 U.S.C. § 1536(a)(2).

[21] The ESA's implementing regulations make plain that the alleged harms are not caused by the loan guaranty decisions here. The regulations direct an action agency to consider "the effects of the action as a whole." 50 C.F.R. § 402.14(c). "Effects of the action" include both the direct and indirect effects of the action. "Indirect effects" are "those that are caused by the proposed action and are later in time, but still are reasonably certain to occur." 50 C.F.R. § 402.02. Thus, to trigger the need for consultation, a discretionary federal action must cause direct or indirect effects that are so closely related to the action that it is reasonable to believe that they may affect the listed species or its designated critical habitat. Without making the categorical assertion that there are no circumstances in which consultation could ever be required for a loan guaranty, it is clear that under a loan guaranty such as that at issue here, the Agency's obligations under ESA Section 7 were not triggered because, as set forth *infra*, the federal action lacks the necessary causal connection to any impact on protected species or critical habitat.

[22] As with NEPA, the fact that the C&H facility might not have been constructed, *but for* the loan guaranties, does not make the guaranties "agency actions" triggering Section 7(a)(2) consultation obligations. *See Public Citizen*, 541 U.S. at 767 (holding "a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA"); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 667 (2007) (noting that basic principle of causation announced in *Public Citizen* applies to Section 7(a)(2) of the ESA).

attenuated chain of causation between a federal loan guaranty and the acts of the private loan recipients, and given the SBA's lack of authority over the acts of the private loan recipients, this Court should find, consistent with the Arizona District Court and the Ninth Circuit in *Ctr. for Biological Diversity v. HUD*, that SBA's loan guaranty is not the legal cause of any harm that the C&H Farm poses to threatened or endangered species. *See* 541 F. 2d at 1101 ("Defendants are not the legal cause of harm to the listed species"); 359 Fed. Appx. at 783 ("The agencies' loan guarantees . . . cannot be held to be a legal cause of any effect on protected species.").[23]

Thus, because the issuance of the loan guaranty to Farm Credit Services to back its loan to C&H Hog Farms was not a major federal action under NEPA or a federal action that is the cause of any effect on species listed under the ESA, SBA had no obligations under either statute. Plaintiffs' claims that SBA violated the ESA and NEPA should be denied and Defendants' motion for summary judgment on those claims granted.[24]

C. FSA Did Not Violate NEPA or the ESA

1. FSA's Issuance of a Loan Guaranty to Farm Credit Services for the C&H Facility did not Trigger NEPA or Consultation Obligations Under the ESA

As explained above, with regard to the SBA, the nexus between the federal act of providing a loan guaranty and the private act of constructing and operating the C&H facility is an

[23] Congress provided in the ESA a direct mechanism for protecting listed species put at risk by the actions of private entities. Section 9 of the Endangered Species Act prohibits "take" of threatened or endangered species by private parties and provides a venue through which private plaintiffs can enjoin private activities that are reasonably certain to harm a protected species. As the Ninth Circuit has recognized, by making the Section 7 consultation requirement applicable only to federal agencies but prohibiting the "taking" of listed species by private actors as well as the federal government, "Congress has . . . indicated that when a wholly private action threatens imminent harm to a listed species the appropriate safeguard is through section 9, 16 U.S.C. § 1538, and not section 7, 16 U.S.C. § 1536." *Sierra Club v. Babbitt*, 65 F.3d at 1512.

[24] The law is clear that if an action has no effect on listed species or their habitat, "consultation is not triggered." *San Luis & Delta-Mendota Water Auth. v. Jewell*, No. 11-1587-1, 2014 WL 975130, at * 5 (9th Cir. Mar. 13, 2014). As set forth *infra* at pp. 47-49, FSA concluded that its loan guaranty would have no effect on ESA-listed species. It was similarly appropriate for SBA to decline to engage in Section 7 consultation, as its loan guaranty likewise had no effect on ESA-listed species or designated critical habitat.

attenuated one that does not federalize the C&H facility under NEPA, and does not trigger obligations under the ESA. As a legal matter, the same is true for FSA: the FSA's loan guaranty to Farm Credit Services is indistinguishable from SBA's with regard to the indicia of federal authority and control. FSA did not fund the farm, and has no authority or control over the farm's construction or operations. Thus, for all the reasons set forth above, Plaintiffs' claim that the FSA violated NEPA and the ESA fails because the issuance of the loan guaranty here did not trigger obligations under either statute.

FSA is distinguishable from SBA in that it has adopted regulations which provide that financial assistance for a livestock-holding facility the size of C&H's is "presumed to be major federal action[]." 7 C.F.R. § 1940.312. But nothing in this regulatory presumption or in FSA's efforts to prepare an EA under NEPA and to consult under the ESA precludes the Court from concluding that as a statutory matter the loan guaranty extended by FSA was a not a federal action triggering obligations under NEPA or the ESA. *See, e.g, Vill. of Los Ranchos*, 906 F.2d at 1482 (holding preparation of an EIS did not federalize an otherwise private project); *Kandra v. United States*, 145 F. Supp. 2d 1192, 1203, n. 4 (D.Or. 2001) (rejecting the contention that the agency, by issuing an EA, had admitted the applicability of NEPA); *Mississippi ex rel. Moore v. Marsh*, 710 F. Supp. 1488, 1502, n.24 (S.D. Miss. 1989)("CEQ regulations specifically allow the preparation of an EA at any time, whether required by the regulations or not.").

2. FSA Complied with NEPA

Should the Court conclude that FSA was required to prepare a NEPA analysis in conjunction with the challenged loan guaranty, then, as set forth in detail below, the FSA's EA and FONSI demonstrate compliance with the statute. First, as a threshold matter, Plaintiffs have waived their substantive objections to FSA's NEPA analysis by failing to bring them to the Agency's attention during the public comment process. Second, on the merits, the FSA took the appropriate "hard look" at the C&H facility and reached the reasonable conclusion that it would not have a significant impact.

Plaintiffs' criticism focuses on the fact that the EA is shorter and less detailed than Plaintiffs would like. This argument misapprehends the nature of an EA. An EA need not address every question nor provide exhaustive evidence on every issue: it is supposed to be a "concise public document" that "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. § 1508.9, *see also id.* at § 1501.3. As the Eighth Circuit has noted, "[a]n EA cannot be both concise and brief and provide detailed answers to every question." *Sierra Club v. U.S. Forest Serv.*, 46 F.3d 835, 840 (8th Cir. 1995). *See also Sierra Club v. Robertson*, 784 F. Supp. 593, 608 (W.D. Ark. 1991) (An "EA is supposed to brief, and 'low-budget.'" (citing *Cronin v. U.S. Dep't of Agric.*, 919 F.2d 439, 443 (7th Cir. 1990)), *aff'd* 28 F.3d 753 (8th Cir. 1994).

In addition to the limited nature of an EA, Plaintiffs' critique also overlooks the fact that the FSA's EA incorporates and relies on the comprehensive analysis of the C&H facility contained in ADEQ's review of C&H's application for coverage under the State's CAFO General Permit. [25] That analysis, which includes a binding CNMP for the facility, addresses many of the issues of concern to Plaintiffs, and provides a reasoned basis for FSA's conclusion that the project is not a major federal action significantly impacting the environment. NEPA does not require an agency to generate additional paperwork by duplicating analyses completed by other agencies. *See* 40 C.F.R. § 1502.21 (providing an agency may incorporate by reference environmental documents prepared by other agencies); *id.* at § 1506.2 (directing agencies to

[25] In reviewing the FSA's compliance with NEPA, the Court is not limited to the text of the EA, but may consider the entire administrative record. *See Missouri Coal. for the Env't v. U.S. Army Corps of Eng'rs*, 866 F.2d 1025 (8th Cir. 1989) (". . .the question before us is not, as the Coalition urges, whether the [Memorandum of Findings for the Record (MFR)] contains the requisite convincing reasons to stand on its own, but whether, under the appropriate standard of review, the determinative finding in the MFR is sustainable on the administrative record made. And that record includes the MFR, the EA and the full ten volumes of documents compiled during the Corps' reevaluation process."); *In re Operation of Missouri River System Litigation*, 421 F.3d 618 (8th Cir. 2005) (holding "there is no requirement that every detail of the agency's decision be stated expressly in the 2003 Amended BiOp. The rationale is present in the administrative record underlying the document, and this is all that is required.").

avoid duplication between NEPA and state and local requirements); *Missouri Coal. for the Env't v. U.S. Army Corps of Eng'rs*, 866 F.2d 1025, 1033 (8th Cir. 1989) (finding review of an agency's finding of no significant impact was not limited to the decision document, but included all the materials in the administrative record), abrogated on other grounds, *Goos v. I.C.C.*, 911 F.2d 1283 (8th Cir. 1990). NEPA also allows an agency to rely on the conclusions of other agencies in finding a project will have no significant impacts. *See Edwardsen v. U.S. Dep't of Interior*, 268 F.3d 781, 789 (9th Cir. 2001) (concluding that it was reasonable for the DOI to rely on compliance with EPA air quality standards in its NEPA analysis); *Border Power Plant Working Grp. v. Dep't of Energy*, 260 F. Supp. 2d 997, 1020 (S.D. Cal. 2003) (upholding DOE's reliance on project compliance with Clean Air Act standards in making finding of no significant impact under NEPA); *Save the Peaks Coal. v. U.S. Forest Serv.*, No. CV 09-8163-PCT-MHM, 2010 WL 4961417, at *20 (D. Ariz. Dec. 1, 2010) ("The Forest Service's reliance on [the Arizona Department of Environmental Quality's] approval of snowmaking as a use for A+ reclaimed water is in keeping with the 'cooperative federalism' which permeates water regulation under NEPA."); *Okanogan Highlands Alliance v. Williams*, No. CIV 97-806-JE, 1999 WL 1029106, at *4 (D. Or. Jan. 12, 1999) ("[A]n agency may properly base its evaluation of environmental impacts on the assumption that other specialized agencies with jurisdiction will enforce permits and related mitigation measures according to the law."), *aff'd*, 236 F.3d 468 (9th Cir. 2000).

Considered in its proper context—an agency with limited control over the proposed action, the limited nature of EAs generally, and the existence of an exhaustive analysis by another regulatory body—the FSA's EA complies with NEPA.

a. Plaintiffs' NEPA Claims are Waived by their Failure to Participate in the Public Comment Process

When challenging an agency's compliance with NEPA, parties must "'structure their participation so that it alerts the agency to the parties' position and contentions in order to allow the agency to give the issue meaningful consideration.'" *Friends of the Norbeck v. U.S. Forest*

Serv., 661 F.3d 969, 976 (8th Cir. 2011) (quoting *Public Citizen*, 541 U.S. at 764). Failure to raise an objection before the agency during the public comment process results in waiver of that objection in subsequent judicial proceedings. *Cent. S.D. Coop. Grazing Dist. v. Sec'y. of U.S. Dep't of Agric.*, 266 F.3d 889, 901 (8th Cir. 2001).

Here, the FSA provided two public comment periods during its consideration of the issuance of a loan guaranty, one on the draft EA and a second on the final EA and FONSI. Plaintiffs did not participate in either comment period, and thus failed to advise the FSA of their concerns with the project at a time when the Agency could have addressed those concerns by providing more explanation or analysis in the EA and FONSI. Plaintiffs should not be allowed to press for the first time in this Court claims that they failed to bring to the FSA's attention in the public comment period.[26]

b. The FSA Reasonably Considered Environmental Impacts

The discussion of project impacts in an EA need not be elaborate; it need only suffice to support a determination that the project will have no significant impacts or that a full EIS was required. *Saint Paul Branch of N.A.A.C.P. v. Dep't of Transp.*, 764 F. Supp. 2d 1092 (D. Minn. 2011) (noting an EA "must include 'brief discussions' regarding . . . environmental impacts") (citing 40 C.F.R. § 1508.9(b)). Here Plaintiffs fault the FSA's EA for allegedly failing to address the impacts of the C&H facility on water resources including the Buffalo River, karst terrain, and the neighboring community including the Mt. Judea Elementary School. Pl. Br. at 21-23. The EA and the administrative record make clear that the FSA considered each of these impacts and reached a reasonable conclusion that the impacts were not significant.

With regard to water resources, the EA explains that there are no wetlands on the farm, and that adherence to the CNMP will ensure that there are no adverse impacts to water quality. FSA-1038. The administrative record demonstrates that this conclusion is a reasonable one: the CNMP is an enforceable term of ADEQ's CAFO General Permit, which, as explained above,

[26] Plaintiffs' claim that the public comment period itself was inadequate is addressed below. *See* Section C.2.f.

was designed in compliance with the EPA's CAFO regulations to ensure no negative impacts to water quality. The CNMP and the permit are set forth in the record, and FSA's reliance on them to conclude the C&H facility would not have negative impacts on water quality was not arbitrary or capricious.[27]

The record also shows that the Agency took a hard look at soil conditions on the farm site and determined there was no karst terrain under the construction site or under the holding ponds. Prior to construction, C&H completed a Geologic Investigation that included taking three deep boring samples to determine soil conditions. FSA-147. Boring hole 1 was drilled in an area now under the Gestation barn, FSA-147, and tested soil composition to a depth of 13.5 feet, FSA-148. Boring hole 2 was located just outside storage pond 1, FSA-147, and tested soil composition to a depth of 18.5 feet, FSA-150. Boring 3 was taken from a location now inside storage pond 2, FSA-147, and tested soil composition to a depth of 11.5 feet, FSA-151. None of the borings revealed karst on the site of the facility.

Finally, the FSA adequately disclosed and considered the C&H facility's proximity to and impact on the town of Mt. Judea, the Mt. Judea Elementary School and the Buffalo River. Pl. Br. at 22-23. The record includes both narrative descriptions (including driving directions) and maps depicting the location of the C&H facility in relation to the town of Mt. Judea. *See* FSA-140, FSA-282, FSA-284, FSA-370, FSA-972, FSA-919, FSA-942. The record also discloses that the Mt. Judea Elementary School is the closest school to the facility. FSA-141.[28]

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[27] Plaintiffs' related claim that the FSA did not appropriately address the fact that the Buffalo River has been designated by the State as an "Extraordinary Resource Water" subject to specific state water quality standards fails for the same reason: the General Permit is designed to insure that permitted facilities comply with state water quality standards.

[28] C&H's CAFO Permit Application mistakenly gives the distance to the Mt. Judea Elementary School as 1.1 miles, rather than .7 miles. Although regrettable, this error does not mean the public lacked adequate notice. The identification of the school as near the project in conjunction with the proliferation of maps depicting the town of Mt. Judea was sufficient to apprize the public—particularly members of the community—of the proximity of the project to the school. *See, e.g., Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1241 n.23 (10th Cir. 2011) (holding that although Agency's maps were of "less than ideal quality" they were sufficient to apprize public of impacted area).

Finally, a site map in the record discloses the proximity of the facility to the Buffalo River. FSA-1003. While a more robust description of the project's location was certainly possible, the FSA adequately described the project's location in relation to the community, the school and the Buffalo River. The record also supports the FSA's conclusion that there would be no significant impact on the community or the Mt. Judea Elementary School because the ADEQ CAFO General Permit, consistent with the EPA regulations, establishes land application buffers around occupied structures. With regard to impacts on the Buffalo River, the FSA relied on the ADEQ CAFO General Permit, which is designed to prevent water pollution. FSA's reliance on those permit terms to find the project would have no significant impacts was reasonable. *See supra* at pp. 32-33 (listing cases).

In short, while the EA does not discuss these impacts in the depth sought by Plaintiffs, it does serve its function of "[b]riefly provid[ing] sufficient evidence and analysis" for determining that the project would have not significant impact. 40 C.F.R. § 1508.9.

c. The EA Reasonably Considered Alternatives

In its EA and FONSI the FSA considered two alternatives, the proposed construction of the C&H facility and the alternative of no-action. FSA-1037. Although this analysis is presented in a truncated fashion, in the context of FSA's limited role in issuing a loan guaranty it was not arbitrary and capricious and should be upheld.

NEPA requires federal agencies to "'study, develop, and describe *appropriate alternatives* to recommended courses of action.'" *Cent. S.D. Co-op Grazing Dist.*, 266 F.3d at 896 (emphasis added) (quoting 42 U.S.C. § 4332(2)(E)). In addition to alternative courses of action, agencies must include the alternative of no-action. 40 C.F.R. § 1502.14(d). While the obligation to consider alternatives applies both to EISs and EAs, "[a]n agency's obligation to consider alternatives under an EA is a lesser one than under an EIS." *Native Ecosystems Council v. Forest Serv.*, 428 F.3d at 1246 (9th Cir. 2005); *Cent. S.D. Co-op Grazing Dist.*, 266 F.3d at 898.

There is no required minimum number of alternatives. Indeed, Courts have frequently upheld EAs, like the FSA's here, that consider only two alternatives – a "no-action" alternative and the "proposed action." *See, e.g., Native Ecosystems Council*, 428 F.3d at 1246; *Akiak Native Comty. v. U.S. Postal Serv.*, 213 F.3d 1140, 1148 (9th Cir. 2000); *Airport Neighbors Alliance v. United States*, 90 F.3d 426, 432 (10th Cir. 1996). Rather than focusing on some numerical minimum, courts evaluating the adequacy of an agency's discussion of alternatives by considering a series of factors, including: (1) the preferences of the project applicant; (2) the extent of the project's environmental impacts; and (3) the authority of the reviewing agency. Consideration of each of these factors makes clear that the FSA did not act arbitrarily in considering only the action and no-action alternatives.

First, as noted above, this is not a case where a federal agency proposes to undertake a project and has full discretion to craft the proposal and alternatives as it sees fit. Instead, the proposed action is developed by a private party. In situations where the federal agency is preparing NEPA for a project developed by a private applicant, the agency "'accord[s] substantial weight to the preference of the applicant . . . in the siting and design of the project.'" *City of Grapevine v. Dep't of Transp.*, 17 F.3d 1502, 1506 (D.C. Cir. 1994) (quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 197-98 (D.C. Cir. 1991)). In *City of Grapevine*, for example, the Federal Aviation Administration ("FAA") was preparing a NEPA evaluation for a proposal by the Dallas-Ft. Worth ("DFW") Airport Board to address increased demand at the DFW Airport. Plaintiffs alleged there were reasonable alternatives that could increase capacity without building new runways at the DFW Airport site and that the FAA was improperly excluding those alternatives to support the economic goals of the project sponsor. *Id.* at 1506. The court rejected this claim. Noting that "Congress did not expect agencies to determine for the applicant what the goals of the applicant's proposal should be," the Court held that FAA did not err in failing to consider alternatives that involved off-site actions, because it was the preference of the applicant to add runways at the DFW site. *Id.* at 1506 (quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991). *See also Colorado Envtl.*

Coalition v. Dombeck, 185 F.3d 1162, 1175 (10th Cir. 1999) ("Agencies … are precluded from completely ignoring a private applicant's objectives."); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d at 196 ("[T]he agency should take into account the needs and goals of the parties involved in the application.")

Similarly, the FSA was not obligated to rewrite C&H's business plan to create alternatives to the hog farm. The record shows that the owners of C&H are local families who desired to expand their farm operations to a modern facility remaining close to their existing home and community. FSA-1036. The farm owners had located an acceptable farm site to purchase and obtained consent from neighboring land owners to use their fields for land application of farm waste. FSA-436 to FSA-447. It would have served no purpose under NEPA for FSA to invent other locations for the farm based on speculation that the owners of C&H could find land for sale in those locations and could secure permission to use neighboring fields for land application.

Second, the obligation to consider alternatives is also narrower where the project will have a minimal environmental impact. *See Highway J Citizens Group v. Mineta*, 349 F.3d 938, 960 (7th Cir. 2003) ("When, as here, an agency makes an informed decision that the environmental impact will be small, . . . a 'less extensive' search [for alternatives] is required."); *Cent. S.D. Co-op Grazing Dist.*, 266 F.3d at 897 ("When an agency has concluded through an Environmental Assessment that a proposed project will have a minimal environmental effect, the range of alternatives it must consider to satisfy NEPA is diminished"); *Friends of the Ompompanoosuc v. FERC*, 968 F.2d 1549, 1558 (2d Cir. 1992) (The "range of alternatives an agency must consider is narrower when, as here, the agency has found that a project will not have a significant environmental impact.").

Here, the C&H facility was developed pursuant to the requirements of, and permitted under, the ADEQ's CAFO General Permit. Those permit conditions, the binding CNMP for the facility, and the ADEQ's continued oversight over the facility, provided FSA with a reasonable

basis for concluding that the project would have no significant impacts, and lessened the FSA's duty to consider alternative locations in the EA.

Finally, the range of alternatives is circumscribed by the Agency's authority to implement alternatives to the proposed action. While NEPA's implementing regulations do provide generally that an EIS should "[i]nclude reasonable alternatives not within the jurisdiction of the lead agency[,]" 40 C.F.R. § 1502.14(c), that obligation has not been read to require *detailed* consideration of alternatives contrary to the agency's basic policy objectives or rendered infeasible by the limits on the agency's jurisdiction. Indeed, recent authority emphasizes that Section 1502.14(c)'s mandate to "include *reasonable* alternatives" outside the jurisdiction of the lead agency is tempered by NEPA's "rule of reason" and the need to *fully* analyze *only* "reasonable" and "feasible" alternatives. *See, e.g.*, *Ctr. for Food Safety v. Vilsack*, 718 F.3d 829, 842 (9th Cir. 2013) (NEPA did not require agency to evaluate alternative of partial deregulation when the agency had no statutory authority to regulate the commodity in question at all); *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, CIV. 12-00594 SOM, 2013 WL 4511314, at *14 (D. Haw. Aug. 23, 2013) ("matters outside the agency's jurisdiction are not 'reasonable alternatives' that an agency must take a hard look at under section 1502.14(a)"); *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1084–85 (9th Cir. 2013) ("'Where an action is taken pursuant to a specific statute, the statutory objectives of the project serve as a guide by which to determine the reasonableness of objectives outlined in an EIS.'") (quoting *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 866 (9th Cir. 2004)); *City of Alexandria v. Slater*, 198 F.3d 862, 869 (1999) (analysis of alternatives outside jurisdiction of the action agency "make little sense for a discrete project within the jurisdiction of one federal agency.")

As set forth above, the FSA—like the SBA—issues loan guaranties under a program that is designed to ensure adequate financing for private companies. It would be infeasible for FSA to use this program to insert itself into planning and locating private businesses, or usurp the role of local governments and land planners. *See Ctr. Biological Div. v. HUD*, 541 F. Supp. 2d at

1100-01 (noting development choices are more attributable to local land use rules than to federal loan guaranties).

In sum, given the preferences of the project applicant, the project's minimal environmental impact and the narrow role of the FSA's loan guaranty program, FSA's limited examination of alternatives was not arbitrary and capricious.

d. The FSA Properly Addressed Mitigation

Plaintiffs claim that the FSA violated NEPA by failing to identify mitigation measures in the EA. Pl. Br. at 27. This claim fails. C&H's CNMP, which is an enforceable term of the ADEQ permit, imposes robust mitigation measures on farm operations, and provides sufficient assurance that the farm will not have significant environmental impacts. The FSA properly relied on the CNMP and permit in concluding that imposition of additional mitigation through the NEPA process was not required. This conclusion is reasonable and should be upheld by the Court.

In asserting that FSA was obligated to identify and discuss mitigation measures, Plaintiffs ignore the fact that the FSA has prepared an EA and not an EIS. "This distinction is critical," because "[a]lthough NEPA regulations do require a discussion of the "'[m]eans to mitigate adverse environmental impacts,' 40 C.F.R. § 1502.16(h), this provision governs the preparation of an *Environmental Impact Statement*, not an Environmental Assessment." *Akiak Native Comty*, 213 F.3d at 1147 (emphasis added). *See also Jensen v. Williams*, No. 08-2016, 2009 WL 1138800, at *4 (W.D. Ark. Apr. 27, 2009) (noting the NEPA regulations do not require a discussion of mitigation measures in an environmental assessment). Plaintiffs' reliance on the CEQ's regulations regarding mitigation and the Supreme Court's opinion in *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989), is thus misplaced, as both relate to the duty to discuss mitigation measures in an EIS. Contrary to Plaintiffs' claim, the FSA's EA is not rendered deficient simply because it does not independently identify and separately discuss mitigation measures.

The administrative record here shows that adherence to the permit and the CNMP, as well as facility design features, ensure the facility will have no significant impact, and FSA thus reasonably concluded no separate mitigation was required. As noted above, the CNMP for C&H Hog Farms imposes a series of measures designed to ensure no significant environmental impacts, including: (1) buffer zones around waterbodies, property lines and occupied buildings (FSA-746 at ¶ 4.2.1.5, *see also* FSA-214); (2) prohibiting application of manure to fields that are saturated, frozen, covered with snow, or when it is raining or likely to rain (FSA-746 at ¶ 4.2.1.6); and (3) requiring testing of both soil and manure prior to application to determine appropriate application rates (FSA-353, FSA-378 to FSA-380). Moreover, the C&H facility is designed to exceed the specifications required by ADEQ, including liquid waste storage capacity that is 40 percent greater than required,[29] and more than twice as much land available for waste application than needed for the amount of waste to be generated.[30] Based on these mitigation measures and ADEQ's determination that adherence to the permit would protect water quality, the FSA concluded that no additional mitigation was required. FSA-1040. This conclusion was reasonable; indeed, the Eighth Circuit has explicitly held that a federal agency may rely on mitigation measures to be undertaken by a third party in making a finding of no significant impact. *See Friends of Richards-Gebaur Airport v. FAA*, 251 F.3d 1178, 188 (8th Cir. 2001); *Audubon Soc'y of Cent. Ark. v. Dailey*, 977 F.2d 428, 435-36 (8th Cir. 1992).

e. FSA Reasonably Concluded that the C&H Facility Would have No Significant Impact

When an agency concludes, on the basis of an EA, that the proposed action will not have a significant impact, it issues a "finding of no significant impact" ("FONSI"). A FONSI need

[29] *Compare* FSA-389 (minimum storage requirement is 279,436 cubic feet) *with* FSA-390 (total storage at C&H is 467,308 cubic feet) (FSA-71 to FSA-72). *See also* FSA-68 (noting facilities are required to have 180 days of storage and that C&H has 270 days).

[30] The C&H farm is expected to produce 14,213 pounds of phosphorus (P_2O_5) annually. FSA-397. One acre of hay or pasture can utilize 56.6 pounds of phosphorus P_2O_5. FSA-391. The facility thus needs 251 acres of pasture to uptake the annual Phosphorus it generates. (14,213/56.6=251.43).

not be elaborate: it need only "briefly present[] the reasons why an action . . . will not have a significant impact on the human environment." 40 C.F.R. § 1508.13. The FONSI prepared by the FSA meets these obligations, briefly addressing each of the 10 intensity factors listed in the CEQ regulations, 40 C.F.R. § 1508.27(b)(1)–(10). FSA-1029. As set forth above, the EA and the underlying administrative record make clear that the Agency's conclusion that the project will not have significant impacts on the environment was not arbitrary or capricious.

f. The FSA Provided Appropriate Notice and Opportunity to Comment

Public involvement is a fundamental purpose of the NEPA process, and the FSA provided multiple opportunities for public involvement and comment. First, although not required to do so by its regulations or by NEPA itself, FSA provided an opportunity for the public to review and comment on the *draft* EA.[31] A notice of the availability of the draft EA 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. After receiving no public comment on the draft EA, the FSA completed its FONSI and, as required by its regulations, 7 C.F.R. § 1940.331(3), 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-1131. This notice stated that FSA would accept public comments through September 11, 2012. *Id.* FSA received no public comment on the final EA and FONSI.

Plaintiffs criticize this public notice process, alleging that: (1) the notice of availability should have run in the newspaper for 15 days rather than three; (2) the notice of availability should have run in the Newton County Times; and (3) the FSA was obligated to provide a 30 day

[31] *See Theodore Roosevelt Conservation Partnership v. Salazar*, 616 F.3d 497, 519 (D.C. Cir. 2010); ("[T]he Bureau need not include the public in the preparation of every EA"); *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1279 (10th Cir. 2004) (declining to require comment period for EA); *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 549 (11th Cir. 1996) ("[T]here is no legal requirement that an Environmental Assessment be circulated publicly and, in fact, they rarely are.").

comment period on the FONSI before finalizing its decision. As set forth below, none of these allegations demonstrate that the public notice process was arbitrary or capricious.

i. FSA Published Notice for Three Days as Required by its Regulations

In publishing notice of the EA/FONSI for three consecutive days, FSA complied with the timing requirements of its regulations, which provide that notice "will appear for at least 3 consecutive days if published in a daily newspaper." 7 C.F.R. § 1940.331(b)(3). Plaintiffs note that FSA's internal handbook appears to provide that notice should run in the newspaper for 15 days.[32] Pl. Br. at 30. But USDA's handbooks do not create judicially enforceable obligations, *see Western Radio Serv. Co. v. Espy*, 79 F.3d 896, 901 (9th Cir. 1996), and certainly cannot override a requirement established by regulation. FSA's public notice regulation properly effectuates the public notice requirements of NEPA, and FSA's adherence to the timing requirements of its regulations was not arbitrary or capricious. *See Wyoming v. U.S. Dep't of Agric.* 661 F.3d 1209, 1239-40 (10th Cir. 2011) (holding district court erred in finding agency should have extended comment period beyond the regulatory minimum).

ii. FSA Published Notice in an Appropriate Newspaper

Plaintiffs also object to FSA's decision to publish notice in the Arkansas Democrat-Gazette rather than in a paper of more local circulation, such as the Newton County Times. Pl. Br. at 30. While FSA regrets that notice apparently did not reach all of plaintiffs, that fact does not render the Agency's decision to publish notice only in the Arkansas Democrat-Gazette arbitrary or capricious. The Democrat-Gazette is physically circulated statewide to approximately 180,000 people on a daily basis.[33] It is also available online.[34] In Arkansas, for

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[32] It is unclear whether the Handbook page cited by Plaintiffs calls for the notice to run in the newspaper for 15 days, or is conflating publication of notice with the obligation to take public comment for 15 days. For example, a process flow-chart also in the Handbook more clearly separates the three day notice requirement from the 15 day comment period. *See* FSA-1028.

[33] http://www.mondotimes.com/newspapers/usa/usatop100.html (last visited 04/11/2014). *See also* Parties Joint Stipulation Resolving Plaintiffs' Request for Judicial Notice ("Joint Stip") at ¶ 10.

an issue of both local and state-wide interest such as the C&H facility, the Democrat-Gazette represented a reasonable means of public notice.

Indeed, even assuming physical access to the Democrat-Gazette is limited in some geographic areas, in this case, two of the four plaintiff groups are located in Little Rock and would thus certainly have access to the paper. *See* Declaration of Robert A. Cross [ECF 33-7] at ¶ 2 (Ozark Society); Declaration of Debbie A. Doss [ECF 33-8] at ¶ 2 (Arkansas Canoe Club). Nor would the other two plaintiff groups have been served by publication in a local periodical, as one is headquartered out-of-state and the other did not exist prior to the construction of the C&H facility. *See* Declaration of Emily Jones [ECF 33-9] at ¶¶ 2-3 (National Parks Conservation Association is headquartered in Washington, D.C.); Declaration of Jack Stewart [ECF 33-10] at ¶ 3 (Buffalo River Alliance formed "in direct response" to C&H Hog Farms). Thus any defect in publication had no effect on the plaintiff groups before the Court.

As Plaintiffs note, FSA's public involvement regulation provides for notice to be published in "the newspaper of general circulation in the vicinity of the proposed action and in any community oriented newspapers within the proposed action's area of environmental impact." Pl. Br. at 30 (citing 7 C.F.R. § 1940.331(b)(1),(3)). While the regulation contemplates publication in more than one paper, its intent is to ensure notice reached those within the "area of environmental impact." *Id.* In this case, the FSA reasonably concluded that the Democrat-Gazette, while a paper of general state-wide circulation, still best reaches those in the areas potentially influenced by the C&H facility. This point is, in fact, illustrated by Plaintiffs' own declarants, who make clear that there is not a local paper which FSA could have utilized to assure better public notice than it obtained through publication in the Democrat-Gazette. Plaintiffs proffer the declarations of four individuals, who among themselves testify to reading *six* different local papers.[35] Indeed, the local paper that Plaintiffs assert FSA should have used,

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[34] http://www.arkansasonline.com/ (last visited 04/11/2014).

[35] Plaintiff Robert Allen testifies that he reads three local papers, "the Russellville Courier, the Atkins Chronicle and the Dover Times." Declaration of Robert Allen [ECF 33-11] at ¶ 10. Plaintiff Pamela Fowler reads the Newton County Times. Declaration of Pamela Fowler [ECF

the Newton County Times (Pl. Br. at 30), is published only once a week, has a circulation of about 2,200 people,[36] and is read by only two of plaintiffs' four declarants.[37] While public notice in this case could have been better, the FSA was not arbitrary or capricious in determining to publish notice in a state-wide paper with a daily distribution of more than 180,000 people, rather than trying to guess which combination of multiple papers of limited circulation would best inform the public.

iii. FSA Was Not Obligated to Publish a Draft FONSI for Public Review

While NEPA does not ordinarily require public comment on a FONSI, the CEQ regulations provide that under specified "limited circumstances" the FONSI should be made available for public review for 30 days before the final decision is made. 40 C.F.R. § 1501.4(e)(2). Plaintiffs allege that in this case, this special 30 day review provision was triggered because "'[t]he nature of the proposed action is one without precedent.'" Pl. Br. at 31 (quoting 40 C.F.R. § 1501.4(e)(ii)). This claim fails.

The C&H facility is not without precedent. There are approximately 300 ADEQ-permitted Regulation No. 5 animal liquid waste facilities in the State of Arkansas. Joint Stip. at ¶ 5.[38] Nor is the placement of the C&H facility near the Buffalo National River unique: there are six active Regulation No. 5 animal liquid waste facilities in the Buffalo River watershed. Joint Stip. at ¶ 7.[39]

33-12] at ¶ 7. Plaintiff Timby reads the Marshall Mountain Wave. Declaration of Laura Timby [ECF 33-14] at ¶ 13. Plaintiff Watkins reads the Harrison Daily Times and Newton County Times. Declaration of Gordon Watkins [ECF 33-15] at ¶ 14.

[36] *See* Joint Stip. at ¶ 10. *See also* http://mediakit.harrisondaily.com/preprints.html (last visited 4/11/2014).

[37] *See* Fowler at ¶ 7 and Watkins Decl. at ¶ 14.

[38] *See also* Arkansas Pollution Control & Ecology Commission Economic Impact/Environmental Benefit Analysis at page 1. 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 - Economic Impact / Environmental Benefit Analysis").

[39] *See also* http://www.adeq.state.ar.us/home/pdssql/p_permit_details_water_npdes.asp?AFINDash=51-

Given the numerous animal feeding operations in Arkansas, Plaintiffs attempt to label the C&H facility as "without precedent" because it is the first facility granted coverage under the ADEQ's CAFO General Permit rather than under the ADEQ's Regulation No. 5. Pl. Br. at 31-32. The question of whether a proposed action is "without precedent" under 40 C.F.R. § 1501.4(e)(2)(ii), however, turns on the nature of the *environmental* impact of the action rather than on the *legal regime* under which it is permitted and regulated. For example, in *Tri-Valley CARES v. U.S. Department of Energy*, the Court found that the Department of Energy's ("DOE") approval of the high security Bio-Safety Level 3 laboratory was not "without precedent," because, although it was the first such laboratory operated by the DOE, many other similar labs were already in operation. No. C-08-01372-SBA, 2009 WL 347744, at *32 (N.D. Cal.Feb. 9, 2009). *See also Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of Army,* 288 F. Supp. 2d 64, 78-79 (D. Mass. 2003) (holding Corps of Engineer's first approval of privately owned data tower was not without precedent because the State permitted similar towers in the same area).

Plaintiffs claim that the different permitting process applied to the C&H facility will result in different environmental impacts because the old regulation prohibited all discharge, while the ADEQ's CAFO General Permit "allows" discharge. Pl. Br. at 31-32. But, the CAFO General Permit allows discharge only in the event of extremely rare precipitation-based overflow, and ADEQ itself explicitly concluded that shifting coverage of CAFOs from Regulation No. 5 to the CAFO General Permit would have no environmental effect, because the "proposed rule essentially continues current levels of protection." Joint Stip. at ¶ 4.[40] Plaintiffs present nothing other than speculation to challenge the State's conclusion as to the protectiveness

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00164&AFIN=5100164&PmtNbr=ARG590001 (click on "View Permit Information," click on "Letter Regarding J Duquid and E Gail Public Comment Letter" April 23, 2013).

[40] *See also* Arkansas Pollution Control & Ecology Commission Economic Impact/Environmental Benefit Analysis (Exhibit E to Petition to Initiate Rulemaking to Amend Regulation No. 5) at 3. http://www.adeq.state.ar.us/regs/drafts/reg05_draft_docket_11-004-R/reg05_draft_docket_11-004-R.htm (click "10/14/2011 - Economic Impact/ Environmental Benefit Analysis").

of the CAFO General Permit. Because the change in permitting systems did not significantly alter the level of environmental protection, the fact that C&H is the first facility authorized under the CAFO General Permit does not make the action one "without precedent" for NEPA proposes.

Given the prevalence of similar animal feeding operations in Arkansas and in the Buffalo River watershed, and the lack of significant environmental distinction between permitting under Regulation No. 5 and the CAFO General Permit, the C&H facility is not "without precedent" under 40 C.F.R. § 1501.4(e)(2), and FSA was not obligated to provide a 30 day public comment period on the FONSI.

3. The FSA Did Not Violate the Endangered Species Act

As is the case with NEPA, the attenuated nexus between the federal loan guaranties Plaintiffs challenge and the construction of the C&H facility does not trigger obligations under the ESA. FSA, however, has opted through its regulations to presume loan guaranties like that extended to Farm Credit Services for the C&H facility are major Federal actions subject to NEPA and the ESA and to comply with both statutes. As explained below, while the record shows both misunderstanding and miscommunication regarding compliance with the ESA, to the extent that Act applies to FSA's issuance of a loan guaranty, FSA has not violated the Act.

On June 26, 2012, Farm Credit Services contacted the FWS to initiate consultation over the proposed C&H facility. FSA-849. On July 5, 2012, FWS advised Farm Credit Services that two federally listed species—the Gray bat and the Indiana bat—and one candidate for listing—the Rabbitsfoot mussel—are "known to occur in this region." FSA-845. The FWS's letter advised that "[s]ediment and/or nutrient transport from the proposed project" could effect "mussels, fish hosts, and/or their habitats" and provided recommended best management practices that minimize or alleviate sedimentation and nitrification. *Id.* For example, FWS advised the "[e]rosion and sediment control measures should be sized to handle at least the 25 year flood and 24-hour storm event." FSA-845. The FWS also recommended certain

precautionary measures to avoid impacts to sensitive or endangered species which may inhabit karst features. FSA-846. The FWS's letter indicates that it is for the sole purpose of "providing technical assistance" and should not be "considered as concurrence" in any determination made by the action agency. FSA-848. On August 24, the FSA issued its FONSI noting that "[t]he preferred alternative would not have adverse effects on threatened or endangered species or designated critical habitat." FSA-1029. FSA also indicated that "[i]nformal consultation with the U.S. Fish and Wildlife Service was completed." *Id.*

On February 8, 2013, six months after the FSA's FONSI was signed and two months after FSA's loan guaranty was issued, FWS sent a second letter to Farm Credit Services advising that in addition to the species listed in its June letter, the snuffbox mussel is known to "occur in this region." FSA-839. The February 8 letter also noted that the "Buffalo River provides proposed critical habitat for the rabbitsfoot." *Id.*[41]

The record reflects considerable miscommunication between the FSA and the FWS, and a misunderstanding on the part of the FSA of the role of FWS's July 5, 2012, "technical assistance" letter. That misunderstanding does not, however, compel a conclusion that the FSA has violated the ESA. *See, e.g., Nat'l Ass'n of Home Builders*, 551 U.S. at 659 (finding, despite EPA's "internally inconsistent" position, Section 7 did not apply as a matter of law to EPA's action, and the Court is to review the agency's ultimate conclusion). As noted above, an action agency, like FSA, is not required to complete consultation and obtain concurrence from the FWS where its action will have no effect on a listed species. *Newton County Wildlife Ass'n v. Rodgers*, 141 F.3d 803, 810-11 (8th Cir. 1998). *See also*, *Southwest Ctr. for Biological Diversity v. United States Forest Serv.*, 100 F.3d 1443, 1447 (9th Cir. 1996) (holding the finding of no effect on a listed species "obviates the need for formal consultation under the ESA"); *Pacific*

[41] The record reflects that communication between the FSA and FWS continued after the C&H facility was constructed and this litigation had commenced, with FSA seeking concurrence that the proposed construction "May Affect but Not Likely to Adversely Affect" any listed species (Declaration of H. Chang, Exh. 2 [ECF No. 33-3]) and FWS replying that it "does not consult on 'after the fact actions'" (*id.* at Exh. 3).

Rivers Council v. Thomas, 30 F.3d 1050, 1054 n.8 (9th Cir. 1994) (stating that "if the [action] agency determines that a particular action will have no effect on an endangered or threatened species, the consultation requirements are not triggered.") As set forth below, the record demonstrates that the issuance of the loan guaranty would have no effect on listed species, and thus FSA—despite its confusion about the process—was not obligated to obtain concurrence from the FWS.

The record provides a reasoned basis for the conclusion that the issuance of the loan guaranties here will not affect listed species. With regard to the bat species, the FSA found the only known bat cave in the area is two and one-half miles (4 km) away from the C&H facility. FSA-1084. FSA noted that the C&H facility is outside of normal foraging range from that cave. FSA-867 (noting normal Gray bat foraging range is 1km). Moreover, the principal risk to the bat species from the C&H facility identified by the FWS is the threat that undiscovered and occupied cave or karst features will be impacted by the construction of the facility. *See, e.g.*, FSA-846 (recommending precautionary measures to avoid impacts to sensitive or endangered species which may inhabit karst features not previously surveyed). As noted above, following FWS's recommendations, the facility site was tested for karst features prior to construction, and none were found.

With regard to the Rabbitsfoot mussel, the record shows that the FSA considered information on the species, including documentation that "few-to-no live individuals" have been found in the Buffalo River in the last ten years. FSA-861 to FSA-862. The lack of a documented population, the fact that the C&H facility is subject to comprehensive permit requirements designed to prevent water pollution, and the physical distance between the C&H facility and the Buffalo River all support the conclusion that the issuance of the challenged loan guaranty will not affect the Rabbitsfoot mussel.

With regard to the Snuffbox mussel—which FWS advised FSA of only after the loans had issued—the administrative record supports the conclusion that the C&H facility will have no effect on the species. The FWS's listing decision for the Snuffbox mussel indicates that in three

surveys conducted in the Buffalo River over the last century, only one found the Snuffbox, and it found only two individual mussels. 77 Fed. Reg. 8,632, 8,649 (Feb. 14, 2012). This single small population group was found in the lower reach of the Buffalo River in Marion County and its "viability is unknown." 77 Fed. Reg. at 8,649. *See also id.* at 8,640 (listing Buffalo River population as "marginal"). The C&H facility is approximately six miles up Big Creek from the Buffalo River, and the intersection of the Big Creek and the Buffalo River is miles upstream from the lower river in Marion County. The physical distance between the C&H facility and the only known Snuffbox mussel occurrence on the Buffalo River, coupled with the fact that the C&H facility is subject to comprehensive permit requirements designed to prevent water pollution, and is subject to ongoing monitoring by the State, justify a finding that the C&H facility will not affect the Snuffbox mussel. *See also* FSA-237 (noting the CNMP is "designed with the intention of reducing any harm or destruction of endangered or threatened species").

D. FSA and SBA Were Not Obligated to Consult with the National Park Service Under the Buffalo River Enabling Act or Agency Regulations

Plaintiffs next assert that both FSA and SBA failed to consult with the National Park Service pursuant to the Buffalo National River Enabling Act. Pl. Br. at 37. This claim falters on the fact that the C&H facility is not a "water resources project" under the Buffalo National River Enabling Act.

The Buffalo National River Enabling Act provides that "no department or agency of the United States shall assist by loan, grant, license, or otherwise in the construction of any water resources project that would have a direct and adverse effect on the values for which such river is established." 16 U.S.C. § 460m-11. The determination of whether a water resources project would have direct and adverse effects is made through consultation with the Secretary of the Interior. *Id.* Although the Buffalo National River Enabling Act does not contain a definition of the term "water resources project," the use of the same phrase in other statutes, as well as agency and judicial interpretations, all make clear that the phrase refers to the construction of

structures—such as dams and diversions—which would physically interfere with the free-flowing characteristics of the River.

As Plaintiffs correctly observe (Pl. Br. at 39-40), the Buffalo National River Enabling Act's language regarding water resources projects is substantially identical to language in Section 7 of the Wild and Scenic Rivers Act ("WSRA"), 16 U.S.C. § 1278, and indeed, the WSRA provides a useful interpretative guide to the Buffalo National River Enabling Act. The WSRA was passed in 1969 in reaction to the increasing damming and impoundment of the nation's rivers in an attempt to ensure the preservation of some rivers in a natural free-flowing state.[42] *See Sierra Club North Star Chap. v. Pena*, 1 F. Supp. 2d 971, 976 (D. Minn. 1998) ("The primary purpose of the WSRA is to preserve the rivers of the System in 'free-flowing condition"). Under the WSRA, "free-flowing" is defined as "flowing in a natural condition without impoundment, diversion, straightening, rip rapping, or other modification of the waterway." 16 U.S.C. § 1286(b). Although a definition of "water resources project" is not included in the text of the WSRA, there is one in the congressional analysis of the statute that was included by unanimous consent in the Congressional Record. There, consistent with the statutory focus on avoiding physical impoundments or diversions, "water resources projects" is defined in reference to structures that make physical use of the river to interfere with its free-flowing condition:

> The term "water resources project," as used in this section should be broadly construed to include any project that impounds, diverts and returns, or otherwise utilizes water in the river for various purposes with Federal assistance. . . .

114 Cong. Rec. S. 28313 (daily ed. Sept. 26, 1968).[43]

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[42] S. Rep. No. 90-491 at 1 (1967) (noting the "need to balance the national policy of dam building with a policy of preserving selected rivers or sections thereof that possess unique conservation, scenic, fish, wildlife and other outdoor recreation values").

[43] Plaintiffs' citation to a statement by the Secretary of the Interior in the legislative history of the WSRA for the proposition that "water resources project" is a broad term that could include sewage treatment plants, Pl. Br. at 40, does not demonstrate that Congress intended the term to include construction that did not physically impact the free-flowing quality of a river. Read in full, the statement is not a definitive interpretation of the phrase, but rather an expression of the Secretary's concern that the Act not be construed to *preclude* construction of projects, like

Like rivers covered by the WSRA, the Buffalo National River was established for the purpose of "preserving [it] as a free-flowing stream." 16 U.S.C. § 460m-8. And, as noted above, the WSRA and the Buffalo National River Enabling Act use precisely the same formulation with regard to restrictions on water resource projects. Congress' use of the same terminology in both statutes provides compelling evidence that both were motivated by the same concern—avoiding physical interference with the free-flowing nature of rivers—and that Congress understood "water resources projects" in both statutes to pertain to construction that would affect the free-flowing characteristics of the rivers. *See Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) ("[W]hen Congress uses the same language in two statutes having similar purposes. . . it is appropriate to presume that Congress intended that test to have the same meaning in both statutes"); *United States v. Honken*, 184 F.3d 961, 969 (8th Cir. 1999) (citing *Rutledge v. United States*, 571 U.S. 292, 299-300 (1977) for proposition that "where Congress used same phrase in other statutes, the same meaning is presumed in the statute under examination.").[44]

Consistent with the statutory purpose of preserving listed rivers in a free-flowing condition, the Interagency Wild and Scenic Rivers Coordinating Council, which is comprised of those agencies tasked with managing Wild and Scenic Rivers, including the National Park Service, defines "water resources projects" in a manner that contemplates structures that physically interfere with the river's free-flowing characteristics:

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sewage treatment facilities, on listed rivers. *See* H.R. Rep. No. 1623 at 40 (1968). In addition, courts generally do not base findings of legislative intent on statements by those who are not members of Congress. *See Circuit City Stores v. Adam*s, 532 U.S. 105, 120 (2001).

[44] Where Congress has provided a statutory definition of "water resources project," it is clear that Congress understands the phrase to involve diversions or impoundments that physically impact the free-flow of water. The Water Resources Development Act of 2000, for example, provides that "[t]he term 'water resources project' means a project for navigation, a project for flood control, a project for hurricane and storm reduction, a project for emergency streambank and shore protection, a project for ecosystem restoration and protection, and a water resources project of any other type carried out by the Corps of Engineers." Pub L. 106-541, 114 Stat, 2572, 2595 (2000). It can be presumed, absent explicit evidence to the contrary, that in using a phrase as unique and explicit as "water resources project" Congress intended that phrase to have the same meaning across the various statutes. *See Smith v. City of Jackson*, 544 U.S. at 233.

> "*Water Resources Projects:* Any dam, water conduit, reservoir, powerhouse, transmission line, or other project works under the Federal Power Act (FPA), or other construction of development which would affect the free-flowing characteristics of [the river]. In addition to projects licensed by the FERC, water resources projects may include dams; water diversion projects; fisheries habitat and watershed restoration/enhancement projects; bridges and other roadway construction/ reconstruction projects; bank stabilization projects; channelization projects; levee construction; recreation facilities such as boat ramps and fishing piers and activities that require a 404 permit from the [Corps of Engineers]."

See Interagency Wild & Scenic Rivers Council, Wild & Scenic Rivers Act: Section 7, *Technical Report of the Interagency Wild and Scenic Rivers Coordinating Council* (2004) at 3-4.[45]

Finally, the sole judicial opinion to consider the question of what constitutes a "water resources project" under the WSRA focused on whether the project would physically affect river flow, and upheld the National Park Service's interpretation of the phrase as "any type of construction which would result in any change in the *free-flowing characteristics* of a particular river." *Sierra Club North Star Chap.*, 1 F. Supp. 2d at 978 (emphasis added). In that case, the Minnesota Department of Transportation proposed to construct a bridge which would have placed piers on the bed of the St. Croix river. *Id.* at 974. The State claimed that the bridge was not a water resources project. The National Park Service, relying on an opinion by the Department of Interior Solicitor's Office, asserted that bridges that "involve construction activity in the bed or on the banks of" the river, and thus need a Corps of Engineers' dredge and fill permit, are "water resource projects," while bridges that do not require a dredge and fill permit and do not change the river's free-flowing characteristics are not "water resources projects." *Id.* at 979. Noting that the principle purpose of the WSRA was to preserve rivers in "free-flowing condition . . . without impoundment, diversion, straightening, rip-rapping, or other modification of the waterway," *id. at* 975 (quoting 16 U.S.C. § 1271, 1286(a)), the court found the Park Service's interpretation to be reasonable, *id.* at 976. Relying on the Park Service's interpretation, the court concluded that because the proposed bridge would place piers on the stream bed and

[45] Available at http://www.rivers.gov/publications.php, (Search "Council White Papers," then follow hyperlink "The Wild & Scenic Rivers Act: Section 7").

banks, it would physically impact the river's free-flowing condition, and was therefore a water resources project.

These varied authorities all consistently identify "water resources projects" as those—like dams, water conduits, and diversions—which would affect the free-flowing characteristics of a listed river. Under this uniform understanding, the C&H facility simply cannot be reasonably construed as a "water resources project." The farm is located approximately six miles from the Buffalo River, and in no manner does it impound, divert, straighten or in other way modify that waterway. Because the C&H facility is not a water resources project under the Buffalo National River Enabling Act, neither the SBA nor FSA violated that Act by not conferring with the National Park Service before issuing the loan guaranties challenged in this litigation.[46]

1. FSA complied with its WSRA regulations

Plaintiffs assert that in addition to violating the duty to confer with the National Park Service under the Buffalo River Enabling Act, the FSA violated its own regulations governing consultation for rivers on the Park Service's National Inventory of Wild and Scenic Rivers. Pl. Br. at 41. To the contrary, FSA complied with its regulations.

The FSA has separate and specific regulations which obligate the Agency to confer with the National Park Service when considering applications for financial assistance for projects near a listed Wild and Scenic River. *See* 7 C.F.R. pt. 1940, subpt. G, Exh. E. Under the FSA regulations, the FSA is to consult with the National Park Service on applications for water resources projects as well as other applications near listed rivers if the proposal: "(i) would be located within one quarter mile of the banks of the river, (ii) involves discharging water to the river via a point source, or (iii) would be visible from the river." *Id.*

[46] Plaintiffs note that the FSA's regulations for the WSRA adopt a definition of "water resource project" that is broader than that used by the Interagency Coordinating Council. Pl. Br. at 40. FSA's definition, of course, has no bearing on the SBA's compliance with the Buffalo National River Enabling Act. To the extent it bears on the FSA's compliance with the *Buffalo National River Enabling Act*, it is addressed separately below, where we explain that under the FSA's regulations there was no obligation to consult on the C&H Hog Farm because the facility does not discharge to the Buffalo River.

Plaintiffs argue that the FSA was required to consult under its regulations because the C&H facility is a point source that involves discharge to the river. Pl. Br. at 41-42.[47] This claim fails. First, the C&H is not designed to discharge water or pollutants. As noted above, ADEQ's CAFO General Permit contains robust design controls to insure that waste will not be discharged from the C&H facility. The only circumstance under which any discharge is allowed from the facility is when a major and unusual rainfall event causes accidental overflow from holding ponds. *See* FSA-736. Such an event is exceedingly unlikely: the facility is engineered to be able to contain the maximum amount of process water and the rain from a once-in-25 year and 24 hour storm event. *Id.* Moreover, even if a discharge at the facility does occur, it would not discharge into the Buffalo River. The storage ponds at the C&H facility are at least 2,000 feet from Big Creek, *see* FSA-160, and approximately six miles from the Buffalo River. Accordingly, FSA had no obligation under its regulations to consult with the National Park Service prior to issuing the challenged loan guaranty.

VI. CONCLUSION

For the reasons set forth above, Defendants respectfully request that this Court deny Plaintiffs' motion for summary judgment and grant Defendants' motion for summary judgment.

Respectfully submitted this 28th day of April, 2014.

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[47] Although Plaintiffs make no claim to the contrary, the C&H facility clearly does not trigger the FSA's other two criteria for consultation under its regulations, as the facility is more than one quarter mile from the banks of the Buffalo River and is not visible from that river.

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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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