

**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.)

Civil No. 4:13-cv-0450 DPM

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-)
SWEET¹, 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.)

**DEFENDANTS’ RESPONSE TO PLAINTIFFS’ STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE DISPUTE**

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

Pursuant to Local Rule 56.1(b), Federal Defendants hereby submit their response to Plaintiffs' statement of undisputed material facts. ECF No. 33-1. Although the local rules contemplate submission of a statement admitting those facts that are not disputed and denying those facts that are disputed, Defendants respectfully submit, for the reasons explained below, that there are no material facts in dispute in this case.

It is well-established that, in cases such as this one—where Plaintiffs seek judicial review of an agency decision under the Administrative Procedure Act “(APA)”, 5 U.S.C. § 551 *et seq.*—the scope of that review is limited to the administrative record that was before the agency at the time the decision was made. *See, e.g., Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985); *Voyageurs Nat'l Park Ass'n v. Norton*, 381 F.3d 759 (8th Cir. 2004).

In considering such cases, the district court functions as a reviewing court; it does not act as a fact-finder. *Florida Power & Light Co.*, 470 U.S. at 744; *Sierra Club v. Robertson*, 784 F. Supp. 593 (W.D. Ark. 1991) (“In such a suit the district court is a reviewing court, like [the appellate] court; it does not take evidence.”). Because the Court need not “find” underlying facts, and all the factual matters are set forth in the administrative record, there are no “disputed” facts in an APA action of a nature that would preclude adjudication of this matter on summary judgment. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Lujan v. National Wildlife Federation*, 497 U.S. 871, 883 (1990).

Without waiving the foregoing objection, Federal Defendants respond as follows to Plaintiffs' statement of material facts:

1. One hundred-thirty five miles of the Buffalo River - the Buffalo National River — is a national park unit administered by the National Park Service. Answer to Amended Complaint ¶¶ 2, 23, ECF No. 20 (“Ans.”).

Response: Not disputed.

2. The entire length of the 150-mile Buffalo River is listed on the Nationwide Rivers Inventory of rivers that potentially qualify as wild, scenic, or recreational rivers. Ans. ¶ 25.

Response: Not disputed.

3. Four species protected under the Endangered Species Act inhabit the Buffalo River watershed: the endangered Gray Bat, the endangered Indiana Bat, the endangered snuffbox mussel, and the threatened rabbitsfoot mussel. Ans. ¶ 69.

Response: Defendants do not dispute that the Gray bat and the Indiana bat are listed as endangered under the Endangered Species Act and inhabit the Buffalo River watershed. Defendants do not dispute that the Snuffbox mussel is listed as endangered under the Endangered Species Act. The United States Fish and Wildlife Service's listing decision states "the Snuffbox mussel is found in the Buffalo River" but further provides that the only known population is "in the lower river in Marion County, and its viability is unknown." 77 Fed. Reg. 8,632, 8,649 (Feb. 14, 2012). Defendants do not dispute that the Rabbitsfoot mussel is listed as threatened under the Endangered Species Act, but note that "few-to-no live individual" of the species have been found in the Buffalo River in the past ten years. FSA-861 to FSA-862.

4. The U.S. Fish and Wildlife Service discussed the sensitivity of the karst in the Buffalo River watershed in a July 5, 2012, letter in the FSA administrative record. FSA-845 to 848.

Response: Defendants do not dispute that a FWS letter dated July 5, 2012 is included in the administrative record. FSA-845 to FSA-848. Defendants dispute Plaintiffs' characterization of the content of the letter and aver that the letter includes a list of general recommended precautionary measures to be taken to avoid karst features. FSA-846 to FSA-847.

5. On November 16, 2012, the Small Business Administration ("SBA") authorized a guarantee for 75 percent of a \$2,318,200 loan to assist C&H Hog Farms, Inc. ("C&H") in purchasing land and constructing buildings for its operation. P-17 to 20, 1188.

Response: Defendants do not dispute that on November 16, 2012, SBA approved a loan guarantee in the amount of 75 percent of a \$2,318,200 loan made by Farm Credit Services to C&H Hog Farms for the purchase of land and the construction of the C&H facility.

6. On December 17, 2012, the U.S. Department of Agriculture's Farm Service Agency ("FSA") approved a 90 percent guarantee for a \$1,302,000 farm ownership loan to C&H for the purchase of land and construction of C&H's operation. FSA-1114 to 1116; Ans. ¶ 98.

Response: Defendants do not dispute that on December 17, 2012, the FSA approved a loan guarantee in the amount of 90 percent of a \$1,302,000 farm ownership loan made by Farm Credit Services to C&H Hog Farm for the purchase of land and the construction of the C&H facility.

7. C&H is located in Newton County, Arkansas, approximately six stream miles from the Buffalo River along Big Creek, a tributary of the Buffalo River. Ans. ¶ 71.

Response: Defendants do not dispute that the C&H facility is located in Newton County approximately six stream miles from the Buffalo River, in the vicinity of Big Creek, a tributary to the Buffalo River.

8. C&H will be the first facility classified as a "Large Concentrated Animal Feeding Operation ("CAFO")" anywhere in the Buffalo River watershed. Ans. ¶ 3.

Response: Defendants do not dispute that the C&H facility is the first facility in the Buffalo River watershed to be classified as a "Large Concentrated Animal Feeding Operation ("CAFO")" under the Arkansas Department of Environmental Quality's ("ADEQ") CAFO General Permit.

9. C&H is operating under a state permit that authorizes it to discharge effluent to receiving waters. FSA-728 to 730.

Response: Defendants do not dispute that the ADEQ CAFO General Permit allows discharge under extremely narrow circumstances. FSA-736.

10. C&H confines 6,503 swine, which will generate waste amounting to more than 92,000 pounds of nitrogen and more than 31,000 pounds of phosphorus each year. Ans. ¶77.

Response: Defendants do not dispute that C&H is authorized to confine up to 6,503 swine and that the annual waste nutrient levels produced by the facility were estimated to be 31,091 pounds of phosphorus and 92,611 pounds of nitrogen. FSA-241.

11. C&H handles this waste by collecting it in two open-air storage ponds, Ans. ¶ 3, then spreading the waste on 17 fields, or “approximately 630.7 acres” of land in the surrounding area. P-807, 863; FSA-729.

Response: Defendants do not dispute that waste is collected in two open-air holding ponds and then applied to fertilize land. Defendants do not dispute that C&H has authorization to use 17 fields comprising approximately 630 acres for land application of waste.

12. Testing by engineering consultants indicated that one storage pond has a seepage rate of approximately 3,448 gallons per acre per day and the other storage pond, a seepage rate of approximately 4,064 gallons per acre per day. P-731.

Response: Not disputed.

13. Nine of C&H’s waste application fields are located along Big Creek. Ans. ¶81.

Response: Defendants do not dispute that nine waste application fields are in the vicinity of Big Creek, and note that the position of the fields relative to the Creek is indicated on maps in the administrative record. *See, e.g.*, FSA-427. Defendants also note that Arkansas’s CAFO General Permit and C&H’s Nutrient Management Plan require a 100 foot buffer zone of grass and trees between areas of application and the Creek.

14. USDA Erosion Calculation Records indicate that seven of C&H’s waste application fields are “occasionally flooded.” P-840 to 855.

Response: Defendants dispute Plaintiffs’ characterization of the cited soil records (P-840 to P-855). The cited records indicate that fields 3, 5, 6, 7, 9, 12 and 16 include soil types categorized as susceptible to occasional flooding, but deny that the cited records show that the fields actually flood beyond the 100 foot buffer zone.

15. C&H’s Nutrient Management Plan (“NMP”) is incorporated into C&H’s permit, FSA-730, and is required to comply with the Arkansas Phosphorus Index, FSA-739, P-817, 818.

Response: Not disputed.

16. The NMP contains no Phosphorus Index assessment for four of the five fields (Fields 5, 6, 7, and 9) on which C&H plans to dispose of a majority of its swine waste. P-831 (missing P Index Range for four fields); FSA-248, 249; See, Ans. ¶ 84.

Response: Defendants do not dispute that the Nutrient Management Plan (“NMP”) included in the FSA’s record does not include a Phosphorus Index assessment for field 5, 6, 7 and 9. Defendants dispute the characterization that C&H plans to dispose of a majority of its waste on those fields. While the NMP contains projected application rates, before waste is applied rates must be adjusted to match soil and waste nutrient levels. FSA-353, FSA-378 to FSA-381.

Defendants note that even if fields 5, 6, 7 and 9 are excluded from consideration, the CNMP shows adequate acreage for land application of waste generated by the facility. 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) for land application per year, FSA-247. C&H thus needs approximately 251 acres for land application of waste ($14,213/56.6 = 251$). Fields 1, 3, 8, 10, 12, 15, 16, and 17 have a Phosphorus Index Range of “Medium” and can thus accept application of phosphorus at full rate of plant uptake. See FSA-249 (fields 1, 3, 8 and 10), FSA-253 (fields 12, 15, 16 and 17). These fields provide a total of 331.97 acres available for land application of waste. See FSA-248 (fields 1, 3, 8 and 10), FSA-253 (fields 12, 15, 16 and 17).

17. The NMP includes Soil Analysis Reports prepared by the University of Arkansas’s Division of Agriculture, which indicate that 15 of C&H’s 17 waste application fields already are at “optimum” or “above optimum” levels of phosphorus. P-885 to 902.

Response: Defendants do not dispute that the University of Arkansas’ Division of Agriculture soil reports in the record indicate that 15 of the 17 land application fields show “optimum” or “above optimum” levels of phosphorus. Defendants do dispute Plaintiffs’ characterization that these reports mean that phosphorus cannot be applied to these fields. A rating of optimum or above optimum means that no additional phosphorus is *necessary* for optimum plant growth. If phosphorus is added at the rate at which plants can uptake the

phosphorus, the soil phosphorus levels will remain unchanged. If phosphorus is added at a rate lower than the plant uptake rate, the soil levels of phosphorus will decline over time as phosphorus in the soil is used by growing plants.

18. The University of Arkansas's Division of Agriculture recommends against additional phosphorus application on these 15 fields. P-885 to 902.

Response: As noted above, Defendants dispute the characterization of the soil reports as recommending against addition of phosphorus.

19. SBA did not consult with the National Park Service prior to approving its loan guarantee. Ans. ¶ 96.

Response: Not disputed.

20. SBA did not undertake any environmental review pursuant to the National Environmental Policy Act in approving its loan guarantee. See, Ans. ¶¶ 95, 139.

Response: Not disputed.

21. FSA does not identify SBA as a cooperating agency in its Environmental Assessment ("EA"). FSA-1033.

Response: Not disputed.

22. SBA did not consult with the U.S. Fish and Wildlife Service about the impacts of its action on species listed under the Endangered Species Act. Ans. ¶ 97.

Response: Not disputed.

23. FSA did not consult with the National Park Service prior to approving its loan guarantee. FSA-1 103 to 1113.

Response: Not disputed.

24. FSA prepared a Class II EA, FSA-1032 to 1043, and issued a Finding of No Significant Impact ("FONSI") dated August 24, 2012, prior to approving its loan guarantee. See, FSA-1029 to 1030.

Response: FSA does not dispute that it prepared a Class II EA and issued a Finding of No Significant Impact ("FONSI") dated August 24, 2012, prior to approving its loan guaranty.

Defendants note that the EA incorporates pages in the administrative record beyond those cited by Plaintiffs in paragraph 24.

25. The notices of availability of the draft EA and of the FONSI were published each for three days only in the Arkansas Democrat Gazette, a state publication based in Little Rock, Arkansas. *See*, FSA-101 1, 1031; Ans. ¶ 133.

Response: Defendants do not dispute that it held two separate comment periods, one for the draft EA and for the final EA and FONSI. Notices of each comment period were published for three consecutive days in the Arkansas Democrat-Gazette which is based in Little Rock, Arkansas and distributed state-wide.

26. The FONSI was made available for comment for 15 days after the day the FONSI was signed and dated. FSA-1030, 1031.

Response: Not disputed.

27. The EA does not identify the Mount Judea school that is located 0.7 miles from C&H. Ans. ¶ 89; *See*, FSA-1032 to 1043.

Response: Defendants dispute Plaintiffs' characterization. Documents included in the record for the EA identify the Mt. Judea Elementary School as the school closest to the facility. FSA-141. Although the distance to the school is misstated, the record for the EA also contains numerous maps and other descriptions of the distance between the facility and the community of Mt. Judea where the school is located. *See* FSA-140, FSA-282, FSA-284, FSA-370, FSA-972, FSA-919, FSA-942, P-864.

28. The EA does not identify the Buffalo River. *See*, FSA-1032 to 1043.

Response: Defendants dispute Plaintiffs' characterization. A map in the record for the EA identifies the Buffalo River in relationship to the C&H facility. FSA-1003.

29. The EA does not identify any state-designated Extraordinary Resource Water. *See*, FSA-1032 to 1043.

Response: Not disputed.

30. The EA does not consider any action alternatives to the proposed action. FSA 1036-37.

Response: Defendants dispute Plaintiffs' characterization of the EA, and contend that the FSA appropriately considered alternatives.

31. The EA does not identify any mitigation measures. *Id.* at 1040.

Response: Defendants dispute Plaintiffs' characterization of the EA, and contend that the FSA appropriately considered mitigation.

32. The U.S. Fish and Wildlife Service has not concurred in an "effect determination" about the impacts of the proposed C&H construction on species protected by the Endangered Species Act. FSA-843, 848.

Response: Not disputed.

33. The FSA's administrative record reflects no "effect determination" made by FSA, apart from the assertion in its EA that FSA received "clearance" from Fish and Wildlife Service. *See*, FSA-1038, 1043.

Response: Defendants dispute Plaintiffs' characterization of the administrative record, and contend that it supports a finding that the issuance of a loan guaranty to Farm Credit Services for the loan to C&H had no effect on species listed under the Endangered Species Act.

Respectfully submitted this 28th day of April, 2014.

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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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