IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

BUFFALO RIVER WATERSHED ALLIANCE, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF AGRICULTURE, et al., Defendants,	Civil Action No. 4:13-CV-450 DPM

PLAINTIFFS' REPLY IN SUPPORT OF
THEIR MOTION FOR SUMMARY JUDGMENT AND
OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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GLOSSARY OF ABBREVIATIONS

Plaintiffs cite to the following items using the abbreviations described below.

ADEQ	Arkansas Department of Environmental Quality
APA	Administrative Procedure Act
CAFO	Concentrated Animal Feeding Operation
CEQ	Council on Environmental Quality
EA	Environmental Assessment
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FONSI	Finding of No Significant Impact
FSA	Farm Service Agency
FWS	U.S. Fish and Wildlife Service
NEPA	National Environmental Policy Act
NMP	Nutrient Management Plan
NOI	C&H's Notice of Intent for coverage under the Arkansas General Permit
NPDES	National Pollution Discharge Elimination System
SBA	Small Business Administration
SOP	Standard Operating Procedure
USDA	U.S. Department of Agriculture

INTRODUCTION

The thrust of the government's defense is a disavowal of all federal responsibility. Despite providing financial assistance to support 97 percent of the loans required for C&H to construct and operate its 6,500-swine concentrated animal feeding operation ("CAFO") – loans totaling more than $3.6 million dollars that C&H was unable to obtain elsewhere – Defendants Farm Service Agency ("FSA") and the Small Business Administration ("SBA") attempt to portray their role as tangential. Ignoring the plain language of their governing statutes and regulations, which give the agencies substantial discretion and control over whether and on what basis to provide loan guarantees, Defendants disclaim any responsibility and any ability to consider the impacts of the federal government's substantial financial assistance. Instead, Defendants point fingers – at the state regulatory agency, at C&H, and at the lender – to distract this Court from the obvious insufficiency of Defendants' own actions.

Defendants' undue focus on the state's permitting regime and on third parties does not excuse Defendants from complying with the procedural and substantive obligations set forth in the law. Likewise, their failure to notify and engage the affected public in the first instance should not release the agencies from a duty to comply with the law after the public discovers the truth. The record reflects that in approving the more than $3.6 million guaranteed loans for the construction of C&H, the agencies – when they did not simply ignore the law entirely – made only the most perfunctory and slipshod attempts to comply. The result is the operation of a 6,500-swine CAFO, the first ever Large CAFO,[1] in the watershed of the beloved Buffalo National River and a state-designated Extraordinary Resource Water, situated in a karst basin

[1] A "Large CAFO" is defined under Environmental Protection Agency regulations to include an animal feeding operation that confines "2,500 swine each weighing 55 pounds or more." 40 C.F.R. § 122.23(b)(4)(iv). C&H confines 2,503 swine over 55 pounds and 4,000 swine under 55 pounds. P-632.

known for rapid underground drainage networks, without notification to the affected community or to the National Park Service and without any reasoned evaluation of the project's impacts.

This Court should not countenance Defendants' egregious failures to heed the dictates of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4371 ("NEPA"); the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-44 ("ESA"); the Buffalo National River Enabling Act, 16 U.S.C. §§ 460m-8 to 460m-14; and regulations promulgated by the U.S. Department of Agriculture ("USDA"), 7 C.F.R. Pt. 1940, Subpt. G. Defendants are empowered to exercise continuing control over the guaranteed loans they provided and can yet take steps to comply with the law and address the harms they thoughtlessly enabled. Accordingly, Plaintiffs request that this Court enter summary judgment in Plaintiffs' favor; deny Defendants' cross-motion for summary judgment; find that FSA's Environmental Assessment ("EA") and Finding of No Significant Impact ("FONSI") are contrary to law and that Defendants failed to comply with NEPA, the ESA, the Buffalo National River Enabling Act, and their own regulations; enjoin the guarantees issued by Defendants; and remand the matter to Defendants for an environmental review and decision in compliance with Defendants' statutory and regulatory obligations.

LEGAL BACKGROUND

I. DEFENDANTS HAVE DISCRETION AND CONTROL OVER WHETHER AND ON WHAT BASIS TO PROVIDE LOAN GUARANTEES

A. SBA's Guaranteed Loan

Pursuant to its authority under Section 7(a) of the Small Business Act, 15 U.S.C. § 636(a), SBA authorized a "7(a) Guaranteed Loan" of $2,318,200, with a 75 percent government guarantee, to assist C&H. *See* P-17 to P-29 (SBA Authorization of 7(a) Guaranteed Loan for C&H Hog Farms, Inc.). Loans made under Section 7(a) of the Small Business Act, referred to as "7(a) loans," "provide financing for general business purposes" and may be one of three types:

> (i) A direct loan by SBA;
> (ii) An immediate participation loan by a Lender and SBA; or
> (iii) A guaranteed loan (deferred participation) by which SBA guarantees a portion of a loan made by a Lender.

13 C.F.R. § 120.2(a). A guaranteed, or "deferred participation," loan

> is initiated by a Lender agreeing to make an SBA guaranteed loan to a small business and applying to SBA for SBA's guarantee under a blanket guarantee agreement (participation agreement) between SBA and the Lender. If SBA agrees to guarantee (authorizes) a portion of the loan, the Lender funds and services the loan.

Id. SBA's commitment to guarantee a portion of the loan, in other words, is what makes it possible for a lender to make a loan to a borrower. Like a direct loan, a guaranteed loan is considered "financing[]" under Section 7(a), but rather than being made directly, a guaranteed loan is made "in cooperation with banks or other financial institutions through agreements to participate on an immediate or deferred (guaranteed) basis." 15 U.S.C. § 636(a). SBA regulations with respect to direct loans apply with equal force to guaranteed loans. For instance, SBA's "Policies Applying to All Business Loans," 13 C.F.R. Subpt. A, applies to all "financial assistance to small businesses under [SBA's] general business loan programs ("7(a) loans") authorized by section 7(a) of the Small Business Act." 13 C.F.R. § 120.1 (making no exceptions for guaranteed loans); *see also* 13 C.F.R. Subpt. B (setting forth "Policies Specific to 7(a) Loans" including loan and guarantee amounts and fees for guaranteed loans).

SBA's financial assistance under Section 7(a) of the Small Business Act is not ministerial. *See* 15 U.S.C. § 636(a) (authorizing SBA, but nowhere requiring or wholly removing the agency's discretion, to provide financial assistance); *see also* 13 C.F.R. § 120.192 (explaining what happens when a loan application is approved or denied). SBA considers a number of criteria in determining whether to grant a 7(a) loan. *See generally* 13 C.F.R. Pt. 120, Subpts. A-B (criteria for "All Business Loans" and "7(a) loans," respectively). SBA also is

empowered to condition the terms of its 7(a) loans. *See id.*; 13 C.F.R. § 120.160 (identifying the loan conditions "normally required by SBA for all business loans"); *id.* § 120.10 (defining an "[a]uthorization" from SBA as "SBA's written agreement providing *the terms and conditions* under which SBA will make or guarantee business loans" (emphasis added)). SBA's enabling statute empowers the agency to "*take any and all actions*" when it "determines such actions are necessary or desirable in making, servicing, compromising, modifying, liquidating, or otherwise dealing with or realizing on loans made under the provisions of this chapter." 15 U.S.C. § 634(b)(7) (emphasis added). SBA can require borrowers to use loan proceeds for certain specified purposes, for instance, as "prescribed in each loan's Authorization." 13 C.F.R. § 120.120. Under its broad authority and discretion, SBA imposes loan conditions as diverse as prohibitions on the use of lead-based paint for home construction loans and verifications of non-delinquency of child support payments. *See id.* §§ 120.171, 120.173.

B. FSA's Guaranteed Farm Ownership Loan

FSA's financial assistance to C&H in the form of a guarantee for 90 percent of a $1,302,000 farm ownership loan was made pursuant to 7 U.S.C. Ch. 50, entitled "Agricultural Credit." *See* 7 U.S.C. §§ 1921-1936a; *id.* Ch. 50, Subch. I. The agency's provision of financial assistance under this chapter is not a ministerial act. *See generally* 7 U.S.C. Ch. 50 (authorizing USDA, but nowhere requiring or wholly removing the agency's discretion, to provide financial assistance).

USDA regulations implementing "Farm Loan Programs" and "Guaranteed Farm Loans," in particular, make clear that the agency has discretion to consider environmental and other factors in choosing to provide agricultural credit and may also place conditions on the financial assistance it provides. *See generally* 7 C.F.R. Pts. 761-62. An application for a guaranteed farm

loan "will not be considered complete until all information required to make an approval decision, *including the information for an environmental review*, is received by the Agency." 7 C.F.R. § 762.130 (emphasis added). FSA's "determination of whether an environmental problem exists" in the issuance of a guaranteed farm loan is to be based on:

> (1) The information supplied with the application;
> (2) The Agency Official's personal knowledge of the operation;
> (3) Environmental resources available to the Agency including, but not limited to, documents, third parties, and governmental agencies;
> (4) A visit to the farm operation when the available information is insufficient to make a determination;
> (5) Other information supplied by the lender or applicant upon Agency request. If necessary, information not supplied with the application will be requested by the Agency.

Id. § 762.128(b).

Indeed, FSA is not only authorized but *required* to consider the environmental impacts of the action for which it is considering financial assistance and to incorporate appropriate mitigation measures into its financial assistance to lessen potential adverse impacts. USDA regulations governing farm loans specify that "[t]he requirements found in part 1940, subpart G, of this title must be met for guaranteed [farm ownership loans]." 7 C.F.R. § 762.128(a); *see also id.* § 761.2(a). Subpart G sets forth USDA's "Environmental Program," which is "designed to integrate the requirements of NEPA with other planning and environmental review procedures required by law," including the ESA. *Id*. § 1940.301(c); *see* Pls.' Mem. of Law in Supp. of Their Mot. for Summ. J. at 16-19, ECF No. 33-2 ("Pls.' Mem.") (describing the Subpart G regulations). Under these regulations, FSA must prepare a Class II EA when it is considering "[f]inancial assistance for a livestock-holding facility or feedlot located in a sparsely populated farming area having a capacity as large or larger than . . . 2,500 swine." 7 C.F.R. § 1940.312(c)(9). In completing the EA, "consideration must be given to all potential impacts

associated with the construction of the project, its operation and maintenance, the operation of all identified primary beneficiaries, and the attainment of the project's major objectives . . . ."

7 C.F.R. Pt. 1940, Subpt. G, Ex. H ¶ 1. The regulations require that "throughout the [EA] process," FSA consider "incorporating mechanisms into the proposed action for reducing, mitigating, or avoiding adverse impacts." *Id.* § 1940.318(g); *see also id.* § 1940.303(d). The mitigation measures ultimately decided on "must be documented in the [EA] . . . and placed in the offer of financial assistance as special conditions . . . ." *Id.* § 1940.318(g); *see also id.* Pt. 1940, Subpt. G, Ex. H, XIX.

II. DEFENDANTS ARE EMPOWERED TO TAKE ACTION RELATED TO LOANS THEY HAVE GUARANTEED

USDA is authorized to exercise continuing supervision of a borrower's operations "[i]n connection with loans made *or insured*" under 7 C.F.R. Ch. 50. 7 U.S.C. § 1983 (emphasis added). In doing so, USDA's governing statute specifically states that the Secretary of Agriculture "shall require . . . such provision for *supervision of the borrower's operations* as the Secretary shall deem necessary to achieve the objectives of the loan and to protect the interests of the United States." *Id.* § 1983(4). The broad language in SBA's enabling statute authorizes similarly continuing discretion, as SBA is empowered to "take any and all actions" when it "determines such actions are necessary or desirable in making, servicing, compromising, *modifying*, liquidating, *or otherwise dealing with* or realizing on loans made under the provisions of this chapter." 15 U.S.C. § 634(b)(7) (emphases added).[2]

USDA regulations further make clear that even after FSA issues a guaranteed farm loan, the agency may play a role in monitoring and supervising the action it financially assisted. *See* 7

[2] As explained in the preceding section, the reference to loans includes 7(a) guaranteed loans.

C.F.R. § 762.130(d)(2) ("The lender must notify the Agency of any scheduled inspections during construction and after the guarantee has been issued. [FSA] may attend these field inspections."). FSA staff "who normally have responsibility for the postapproval inspection and monitoring of approved projects will ensure that those measures which were identified in the preapproval stage and required to be undertaken in order to reduce adverse environmental impacts are effectively implemented." *Id*. § 1940.330(a); *see also id.* § 1940.330(c) ("The preparer [of the action's environmental review document] will directly monitor actions containing difficult or complex environmental special conditions.").

III. DEFENDANTS PROVIDE LOAN GUARANTEES ONLY TO BORROWERS WHO CANNOT OTHERWISE OBTAIN THE CREDIT THEY DESIRE

Defendants do not contest that, by law, they can provide loan guarantees only to entities that are unable to obtain the credit they desire elsewhere. *See* Defs.' Mem. of Law in Supp. of Their Mot. for Summ. J. and in Opp'n to Pls.' Mot. for Summ. J. at 15, ECF No. 38 ("Defs.' Mem."). The requirement that the federal government financially assist only those entities that are unable to obtain credit commercially is enshrined in the statutes governing both SBA and FSA. Section 7(a) of the Small Business Act unequivocally states that: "No financial assistance shall be extended pursuant to this [Section 7(a) of the Small Business Act] if the applicant can obtain credit elsewhere." 15 U.S.C. § 636(a)(1)(A); *see also* 13 C.F.R. § 120.101. The statute governing the USDA's agricultural credit program similarly requires that, "[i]n connection with loans made or insured under this chapter," the Secretary of Agriculture "shall determine[] that [the applicant] is unable to obtain sufficient credit elsewhere to finance his actual needs at reasonable rates and terms, taking into consideration prevailing private and cooperative rates and terms in the community in or near which the applicant resides for loans for similar purposes and periods of time." 7 U.S.C. § 1983(1); *see also* 7 C.F.R. § 762.120(h).

ARGUMENT

I. DEFENDANTS HAVE DISCRETION AND CONTROL OVER THE ENVIRONMENTAL IMPACTS OF THE FINANCIAL ASSISTANCE THEY PROVIDE

A central theme of the federal government's defense, which goes hand in hand with an effort to divert the Court's attention away from Defendants to C&H, is the claim that Defendants have no discretion or control over C&H's actions and impacts. This claim pervades Defendants' brief and is specifically raised in Defendants' arguments concerning SBA's compliance with NEPA and the ESA and in their arguments on the redressability of Plaintiffs' claims. *See* Defs.' Mem. at 17-19, 24-26, 29-30. Plaintiffs set the record straight below.

As described in the Legal Background, *supra*, SBA's and FSA's governing statutes and regulations give the agencies discretion and control over whether and on what basis they provide financial assistance, and this discretion and control continues even after the agencies authorize the guarantee. Both SBA and FSA are broadly empowered to condition their financial assistance, including to minimize environmental impacts and to address the needs of threatened and endangered species. *See* Legal Background, *supra*. FSA's regulations provide insight into the type of conditions that the agencies can attach to financial assistance to address environmental impacts. The regulations direct FSA as follows:

> [T]hroughout the [Class II EA] process, consideration will be given to incorporating mechanisms into the proposed action for reducing, mitigating, or avoiding adverse impacts. Examples of such mechanisms which are commonly referred to as mitigation measures include the deletion, relocation, redesign or other modifications of the project elements; the dedication of environmentally sensitive areas which would otherwise be adversely affected by the action or its indirect impacts; soil erosion and sedimentation plans to control runoff . . . ; the establishment of vegetative buffer zones . . . ; [and] protective measures recommended by environmental and conservation agencies . . . . Mitigation measures which will be taken must be documented in the [EA] . . . and include an analysis of their environmental impacts and potential effectiveness and placed in the offer of financial assistance as special conditions . . . .

7 C.F.R. § 1940.318(g); *see also id.* § 1940.305(k) ("When necessary, the proposed activity will be modified to protect water quality standards, including designated and/or existing beneficial uses that water quality criteria are designed to protect, and meet antidegradation requirements."). FSA is thus clearly deputized with the power to influence the environmental impacts of the projects it supports through financial assistance. Although SBA regulations do not contain such detail, it is apparent from the breadth of that agency's authority to "take any and all actions" that it "determines . . . are necessary or desirable" in providing financial assistance, 15 U.S.C. § 634, that nothing prevents SBA from exercising the same level of discretion and control to minimize the environmental impacts of the projects it financially assists.

Apart from attaching conditions to their financial assistance, Defendants can also refuse to provide financial assistance. Their decisions to provide guarantee assistance are not ministerial acts. Indeed, USDA regulations specifically state, "[i]f a determination is made that the proposed action does not comply with the environmental requirements that are explained in this subpart . . . and there are no feasible alternatives . . . , modifications, or mitigation measures which could comply, *the action will be denied or disapproved.*" 7 C.F.R. § 1940.318(j) (emphasis added); *see also id.* § 1940.304(h) ("[FSA] will not provide financial assistance to any activity that would either impair a State water quality standard, including designated and/or existing beneficial uses that water quality criteria are designed to protect, or that would not meet antidegradation requirements."). In short, the extent of Defendants' discretion and control over the financial assistance they provided – from conditioning it with mitigation measures to minimize environmental impacts to denying the assistance altogether based on adverse impacts to the environment – refutes Defendants' protestations that they should be excused from

compliance with NEPA and ESA because they possess no ability to influence the impacts of C&H.

Defendants' discretion and control continues even after they have authorized financial assistance. As Defendants acknowledge, the federal money promised under these loan guarantees has not yet been expended. Defs.' Mem. at 16. The guarantees are understood as "deferred participation loans" in which the agencies agree to participate in a loan on a deferred basis and commit to making an expenditure *in the future*. *See* 15 U.S.C. § 636(a). USDA's governing statute authorizes "supervision of the borrower's operations as the Secretary shall deem necessary" – even for loans guaranteed rather than directly made by USDA. 7 U.S.C. § 1983(4). SBA too is authorized to "take any and all actions," including "modifying" and "otherwise dealing with," guaranteed loans that it makes. 15 U.S.C. § 634(b)(7).

II. FEDERAL FINANCIAL ASSISTANCE WAS NECESSARY AND ESSENTIAL TO C&H'S EXISTENCE

Defendants' authorization of guaranteed loans was indispensable for the construction and operation of C&H. Together, FSA and SBA backed 100 percent of the loans that C&H needed to construct its facility. *See* P-142 ("The cost of construction is being split between this request for SBA guaranty in the amount of $2,318,136 and FSA guaranty loan in the amount of $1,302,000."). This federal financial assistance constituted 97 percent of all the loans that C&H obtained in order to begin operations. *See id.* ("Farm Credit Services will also originate a start up operating loan in the amount of $95,000"). Defendants' federal guarantees were, moreover, a necessary condition of the lender's agreement to loan money to C&H. *See* 13 C.F.R. § 120.2(a) (lender agrees to make loan contingent on SBA's guarantee); P-96 ("Farm Credit Services has approved this line of credit *subject to guaranty*" (emphasis added)). Finally, as outlined in Section III of the Legal Background, *supra*, Defendants provide financial assistance only to

borrowers who cannot obtain the desired credit elsewhere. In short, C&H could not have constructed a 6,500-swine CAFO without Defendants' financial assistance.

III. DEFENDANTS VIOLATED NEPA

A. Defendants' Financial Assistance Is Subject to NEPA

Defendants' position on the threshold question of whether an agency action is subject to NEPA is "not entitled to the deference that courts must accord to an agency's interpretation of its governing statute." *Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1150 (D.C. Cir. 2001) ("*CART*"). This Court reviews the threshold legal question of whether an action is a "major federal action" subject to NEPA under a "reasonableness" or de novo standard of review that is more stringent than the arbitrary and capricious standard otherwise applicable to review under the Administrative Procedure Act ("APA"). *See Goos v. Interstate Commerce Comm'n*, 911 F.2d 1283, 1291-92 (8th Cir. 1990); *accord Ka Makani 'O Kohala Ohana Inc. v. Water Supply*, 295 F.3d 955, 959 (9th Cir. 2002) ("[W]here an agency has decided that a particular project does not require the preparation of an EIS, without having conducted an [EA], and we are dealing with primarily legal issues that are based upon undisputed historical facts, we review the decision under the less deferential standard of 'reasonableness'"); *see also CART*, 267 F.3d at 1151 n.7 (D.C. Cir. 2001) (noting that, in this context, the "reasonableness" standard of review "mean[s] that the court[] conduct[s] de novo review"); *Sierra Club v. Lujan*, 949 F.2d 362, 367 (10th Cir. 1991) (same).

1. USDA Regulations Require an EA for the Type of Financial Assistance FSA Provided to C&H

USDA regulations implementing NEPA specifically identify "[f]inancial assistance for a livestock-holding facility or feedlot . . . having a capacity as large or larger than . . . 2,500 swine" as a "Class II action" that is "presumed to be [a] major Federal action[]" under NEPA. 7 C.F.R.

§ 1940.312. Class II actions are deemed to have "the potential for resulting in more varied and substantial environmental impacts" and therefore require a "more detailed EA" that considers "all potential impacts associated with the construction of the project, its operation and maintenance, [and] the operation of all identified primary beneficiaries." 7 C.F.R. Pt. 1940, Subpt. G, Ex. H ¶ 1. FSA conceded its obligation to comply with NEPA when it concluded that its financial assistance to C&H "requires a Class II Environmental Assessment," *see* FSA-1037, and consequently attempted to prepare one. Defendants' invitation for the Court to find that FSA's financial assistance did *not* trigger NEPA, *see* Defs.' Mem. at 31, asks the Court to overturn the USDA regulations and to ignore the record of FSA's own acknowledged NEPA obligation. This argument is unavailing.

2. SBA's Standard Operating Procedure Sets Forth NEPA Review Procedures for the Type of Guaranteed Loan SBA Approved for C&H

FSA's guarantee for a $1,302,000 loan to C&H is subject to NEPA under USDA regulations. Yet, SBA claims that its guarantee for a $2,318,200 loan is not subject to NEPA, despite the fact that its Standard Operating Procedure ("SOP") implementing NEPA contemplates that guarantees for loans exceeding *$300,000* may require the preparation of an EA. *See* Final SBA Procedures Implementing National Environmental Policy Act, 45 Fed. Reg. 7358 (Feb. 1, 1980). Under its own SOP, SBA was at least required to determine whether to prepare an EA. It did not. Moreover, under the applicable standard of reasonableness, it was patently unreasonable for the agency not to prepare an EA for a loan guarantee in which the loan amount was more than seven times the threshold amount triggering consideration under NEPA.

SBA's SOP identifies categories of agency actions excluded from NEPA compliance, but does *not* include within these categorical exclusions loans and guarantees where the loan

proceeds for "[c]onstruction and/or purchase of land exceeds $300,000." *Id.* at 7360 ¶ 7 (noting that in these circumstances, "an environmental assessment may be required"). In Appendix 2 to the SOP, SBA spells out the procedures applicable to this particular category of SBA action. *See* Amendment to Final SBA Procedure Implementing NEPA, 45 Fed. Reg. 79,621, 79,621 (Dec. 1, 1980) ("These guidelines apply to [7(a) business loans, among others] if the use of loan proceeds . . . exceeds $300,000 for construction reconstruction and/or the acquisition of land.").

> The loan officer screening the application will make the initial evaluation of the possibility that a loan could result in a significant environmental impact if the loan is approved. Loans that are not categorically excluded will be forwarded to the district director. When the district director determines that a NEPA decision is required before the loan could be approved . . . , the loan officer will contact the applicant (the small business concern for a direct loan or the participating lender for a participation or guarantee loan) . . . .
>
> The district director, based on [environmental impact data submitted by the applicant], will have an [EA] prepared. Unless SBA makes a determination of "no significant impact," an EIS will also be prepared.

Id. at 79,621.

Defendants never cite or acknowledge Appendix 2.[3] And they reference SBA's SOP only in a footnote, dismissing it as "over 30-year[s] old." Defs.' Mem. at 23 n.18. In that footnote, Defendants cite 69 Fed. Reg. 47,971 (Aug. 6, 2004), claiming that "SBA, nearly ten years ago, concluded that NEPA analysis of individual Section 7(a) loan guaranties is not warranted." Defs.' Mem. at 23 n.18. Defendants fail to mention, though, that they cite merely a notice of proposed changes to the SOP, which notably, *were never finalized*. *See* 69 Fed. Reg. 47,971. That SBA undertook to initiate notice and comment procedures to amend the SOP in 2004, but never finalized any amendment, suggests, if nothing else, the continuing import and

[3] The online version of the SOP cited in Pls.' Mem. at 33 does not include Appendix 2, which was adopted and added to the SOP eight months after the final SOP was published. *See* 45 Fed. Reg. at 79,621 ("This amendment adds the NEPA guidelines for financial assistance applicants as appendix 2 to the basic procedures.").

legal effect of the SOP adopted in 1980. Thus, despite Defendants' attempt to evade responsibility under NEPA, SBA's SOP, as published in the Federal Register on February 1, 1980, pursuant to notice and comment procedures and amended with the addition of Appendix 2 on December 1, 1980, remains the controlling procedure promulgated by the agency to implement NEPA.[4] These procedures require SBA to take certain steps to determine whether to prepare an EA for the type of financial assistance SBA provided to C&H. Defendants do not dispute that they failed to take any of these steps.

Defendants instead attempt to deflect attention from the SOP by arguing that SBA's guaranteed loan is not a "major federal action" under NEPA. *See* Defs.' Mem. at 22-26 (arguing that SBA neither funded C&H nor exercised authority or control over it). To the contrary, the federal financial assistance to C&H, including SBA's guaranteed loan of more than $2.3 million, is a major federal action subject to NEPA review. "The touchstone of whether NEPA applies is discretion." *CART*, 267 F.3d at 1151. Because the information gathered in a NEPA review "may cause the agency to modify its proposed action in a way that lessens adverse environmental impacts," the agency must have "sufficient discretion to affect the outcome of its actions." *Id.* If, instead, "its role is merely ministerial, the information that NEPA provides can have no effect on the agency's actions, and therefore NEPA is inapplicable." *Id.*; *see also Goos*, 911 F.2d at 1296 (finding that, because an agency "has no discretion to consider the environmental effects" of an action, there was no legal control and therefore no major federal action). Here, SBA's financial assistance is not ministerial, and the agency is empowered to "take any and all actions"

[4] That the SOP was not published in the Code of Federal Regulations does not diminish its legal effect. "The CFR is 'the permanent publication of rules but publication there does not affect the validity of the rule so long as the rule was originally contained in the Federal Register.'" *United States v. S. Union Co.*, 643 F. Supp. 2d 201, 216-17 (D.R.I. 2009), *aff'd*, 630 F.3d 17 (1st Cir. 2010), *rev'd and remanded on other grounds*, 132 S. Ct. 2344 (2012) (quoting Charles Alan Wright & Charles H. Koch, Jr., 32 Federal Practice & Procedure § 8185 (2006)).

when it "determines such actions are necessary or desirable in making, servicing, compromising, modifying, liquidating, or otherwise dealing with or realizing on loans" that it makes. 15 U.S.C. § 634(b)(7). The cases cited by Defendants are therefore inapposite because they involved situations in which the federal agency had no ability to control or make decisions with respect to the non-federal activity. *See* Defs.' Mem. at 24-26.[5]

SBA's discretion over C&H through its ability to refuse guaranteed loans and its authority to condition the agency's financial assistance must be read together with SBA's concurrent duties under NEPA.[6] *See, e.g.*, 42 U.S.C. § 4332 ("direct[ing] that, to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in [NEPA]"); 40 C.F.R. § 1500.6 ("Each agency shall interpret the provisions of [NEPA] as a supplement to its existing authority and as a mandate to view traditional policies and missions in the light of the Act's

[5] Apart from an argument related to "power, authority, and control," Defendants also contend that SBA's guarantee was not "significant federal funding" and therefore cannot be a major federal action under NEPA. *See* Defs.' Mem. at 22-23. This point is irrelevant, however, because SBA is empowered to exercise control over the impacts of C&H and it is not the case, and Defendants do not contend, that the agency need provide significant federal funding *and* exercise authority and control over the project. *See id.* at 22 (presenting these two factors disjunctively). In any event, Defendants are wrong that direct funding is necessary for a major federal action. *See Mason Cnty Med. Ass'n v. Knebel*, 563 F.2d 256 (6th Cir. 1977) (Rural Electrification Administration prepared an EIS for its issuance of a loan guarantee to help finance the construction of a power plant); *Sierra Club v. Lynn*, 502 F.2d 43 (5th Cir. 1974) (Department of Housing and Urban Development ("HUD") prepared an EIS for its offer of commitment to guarantee a private bond issue for a development); *Silva v. Romney*, 473 F.2d 287 (1st Cir. 1973) (affirming an injunction against HUD pending preparation of an EIS for HUD's commitment to provide a mortgage guarantee and an interest grant for a private developer's construction of housing).

[6] For purposes of determining the threshold question of whether the financial assistance triggered NEPA, the appropriate question is whether SBA had discretion and control at the time it was considering whether to provide the assistance. Plaintiffs contend that SBA and FSA *still* exercise discretion and control over the loan guarantee, but this question arises only in the context of Defendants' mootness claim and is not relevant here.

national environmental objectives.").[7] SBA's SOP dictates that "[i]n all cases . . . where a proposed SBA action could potentially have a significant effect on the environment, an [EA] will be made and an [EIS] prepared when appropriate." 45 Fed. Reg. at 7359 ¶ 1. The SOP also specifically anticipates that guarantees for loans exceeding $300,000 for construction or land acquisition could have environmental impacts that must be reviewed under NEPA. *See id.* at 7360 ¶ 7. It does not stand to reason that SBA's procedures implementing NEPA, which were adopted only after "review by the Council [on Environmental Quality ("CEQ")] for conformity with [NEPA and CEQ's] regulations," 40 C.F.R. § 1507.3, would require the agency to undertake NEPA review when SBA cannot exercise some discretion and control over the impacts of its assistance.

Defendants' claims that "a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA" thus misses the extent to which SBA has authority to influence the environmental impacts of C&H. Defs.' Mem. at 24-26. *Department of Transportation v. Public Citizen* is inapposite because in that case, the Supreme Court found that the Federal Motor Carrier Safety Administration ("FMCSA") did not need to consider the impacts of increased cross-border operations of Mexican motor carriers under NEPA, because the agency *lacked discretion* to prevent these operations. 541 U.S. 752, 770 (2004). The increased operations were a result of the President's decision to lift a moratorium that had prohibited Mexican motor carriers from operating in the United States; and FMCSA's registration of the carriers was statutorily required if the carrier met basic requirements. *Id.* at 766. Because the agency could neither refuse to register the carriers nor countermand the

[7] *See also* 40 C.F.R. § 1500.6 ("The phrase 'to the fullest extent possible' in section 102 means that each agency of the Federal Government shall comply with that section unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible.").

President's decision to lift the moratorium, the Court concluded that the agency was not the legal cause of the environmental impacts from these motor carriers. *See id.* at 770 ("[W]here an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect."). The "particularly unyielding variation of 'but for' causation" that the Court rejected in this case was "where an agency's action is considered a cause of an environmental effect *even when the agency has no authority to prevent the effect*." *Id.* at 767 (emphasis added). This conclusion is not relevant to the present case because SBA *does* have authority to reject loan guarantee requests and to condition loan guarantees to minimize adverse impacts.

In addition to its discretion and control, SBA provided assistance constituting more than 60 percent of the total loans received by C&H, and the federal government as a whole guaranteed 97 percent of the loans necessary for C&H to begin operations. *See* P-142. FSA's concurrent guarantee for the same project is a major federal action subject to NEPA compliance. 7 C.F.R. § 1940.312. Moreover, C&H could not have obtained the loans it wanted without the federal government's involvement as a guarantor. *See* Section II, *supra*. In light of all of these facts, and the extent of SBA's discretion to condition its guaranteed loans to reach environmental impacts, SBA's argument that it is exempt from NEPA must fail.

B. SBA Ignored Its Obligations Under NEPA

It is undisputed as a factual matter that in providing a guarantee for a $2,318,200 loan to C&H, SBA did not undertake *any* environmental review pursuant to NEPA. *See* Defs.' Resp. to Pls.' Statement of Material Facts ¶¶ 20-21, ECF No. 41 ("Defs.' Resp."). Because SBA is required to undertake review procedures for the type of guaranteed loan that it provided, and

SBA flouted these procedures, the agency acted arbitrarily, capriciously, and not in accordance with the law. This Court should therefore grant summary judgment to Plaintiffs on this claim.

C. FSA Violated NEPA

The purpose of NEPA is "to ensure a fully informed and well considered [federal agency] decision, and disclosure to the public that the agency has considered environmental concerns in its decisionmaking." *Friends of the Norbeck v. U.S. Forest Serv.*, 661 F.3d 969, 973-74 (8th Cir. 2011) (citing *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.,* 435 U.S. 519, 558 (1978), and *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983)), *cert. denied*, 132 S. Ct. 1973 (2012). FSA's botched attempts to produce the Class II EA required under USDA regulations failed both of these purposes.

1. FSA Failed to Properly Notify the Public of Its Financial Assistance to C&H

FSA violated two separate regulations and its own policies governing public notice for an EA and FONSI. *See* 7 C.F.R. § 1940.331(b) and 40 C.F.R. § 1501.4(e)(2). First, USDA regulations require that notices of FONSIs for Class II actions, like the one prepared for C&H, be published in both (1) "the newspaper of general circulation in the vicinity of the proposed action" and (2) "any local or community-oriented newspapers within the proposed action's area of environmental impact." 7 C.F.R. § 1940.331(b)(1). Defendants do not dispute that FSA never published notice of the availability of its FONSI in a "local or community-oriented newspaper" within the Mount Judea or Newton County area. Defs.' Resp. ¶ 25.[8] FSA's

[8] Defendants claim that Plaintiffs "alleg[e] that . . . the notice of availability should have run in the Newton County Times." Defs.' Mem. at 42. Plaintiffs do not make this allegation. Plaintiffs identified the Newton County Times merely as an example of a local publication covering the Newton County area. *See* Pls.' Mem. at 30 n.22.

regulation required an action that Defendants concede was never taken.[9] This is the end of the story. Whether FSA could have "reasonably concluded" that it only needed to publish notice in the generally circulated Arkansas Democrat-Gazette, as Defendants frame their argument, simply is not the appropriate question. *See* Defs.' Mem. at 44 (citing no support for the proposition that an agency can violate its own regulations if it concluded that it was reasonable to do so).[10] Defendants' arguments on this point, *see id.* at 43-45, do not merit further response from Plaintiffs or any consideration from this Court.

Defendants also violated CEQ regulations implementing NEPA, which require the agency to make a FONSI available for public review for 30 days when "[t]he nature of the

[9] FSA's Handbook "contains procedures and guidelines for completing the appropriate level of environmental . . . review . . . while ensuring compliance with all applicable environmental . . . laws [and] regulations." U.S. Dep't of Agric., FSA Handbook: Environmental Quality Programs 1-EQ (Rev. 2) at 1-1 (2009), *available at* http://www.fsa.usda.gov/Internet/FSA_File/1-eq_r02_a01.pdf ("Handbook"). The Handbook specifies that FSA is to publish notice of availability of a draft Class II EA in a "local newspaper . . . for 15 calendar days." *Id.* at 3-23. Defendants tout their public notice of the draft EA as an example of the "multiple opportunities for public involvement and comment" FSA provided. *See* Defs.' Mem. at 42. Yet, FSA neither published it in a local newspaper nor published it for 15 days, as the Handbook specifies. FSA cannot pick and choose which policies, or portions of policies, with which to comply. Its disregard of the Handbook's admonition to publish in a local newspaper is further evidence of the agency's arbitrary and capricious behavior.

[10] Defendants argue that FSA could permissibly violate its regulations so long as there was no prejudice to Plaintiffs. *See* Defs.' Mem. at 44-45 (citing the standing declarations submitted by Plaintiffs' members to allege that "any defect in publication had no effect on the plaintiff groups"). The declarations submitted by Plaintiffs' members, *see* ECF Nos. 33-7 to 33-15, were submitted in support of Plaintiffs' standing, and may be considered only for that purpose – "not in order to supplement the administrative record on the merits." *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1528 (9th Cir. 1997). Prejudice is irrelevant to this Court's inquiry, but to the extent the Court considers it, Plaintiffs should have an opportunity to present evidence of such prejudice rather than be limited to the statements made by their members in support of standing. In any event, the record already contains statements from the Park Service attesting that the lack of appropriate notice denied "[t]he rights of [the Newton County] population to provide public input." FSA-1107; *see also id.* 1110-12. *See Newton Cnty. Wildlife Ass'n v. Rogers*, 141 F.3d 803, 807 (8th Cir. 1998) ("APA review of agency action is normally confined to the agency's administrative record.").

proposed action is one without precedent." 40 C.F.R. § 1501.4(e)(2). Defendants do not dispute that they failed to do this and claim only that "[t]he C&H facility is not without precedent." Defs.' Mem. at 45. The parties agree that the question of whether a proposed action is "without precedent" relates to the nature of the action's environmental impacts. *Compare* Pls.' Mem. at 32, *with* Defs.' Mem. at 46; *see also Food & Water Watch, Inc. v. U.S. Army Corps of Eng'rs*, 570 F. Supp. 2d 177, 190-91 (D. Mass. 2008) ("Because the CEQ regulations are concerned with environmental impacts, the question of whether something is 'without precedent' is limited to whether there is something unprecedented about the way a particular project will impact the environment." (citing *Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of Army*, 398 F.3d 105, 115 (1st Cir. 2005))). In attempting to answer this question, though, Defendants conveniently omit several key facts. It is undisputed that C&H is the first Large CAFO anywhere in the Buffalo River watershed. *See* Defs.' Resp. ¶ 8. It is also undisputed that the six other animal liquid waste facilities currently operating in the Buffalo River watershed confine, respectively, 400, 350, 425, 60, 112, and 300 animals. Joint Stip. ¶ 7, ECF. No. 40. By comparison, C&H confines 6,503 swine. P-632. Thus, contrary to Defendants' claim of a "prevalence of similar animal feeding operations," Defs.' Mem. at 47, C&H's size and scale – and consequently the amount of waste expected to be produced by its animals – dwarf those of any other operation currently in the Buffalo River watershed. Confining this many swine in one facility in the Buffalo River watershed, not to mention spraying the waste of 6,500 pigs on fields along a tributary to the Buffalo National River, simply has never been done before. Defendants' attempts to minimize the unprecedented environmental impacts of the Buffalo River watershed's first ever Large CAFO are therefore unavailing.

That C&H is the first and so far only facility in the state of Arkansas to operate under the state's NPDES General Permit for CAFOs, Joint Stip. ¶ 6, only adds to the unprecedented nature of the environmental impacts at issue. The Regulation No. 5 permit under which every other liquid animal waste facility in the state operates is a no-discharge permit that flatly prohibits discharge. *See* Joint Stip. ¶¶ 1, 2. By contrast, as Defendants concede, the NPDES General Permit under which C&H operates "allows discharge" under certain circumstances. *See* Defs.' Mem. at 46. Specifically, permittees "are *authorized to discharge* whenever precipitation causes an overflow of manure, litter, or process wastewater into all receiving waters," FSA-730 (emphasis added), provided that the facility is designed and operated to contain such waste "including the runoff and the direct precipitation from a 25-year, 24 hour rainfall event." FSA-736. In addition, the General Permit allows storm water from a CAFO's land application fields to wash into surface waters so long as waste is applied in accordance with an NMP. *See id.*[11]

In other words, so long as a facility is built to meet certain design standards and applies waste in compliance with its NMP, discharge of pollutants from that facility to waters is permissible. Defendants' attempt to discount the unprecedented nature of the environmental impacts of C&H's permitting under this regime by speculating that precipitation-based overflows are "extremely rare," Defs.' Mem. at 46, ignores the permitted stormwater discharges and the daily seepage from the waste storage ponds in a karst basin. In any event, the frequency at which the overflow of waste collectively generated by 6,500 pigs occurs has little to do with the unprecedented (and catastrophic) impacts when that overflow happens. The undisputed facts remain that C&H, the first ever Large CAFO in the Buffalo River watershed – more than fifteen

[11]As Plaintiffs have previously pointed out, the NMP, in the case of C&H, is deeply flawed and actually is missing Phosphorus Index assessments, a critical permit term, for four of the five fields on which C&H plans to dispose of a majority of its swine waste. *See* Pls.' Mem. at 5-7; *see also* Defs.' Resp. ¶¶ 12-18.

times larger than any other currently operating liquid animal waste facility in the watershed – also is the *only* facility in the state authorized to discharge its waste to waters. FSA's failure to publish its FONSI for 30 days as required under the CEQ regulations therefore is arbitrary, capricious, and unlawful.

2. Plaintiffs Did Not Waive Their NEPA Claims

Defendants' argument that Plaintiffs waived their NEPA claims falls under the weight of the case law. Even assuming that exhaustion is generally required,[12] in a situation as here where Plaintiffs were unaware of opportunities to comment and participate in the administrative process due to legally insufficient notice, exhaustion is not required. *See Bowen v. City of New York*, 476 U.S. 467, 482 (1986) (finding that, because plaintiffs "could not attack a policy they could not be aware existed, it would be unfair to penalize [them] for not exhausting under these circumstances") (internal quotation marks and citation omitted); *Brown v. J.B. Hunt Transp. Servs., Inc.*, 586 F.3d 1079, 1085 (8th Cir. 2009) (finding, in context of Employee Retirement Income Security Act, that where participants were not provided "notice and review" as required by statute, "aggrieved participants are not required to exhaust their administrative remedies before filing a lawsuit"); *Ecology Ctr. of La., Inc. v. Coleman*, 515 F.2d 860, 865 (5th Cir. 1975) ("If the [agency] violated the regulations . . . for notification of interested parties concerning hearings which afford opportunity for comment on the slated issues, then those parties cannot be held to have failed to exhaust their administrative remedies when they do not attend the hearing."); *Lands Council v. Vaught*, 198 F. Supp. 2d 1211, 1241 (E.D. Wash. 2002) ("A

[12] Some courts have refused to require issue exhaustion under NEPA. *See, e.g., Sierra Club v. Bosworth*, 352 F. Supp. 2d 909, 926-27 (D. Minn. 2005) (noting that "[n]either the text of NEPA nor its implementing regulations specifically require issue exhaustion"); *Vt. Pub. Interest Research Group v. U.S. Fish & Wildlife Serv.*, 247 F. Supp. 2d 495, 516 (D. Vt. 2002) (similarly finding issue exhaustion "not necessary" under NEPA).

plaintiff's failure to exhaust may be forgiven if he lacked a meaningful opportunity to challenge the agency's action during the review period. There is no meaningful opportunity to challenge an agency action when, for example, the party has inadequate notice that it will be affected by the action." (citing *Nw. Tissue Ctr. v. Shalala*, 1 F.3d 522, 530 (7th Cir.1993))).

Moreover, requiring exhaustion would not be appropriate here, where Defendants claim that they adequately considered all the concerns raised by Plaintiffs. *See* Defs.' Mem. at 34 (noting the concerns raised by Plaintiffs and claiming that "[t]he EA and the administrative record make clear that the FSA considered each of these impacts"). The exhaustion doctrine "restrains courts from ruling on objections not considered by the agency by requiring a party to exhaust its administrative remedies before pursuing judicial review." *Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 295-96 (5th Cir. 1998) (citing *Unemployment Comp. Comm'n v. Aragon*, 329 U.S. 143, 155 (1946)). When an agency was aware in reaching its final decision of the issues now raised in litigation, as Defendants claim, the agency "cannot reasonably claim that it has been denied the opportunity to consider the issue." *Id.*; *see also Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1133 (9th Cir. 2011) (noting that "an EA's flaws might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action" and refusing to require exhaustion where "the agencies had independent knowledge" of the issue (quoting *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 765 (2004)) (internal quotation marks omitted)); *Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1093 (9th Cir. 2006) (finding that "Plaintiffs have not waived their right to challenge the sufficiency of the Army's consideration" because "[t]he Army had independent knowledge of the very issue that concerns Plaintiffs in this case"); *Vt. Pub. Interest Research Grp. v. U.S. Fish*

& Wildlife Serv., 247 F. Supp. 2d 495, 516 (D. Vt. 2002) (finding exhaustion unnecessary where the agency was aware of the issue at the time it published the final EIS).

3. The EA and FONSI Are Arbitrary and Capricious

To pass muster under the arbitrary and capricious standard of review, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Friends of the Norbeck*, 661 F.3d at 976 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). As was discussed in Plaintiffs' Memorandum of Law in Support of their Motion for Summary Judgment at 21-29, ECF No. 33-2, and further reiterated below, Defendants' environmental review does not meet this standard. An EA is admittedly "concise and brief" and need not "provide detailed answers to every question." *Sierra Club v. U.S. Forest Serv.*, 46 F.3d 835, 840 (8th Cir. 1995). Nevertheless, a review of the EA, the FONSI, and FSA's administrative record fails to reveal any evidence that FSA actually examined the relevant data and any articulation of "a satisfactory explanation . . . including a rational connection between the facts found and the choice made." *Friends of the Norbeck*, 661 F.3d at 976.

In its argument, Defendants confuse and conflate the scope of review and the standard of review. *See* Defs.' Mem. at 32 n.25. Plaintiffs do not dispute that the scope of this Court's review encompasses the entire administrative record, *see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977), and that in reviewing this record, the Court applies the arbitrary and capricious standard of review inquiring whether the agency articulated a satisfactory explanation for its action. These two uncontroversial propositions do not combine to transform into license for an agency to claim that *everything in its record constitutes the agency's own reasoned*

explanation.[13] That this Court may consider all of the evidence in the record – including C&H's application for coverage under the General Permit ("Notice of Intent" or "NOI"), FSA-39 to 221, and C&H's Nutrient Management Plan ("NMP"), FSA-222 to 366 – does not absolve FSA from the basic requirement incumbent on all agencies to articulate a "rational connection between the facts found and the choice made." *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962); *see also Audubon Soc'y of Cent. Ark. v. Dailey*, 977 F.2d 428, 435 (8th Cir. 1992) (asking whether "the [EA] *make[s] a convincing case* that the impact of the [action] will be insignificant" (emphasis added)); *Choate v. U.S. Army Corps of Eng'rs*, No. 4:07-CV-01170-WRW, 2008 WL 4833113, *6 & n.85 (E.D. Ark. Nov. 5, 2008) ("An agency's decision not to prepare an EIS will be considered unreasonable if the agency failed to *supply a convincing statement of reasons* why potential effects are insignificant." (citing *Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988)) (emphasis added)). As is set forth below, FSA failed to meet this basic requirement.

[13] Defendants appear to be claiming precisely this. *See* Defs.' Mem. at 32 n. 25; *see also id.* at 34 ("The EA *and the administrative record* make clear that the FSA considered each of these impacts . . . ." (emphasis added)); *id.* at 35-36 (citing the record generally to support a claim that FSA considered certain facts).

The cases cited by Defendants do not support this claim, however. *See id.* at 32 n.25. In *Missouri Coal. for the Env't v. U.S. Army Corps of Eng'rs*, the plaintiffs argued that the entire administrative record was confined to the six-page decision document, and excluded the EA and ten volumes of other documents compiled during the agency's NEPA review. 866 F2d. 1025, 1030-31 (8th Cir. 1989), *abrogated by Goos*, 911 F.2d 1283. In *that* context, the Eighth Circuit made the statement quoted by Defendants – which, in any event, does not support Defendants' outlandish claim that the administrative record itself substitutes for the agency's rational explanation. Additionally, the proposition for which Defendants cite *In re Operations of Mo. River Sys. Litig.*, 421 F.3d 618 (8th Cir. 2005), misses the point. Even assuming that a Biological Opinion issued under the ESA is comparable to an EA, Plaintiffs do not contend "that *every detail* of the agency's decision [should] be stated expressly." *See* Defs.' Mem. at 32 n.25 (emphasis added). The problem in the present case is that FSA provided *no detail.*

a. FSA's Wholesale Reliance on the NMP Is Impermissible

The central theme in Defendants' defense of FSA's NEPA review is the claim that the "comprehensive analysis of the C&H facility contained in [the Arkansas Department of Environmental Quality's ("ADEQ's")] review of C&H's application for coverage under the State's CAFO General Permit" serves as a *substitute* for the agency's own reasoned explanation.[14] It does not, for the reasons set forth below. Moreover, FSA's duty to examine the relevant data and articulate an explanation rationally connecting the facts with its conclusions cannot now be foisted onto this Court.

i The Agency Must Take Its Own Hard Look

This Court should not countenance Defendants' efforts to prop up a faulty EA through reference to documents the agency never properly incorporated and that the record shows the agency never anywhere described, considered, or analyzed. It is quintessential that an agency must "tak[e] its own 'hard look' at the environmental impact of a project," *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 544 (8th Cir. 2003). While NEPA allows state agencies and interested applicants to provide the federal agency with information and assistance in undertaking the environmental review, NEPA "demands" that

> the applicable federal agency must bear the responsibility for the ultimate work product designed to satisfy the requirement of § 102(2)(c). NEPA's commands . . . do not permit the responsible federal agency to abdicate its statutory duties by reflexively rubber stamping a statement prepared by others. The agency must independently perform its reviewing, analytical and judgmental functions and participate actively and significantly in the preparation and drafting process.

[14] Although Defendants attribute the "analysis" in the NOI and NMP to ADEQ, in fact both documents were prepared and submitted by C&H. The record does not contain any analysis of these materials by ADEQ. The record also does not contain any communications between FSA and ADEQ regarding these materials.

Sierra Club v. Lynn, 502 F.2d 43, 59 (5th Cir. 1974) (citations omitted); *see also Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215, 236 (5th Cir. 2006) (reinforcing that an agency may not "reflexively rubber stamp information prepared by others" (internal quotation marks and citations omitted)). The proposition put forth by Defendants – that an agency can "rely on the conclusions of other agencies" and "incorporat[e]" the analysis of other agencies, Defs.' Mem. at 32-33 – does not discharge the action agency of its obligation "to examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Friends of the Norbeck*, 661 F.3d at 976.

Nothing in the cases cited by Defendants suggests otherwise. *See* Defs.' Mem. at 32-33. In fact, in all of the cases relied upon by Defendants, the agency performed its own analysis and stated its own reasoning separate and apart from its reliance on the analysis of others. In *Edwardsen v. U.S Dep't of Interior*, 268 F.3d 781, 789 (9th Cir. 2001), for instance, the court, noting that the challenged EIS "contain[ed] an extensive analysis" of the air impacts from a proposed oil and gas development project, concluded that the agency could permissibly rely on federal air quality standards as reference points for drawing a conclusion about the extent of that impact. *See also Border Power Plant Working Grp. v. Dep't of Energy*, 260 F. Supp. 2d 997, 1020 (S.D. Cal. 2003) (cited in Defs.' Mem. at 33) (recognizing that the agency had discussed health impacts in the EA, including through an analysis of modeling data); *Save the Peaks Coal. v. U.S. Forest Service*, CV 09-8163-PCT-MHM, 2010 WL 4961417, *21 (D. Ariz. Dec. 1, 2010) (cited at Defs.' Mem. at 33) (noting that the agency's Final EIS "*considered and discussed* [Arizona]'s reclaimed water grading system as well as state standards for issuing permits for the use of reclaimed water" in relying on these standards to evaluate impacts (emphasis added), *aff'd*, 669 F.3d 1025 (9th Cir. 2012)); *Okanogan Highlands Alliance v. Williams*, CIV. 97-806-

JE, 1999 WL 1029106, *3 (D. Or. Jan. 12, 1999) ("Plaintiffs argue that the [Forest Service] violated NEPA by failing to collect and evaluate critical information about the project concerning water quality impacts. However, both qualitative and quantitative impacts to water quality *are disclosed and evaluated in the FEIS*." (emphasis added), *aff'd*, 236 F.3d 468 (9th Cir. 2000)). *Cf. Pogliani v. U.S. Army Corps of Eng'rs*, 1:01-CV-0951, 2007 WL 983549, *18 (N.D.N.Y. Mar. 28, 2007) (finding that the agency properly "did not simply adopt and circulate the determination of [the state agency]" because "the record reveals that the [agency] reviewed the administrative record . . . then undertook an independent, measured analysis"). In short, while courts have found that agencies may *reference or base* their consideration on documents and standards prepared by others, nothing in the law permits an agency to simply *substitute* the analysis of others for its own.

Incorporation by reference is the only way in which an agency could conceivably adopt wholesale the analysis of others. But it takes little to see that Defendants did not, and could not properly have, "incorporated" the NOI and NMP into its EA. The CEQ regulations provide that:

> Agencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. *The incorporated material shall be cited in the statement and its content briefly described.*

40 C.F.R. § 1502.21 (emphasis added). The requirement that incorporated material be identified and described in the content of the EA or EIS itself reflects NEPA's fundamental aim of informing and engaging the public. *See, e.g., Or. Natural Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1121 n. 24 (9th Cir.2010) (stating that "[c]larity is at a premium in NEPA because the statute . . . is a democratic decisionmaking tool"); *Recent Past Pres. Network v. Latschar*, 701 F. Supp. 2d 49, 59 (D.D.C. 2010) (rejecting claim of incorporation by reference where the EA did not cite and describe the materials claimed to be incorporated because "[t]he

Court cannot countenance disregard for NEPA's public notice requirements by considering unincorporated documents in its evaluation of the [agency's] actions").

In the present case, Defendants' claim of incorporation by reference arises for the first time in its briefing. *See* Defs.' Mem. at 32. The EA does not claim to incorporate the NOI and NMP, much less describe their contents. This bars FSA's post-hoc claim of incorporation by reference. *See, e.g.*, *Ass'n Concerned About Tomorrow, Inc. (ACT) v. Dole*, 610 F. Supp. 1101, 1109 (N.D. Tex. 1985) (finding that EIS's "cursory reference [to allegedly incorporated material] . . . falls far short of the regulations governing incorporation by reference"). A number of courts have followed a three-part test for proper incorporation, which asks whether "1) the material is reasonably available; 2) the statement [*i.e.*, EA or EIS] is understandable without undue cross reference [to the material that is claimed to be incorporated]; and 3) the incorporation by reference meets a general standard of reasonableness." *Natural Res. Def. Council v. Duvall*, 777 F. Supp. 1533, 1539 (E.D. Cal. 1991); *see also Ctr. for Envtl. Law & Policy v. U.S. Bureau of Reclamation*, 715 F. Supp. 2d 1185, 1192 (E.D. Wash. 2010) (agreeing with *Duvall* and noting that incorporation was acceptable if the agency "sufficiently summarizes the relevant portions of those documents"), *aff'd*, 655 F.3d 1000 (9th Cir. 2011); *Siskiyou Reg'l Educ. Project v. Rose*, 87 F. Supp. 2d 1074, 1098 (D. Or. 1999) (following the three-part test to reject claim that documents were incorporated by reference into an EA).

In *Duvall*, the court rejected the agency's claim of incorporation by pointing out that "undue cross-reference is required because the previous findings are referred to [in the EA] in only the briefest and most cursory manner," and that the claim of incorporation "fails the test of general reasonableness" because the EA "neither details the study nor even explicitly asserts incorporation." 777 F. supp. at 1539. Without adequately describing the material claimed to be

incorporated, the EA could neither inform the public nor "facilitate or enable," as it must, "public comment concerning the agency's determination that the project does not significantly affect the environment." *Id.* at 1538-39. By the same token, FSA's EA did not incorporate the NOI and NMP because the EA never even mentions the NOI and only cursorily references the NMP, without providing any description or summary of its findings. FSA's claim in litigation that it "incorporates" the analysis in those documents plainly fails to meet the standard set forth in 40 C.F.R. § 1502.21 and in the case law for proper incorporation.[15]

FSA's attempt to "incorporate" the NOI and NMP into its EA is inappropriate in any event because incorporation by reference is appropriate only "when the material is not of central importance." Implementation of Procedural Provisions, 43 Fed. Reg. 55,978, 55,979 (Nov. 29, 1978); *see also* 46 Fed. Reg. 18,026, 18,037 (March 23, 1981) ("[T]he EA may incorporate by reference *background data* to support its concise discussion of the proposal and relevant issues." (emphasis added)). Here, the NMP is central to FSA's EA and to Defendants' defense of the EA. The bottom line remains, despite Defendants' efforts to divert the Court's attention from the inadequacies of its EA and FONSI, that the NOI and NMP are documents submitted by C&H, and that FSA's administrative record contains no evidence of any analysis or consideration of the information in these documents or any communications with ADEQ about the state agency's review of these documents. FSA has, in other words, simply included in its record the bare

[15] Even if FSA had incorporated the NOI and NMP into its EA, the agency does not escape an obligation to take its own hard look and articulate a reasoned explanation for its conclusion. *See* 40 C.F.R. § 1501.2(b) (requiring agencies to "[i]dentify environmental effects and values in adequate detail so they can be compared to economic and technical analyses"); *id.* § 1506.5(a) (requiring an agency accepting an applicant's environmental information to "independently evaluate the information submitted" in order that "acceptable work . . . be verified by the agency"); *id.* § 1506.5(b) ("If an agency permits an applicant to prepare an [EA], the agency, besides fulfilling the requirements of paragraph (a) of this section, shall make its own evaluation of the environmental issues . . . .").

documents prepared and submitted by C&H, and now relies on the very existence of these documents to justify its EA and FONSI. This it cannot do.

ii It Is Not for This Court to Articulate an Explanation that FSA Did Not Provide

Despite no evidence in the record that FSA independently considered C&H's NOI and NMP, now in litigation, Defendants posit theories and analyses based on the NOI and NMP that were never identified in the record and never presented to the public. *See, e.g.*, Defs.' Mem. at 10 (walking the Court through calculations to support the newly asserted allegation that "C&H needs approximately 251 acres of pasture); *id.* at 35 (claiming for the first time that borings undertaken for design of C&H's two ponds revealed no karst).[16] Defendants cannot ask the Court to undertake an independent analysis when the record itself shows that FSA nowhere "articulates" an explanation in the first instance, much less "a satisfactory explanation for its

[16] Although the EA and FONSI nowhere mention the karst terrain that undisputedly underlies the Buffalo River watershed, Defendants now claim in their brief that C&H conducted test borings that revealed no "karst on the site of the facility." Defs.' Mem. at 35. This newfound factual claim is unaddressed in the EA or FONSI, and warrants a remand for further fact-finding or, alternatively, a presentation of affidavits or testimony to determine the veracity of this claim.

Plaintiffs aver that the "geologic investigation" referenced by Defendants was conducted for purposes of designing the clay liner for C&H's two waste storage ponds and did not test for karst. *See* FSA-146 (showing that the soil borings were performed for purposes of the pond liner). The soil sampling for the pond liners could not have tested for karst because karst is present and indicative not in *soil* but in the underlying bedrock. *See* Merriam-Webster, http://www.merriam-webster.com/dictionary/karst (last visited May 16, 2014) (defining karst as "an irregular limestone region with sinkholes, underground streams, and caverns"). The U.S. Geological Survey confirms that the bedrock in Newton County is the Boone Formation, which is primarily comprised of limestone. *See* U.S. Geological Survey, *Boone Formation*, http://tin.er.usgs.gov/geology/state/sgmc-unit.php?unit=ARMb%3B0 (last visited May 16, 2014) The soil sampling that Defendants point to was conducted with an auger and "auger refusal" was noted at "11½ feet," FSA-151 – which is the point at which the auger hit solid bedrock and went no further. In other words, the soil sampling did not test for karst. Defendants grasp at straws to support their claim that FSA "took a hard look" at the karst conditions, but it is plain that even when the agency seeks to reach beyond the agency's EA and FONSI to rely on C&H's own materials, those materials do not support the arguments that Defendants make for the first time in litigation.

action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs.*, 463 U.S. at 43.

"[C]ourts may not accept appellate counsel's post hoc rationalizations for agency action." *In re Operation of Mo. River Sys. Litig.*, 421 F.3d 618, 634 (8th Cir. 2005). As the Supreme Court has noted, "an agency's discretionary order [is] upheld, if at all, on the same basis articulated in the order by the agency itself." *Burlington Truck Lines*, 371 U.S. at 168-69; *see also Citizen Advocates for Responsible Expansion, Inc. (I-Care) v. Dole*, 770 F.2d 423, 434 (5th Cir. 1985) ("[S]tatements, opinions, . . . rationalizations, or other assertedly relevant and non-duplicative evidence made or offered *after* the decision not to prepare an EIS has been reached to support that decision must be viewed critically and ordinarily cannot constitute part of the administrative record. . . . [G]overnment agencies must prepare the required meaningful [EA] and reviewable administrative record *before* reaching a decision on whether an EIS is necessary; an agency's decision not to file an EIS will be analyzed on the basis of the agency's findings . . . at th[e] time [it reached its decision]." (emphasis added)). Where "the basis for [an agency's] conclusion that the project will not significantly affect the quality of the human environment" is not articulated in a way that provides a rational connection between the facts found and choice made, and "can *only* be ascertained by reviewing the voluminous agency record," the agency asks the Court to speculate as to the agency's rationale. *LaFlamme v. FERC*, 852 F.2d 389, 399 (9th Cir. 1988) (emphasis added). "This kind of speculation regarding the basis for an agency's decision not to prepare an EIS is precisely what NEPA was intended to prevent." *Id.*

It is not the role of this Court to undertake the technical analysis necessary to verify the truth of Defendants' newly asserted statements. To the extent that Defendants ask this Court to find facts supporting the rationality of FSA's decision and these facts were nowhere stated in the

EA or FONSI or underlying record, a remand is in order so that the agency can properly consider and engage the public in developing the factual record. Alternatively, Plaintiffs should have an opportunity to present evidence to the contrary. "In NEPA cases, . . . courts have found it necessary to review material outside the administrative record to properly assess the agency's decisionmaking." *Earth Protector, Inc. v. Jacobs*, 993 F. Supp. 701, 707 (D. Minn. 1998) (noting that "the Eighth Circuit has held that it is not error for a district court to allow 'testimony of an explanatory nature' to 'sort out and wade through the voluminous administrative record,' in a NEPA case, as long as the court did not create a new record on which to base its findings") (quoting *Missouri Coal. for the Env't v. U.S. Army Corps of Eng'rs*, 866 F.2d 1025, 1031 (8th Cir. 1989)); *see also In re Guardianship & Conservatorship of Blunt*, 358 F. Supp. 2d 882, 892-93 (D.N.D. 2005) ("While the general rule is that the court must look to the agency record, . . . courts have held that consideration of after-the-fact affidavits or testimony is sometimes necessary for background purposes, to help determine whether the agency record is complete as to the issues being raised, or to help determine whether the agency considered all of the required factors." (citing *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-744 (1985), among others)).

b. FSA Did Not Identify Environmental Impacts

NEPA's purpose is twofold: "to ensure a fully informed and well considered decision" and "disclosure to the public that the agency has considered environmental concerns in its decisionmaking." *Friends of the Norbeck*, 661 F.3d at 973. USDA regulations for Class II EAs admonish that

> [i]n completing this assessment, it is important to understand the comprehensive nature of the impacts which must be analyzed. Consideration must be given to all potential impacts associated with the construction of the project, its operation and

> maintenance, the operation of all identified primary beneficiaries, and the attainment of the project's major objectives . . . .

7 C.F.R. Pt. 1940, Subpt. G, Ex. H ¶ 1. FSA's failure to actually identify the impacts of C&H thwarts the letter and spirit of NEPA and the agency's own regulations and evidences the agency's failure to consider the environmental consequences of its financial assistance for C&H. *See* 40 C.F.R. § 1500.1(c) ("The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences."); *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 991 (8th Cir. 2011) ("Each EA 'shall include' discussions of the 'environmental impacts of the proposed action[.]'") (quoting 40 C.F.R. § 1508.9(b)). Defendants' brief fails to respond adequately to Plaintiffs' claim that the EA simply contains no identification, much less consideration, of impacts.

Defendants rely heavily on the fallacy addressed above that the agency can simply point to anything in the administrative record to satisfy its duty to consider "the environmental impact of the proposed action." 42 U.S.C. § 4332(2)(C)(i). For instance, Defendants point solely to facts and information submitted by C&H, *and never cited or discussed in the EA*, to support its representation that "*FSA adequately described* the project's location in relation to the community, the school and the Buffalo River." Defs. Mem. at 36 (emphases added). In fact, though, FSA did not. The bare identification of Mount Judea or the Mount Judea school or the Buffalo River in documents prepared and submitted by C&H to ADEQ and buried in the administrative record does not equate to FSA's identification and consideration of the *impacts* of the 6,500-swine operation on the community, or the school, or the national park unit. The EA and FONSI show that FSA does not actually identify, much less consider, the impacts of C&H on Mount Judea, the Mount Judea school, the Buffalo National River, or the Extraordinary

Resource Water designation of the Buffalo River.[17] There is, in other words, no evidence that in preparing the EA and reaching its FONSI, FSA "examine[d] the relevant data" and made "a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs.*, 463 U.S. at 43.[18]

This Court's role is "to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Mid States Coal.*, 345 F.3d at 534 (Heaney, J., concurring) (internal quotation marks omitted) (citing *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97-98 (1983)). Here, FSA's EA and FONSI are devoid of "disclos[ure]" regarding environmental impacts, and even assuming that the agency did consider such impacts, its failure to articulate any impacts in its EA and FONSI makes it impossible for the public to know that the agency considered the environmental consequences of its action and for this Court to determine whether the agency

[17] In response to Plaintiffs' claim that FSA did not comply with its own regulations requiring the agency to review applications for financial assistance to assess whether they "would impair a State water quality standard or meet antidegradation requirements," 7 C.F.R. § 1940.305(k); *id.* Pt. 1940, Subpt. G, Ex. H, Defendants argue that the claim fails because "the General Permit is designed to insure that permitted facilities comply with state water quality standards." Defs.' Mem. at 35 n.27. The bare existence of a permit does not absolve the agency of its duty to comply with its own regulations though, and Defendants cite no authority suggesting that *permitted* activities are excepted from FSA's review requirement.

[18] Defendants wrongly argue that they could reasonably rely on C&H's permit, which includes its NMP, to conclude that "there would be no significant impact *on the community or the Mt. Judea Elementary School*." Defs.' Mem. at 36 (emphasis added). To the contrary, any reliance on the NMP to reach a Finding of No Significant Impact does not discharge the agency of its duty to identify impacts in the first instance, which it has failed to do. Moreover, C&H's permit is a Clean Water Act permit addressing discharges to water and cannot be relied on *exclusively* to draw conclusions about non-water-related impacts, such as impacts on the air, on public health, and on biological resources including wildlife. *See* FSA-1037 to 1038 (doing just that). Reliance on material in a NEPA review is misplaced when the material does not address the same issues faced by the action agency. *See San Francisco Baykeeper v. U.S. Army Corps of Eng'rs*, 219 F. Supp. 2d 1001, 1012-13 (N.D. Cal. 2002).

"adequately considered" these impacts. In short, FSA's environmental review is arbitrary and capricious.

c. FSA Failed to Discuss Mitigation

Defendants dismiss Plaintiffs' claim concerning mitigation by contending that the requirement to identify and discuss mitigation applies only to EISs. *See* Defs.' Mem. at 40-41. In making this argument, Defendants ignore USDA regulations that explicitly require the agency to consider mitigation in preparing a Class II EA. The regulations direct FSA to

> [d]escribe any measures which will be taken or required by [FSA] to avoid or mitigate the identified adverse impacts. Analyze the environmental impacts and potential effectiveness of the mitigation measures. Such measures shall be included as special requirements or provisions to the offer of financial assistance . . . .

7 C.F.R. Pt. 1940, Subpt. G, Ex. H, XIX; *see also* 7 C.F.R. § 1940.318(g) ("[T]hroughout the [Class II EA] process, consideration will be given to incorporating mechanisms into the proposed action for reducing, mitigating, or avoiding adverse impacts. Examples of such mechanisms which are commonly referred to as mitigation measures include the deletion, relocation, redesign or other modifications of the project elements . . . ."). It is not in dispute that FSA did not discuss mitigation in its EA, as required by these regulations. *See* FSA-1040.

Mitigation measures are also required in an EA "when such measures are material to a FONSI." *Jensen v. Williams*, No. 08-2016, 2009 WL 1138800, *4 (W.D. Ark. Apr. 27, 2009) (citing *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1015 (9th Cir.2006)). Here, it appears that FSA considers C&H's NMP a mitigation measure. Although the EA states that "[m]itigation is not required at this time," it follows this sentence with the assertion that "[a]pplicants will need to comply with their CNMP." FSA-1040. Here and elsewhere, the EA makes clear that FSA views the NMP as a means of mitigating the impacts of the proposed

action. *See id.* at 1037 ("Any endangered species in this area will not be harmed *by complying with the Comprehensive Nutrient Management Plan*." (emphasis added)); *id.* at 1038 ("Water quality will be protected *by producer's adherence to their CNMP*." (emphasis added)); *id.* ("Compliance with the CNMP should keep [air] emissions to a minimum."). Indeed, Defendants make the very same argument in their brief. *See* Defs.' Mem. at 41 (citing to the NMP and describing its provisions as "mitigation measures").

Because FSA relies on the NMP as a mitigation measure, the USDA regulations require that it "be documented in the [EA]," which must "include an analysis of [the mitigation measure's] environmental impacts and potential effectiveness." 7 C.F.R. § 1940.318(g). Where an agency relies on mitigation to support a determination that the proposed action will not have a significant impact, the agency must discuss the mitigation beyond "a perfunctory description or mere listing of mitigation measures, without supporting analytical data." *Forest Serv. Employees for Envtl. Ethics v. U.S. Forest Serv.*, 689 F. Supp. 2d 891, 898 (W.D. Ky. 2010) (internal quotation marks omitted) (quoting *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 735 (9th Cir.2001)); *see also O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 231 (5th Cir. 2007) (finding that EA's discussion of mitigation "fails to sufficiently demonstrate that the mitigation measures adequately address and remediate the adverse impacts so that they will not significantly affect the environment"); *cf. Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 17 (2d Cir. 1997) (requiring "substantial evidence" to support mitigation relied on to reach a FONSI). In *O'Reilly*, the Fifth Circuit explicitly recognized the nature of the EA as a "rough-cut, low-budget" version of an EIS, but nevertheless found the EA's discussion of mitigation inadequate because "mere perfunctory or conclusory language will not be deemed to constitute an adequate record and cannot serve to support the agency's decision not to prepare an EIS." 477 F.3d at 231

(quoting *I-Care v. Dole*, 770 F.2d at 434). Here, too, the EA's references to the NMP are perfunctory and conclusory and contain no discussion or analysis sufficient "to allow the public or a reviewing court to evaluate the adequacy" of this "mitigation measure." *Dine Citizens Against Ruining our Env't v. Klein*, 747 F. Supp. 2d 1234, 1258 n.39 (D. Colo. 2010).[19] For this reason and because FSA ignored its own regulations requiring discussion of mitigation, this Court should find FSA in violation of NEPA.

d. FSA's Analysis of Alternatives Was Inadequate

Defendants' defense of FSA's alternatives analysis is unconvincing. First, Defendants focus their argument on the range of alternatives, but do not address Plaintiffs' claim that FSA's consideration of the no-action alternative is inadequate under the applicable rule of reason. *See Friends of Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1128 (8th Cir. 1999) (requiring under the rule of reason that the agency "adequately set[] forth sufficient information to allow the decision-maker to consider alternatives and make a reasoned decision after balancing the risks of harm to the environment against the benefits of the proposed action"). The EA's discussion of the no-action alternative states in its entirety:

> If the project is not completed, the community will lose the potential financial benefits of this project: (Integrator, utility companies, swine supply companies, etc.) In addition, as this tract is located in reasonable proximity to the feed mill (less than 100 miles).

FSA-1037 (errors in original). As Plaintiffs explained in their Memorandum of Law, this "analysis" does not, as required, present environmental impacts or identify a baseline upon which to judge a preferred alternative. *See* Pls.' Mem. at 26. Defendants have offered no response.

[19] It is worth reiterating, moreover, that the NMP – prepared for purposes of a NPDES permit -- cannot provide sufficient mitigation for *all* of C&H's impacts, including its impacts on air quality, wildlife, and public health.

Moreover, even Defendants' arguments concerning the appropriate range of alternatives fail. Defendants justify FSA's failure to identify alternatives beyond the no-action and preferred alternatives in part on the basis that "the project will have a minimal environmental impact." *See* Defs.' Mem. at 38. For all the reasons already described, FSA's FONSI is unsustainable. The agency failed to identify impacts in its EA and consequently cannot rationally or legitimately claim that these impacts are "minimal." The agency also cannot rely on the NMP and C&H's general permit as the exclusive reason why impacts are minimal, *see id.* at 38-39, when the NMP was not independently evaluated by the agency and, in any event, addresses only discharges to water. The uncontested fact remains that reasonable and feasible alternative locations could exist based on the fact that Cargill expressed a preference to contract with farms anywhere within 100 miles, *see* P-554, and that reasonable, feasible designs to mitigate the water quality and air impacts of the facility could exist. NEPA and USDA regulations require a Class II EA to "[d]iscuss the feasibility of alternatives," including "(a) alternative locations, (b) alternative designs, [and] (c) alternative projects having similar benefits." 7 C.F.R. Pt. 1940, Subpt. G, Ex. H, XVIII. FSA failed to do so.[20]

Finally, Defendants fall back on their central message – that FSA plays no meaningful role at all and should be absolved of its responsibilities. *See* Defs.' Mem. at 39. Defendants claim that "[i]t would be infeasible for FSA to use th[e agency's agricultural credit] program to insert itself into planning and locating private businesses, or usurp the role of local governments and land planners." *Id.* This is a vast overstatement of what NEPA requires. NEPA requires the

[20] FSA cannot evade these regulatory requirements by posing the straw man that NEPA "has not been read to require *detailed* consideration of alternatives." *See* Defs.' Mem. at 39 (positing that NEPA requires only "the need to *fully* analyze *only* 'reasonable' and 'feasible' alternatives" (emphases in original)). The problem here is that FSA has not identified *any* feasible alternatives, not that it did not provide a sufficiently "detailed" or "full" analysis of these alternatives.

agency to consider the environmental consequences of its actions, including by considering alternative courses of action. This requirement does not "insert" FSA into C&H's business or "usurp" anyone's role. FSA's duties under NEPA "are not discretionary, but are specifically mandated by Congress, and are to be reflected in the procedural process by which agencies render decisions." *Silva v. Romney*, 473 F.2d 287, 292 (1st Cir. 1973). FSA's failure to comply with NEPA's requirements renders its EA and FONSI arbitrary and capricious.

e. The FONSI Is Unsupportable

For all of the reasons already set forth above, FSA's FONSI is unsupportable on the record before this Court. That record shows that FSA provided financial assistance necessary for the construction and operation of the first Large CAFO in the watershed of an Extraordinary Resource Water and a national park unit characterized by karst terrain. It is undisputed that this 6,500-swine CAFO will generate an estimated 31,091 pounds of phosphorus and 92,611 pounds of nitrogen a year, and that this waste will be stored in two open air storage ponds that allow the waste to seep into the ground at a rate of 3,448 gallons per acre per day and 4,064 gallons per acre per day, respectively. Defs.' Resp. ¶¶ 10-12. It is further undisputed that all of the waste produced by the 6,500 pigs will be spread on 17 fields, seven of which are identified as susceptible to occasional flooding and 15 of which are identified by experts to already contain "optimum" or "above optimum" levels of phosphorus. *Id.* ¶¶ 14, 17. "An agency's decision not to prepare an EIS will be considered unreasonable if the agency failed to supply a convincing statement of reasons why potential effects are insignificant." *Choate*, 2008 WL 4833113, at *6 n.85. *Cf. Newton Cnty. Wildlife Ass'n v. Rogers*, 141 F.3d 803, 809 (8th Cir. 1998) (noting that a court will affirm an EA where the agency "took a 'hard look' at the project, identified the relevant areas of environmental concern, and made a convincing statement for its FONSI")

(quoting *Sierra Club v. U.S. Forest Serv.*, 46 F.3d at 838-39). On the factual record before this Court, it is evident that even beyond the inadequacies of the EA, a FONSI is unsupportable.

IV. DEFENDANTS VIOLATED THE ENDANGERED SPECIES ACT

The ESA requires that "[e]ach Federal agency shall review its actions at the earliest possible time to determine whether any action *may affect* listed species or critical habitat." 50 C.F.R. § 402.14(a) (emphasis added). If an agency determines that the proposed action will have "no effect" on listed species, it need not undertake any consultation. *See Wildearth Guardians v. Salazar*, 880 F. Supp. 2d 77, 94 (D.D.C. 2012), *aff'd*, 738 F.3d 298 (D.C. Cir. 2013). But if the agency determines that the action "may affect" listed species or critical habitat, "formal consultation is required" *unless* the agency – either "as a result of the preparation of a biological assessment ["BA"] under § 402.12 or as a result of informal consultation . . . under § 402.13" – "determines, *with the written concurrence of [FWS]* that the proposed action is *not likely to adversely affect* any listed species or critical habitat." 50 C.F.R. § 402.14(b)(1) (emphases added). In other words, once an agency determines that its action "may affect" listed species or critical habitat, it then determines whether the action is "not likely to adversely affect" or is "likely to adversely affect" the species or habitat. The former determination, when made either through a BA or informal consultation, completes the agency's consultation obligations so long as the agency obtains FWS's written concurrence in the "not likely to adversely affect" determination. *See* 50 C.F.R. §§ 402.12(k), 402.13, 402.14(b)(1). If the agency determines, on the other hand, that the action *is* "likely to adversely affect" listed species or critical habitat, it must conduct a formal consultation, which culminates in FWS's issuance of a biological opinion indicating whether the action is likely to jeopardize the species. *See* 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14.

A. FSA Failed to Ensure No Jeopardy to Protected Species

Defendants concede that USDA regulations require the agency to comply with Section 7(a)(2) of the ESA for loan guarantees like the one at issue in this case. *See* Defs.' Mem. at 47; *see also* 7 C.F.R. §§ 1940.304(b), 1940.305(e); 7 C.F.R. Pt. 1940, Subpt. G, Ex. D ¶ 1 (requiring Section 7 consultation for all "applications for financial assistance"). The only question for the Court, then, is whether FSA properly complied with Section 7(a)(2)'s mandate to "insure," "in consultation" with FWS, that its financial assistance "is not likely to jeopardize the continued existence of any endangered species." 16 U.S.C. § 1536(a)(2). Two facts material to this inquiry are not in dispute:

(1) FSA concluded that its action "May Affect but [is] Not Likely to Adversely Affect" listed species. ECF Nos. 33-5; *see also* ECF No. 43.

(2) FWS never concurred with FSA, in writing or otherwise, in a "not likely to adversely affect" determination or in any effect determination at all. *See* Defs.' Resp. ¶ 32.

As is explained below, despite Defendants' post hoc attempts to back out of Section 7(a)(2)'s requirements, these facts together inexorably lead to a conclusion that FSA shirked its duties under the ESA.

In August 2013, eight months after it authorized loan guarantees for C&H to construct and operate its CAFO, FSA wrote to FWS seeking its concurrence in a determination that FSA's "finance of a Cargill Hog unit" identified as C&H "'May Affect but [is] Not Likely to Adversely Affect' any endangered or threatened species that might be in the area of the project." ECF No. 33-5; *see also* ECF No. 43. Plainly, FSA did not make a "no effect" determination. Rather, it concluded that its assistance to C&H "may affect" but was "not likely to adversely affect" listed species. *See id.* The "may affect" determination necessitates formal consultation unless the

agency obtains FWS's written concurrence that the action "is not likely to adversely affect" any listed species. 50 C.F.R. § 402.14(a)-(b). Defendants concede that FSA never obtained this concurrence. *See* Defs.' Resp. ¶ 32. Thus, despite FSA's false assertion in its FONSI that it had "completed" informal consultation with FWS, *see* FSA-1029, in fact, FSA did not.

Now in litigation, FSA claims inconsistently that it actually concluded "that its loan guaranty would have *no effect* on ESA-listed species," and therefore that the agency was not required to undertake any consultation at all. Defs.' Mem. at 30 n.24 (emphasis added); *see also id.* at 48-50.[21] This claim is obviously belied by the fact that FSA wrote to FWS seeking a concurrence in a "*may affect*, but not likely to adversely affect" determination. *See* ECF No. 33-5; *see also* ECF No 43. But even putting that aside, the record does not reflect that FSA made any effect determination apart from its erroneous assertions in the EA and FONSI that "[t]here will be no impact to . . . any threatened or endangered species *based on a clearance determination by Arkansas Fish and Wildlife* [sic]," FSA-1038 (emphasis added). Defendants concede that no such "clearance" exists – that FSA was "confus[ed] about the process" and "misunderst[ood]" FWS's July 5, 2012, letter. *See* Defs.' Mem. at 48-49. Nowhere else in the

[21] Defendants implicitly concede the inconsistency of their position by citing *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 659 (2007), for the proposition that a court "is to review the agency's ultimate conclusion" regardless of any "internally inconsistent" position held by the agency. Defs.' Mem. at 48. Defendants omit a key point, however, that makes this claim misleading and *Nat'l Ass'n of Home Builders* inapposite. In that case, the agency's conclusion that the ESA required consultation for the particular action was memorialized in a Federal Register notice, but elsewhere, and in litigation, the agency claimed that Section 7's consultation requirement was not triggered at all. *See* 551 U.S. at 659. Notably, the agency in that case had properly concluded consultation. *See id.* The Court thus held that its inconsistent position in litigation reflected "that the agencies changed their minds—something that, *as long as the proper procedures were followed*, they were fully entitled to do." *Id.* (emphasis added). In contrast, Defendants here concede that FSA did not obtain written concurrence from FWS. FSA thus did not comply with Section 7's procedures. The agency cannot now evade that responsibility by taking an inconsistent position unsupported in the administrative record that it determined that there was "no effect."

record does it appear, though, that FSA arrived at a "no effect" determination apart from this "confus[ed]" reliance on an illusory "clearance" from FWS.[22]

Rather than identifying for the Court where in the administrative record FSA documented and supported a "no effect" determination, Defendants impermissibly invite this Court to undertake the effects determination itself. *See* Defs.' Mem. at 49-50 (referring the Court to secondary sources about endangered species).[23] But the determination of whether FSA's action "may affect" listed species is not for this Court to make. "It is not the responsibility of the plaintiffs to prove, nor the function of the courts to judge, the effect of a proposed action on an endangered species when proper procedures have not been followed." *Thomas v. Peterson*, 753 F.2d 754, 765 (9th Cir.1985). "The lack of any documentation to support [an agency's] 'no effect' determination precludes any judicial review of [the agency's] apparent 'determination' and undermines the . . . Section 7(a)(2) consultation procedures that only allow an agency to avoid formal consultation through a biological assessment or a concurrence letter following

[22] Apart from the baseless references in the EA and FONSI, the only other references to listed species in FSA's administrative record appear at FSA-839 to 868. These pages include the correspondence with FWS, which reflect in Defendants' own words, "considerable miscommunication" and FSA's "misunderstanding." Defs.' Mem. at 47-48. The remainder of the pages, from FSA-850 to 868, are secondary sources. These pages contain *no* information about the proximity of Gray bats, Indiana bats, rabbitsfoot mussels, or snuffbox mussels to the Newton County and Big Creek area where C&H is located, or the potential impacts of swine waste contamination on waters and caves in which these species live. In fact, these secondary sources only reference Gray bats and rabbitsfoot mussels. They contain no information whatsoever on Indiana bats or snuffbox mussels.

[23] Defendants cite to FSA's March 29, 2013, letter in response to the Park Service's critiques, *see* Defs.' Mem. at 49 (citing FSA-1084), which occurred after FSA's EA and FONSI and approval of the loan guarantee. It is also worth noting that Defendants appear to misrepresent the fact that "following FWS's recommendations, the facility site was tested for karst features prior to construction." Defs.' Mem. at 49. The soil testing results that Defendants allege "tested for karst features" were appended to C&H's NOI, which is dated June 5, 2012. FWS's letter alerting FSA to the presence of karst terrain in the area is dated July 5, 2012. *See* FSA 845-48.

informal consultation with FWS." *Nat'l Wildlife Fed'n v. Fed. Emergency Mgmt. Agency*, 345 F. Supp. 2d 1151, 1175 (W.D. Wash. 2004) (citing 50 C.F.R. § 402.14(b)(1)).

Thus, despite Defendants' efforts to avoid inconvenient facts, FSA stands in violation of the ESA because it neither made a supportable "no effect" determination nor obtained a written concurrence from FWS in a "not likely to adversely affect" determination. Section 7(a)(2)'s consultation procedures "are designed to ensure compliance with the substantive provisions" of the ESA – that agency action not jeopardize listed species – and are consequently to be "stringent[ly] enforce[d]." *Thomas*, 753 F.2d at 764. Having failed to comply with Section 7's procedure, FSA has not, as required by the ESA, "insure[d]" that its action "is not likely to jeopardize" the endangered Gray bat, Indiana bat, and snuffbox mussel, and the threatened rabbitsfoot mussel. This Court must accordingly enforce Section 7(a)(2) to "vindicate the objectives of the [ESA]." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982); *see* 16 U.S.C. § 1540(g)(1).

B. SBA Ignored Its Obligation Under Section 7(a)(2)

SBA's financial assistance to C&H triggered the substantive no-jeopardy mandate and procedural consultation requirement of Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2). Yet, in authorizing the $2,318,200 guaranteed loan to assist C&H, SBA did not consult with FWS. *See* Defs.' Resp. ¶ 22. Defendants' attempt to absolve the SBA of its obligation to comply with the ESA by mis-portraying the "action" at the center of the Section 7 mandate, Defs.' Mem. at 27-29, and disclaiming any authority over the financial assistance SBA provided, *id.* at 29-30, must fail. The action at issue in the present case is the federal government's financial assistance to C&H, and this agency action "may affect" protected species because the adverse impacts from the 6,500-swine CAFO it enabled are "reasonably certain to occur." 50 C.F.R. § 402.02.

1. SBA's Guaranteed Loan Assistance is an "Action" Subject to Section 7 of the ESA

Section 7 of the ESA requires that:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that *any action authorized, funded, or carried out* by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species.

16 U.S.C. § 1536(a)(2) (emphasis added). The regulations implementing the ESA define "action" to mean "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies," and to include, among other things, "actions directly or indirectly causing modifications to the land, water, or air." 50 C.F.R. § 402.02. The "agency action" here is SBA's financial assistance to C&H in the form of a 7(a) guaranteed loan. *See* P-17. SBA's provision of this financial assistance pursuant to the Small Business Act is an action "carried out" by SBA. *See* 16 U.S.C. § 1536(a)(2). This financial assistance for C&H to purchase land and construct buildings, *see* Defs.' Resp. ¶ 5, moreover, is an "activit[y] . . . carried out" by a federal agency that "directly or indirectly caus[es] modifications to the land, water, or air." 50 C.F.R. § 402.02. Section 7(a)(2)'s plain terms thus require that SBA "insure," "in consultation" with FWS, that this agency action "is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(a)(2).

Defendants attempt to sidestep the inevitable conclusion that SBA's loan guarantee is an action "carried out" by an agency, *id.*, by suggesting that the "action" at issue actually is "construction of the hog farm" rather than SBA's provision of financial assistance. *See* Defs.' Mem. at 28 (arguing that "SBA simply did not authorize, fund, or carry out construction of the hog farm"). Misguiding the Court under this erroneous reading of the statute, Defendants focus wrongly on whether SBA "authorized" or "funded" C&H. *See id.* at 28-29. But these questions

are immaterial. *See, e.g.*, *Nat'l Wildlife Fed'n v. Fed. Emergency Mgmt. Agency ("FEMA")*, 345 F. Supp. 2d 1151 (W.D. Wa. 2004) (dismissing a similar argument made in the context of an agency's implementation of a federal insurance program by noting that "[w]hether or not FEMA funds the [National Flood Insurance Program (NFIP)], in whole or in part, is immaterial because it is undisputed that FEMA is the federal agency charged with administering the NFIP and that is sufficient to qualify as an "agency action"). It is uncontested that SBA provided financial assistance for C&H's purchase of land and construction of a 6,500-pig CAFO. This financial assistance is an action "carried out" by SBA and consequently is subject to the mandate set forth in Section 7 of the ESA.[24]

2. SBA was Required to Consult With FWS Because Its Financial Assistance "May Affect" Listed Species

Defendants argue that SBA's loan guarantee "is far too attenuated" to make it "the cause of [any] harm to listed species" – in other words, that Defendants' action has "no effect" on listed species and therefore is not subject to consultation requirements. *See* Defs.' Mem. at 29-

[24] Although Defendants do not explicitly raise this issue in the context of the ESA, it is worth noting for the Court's benefit that the regulations implementing the ESA state that "Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. This provision does not change the conclusion that SBA's financial assistance is subject to Section 7's mandate.

The Supreme Court has interpreted 50 C.F.R. § 402.03 to mean "that § 7(a)(2)'s no-jeopardy duty covers only discretionary agency actions and does not attach to actions . . . that an agency is *required* by statute to undertake once certain specified triggering events have occurred." *Ass'n of Home Builders*, 551 U.S. at 669; *see also Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1021 (9th Cir. 2012), *cert. denied* 133 S. Ct. 1579 (2013) (noting that "this limitation harmonizes the ESA consultation requirement with other statutory mandates that leave an agency no discretion to consider the protection of listed species"). Most recently, the Ninth Circuit has reiterated that Section 7(a)(2)'s consultation requirement "applies with full force so long as a federal agency retains '*some discretion*' to take action to benefit a protected species." *Natural Res. Def. Council v. Jewell*, --- F.3d ----, 2014 WL 1465695, *7 (9th Cir. 2014) (emphasis added). As is set forth in the Legal Background, *supra*, Defendants' provision of financial assistance is not simply ministerial, and Defendants have discretion to condition their assistance – discretion that continues even after the agencies authorize the guarantees.

30. This post-hoc litigation position fails to acknowledge that SBA was required in the first instance to determine whether its financial assistance "may affect" listed species. *See* 50 C.F.R. § 402.14(a). In making this determination, SBA perhaps might have concluded that the 7(a) guaranteed loan would have "no effect" but there is *no evidence in the record* that SBA took any steps to make this determination. SBA's administrative record is devoid of any reference to threatened or endangered species or to the ESA. Thus, even apart from its failure to undertake consultation, SBA failed to comply with the ESA at all by not considering, as an initial matter, whether its action might affect listed species

Even had SBA attempted to carry out its obligation to review its action "to determine whether [it] may affect listed species or critical habitat," 50 C.F.R. § 402.14(a), a "no effect" determination would have been unsustainable. It is well-established that the threshold for determining whether an action "may affect" listed species is exceedingly low. In the final rule establishing the procedures governing Section 7 consultation, FWS made clear that "*[a]ny possible effect*, whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement." 51 Fed. Reg. 19,926, 19,949 (June 3, 1986). The preamble to the final rule further emphasizes that

> [t]he threshold for formal consultation must be set sufficiently low to allow Federal agencies to satisfy their duty to "insure" under section 7(a)(2). Therefore, the burden is on the Federal agency to show *the absence* of likely, adverse effects to listed species or critical habitat as a result of its proposed action in order to be excepted from the formal consultation obligation.

Id. at 19,949 (emphasis added); *see also Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 1579 (2013) ("[A]ctions that have *any chance* of affecting listed species or critical habitat – even if it is later determined that the actions are 'not likely' to do so – require at least some consultation under the ESA." (emphasis added)); *Colo.*

Envtl. Coal. v. Office of Legacy Mgmt., 819 F. Supp. 2d 1193, 1121-22 (D. Co. 2011) (finding that an agency's conclusion that the effects of its action on listed species were "'highly unlikely' satisfies this low 'may affect' standard" and triggered the agency's duty to consult), *amended on other grounds*, 08-CV-01624-WJM-MJW, 2012 WL 628547 (D. Colo. Feb. 27, 2012). Thus, in order to avoid consultation, SBA would have had to conclude – which it apparently did not, based on the record – that its guaranteed loan necessary for the construction and operation of an unprecedented 6,500-swine CAFO generating tremendous amounts of waste to be spread on 630 acres of land in a karst basin and along a tributary to the Buffalo River would have *no effect* whatsoever on the listed species known to inhabit the area.

As Defendants concede, the "effect" that is to be considered in making the "may affect" determination includes both direct and indirect effects of the agency action. *See* Defs.' Mem. at 29 n.21. "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. The law thus requires that the agency consider "the effects of the action as a whole." *Id.* § 402.14(c); *see also N. Slope Borough v. Andrus*, 642 F.2d 589, 608 (D.C. Cir. 1994) (finding that the ESA requires agency to "look at *all the possible ramifications* of the agency action" (emphasis added)); *see, e.g.*, *Nat'l Wildlife Fed'n v. FEMA*, 345 F. Supp. 2d 1151 (finding that FEMA's implementation of the National Flood Insurance Program "may affect" protected species because although the agency does not itself "authorize, permit, or carry out the actual development" that causes harm, "development is 'reasonably certain to occur' as a result of the agency's action" and consultation was therefore required (citing 50 C.F.R. § 402.02)).

The Tenth Circuit's decision in *Riverside Irrigation Dist. v. Andrew*, 758 F.2d 508 (10th Cir. 1985), is instructive on the scope of effects to be considered under the ESA. The plaintiffs

in that case challenged the U.S. Army Corps of Engineers' denial of a permit for the deposit of dredge material for construction of a dam and reservoir. *See id.* at 510-11. The plaintiffs complained that the Corps had exceeded its authority "when it considered the effects of depletions caused by consumptive use of the water to be stored in the reservoir." *Id.* at 511. As the court noted,

> [n]o one claims that the fill itself will endanger or destroy the habitat of an endangered species or adversely affect the aquatic environment. However, the fill that the Corps is authorizing is required to build the earthen dam. The dam will result in the impoundment of water in a reservoir, facilitating the use of the water in Wildcat Creek. The increased consumptive use will allegedly deplete the stream flow, and it is this depletion that the Corps found would adversely affect the habitat of the whooping crane.

Id. at 511-12. The court acknowledged that "the depletion of water is an indirect effect of the [fill of dredge material] in that it results from the increased consumptive use of water facilitated by the [fill]." *Id.* The court upheld the Corps' decision, concluding that the ESA requires consideration of such indirect effects.

> To require [the agency] to ignore the indirect effects that result from its actions would be to require it to wear blinders that Congress has not chosen to impose. The fact that the reduction in water *does not result from direct federal action does not lessen the [agency's] duty under § 7 [of the Endangered Species Act]*. The relevant consideration is *the total impact of the* [fill of dredge material] on the [listed species].

Id. at 512-13 (internal quotation marks and citation omitted) (emphasis added). As in *Riverside Irrigation*, Defendants in the present case were required to consider "all the possible ramifications," *Andrus*, 642 F.2d at 608, of their financial assistance to C&H, including "modifications to the land, water, or air" that could be expected from the construction and operation of a CAFO that confines 6,500 pigs and spreads the amassed waste, containing an estimated 92,611 pounds of nitrogen and 31,091 pounds of phosphorus each year, onto land deemed susceptible to flooding along a tributary of the Buffalo National River. *See* 50 C.F.R. §

402.02; Defs.' Resp. ¶¶ 10, 13, 14. SBA could not have rationally found that such indirect effects would amount to "no effect" on protected species known to inhabit the area.

Neither can Defendants avoid a "may affect" determination by arguing that SBA's guaranteed loan "is not the legal cause of any harm that the C&H Farm poses to threatened or endangered species" due to "the attenuated chain of causation" and "SBA's lack of authority" over C&H. Defs.' Mem. at 29-30. *FSA's* guarantee is concededly an action subject to Section 7(a)(2) consultation, and its guaranteed loan, together with SBA's guaranteed loan, constituted 97 percent of the loans that C&H obtained to construct and operate its facility. Moreover, Defendants possess broad authority over their financial assistance – authority that could have been and still could be used to minimize the environmental impacts of C&H. *See* Sections I, II.B, *supra*. Defendants' reliance on *Center for Biological Diversity v. HUD*, is therefore misplaced. *See* 541 F. Supp. 2d 1091, 1094 (D. Ariz. 2008), *aff'd*, 359 F. App'x 781, 783 (9th Cir. 2009). There, the challenged actions were loan guarantees for residential and commercial development, including for thousands of homes and 34 businesses built over a five-year period. *See id.* at 1094-95. One of the defendant agencies in that case exercised no discretion in providing financial assistance and was required to provide loan guarantees on an "automatic" basis once an applicant met certain criteria. *See id.* at 1094. On these facts, the District of Arizona found that the agencies did not have discretionary control over the urban development alleged to cause environmental harm and exercised no authority or discretion to effect measures that would inure to the benefit of ESA-protected species. *See id.* at 1097-99. In an unpublished opinion affirming the District of Arizona, the Ninth Circuit noted that "[t]his case stands in contrast to those where the disputed agency action had a more direct, on-the-ground effect and where the environmental mandates thus had to be followed by the agencies." 359 F. App'x at

783. The present case before this Court – in which the federal government's guarantee of 97 percent of the loans necessary for a single massive and unprecedented project to go forward, and which went hand in hand with authority and discretion over whether and on what basis the federal assistance would be provided – is precisely the case in which ESA's mandate must be followed.

V. DEFENDANTS FAILED TO CONSULT WITH THE NATIONAL PARK SERVICE

A. FSA Violated Its Own Regulations Requiring Consultation with the Park Service for Rivers on the Nationwide Rivers Inventory

USDA regulations require that "[e]ach application for financial assistance . . . be reviewed to determine if it will affect a river or portion of it, which is . . . identified in the Nationwide Inventory prepared by the National Park Service . . . ." 7 C.F.R. § 1940.305(f). Defendants concede that the Buffalo River is on the Nationwide Rivers Inventory. Defs.' Resp. ¶ 2. The only question, then, is whether C&H involves "discharging water to the river via a point source." 7 C.F.R. Pt. 1940, Subpt. G, Ex. E ¶ 3 (identifying the three circumstances under which the FSA "shall consult with the appropriate regional office of NPS").

Plaintiffs have noted that CAFOs are statutorily defined point sources under the Clean Water Act, 33 U.S.C. § 1362(14); 40 C.F.R. § 122.23(b)(4)(iv), and that C&H's permit is self-described as applying to CAFOs "*that discharge* and are located in the State of Arkansas," FSA-732 (emphasis added); *see also id.* ("This permit covers any operation that meets the definition of a CAFO *and discharges pollutants to waters of the state*." (emphasis added)). The permit, moreover, allows overflow from C&H's waste storage ponds and storm water runoff from its waste application fields to reach waters of the State. *See* FSA-736; *see also* Pls.' Resp. to Defs.' Statement of Material Facts ¶¶ 7-8. Defendants' only response is that C&H is "not *designed* to

discharge" and that when it does discharge, it does so only rarely. Defs.' Mem. at 55 (emphasis added). Defendants point to no de minimis exceptions in the USDA regulations, however; nor do they point to any provision of law suggesting that the required consultation is unnecessary so long as a facility is "designed" not to discharge. The facts in the record remain that C&H's two storage ponds are estimated to seep 3,448 gallons per acre per day and 4,064 gallons per acre per day, respectively, in terrain that is notorious for rapid underground drainage and sinkholes; and that the estimated 31,091 pounds of phosphorus and 92,611 pounds of nitrogen generated by C&H's swine each year are sprayed on 17 fields, nine of which lie along Big Creek, seven of which are deemed susceptible to occasional flooding, and fifteen of which have soils with "above optimum" levels of phosphorus. *See* Defs.' Resp. ¶¶ 10-17. Under these circumstances, and given that C&H's permit specifically contemplates the possibility that waste will be discharged to waters of the state, it was arbitrary, capricious, and a violation of law for FSA not to heed its own regulations and consult with the Park Service.[25]

B. Defendants Violated the Buffalo National River Enabling Act

The Buffalo National River Enabling Act provides that:

> [N]o 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, as determined by the Secretary. Nothing contained in the foregoing sentence, however, shall preclude licensing of, or assistance to, developments below or above the Buffalo National River or on any stream tributary thereto which will not invade the area or unreasonably diminish the scenic, recreational, and fish and wildlife values present in the area on March 1, 1972.

16 U.S.C. § 460m-11. Defendants present a narrow interpretation of "water resources project" to argue that they were not required to consult with the Park Service prior to enabling the

[25] The Park Service itself has asserted that "FSA should have contacted NPS" because the Buffalo River is on the Nationwide Rivers Inventory. FSA-1111.

construction of C&H. Defendants' restrictive reading of the term "water resources project" to include only a project that "would physically interfere with the free-flowing characteristics of the River," Defs.' Mem. at 51, however, is inconsistent with FSA's own definition of the term under the Wild and Scenic Rivers Act and also is irreconcilable with the broadly protective aims of the Buffalo National River Enabling Act and the Wild and Scenic Rivers Act.

USDA's definition of "water resource project" for purposes of the Wild and Scenic River Act is determinative of at least FSA's interpretation of the same term in the Buffalo National River Enabling Act. *See* Defs. Mem. at 51 (acknowledging that the Wild and Scenic Rivers Act, which uses nearly identical language regarding water resources project, "provides a useful interpretative guide to the Buffalo National River Enabling Act"). USDA regulations define "water resource project" under the Wild and Scenic Rivers Act to

> [i]nclude[] any type of construction which would result in either *impacts on water quality* and the beneficial uses that water quality criteria are designed to protect or any change in the free-flowing characteristics of a particular river or stream to include *physical, chemical, and biological characteristics of the waterway*. This definition encompasses construction projects within and along the banks of rivers or streams, as well as projects involving withdrawals from, and discharges into such rivers or streams.

7 C.F.R. § 1940.302(i) (emphases added); *see also id.* § 1940.304(c) (barring FSA from "assist[ing] developments (commercial, industrial, residential, *farming* or community facilities) located below or above a wild, scenic or recreational river area, or on any stream tributary thereto which will invade the area or unreasonably diminish the scenic, recreational, and fish and wildlife values present in the area" (emphasis added)). This definition plainly conceived of "water resource projects" broadly to include any type of construction, like C&H, that would affect water quality and alter a waterway's physical, chemical, and biological characteristics. In light of the facts in the record concerning the seepage from C&H's waste storage ponds; the

underground drainage present in karst terrain; the spraying of phosphorus and nitrogen-laden waste from 6,500 swine onto fields along a tributary to the Buffalo National River; the "above optimal" phosphorus contents of soil in nearly all of these fields; and the designation of nearly half of these fields as susceptible to flooding, it was arbitrary and capricious for FSA to ignore its own regulatory understanding of "water resource project" – which encompasses farming facilities – and bypass the Park Service in approving assistance to C&H.[26]

Defendants dismiss the determinative USDA regulations and instead place undue emphasis on the "free-flowing" characteristic of a river as the basis for a restrictive understanding of "water resources project." *See* Defs.' Mem. at 53 (quoting the definition of "water resources project" in an interagency report, which includes "construction of development which would affect the free-flowing characteristics of [the river]"). "Free-flowing" is defined in the Wild and Scenic Rivers Act to mean "existing or flowing in natural condition without impoundment, diversion, straightening, rip-rapping, or other modification of the waterway." 16 U.S.C. § 1286(b). Crucially, this broad definition includes the "*exist[ence]*" of a river in its "*natural conditions*" without any "modification[s]" – even modifications apart from physical interference, such as "impoundment, diversion, straightening, [and] rip-rapping." *Id.* (emphasis added). Defendants' restrictive interpretation of "water resources project" is therefore grounded in an unduly narrow understanding of a river's "free-flowing characteristic" that is unsupported by the statutory definition of the term.

The Wild and Scenic Rivers Act's broad understanding of free-flowing characteristics is

[26] SBA was aware that C&H's "cost of construction [wa]s being split between" SBA's 7(a) guaranteed loan and FSA's guaranteed loan. P-142. To the extent the two agencies were jointly assisting the same project and one of the two agencies defined by regulation a relevant term in a law applicable to both agencies, it only makes sense that the agencies would have heeded that definition and consulted with the Park Service, regardless of SBA's own ad hoc interpretation.

consistent with its statutory intent of not only preserving rivers in "free-flowing condition" but also protecting the "outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural" and other values of the rivers, as well as their "immediate environments," "for the benefit and enjoyment of present and future generations." 16 U.S.C. § 1271. Similarly, although Defendants note that "the Buffalo National River was established for the purpose of 'preserving [it] as a free-flowing stream," Defs.' Mem. at 52 (quoting 16 U.S.C. § 460m-8), Defendants fail to acknowledge in this quote that preservation of the Buffalo as free-flowing was only one of at least two identified purposes of the Enabling Act, which established the Buffalo National River "[f]or the purposes of *conserving and interpreting an area containing unique scenic and scientific features, and* preserving [it] as a free-flowing stream . . . ." *Id.* (emphasis added).[27] Nothing cited by Defendants emphasizing the free-flowing characteristics of rivers in the Wild and Scenic Rivers System, therefore, precludes a broad understanding of the term "water resources project" that, like USDA's regulatory definition, includes developments that would affect the unique values of the protected river, including water quality and the physical, chemical, and biological characteristics of the waterway.

As Plaintiffs noted in their opening brief, the Department of Interior commented to Congress during consideration of the enactment of the Wild and Scenic Rivers Act that "[w]ater resources project is a very broad term which includes sewage treatment plants . . . ," H.R. Rep. No. 90-1623 at 40. Defendants' attempt to dismiss this statement is unpersuasive, *see* Defs.' Mem. at 51-52 n.43, because "great deference" is given "to contemporaneous constructions of the governing regulatory scheme by the agency charged with its implementation." *Wilderness*

[27] The statute reflects the breadth of Congress's intent to protect the Buffalo from any "developments below or above the . . . River or on any stream tributary thereto" which would "invade the area or unreasonably diminish the scenic, recreational, and fish and wildlife values present in the area." 16 U.S.C. § 460m-11.

Soc'y v. Tyrrel, 701 F. Supp. 1473, 1486 (E.D. Cal. 1988) (quoting *Udall v. Tallman*, 380 U.S. 1, 16 (1965)); *see also Miller v. Youakim*, 440 U.S. 125, 144 (1979) (noting the "principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong"). In *Sierra Club North Star Chapter v. Pena*, moreover, relied on by Defendants as "the sole judicial opinion" on the interpretation of "water resources project" under the Wild and Scenic Rivers Act, Defs.' Mem. at 53, the District of Minnesota based its interpretation largely on an opinion issued by the Department of Interior Solicitor's office shortly after enactment of the Wild and Scenic Rivers Act, which *repeats verbatim* the Department's report to Congress. *See* 1 F. Supp. 2d 971, 977-78 (D. Minn. 1998). Specifically, as quoted by the court in *Pena*, the Solicitor's opinion noted that "water resource project is a very broad term which includes sewage treatment plants" and concluded that the Department of Interior "finds nothing in the House or Senate reports or the congressional debates which indicates that Congress considered the term other than in its broadest context." *Id.* at 978 (quoting Memorandum from Bernard R. Meyer, Assoc. Solicitor, Dep't of Interior, to the Dir. of the Bureau of Outdoor Rec. (Feb. 7, 1969)). In *this* context, the Department of Interior concluded that:

> [I]t is our judgment that a water resource project can best be defined as any type of construction which would result in *any change* in the free-flowing *characteristics* of a particular river. . . . To view the act otherwise could result in the complete frustration of the Congressional purpose behind this legislation which is to preserve certain rivers in their free-flowing *natural condition* unaffected by dredging, filling or *other modification.*

Id. (quoting from Solicitor's opinion) (emphases added). Thus, despite Defendant's emphasis on the words "free-flowing," the context – in which the Department of Interior acknowledged the term "water resource project" to be understood "*in its broadest context*" and to include projects like sewage treatment plants – shows that the agency charged with enacting the statute viewed

"water resource project" to include any project that would change the values and qualities of the protected river. Because it is apparent from the record that C&H is such a project, it was arbitrary and capricious for Defendants to ignore the Buffalo National River Enabling Act.

VI. THIS COURT HAS JURISDICTION TO DECIDE PLAINTIFFS' CLAIMS

A. Plaintiffs' Injuries Are Fairly Traceable to Defendants' Actions

In the same way that Defendants attempted to divert the Court's attention on the merits of this case away from Defendants' own unlawful acts to the acts of C&H, so they attempt in their arguments on standing to do the same. Defendants do not contest that Plaintiffs have concrete interests in an uncontaminated Buffalo National River and a healthy, functioning ecosystem in the Buffalo River watershed. *See* Defs.' Mem. at 14. Critically, though, Defendants fail to recognize that Plaintiffs primarily seek to remedy violations of procedural rights,[28] which warrants a reduced showing on causation and redressability for standing. As the Supreme Court recognized in *Lujan v. Defenders of Wildlife*, an individual can enforce procedural rights "so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." 504 U.S. 555, 573 n.8 (1992). The Court explained:

> The person who has been accorded a procedural right to protect his concrete interests can assert that right *without meeting all the normal standards for redressability and immediacy*. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.

[28] *See, e.g.*, Decl. of Robert Allen ¶¶ 10-12, ECF No. 33-11; Decl. of Pamela Fowler ¶¶ 7, 9, 11, ECF No. 33-12; Decl. of Janet Nye ¶¶ 11-14, ECF No. 33-13; Decl. of Laura Timby ¶¶ ¶¶ 13-16, ECF No. 33-14.

Id. at 572 n.7 (1992) (emphasis added). Put another way, "[t]o establish standing by alleging procedural harm," an individual "must show only that they have a procedural right that, if exercised, *could* protect their concrete interests." *Defenders of Wildlife v. EPA*, 420 F.3d 946, 957 (9th Cir. 2005), *rev'd in part on other grounds, Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007). Plaintiffs meet this burden.

To satisfy standing requirements, "there must be a causal connection between the injury and the conduct complained of." *Lujan*, 504 U.S. at 560 (alterations and internal quotation marks omitted). As the Eighth Circuit has recognized,

> [i]njury under NEPA occurs when an agency fails to comply with that statute, for example, by failing to issue a required [EIS]. The injury-in-fact is increased risk of environmental harm stemming from the agency's allegedly uninformed decision-making.

See Sierra Club v. U.S. Army Corps of Eng'rs, 446 F.3d 808, 816 (8th Cir. 2006) (citing *Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 448-49 (10th Cir.1996)).[29] In other words, when procedural rights are being enforced, as under NEPA, "the injury is the increased risk of environmental harm to concrete interests, and the conduct complained of is the agency's failure to follow the [required] procedures." *Rio Hondo*, 102 F.3d at 451-52. "To establish causation, a plaintiff need only show its increased risk is fairly traceable to the agency's failure to comply" with the required procedures. *Id.*

Here, Defendants jointly provided guarantees for 97 percent of the loans that C&H received for the construction and operation of its facility. These federal guarantees were a necessary condition of the lender's agreement to loan money to C&H. *See* 13 C.F.R. § 120.2(a);

[29] Similarly, "alleged violations of Section 7(a)(2)'s consultation requirement constitute a procedural injury for standing purposes." *NRDC v. Jewell*, 2014 WL 1465695, at *5 (citations omitted). Thus, "to establish standing, a litigant who asserts a procedural violation under Section 7(a)(2) need only demonstrate that compliance with Section 7(a)(2) *could* protect his concrete interests." *Id.*

P-96. Moreover, both agencies provide financial assistance only to borrowers who cannot obtain the credit they desire anywhere else. Defendants therefore played a central and essential role in enabling the construction of a 6,500-swine CAFO in the Buffalo River watershed. Defendants' failure to comply with required environmental reviews and consultations, and their associated failure to place appropriate conditions on the guarantees to mitigate the adverse impacts of C&H directly translates into how C&H was constructed and now operates, with all of its attendant risk to the Buffalo River and its watershed. Plaintiffs' injuries – the increased risk of harm to the Buffalo River – are therefore fairly traceable to Defendants' failure to properly review, consult, and consequently condition their guarantees appropriately.

Defendants overstate the stringency of the "substantial probability" standard. *See* Defs.' Mem. at 14 (quoting *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 669 (D.C. Cir. 1996)).[30] In 2003, the D.C. Circuit, citing its own decision in *Bentsen* and the "substantially probable" standard, emphasized the Supreme Court's admonition in *Lujan* that the causation requirement

[30] The Tenth Circuit rejected *Bentsen*'s articulation of a "substantial probability" requirement. *Rio Hondo*, 102 F.3d at 451-52. In *Rio Hondo*, the court explained that *Bentsen* "appears to confuse the issue of the likelihood of the harm, which is better addressed in the injury in fact prong of the analysis, with its cause":

> Whether an increased risk will or will not occur due to the agency action determines whether a plaintiff has suffered injury in fact, not causation. Certainly, under the injury in fact prong, a plaintiff cannot merely allege that some highly attenuated, fanciful environmental risk will result from the agency decision; the risk must be actual, threatened or imminent. However, once the plaintiff has established the likelihood of the increased risk for purposes of injury in fact, to establish causation, . . . the plaintiff need only trace the risk of harm to the agency's alleged failure to follow [NEPA's] procedures. Under [NEPA], an injury results not from the agency's decision, but from the agency's *uninformed* decisionmaking. The increased risk of adverse environmental consequences is due to the agency's failure substantively to consider the environmental ramifications of its actions in accordance with [NEPA].

Id. (internal quotation marks omitted).

"is not very stringent." *City of Waukesha v. EPA*, 320 F.3d 228, 234-35 (D.C. Cir. 2003). "In fact, all that is necessary is to show that the procedural step *was connected to* the substantive result." *Id.*at 235 (citing *Bentsen*, 94 F.3d at 669) (alterations and internal quotation marks omitted) (emphasis added). Here, Defendants' provision of financial assistance (without following proper procedures) was necessary for the construction of a 6,500-swine CAFO that increases risk of harm to the Buffalo River.

In any event, Plaintiffs easily satisfy the "substantial probability" standard posed in *Bentsen*, which asks whether "there is a substantial probability . . . that the substantive agency action that disregarded a procedural requirement" – here, Defendants' provision of financial assistance without undertaking the appropriate reviews and consultations – "created a demonstrable risk, or caused a demonstrable increase in an existing risk, or injury to the particularized interests of the plaintiff." *Bentsen*, 94 F.3d at 669. Defendants do not contest that Plaintiffs have demonstrated sufficient injury-in-fact. *See* Defs.' Mem. at 13-19; *see also* Pls.' Mem. at 4-7 (identifying the significant flaws of C&H's NMP and the risks posed to the environment). The only question is whether there is a "substantial probability" that Defendants' flawed loan guarantees caused Plaintiffs' injury-in-fact. The "but for" causation that Defendants have all but conceded elsewhere, *see* Defs.' Mem. at 24, 26, 29, is relevant here. The records show that Defendants' guarantees were indispensable for the construction and existence of C&H. Had Defendants not provided guarantees – for *97 percent* of the loans that Defendants needed *and could not otherwise reasonably obtain elsewhere* – C&H would almost certainly not have

been built or at least would not have been built at the scale and size that required more than $3.5 million in federally-guaranteed loans.[31]

The cases cited by Defendants, *Appalachian Voices v. Bodman*, 587 F. Supp. 2d 79 (D.C. Cir. 2008), and *Sierra Club v. DOE*, 825 F. Supp. 2d 142 (D.D.C. 2011), are therefore easily distinguishable. In *Appalachian Voices*, the third party's decision to begin construction of its project was unaffected by the federal agency's action of providing tax credits representing only seven percent of the project's funding. *See* 587 F. Supp. 2d at 88. Similarly, in *Sierra Club v. DOE*, the record showed that the third party would continue to construct the project regardless of the federal agency's action in disbursing additional funds and/or approving loan guarantees. 825 F. Supp. 2d at 151. Here, the record reflects, by contrast, that C&H could not have gone forward had Defendants not provided their assistance. Defendants are off point in suggesting that C&H or ADEQ, as third parties, are the causes of Plaintiffs' injuries. Regardless of C&H's permit or ADEQ's permitting scheme, Defendants could have – after complying with the law and conducting the appropriate environmental reviews and consultation – refused to guarantee the loans or placed conditions on their guarantees to mitigate adverse impacts. Plaintiffs' injuries are fairly traceable to Defendants' failure to do so.[32]

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[31] Defendants claim that Plaintiffs fail to show "a 'substantial probability' that *absent* the federal guaranties," "C&H would not have secured credit at higher rates or other less favorable terms, and constructed the farm." Defs.' Mem. at 15. This misstates the test. The test is whether there is a substantial probability that Defendants' actions caused C&H to be built (with its injuries to Plaintiffs). Plaintiffs do not have the burden of demonstrating that there is *no probability* that C&H would have been built but for Defendants' actions. Rather, the fact that Defendants guaranteed almost the entirety of the loans that C&H obtained and that C&H was unable to obtain those loans commercially establishes a substantial probability, if not a near certainty, that Defendants' assistance led to the construction of C&H, with its risk to the Buffalo River.

[32] Notably, even in *Ctr. for Biological Diversity v. HUD*, on which Defendants heavily rely as a case in which plaintiffs challenged loan guarantees, the court found that Article III standing was satisfied. *See* 541 F. Supp. 2d at 1095.

B. Plaintiffs' Claims Are Not Moot and Their Injuries Are Redressable

Defendants' arguments concerning mootness and redressability are closely intertwined, so this section responds to both simultaneously. A case is moot when it becomes "impossible for the court to grant *any effectual relief whatever* to a prevailing party." *In re W. Pac. Airlines*, 181 F.3d 1191, 1194-95 (10th Cir. 1999) (quoting *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992)) (internal quotation marks omitted) (emphasis added). "The heavy burden of proving mootness falls on the party asserting the case has become moot." *Kennedy Bldg. Assocs. v. Viacom, Inc.*, 375 F.3d 731, 745 (8th Cir. 2004) (internal quotation marks omitted). As is set forth below, a favorable decision from this Court is likely to redress Plaintiffs' injuries notwithstanding that C&H has been constructed. *See Lujan*, 504 U.S. at 561-62. Because *some* "effectual relief" is possible, this case is not moot.

FSA's and SBA's loan guarantees are continuing obligations of the federal government. As such, contrary to Defendants' portrayal, the federal financial assistance provided to C&H is not an ephemeral action taken in the distant past with no ongoing and future impacts. Defendants' financial assistance is a commitment on the part of the government to participate in a loan directly should the borrower default. *See, e.g.*, 13 C.F.R. § 120.2(a)(2) (explaining guaranteed, or "deferred participation," loans). Defendants' obligations are therefore ongoing.[33] Indeed, Defendants are the first to acknowledge that the federal money that they promised in order to enable the construction of C&H has not yet been expended. *See* Defs.' Mem. at 4, 5, 16,

[33] USDA's continuing commitment extends even to providing advances on the guarantee: "[T]he Secretary [of Agriculture] shall ensure that farm loan guarantee programs . . . are designed so as to be responsive to borrower and lender needs and to include provisions under reasonable terms and conditions for advances, before completion of the liquidation process, of guarantee proceeds on loans in default." 7 U.S.C. § 1998.

21, 23.[34] Importantly, the government's continuing commitment throughout the life of the loan *is essential* to the loan's existence, as the loans were provided on the premise of Defendants' guarantee commitment. *See* 13 C.F.R. § 120.2(a)(2); P-96. Along with continuing government commitment are the ongoing impacts of C&H, which continue to injure Plaintiffs – impacts that Defendants failed to review and consult over in violation of the law, and impacts that could have been eliminated altogether or at least mitigated had Defendants complied with the law.[35]

Despite their protestations otherwise, Defendants have authority to exercise, if they choose, continuing control over the financial assistance they authorized. *See* Legal Background, *supra*; *see also Sierra Club v. USDA*, 777 F. Supp. 2d 44, 53 (D.D.C. 2011) (noting that "the ability of a court to grant effective relief in the context of a NEPA action involving a non-federal party can depend on whether the agency has maintained authority to impose mitigation measures"). USDA regulations specifically contemplate that FSA can play a role in monitoring and supervising the project for which it authorizes a guaranteed farm loan even "*after the guarantee has been issued*." 7 C.F.R. § 762.130(d)(2) (emphasis added); *see also id.* § 1940.330. The regulations indicate, for instance, that FSA staff "will ensure that those measures

[34] Although Defendants have not yet provided direct funds, there is no truth to Defendants' implicit suggestion that the agencies' guarantees have no impact on the national fisc. USDA regulations governing guaranteed farm loans indicate that such loans "are approved subject to the availability of funding." 7 C.F.R. § 762.130(b). When there are inadequate funds "to meet the needs of all approved applicants [for guaranteed farm loans]," approved applications are placed on a waiting list. *Id.*; *see also* U.S. Dep't of Agric., *Your Guide to FSA Farm Loans* 34 (2012), http://www.fsa.usda.gov/Internet/FSA_File/fsa_br_01_web_booklet.pdf (noting that "FSA receives funding for guarantees on a fiscal-year basis, and the demand for some guaranteed loan types may exceed the level of funding received").

[35] In fact, had Defendants properly notified the affected community, C&H may never have been built, given the intense public opposition and controversy over its existence in the Buffalo River watershed. As the Park Service stated: "[A]pplying hog waste to fields within a couple of hundred feet of the Mt. Judea School for up to three months of the year sounds quite controversial . . . . We also contend that risking the pollution of Big Creek with phosphorus is quite controversial since it flows into America's First National River." FSA-1109.

which were identified in the preapproval stage and required to be undertaken in order to reduce adverse environmental impacts are effectively implemented." *Id.* 1940.330(a). The NMP, on which FSA wholly relies in its EA, is such a measure. *See, e.g.*, FSA-1038 ("Water quality will be protected by producer's adherence to their CNMP."); *id.* ("Compliance with the CNMP should keep [air] emissions to a minimum."). Thus, although Defendants claim that they "do not exercise any control over C&H's operations," Defs.' Mem. at 20 n.16, FSA *already is required* to exercise control over C&H's operations to ensure that the NMP is being "effectively implemented" to "reduce adverse environmental impacts."[36] Moreover, FSA is broadly authorized to provide "for supervision of the borrower's operations as the Secretary [of Agriculture] shall deem necessary," 7 U.S.C. § 1983(4), and SBA is similarly empowered to "take any and all actions . . . necessary or desirable" in "modifying . . . or otherwise dealing with" the guaranteed loans that it authorizes, 15 U.S.C. § 634(b)(7).

In light of Defendants' unfulfilled obligations to review and consult, and to condition their guarantees accordingly, and their continuing ability to take these steps in a meaningful way, this Court can provide effective relief to Plaintiffs. The key question in considering mootness is not whether "the action challenged is complete," as Defendants would have the Court believe, Defs.' Mem. at 19, but rather, whether the court can "fashion an appropriate remedy." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 871 (9th Cir. 2004); *see also Airport Neighbors Alliance, Inc. v. United States*, 90 F.3d 426, 428-29 (10th Cir. 1996) ("[C]ourts still consider NEPA claims after the proposed action has been completed when the court can provide *some remedy* if it determines that an agency failed to comply with NEPA." (emphasis added)).

[36] The problem, as discussed in Section III, *supra*, is that FSA failed to identify and consider those impacts in the first instance, so it is difficult to see how, without a proper NEPA review, it could meaningfully monitor implementation of the NMP to reduce those impacts.

Even the court in *One Thousand Friends of Iowa v. Mineta*, 364 F.3d 890 (8th Cir. 2004), a case highlighted by Defendants, recognized that a NEPA claim is moot only "when the proposed action has been completed and *no effective relief is available*." *Id.* at 893 (emphasis added). Effective relief is still available where, as here, Defendants can modify the actions that they took and take further action that could meaningfully minimize adverse impacts to Plaintiffs.[37]

In *Nat'l Parks & Conservation Ass'n v. FAA*, 998 F.2d 1523 (10th Cir. 1993), for instance, petitioners challenged an order of the Federal Aviation Administration ("FAA") approving the construction, operation, and funding of an airport, and the actions of the Bureau of Land Management ("BLM") in amending a land management plan in order to allow the conveyance of public land for the site of the airport. *Id.* at 1525. At the time of the court's decision, BLM had already amended its land plan, conveyed the land, and the airport had already been built, but the court noted that mootness was not an issue because "the land could be reconveyed to the BLM or certain restrictions could be placed on the use of the airport." *Id.* n.3. In reviewing the record, the Tenth Circuit concluded that FAA's NEPA review for the airport was arbitrary and capricious and that BLM had violated public notice requirements in amending its management plan and conveying the public land. *Id.* at 1531, 1533. Finding it "unclear here whether the BLM would have reached the same decision if active involvement by the public was present from the beginning of the process," the court reversed BLM's plan amendment and land transfer. *Id.* at 1533. The court similarly reversed and remanded FAA's NEPA review, noting that the fact that the airport has already been built "does not mean that a remand would be

[37] Defendants' arguments concerning mootness are based entirely on NEPA case law. *See* Defs.' Mem. at 19-21. That is probably because there is no dispute that the ESA "imposes substantial, continuing, and affirmative obligations on federal agencies." *Nat'l Wildlife Fed'n v. Harvey*, 574 F. Supp. 2d 934 at 944 (E. D. Ark 2008).

meaningless" because FAA could take steps "to mitigate the damage or adverse impact." *Id.* at 1533-34.

Other courts reviewing NEPA claims have similarly provided relief despite completion of the offending project when it was possible, as in the present case, to mitigate harm to the Plaintiffs from ongoing operation of the completed project. *See Ocean Advocates*, 402 F.3d at 871 (finding that requiring an EIS would remedy plaintiffs' harm even when the underlying project – an addition to an existing oil refinery dock – had already been constructed, because plaintiffs were concerned about the dock extension's *operation* and the Corps was authorized to "impose conditions on the operation of permitted terminals"); *Airport Neighbors Alliance*, 90 F.3d at 429 (similarly finding a NEPA case not moot even though it challenged the upgrade of an airport runway that had already been completed because "[t]he majority of environmental concerns" related not to the "actual physical construction of the enlarged runway, but rather to the new patterns of commercial jets using the runway," which could still be altered).

Defendants' undue and misplaced emphasis on the wholesale shutdown of C&H as the *only* remedy required to redress Plaintiffs' injuries thus fails to acknowledge that this Court can "fashion an appropriate remedy." *See* Defs.' Mem. at 18 (noting that "enjoining the federal loan guaranties now will not prohibit C&H from continuing to operate" and "would not deny C&H Hog Farms the use of the land or facilities"); *id.* (citing cases where Plaintiffs did not meet the redressability requirement because they could not show that the project would be "scrap[ped]" or "imperil[ed]" by a favorable court decision). *Cf. Byrd v. EPA*, 174 F.3d 239, 244 (D.C. Cir 1999) ("[E]ven the availability of a partial remedy is sufficient to prevent a case from being moot." (internal quotation marks omitted)). Although Plaintiffs believe that proper notice and public involvement would have resulted in a different outcome in the first instance, Plaintiffs

continue to suffer injury from a 6,500-swine CAFO operating without proper consideration of impacts and appropriate mitigation, such as, for instance, measures to control air emissions, adequate storage pond liners to prevent leakage, pond covers, and sufficient buffer zones for spraying of the swine waste. A serious inquiry into the impacts of C&H's operation on, among other things, air quality, water quality, public health, and protected species, and consideration of appropriate mitigation measures could still provide Plaintiffs meaningful relief.[38] Accordingly, Plaintiffs' claims are not moot and are redressable by this Court.

VII. THIS COURT SHOULD ENJOIN DEFENDANTS' GUARANTEES UNTIL SUCH TIME AS DEFENDANTS FULLY COMPLY WITH THE LAW

Because Defendants violated NEPA, ESA, the Buffalo National River Enabling Act, and their own regulations in reviewing and authorizing loan guarantees to assist C&H, this Court should exercise its authority under the APA and the ESA to set aside the ongoing loan guarantees until such time as Defendants comply with the law. Under the APA, this Court is authorized to "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). "[O]nce noncompliance with NEPA is shown, the federal courts have uniformly held that injunctive relief is appropriate." *Nat'l Wildlife Fed'n v. Harvey*, 574 F. Supp. 2d 934, 944 & n.50 (E.D. Ark. 2008) (citing *Comm. for Nuclear Responsibility, Inc. v. Schlesinger*, 404 U.S. 917, 921 (1971)); *see also Realty Income Trust v. Eckerd*, 564 F.2d 447, 456 (D.C. Cir. 1977) ("Ordinarily when an action is being undertaken in violation of NEPA, there is a presumption that injunctive relief should be granted against continuation of the action until the agency brings

[38] Plaintiffs who "assert[] inadequacy of a government agency's environmental studies under NEPA need not show that further analysis by the government would result in a different conclusion. It suffices that, as NEPA contemplates, the [agency's] decision *could* be influenced by the environmental considerations that NEPA requires an agency to study." *Ocean Advocates*, 402 F.3d at 860 (quoting *Hall v. Norton*, 266 F.3d 969, 977 (9th Cir. 2001)).

itself into compliance."); *Audubon Soc'y of Central Ark. v. Dailey*, 761 F. Supp. 640 (E.D. Ark. 1991), *aff'd*, 977 F.2d 428 (8th Cir. 1992) (enjoining the Army Corps of Engineers to suspend an issued permit and enjoining further construction of a bridge as a result of NEPA violations).

District courts are required, moreover, "to enforce" the ESA and the regulations issued under it. *See* 16 U.S.C. § 1540(g)(1); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 193-95 (1978) (concluding that the ESA forecloses the exercise of a court's equitable discretion). In *TVA v. Hill*, the Court found that Section 7 of the ESA applied to a dam impounding a section of the Little Tennessee River. Although construction of the costly project was virtually complete, the Court prohibited completion and operation of the dam because its operation would jeopardize a protected species. Although the Court recognized that an interpretation of the ESA to remove its equitable discretion "will produce results requiring the sacrifice of the anticipated benefits of the project and of many millions of dollars in public funds," it concluded that "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities." *Id*. at 194; *see also id.* at 186 ("Congress foresaw that § 7 would, on occasion, require agencies to alter ongoing projects in order to fulfill the goals of the Act."); *Weinberger*, 456 U.S. at 314 ("The purpose and the language of the [ESA] limited the remedies available to the District Court; only an injunction could vindicate the objectives of the Act."); *Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir. 1987) ("[S]ection 7 is a significant restriction on courts' equity jurisdiction."). Because Defendants violated the ESA, this Court must enforce Section 7(a)(2) and enjoin Defendants' guarantees until such time

as they consult with FWS and insure that the endangered Gray bat, Indiana bat, and snuffbox mussel, and the threatened rabbitsfoot mussel are not jeopardized by the operation of C&H.[39]

So long as the Court is required to enjoin the guarantee in order to enforce the ESA, it should at the same time require Defendants to comply with the other violated laws. To the extent this Court considers it necessary to undertake a separate inquiry into the propriety of an injunction for Plaintiffs' NEPA and Buffalo National River enabling act claims, each of the factors considered in granting an injunction warrant one in this case. Plaintiffs have shown "(1) that [they have] suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 130 S. Ct. 2743, 2756 (2010); *see also Nat'l Wildlife Fed'n v. Harvey*, 440 F. Supp. 2d 940, 949-50 (E.D. Ark. 2006) (formulating the test).

Here, Plaintiffs have described the injury they face as a result of the construction and operation of a 6,500-swine CAFO along a tributary to the beloved Buffalo National River. *See* ECF Nos. 33-7 to 33-15. Defendants do not contest that Plaintiffs have established the requisite concrete and particularized injury-in-fact necessary for standing. *See* Defs.' Mem. at 14-19. These injuries are irreparable and cannot be compensated by damages. As the Supreme Court

[39] Defendants point to FWS's August 28, 2013, email in response to FSA's request for a concurrence on a "may affect, but not likely to adversely affect" determination to suggest that relief for Plaintiffs' ESA claims is not possible at this stage. *See* Defs.' Mem. at 21. FWS's refusal to concur in FSA's effects determination more than eight months after FSA authorized its guarantee reflects, if nothing else, FWS's refusal to be complicit in FSA's blatant disregard of the Section 7(a)(2) consultation requirements. FWS's apparent misconception that FSA's guarantee is not an ongoing action over which FSA still maintains control, *see* ECF No. 33-6, does not preclude this Court from ordering Defendants to comply with Section 7(a)(2). FWS is under an independent obligation to assist agencies during consultation. *See generally* 16 U.S.C. § 1536.

has noted, environmental harm, "by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987); *see also Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 25 (D.D.C. 2009) ("[E]nvironmental and aesthetic injuries are irreparable."); *Stand Together Against Neighborhood Decay, Inc. v. Bd. of Estimate of City of N.Y.*, 690 F. Supp. 1192, 1200 (E.D.N.Y. 1988) ("In a typical environmental case, the alleged harm is purely environmental and truly irreparable . . . .").

Moreover, the balance of equities between Plaintiffs and Defendants weigh in favor of an injunction. In cases involving preservation of the environment, the balance of harms generally favors the grant of an injunction. *See Amoco Prod. Co.*, 480 U.S. at 545 ("If such injury is sufficiently likely . . . , the balance of harms will usually favor the issuance of an injunction to protect the environment."); *see also Nat'l Wildlife Fed'n v. Burford*, 676 F. Supp. 271, 279 (D.D.C. 1985) ("[A] preliminary injunction would serve the public by protecting the environment from any threat of permanent damage."). In this case in particular, the balance of equities strongly disfavors Defendants, who as a result of violations of notice requirements, approved significant federal financial assistance for the first ever Large CAFO in the leaky karst terrain of the Buffalo River watershed out of the public eye. Defendants' egregious violations of the law are pointed out by their own sister agency, the National Park Service, in a scathing letter to FSA after the Park Service found out about C&H. *See* FSA-1103 to 1113. The Park Service's critique confirms the extent to which that agency, "the public[,] and other stakeholders" were never "afforded an opportunity to comment" about a project with "potential to significantly impact public safety and values." FSA-1112. Under circumstances such as this – in which federal agencies violate the law in enabling a project that with significant adverse environmental

impacts *without first letting the affected public know about the project* – the equities demand that the Defendants not be let off the hook.

Finally, the public interest weighs in favor of an injunction. There "is no question that the public has an interest in having Congress' mandates in NEPA carried out accurately and completely." *Brady Campaign*, 612 F. Supp. 2d at 26. As the Eighth Circuit has noted, an injunction is in the public interest when "it would convey to the public the importance of having its government agencies fulfill their obligations and comply with the laws that bind them." *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d at 997 (alterations and internal quotation marks omitted). Here, Defendants have violated the law – they failed to properly notify and engage the communities affected by an unprecedented and massive swine CAFO in the sensitive watershed of a national park unit and Extraordinary Resource Water; failed to consult even with the Park Service whose duty is to protect the Buffalo National River; ignored the mandates of the law altogether in the case of SBA; and prepared a slipshod imitation of a proper NEPA review in the case of the FSA. Such violations of the law, with irreparable impacts to Plaintiffs, the Mount Judea community, and the more than one million annual visitors to the Buffalo National River, *see* Am. Compl., ECF No. 18 ¶ 2, should not go unheeded by this Court. "Congress has determined that neither the public, nor the environment, should bear the consequences of [an agency's] failure to comply with statutory and regulatory requirements." *Ark. Nature Alliance, Inc. v. U.S. Army Corps of Eng'rs*, 266 F. Supp. 2d 876, 893 (E.D. Ark. 2003) (requiring the Army Corps to conduct a proper NEPA analysis and ordering the restoration of a bridge to its original low-water dimensions even though modifications to the bridge has already been fully completed). This court retains "broad discretion in shaping remedies." *See Sea–Land Serv. Inc.*

v. Int'l Longshoremen's & Warehousemen's Union, 939 F.2d 866, 870 (9th Cir.1991). The equities and the public interest demand that this Court exercise that discretion here.

CONCLUSION

For all the reasons set forth above, Plaintiffs request that this Court deny Defendants' cross-motion for summary judgment; enter summary judgment in Plaintiffs' favor; find that FSA's EA and FONSI are contrary to law and that Defendants failed to comply with NEPA, the ESA, the Buffalo National River Enabling Act, and their own regulations; enjoin the loan guarantees issued by Defendants; and remand the matter to Defendants for an environmental review and decision in compliance with Defendants' statutory and regulatory obligations.

Respectfully submitted this 19th day of May, 2014,

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