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

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| BUFFALO RIVER WATERSHED ALLIANCE; ARKANSAS CANOE CLUB; NATIONAL PARKS CONSERVATION ASSOCIATION; and OZARK SOCIETY,<br><br>Plaintiffs,<br><br>V.<br><br>UNITED STATES DEPARTMENT OF AGRICULTURE; UNITED STATES SMALL BUSINESS ADMINISTRATION; TOM VILSACK, in his official capacity as Secretary, United States Department of Agriculture; MARIA CONTRERAS-SWEET, in her official capacity as Administrator, Small Business Administration; JUAN GARCIA, in his official capacity as Administrator, Farm Service Agency; LINDA NEWKIRK, in her official capacity as Arkansas State Executive Director, Farm Service Agency; and LINDA NELSON, in her official capacity as Arkansas District Director, Small Business Administration,<br><br>Defendants. | ) | Civil No. 4:13-cv-0450 DPM |

**FEDERAL DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

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# I. INTRODUCTION

In their reply, Plaintiffs labor to hold the Small Business Administration ("SBA") and the Farm Service Agency ("FSA") legally responsible for the potential environmental impacts of a private Concentrated Animal Feeding Operation ("CAFO") owned and operated by C&H Hog Farms ("C&H") near Mt. Judea, Arkansas. While Plaintiffs decry Defendants for "disavowing" federal responsibility for the farm, Plaintiffs cannot avoid the fact that they seek to force the Agencies to play a role in managing the decisions of small business owners and local land use planners that the Agencies were not meant to play.

Plaintiffs' claims falter on the threshold jurisdictional doctrines of standing and mootness, because their injuries are neither legally traceable to the Agencies nor redressable by a judicial ruling against those Agencies. On the merits, Plaintiffs' claims under the National Environmental Policy Act ("NEPA"), the Endangered Species Act ("ESA") and the Buffalo National River Enabling Act fail because those statutes are not applicable in this case. And, to the extent the FSA was required to conduct analyses under NEPA and the ESA, it complied with both statutes.

Federal Defendants' motion for summary judgment should therefore be granted, and Plaintiffs' motion denied.

# II. ARGUMENT

## A. Plaintiffs' Claims Are Not Justiciable

### 1. Plaintiffs Lack Standing

Plaintiffs' challenge to SBA and FSA's issuance of loan guaranties falters on the threshold jurisdictional requirement of standing. Plaintiffs allege that they are injured by the adverse effects the C&H facility will have on the water quality of the Buffalo National River. Plaintiffs lack standing to pursue this claim, however, because they fail to demonstrate that their alleged injury is "fairly traceable" to the Defendants' loan guaranties or that it would be

redressed by a favorable judicial decision. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009).

In their reply, Plaintiffs seek to lower the bar, asserting that because the rights they seek to remedy are procedural –failure to follow NEPA procedures and failure to consult under the ESA and Buffalo National River Enabling Act—their burden of showing causation and redressability is reduced. Pl. Reply (ECF No. 46) at 58. It is true that the showing of causation and redressability is reduced in the context of procedural injuries, in the sense that plaintiffs are not obligated to prove that an agency would have reached a different decision had it complied with the procedures of NEPA or the ESA. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.8 (1992). But a plaintiff must still satisfy the normal—and more stringent—requirements of demonstrating causation and redressability where its alleged injury is directly caused by the actions of third parties. *See St. John's United Church of Christ v. FAA*, 520 F.3d 460, 463 (D.C. Cir. 2008) (holding plaintiffs' allegation of procedural failure by FAA did not absolve them of normal obligation to show causation and redressability where their injury was caused by Chicago's construction of an airport). In other words, the allegation of a procedural violation by the government does not assure that the government is a proper defendant in a procedural-rights case: a "prospective plaintiff must demonstrate that the defendant caused the particularized injury, and not just the alleged procedural violation." *Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996). Here, because any injury to Plaintiffs is caused by the acts of a third party the normal standards of causation and redressability apply.

**a. Plaintiffs' Alleged Injuries are not Fairly Traceable to the Federal Defendants**

To demonstrate the requisite causal link—traceability—between the federal loan guaranties and the injury allegedly caused by the construction and operation of the C&H facility, Plaintiffs must show that "there is a substantial probability that the substantive agency action . . . created a demonstrable risk, or caused a demonstrable increase in an existing risk, of injury to the

particularized interests of the plaintiff." *Fla. Audubon*, 94 F.3d at 669 (internal citation omitted). Here Plaintiffs have not met that burden.[1]

First, Plaintiffs have failed to show a substantial probability that absent the federal guaranties, C&H would not have constructed the facility. Plaintiffs emphasize that the SBA and FSA guaranteed a large percentage[2] of the loans issued to C&H by the bank, Farm Credit Services, and assert that absent those guaranties C&H would not have received credit and would not have built the farm. But while SBA and FSA require a representation that, without that guaranty, the desired credit is not currently available *at reasonable rates and terms*, *see* 13 C.F.R. § 120.101 (SBA) and 7 C.F.R. § 762.120 (FSA), there is no evidence that in the absence of the Agencies' guaranties C&H would not have secured credit at higher rates or other less favorable terms and proceeded with construction of the facility. In the absence of such evidence, Plaintiffs cannot carry their burden and "'adequately bridge the uncertain ground in any causal path that rests on the independent acts of third parties.'" *Appalachian Voices v. Bodman*, 587 F. Supp. 2d 79 (D.D.C. 2008) (quoting *Fla. Audubon*, 94 F.3d at 670).

Second, in attempting to demonstrate causation, Plaintiffs ignore the direct causal link between their alleged injury and the actions of a regulatory agency not before the Court, the Arkansas Department of Environmental Quality ("ADEQ"). As set forth in detail in Defendants'

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[1] Plaintiffs suggest in passing that the "substantial probability" standard in *Florida Audubon* is not good law. Pl. Reply at 60-61. To the contrary, the D.C. Circuit has continued to rely on *Florida Audubon* to determine whether a claimed injury is fairly traceable to the defendant's alleged procedural breach. *See*, *e.g.*, *WildEarth Guardians v. Jewell*, 738 F.3d 298, 306 (D.C. Cir. 2013). While Plaintiffs note a Tenth Circuit decision which disagreed with the analysis in *Bentsen*, that case did not involve the question of causation when the independent actions of third parties are involved. Moreover, the "substantial probability" test in *Florida Audubon* derives directly from unquestionably valid Supreme Court case law. *See Warth v. Seldin*, 422 U.S. 490, 504 (1975) (requiring plaintiffs to show "substantial probability" that their inability to lease or purchase a house was caused by the defendant's zoning practices) (cited in *Florida Audubon* at 94 F.3d at 663).

[2] Plaintiffs erroneously assert that the Defendant agencies provided guaranties on 97 percent of the loans that C&H received. Pl. Reply at 1, 10, 59. In fact, SBA guaranteed 75 percent of Farm Credit's loan of $2,318,200 and FSA guaranteed 90 percent of Farm Credit's loan of $1,302,000, resulting in total federal guaranties on 80 percent of the amount loaned.

opening brief, the ADEQ oversees a well-established regulatory permitting system established pursuant to the Clean Water Act to eliminate harmful discharges into the Nation's waters. *See* Def. Br. (ECF No. 38) at 5-8, 16. C&H operates under an ADEQ permit and the ADEQ retains jurisdiction to monitor C&H's operations and enforce violations of the permit. *Id.*

Plaintiffs' alleged injury thus requires that the Court speculate both as to the choices C&H would have made in the absence of the federal guaranties and to assume the failure of the State's regulatory processes in ensuring that the facility will not cause water pollution. The existence of these speculative leaps shows that Plaintiffs' injuries are not "fairly traceable" to the conduct of the SBA and FSA for the purposes of establishing standing *See Clapper v. Amnesty Int'l*, 133 S.Ct. 1138, 1150 (2013) (noting standing cannot be predicated on "theories that rest on speculation about the decisions of independent actors"). Because their injuries are not fairly traceable to the Agencies' conduct, Plaintiffs fail to establish standing and this case must be dismissed.

**b. Plaintiffs' Alleged Injuries are not Redressable**

Assuming arguendo that Plaintiffs' injuries are fairly traceable to the SBA and FSA's loan guaranties, Plaintiffs still lack standing because those injuries will not be redressed by the remedies that Plaintiffs' themselves seek. *See Defenders*, 504 U.S. at 561 (it must be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision") (quotation marks and citation omitted).

As noted in Defendants' opening brief, and undisputed by Plaintiffs, C&H Hog Farms has received all necessary permits from the State of Arkansas, received all loan proceeds, completed construction of the farm, and is now operating. Under these circumstances, Plaintiffs' injuries are not redressable by the Court. First, enjoining the federal loan guaranties would do nothing to redress the injuries allegedly caused by the C&H facility: Farm Credit Service's loan to C&H would remain in place, and C&H would be able to continue operations as authorized

under its permit from ADEQ.[3] The only impact of such an injunction would be to render the lender, Farm Credit Services, less secure, because in the event of a default by C&H the United States would no longer be obligated to pay the guaranteed portion of the lender's loan. The case law makes plain that in cases such as this—where a plaintiff's injury is directly caused by a third party and injunctive relief against the federal government will not alter the injurious behavior of that third party—the plaintiff's injury is not redressable. *See Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 43 (1976) (holding plaintiffs lacked standing where it was speculative that a court order against the federal agency would alter the injurious behavior of private hospitals); *St. John's United Church v. FAA*, 520 F.3d at 463 (holding plaintiffs' injury was not redressable where they had "not shown a 'substantial probability' that Chicago would scrap the O-Hare project if the court vacated the $29.3 million [federal] grant."); *Sierra Club v. U.S. Dep't of Energy*, 825 F. Supp. 2d 142, 151 (D.D.C. 2011) (noting plaintiffs' standing doubtful where they failed to show that the relief sought "would imperil the project").

Second, it is also clear that injunctive relief directing the Agencies to prepare a new environmental analysis on remand would not provide effective relief to Plaintiffs. The project which would be the subject of such an analysis is complete, and ordering the Agencies to engage in a review of the project and its alternatives as if the project had not yet been undertaken would

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[3] While Plaintiffs devote substantial energy to the argument that without the federal loan guaranties the C&H facility would not have been built, the inquiry in the redressability context is not whether the farm would have been built in the first place, but whether, now that it is built, Plaintiffs' alleged injury is redressable. The D.C. court's analysis in *Sierra Club v. U.S. Dep't of Energy*, 825 F. Supp. 2d 142 (D.D.C. 2011), is illustrative. There, plaintiffs sought to enjoin additional federal financial support of a power plant being constructed by Mississippi Power. The Court found that although

> "there is some evidence that Mississippi Power would not have gone forward with the [project] had DOE not initially provided funding. . . . It is largely irrelevant, however, what Mississippi Power would or would not have done had DOE not made its initial decision to fund the project. With respect to injunctive relief, the relevant question is what effect an order from this Court would have *now*."

825 F. Supp. 2d at 152. The Court concluded that because there was not sufficient evidence that enjoining further federal financial assistance would now imperil the project, an injunction would not address plaintiffs' injury. *Id.*

neither benefit Plaintiffs nor serve the purposes of the statutes at issue. *See One Thousand Friends of Iowa v. Mineta*, 364 F.3d 890, 894 (8th Cir. 2004) (declining to order NEPA analysis of a completed highway project); *Rattlesnake Coal. v. EPA*, 509 F.3d 1095, 1102-03 (9th Cir. 2007) (holding plaintiffs lacked standing because their injuries would not be redressed by requiring NEPA analysis after project construction was complete and federal funds expended); ECF No. 33-6 (email from the United States Fish and Wildlife Service ("FWS") to FSA explaining that FWS "does not consult on 'after-the-fact' actions").

In their reply, Plaintiffs insist that although the C&H facility is complete and operational, their injuries are redressable because the FSA and SBA can "modify the actions that they took and take further action that could meaningfully minimize adverse impacts to Plaintiffs." Pl. Reply. at 66. Although Plaintiffs fail to spell out in concrete terms exactly how they believe their injury can be redressed, they appear to contend that the Agencies can—after conducting a NEPA analysis and ESA consultation on the now complete C&H facility—impose different facility design requirements or mitigations that would alleviate Plaintiffs' alleged injuries. Pl. Reply at 66. But Plaintiffs entirely fail to explain how this could be done. Neither SBA nor FSA has direct regulatory authority over C&H such that they could require it to alter its facilities or operations. And, even assuming that FSA and SBA have the authority to modify the existing guaranties (or rescind them and issue new guaranties) to make them contingent on design changes or mitigations, there is nothing requiring *C&H* to make those changes and no basis for assuming it would. In other words, altering the terms of the guaranty, which is a relationship between the *lender* and the agency, would not likely change the behavior of the *borrower*.

Plaintiffs' assertion that the Agencies exercise sufficient authority over C&H's operations that they could compel C&H to modify its operations in response to the outcome of a new NEPA analysis or ESA consultation falls short. First, while Plaintiffs locate some examples of

continuing involvement by the FSA after guaranties are issued,[4] none of the cited provisions amount to the authority that would be required to render Plaintiffs' alleged injury redressable: the authority to change the terms of a previously executed guaranty after the loans have issued and to compel the borrower to modify its already constructed project.[5] Second, Plaintiffs attempt to find ongoing authority to modify C&H's operations in the fact that the Agencies have not yet expended any federal money on the guaranties. Pl. Reply at 61-62. This argument misapprehends the nature of the federal guaranties. At this juncture the guaranties represent a completed contractual relationship between the bank and the United States ensuring that the United States will repay a portion of the bank's loss if the borrower defaults.[6] The guaranties are not the equivalent of future funding of the C&H facility which can now be conditioned or withheld to change C&H's operations.

Because they have not carried their burden of demonstrating that their injuries are likely to be redressed by a favorable ruling from this Court, Plaintiffs lack standing and this case should be dismissed.

**2. Plaintiffs' Claims Are Moot**

The fact that construction of the C&H facility is complete and that there is no effective relief that can be awarded Plaintiffs also supports dismissal of this action under the doctrine of mootness. *See* Def. Reply at 19-21. In their reply, Plaintiffs concede that the mootness inquiry is essentially coterminous with the question of whether their claims are redressable and turns on

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[4] *See* Pl. Reply at 64 (citing 7 C.F.R. § 762.130(d)(2) which allows FSA employees to accompany lenders on field inspections); *id.* at 65 (citing 7 C.F.R. § 1940.330(a) which provides that FSA will insure that any measures included in the guaranty approval are implemented).

[5] Notably, Plaintiffs cite to no instances of any ongoing involvement in the borrowers' operations in the SBA's regulations. Pl. Reply 64-65.

[6] The Agencies' authority to rescind guaranties already issued is narrowly prescribed. *See* 7 U.S.C. § 1928 (a)-(b) (providing that a loan guaranty issued by the USDA "shall be an obligation supported by the full faith and credit of the United States," and "shall be incontestable except for fraud or misrepresentation" known of or participated in by the lender); 7 C.F.R. § 762.103 (same); 13 C.F.R. § 120.524(a) (listing conditions under which SBA is released from its obligation to honor a guaranty).

whether effective relief can be granted. Pl. Reply at 63-67. Plaintiffs allege that effective relief can be awarded because the Agencies exercise sufficient authority over the C&H facility to impose mitigation measures. For the reasons explained above, however, Plaintiffs fall well short of demonstrating that the Agencies retain enough authority over C&H's operations that they could compel C&H to alter its operations in response to a new NEPA analysis or ESA consultation.

The cases Plaintiffs cite in support of the proposition that this case is not moot are all inapposite, as they all involved situations where the evidence showed the federal agency retained sufficient authority over the project to alleviate the plaintiffs' injury. *See* Pl. Reply 64-66. In *National Parks and Conservation Ass'n v. FAA*, for example, the court concluded that a challenge to a land transfer by the Bureau of Land Management ("BLM") and approval of an airport by the Federal Aviation Administration ("FAA") was not mooted by the completion of construction of the airport because the parties agreed that the land transfer could be reversed and that FAA had authority to impose restrictions on the subsequent operations of the airport. 998 F.2d 1523, 1525 n.3 (10th Cir. 1993). Similarly, in *Airport Neighbors Alliance v. United States*, the court found completion of the challenged runway *did* moot NEPA claims related to the construction of a runway, but *did not* moot claims related to the *use* of the new runway, because the defendants before the court, both the FAA and the City, had authority to change use of the new runway in response to a new NEPA analysis. 90 F.3d 426, 430 (10th Cir. 1996). Finally, in *Ocean Advocates v. U.S. Army Corps of Engineers*, the court found that completion of a loading dock did not moot plaintiffs' claims because plaintiffs challenged "only the operation of the new platform and not its construction" and because the federal defendant had authority over operation of the dock. 402 F.3d 846, 871 (9th Cir. 2005). Critically, in all of these cases, the defendants had clear and ongoing authority to take action in response to a new NEPA analysis in a manner that would address the plaintiffs' alleged injury. Here the Defendants have no such authority. Regardless of what authority the Agencies may have had prior to the issuance of the loan guaranties and prior to C&H's completion of construction, they do not now have the authority to

mandate any change in C&H's operations in response to any new NEPA analysis or ESA consultation.

In sum, this case should be dismissed on jurisdictional grounds. The tenuous connection between the FSA and SBA loan guaranties and the allegedly harmful operations of the C&H farm and the impossibility of redressing Plaintiffs' injuries through a judgment against FSA and SBA dictate that the Plaintiffs lack standing and that the case is moot.

### B. SBA Did Not Violate NEPA Or The ESA

SBA's issuance of a loan guaranty to Farm Credit Services to back one of that bank's loans to C&H did not provide the Agency with sufficient control over the C&H facility to require analysis of the facility's impacts under NEPA. Nor did it trigger consultation obligations under the ESA.

#### 1. Plaintiffs Misconstrue SBA's Authority Over The Decisions Of Small Business Owners

In an attempt to bolster their claim that the SBA violated NEPA and the ESA, Plaintiffs assert that the provision in SBA's statute providing that the agency may "take any and all actions" with regard to loans made under the statute, confers upon the Agency broad authority to control the operational decisions of individual small businesses receiving loans guaranteed by the SBA. Pl. Reply at 4 (citing 15 U.S.C. § 634(b)(7)). It strains credibility, and defies common principles of statutory interpretation, to assume that Congress intended the "any and all actions" language to bestow upon the SBA broad authority beyond its statutory mission of assisting in the financing of small business to intervene in the operational planning of individual small businesses. *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 162 (4th Cir. 1998) (noting statutory text must be interpreted in light of the object and policy of the law and that interpretations expanding agency authority receive "more intense scrutiny" ), *aff'd*, 529 U.S, 120 (2000).

Certainly no assertion of such broad authority can be found in the SBA's regulations. Plaintiffs assert that under 13 C.F.R. § 120.120, SBA may "require borrowers to use loan

proceeds for certain specified purposes, . . . as 'prescribed in each Loan's Authorization.'" Pl. Reply at 4. In fact, however, Section 120.120 only sets forth a general list of eligible uses of loan proceeds. It does not contain any assertion of authority to specify in the loan authorization the particulars of how any business will operate. Nowhere in section 120.120, or anywhere else in SBA's regulations, is it provided that when issuing a guaranty SBA is to become involved in which land a borrower should buy, what buildings a borrower is to construct, or how working capital is to be spent. Plaintiffs also claim that SBA's broad authority is evidenced by regulations that require recipients of loans backed by SBA guaranties to certify that they are not delinquent on child support (§ 120.171(d)), and to refrain from the use of lead-based paint (§ 120.173). But these sort of easily administered requirements, which can be satisfied by a certification of compliance, are a far cry from the role which Plaintiffs seek to impose on the SBA, in which the SBA would be obligated—even when the use of the loan proceeds provided by a lender which has received a SBA loan guaranty are otherwise permissible under Section 120.120—to involve itself in determining where individual small businesses should be located and how eligible businesses should be operated. SBA does not read its authorities to issue loan guaranties to lenders so broadly.

Indeed, in 2004, after closely reviewing the NEPA case law and its own programs, the SBA concluded that:

> SBA does not have control over the business activities of the private borrower, has no responsibility for the borrower's business activities and has no authority over the outcome of the borrower's efforts. Thus, SBA borrowers approach lenders with business plans which they have formulated without SBA direction; they have chosen, or choose, the location of their businesses without directives from SBA; SBA does not direct or even supervise the efforts of borrowers to operate, modify, or expand their businesses; SBA has no role whatsoever in the day-to-day activities of the borrowers; and SBA does not control a borrower's ability to succeed in its business activities.

69 Fed. Reg. 49, 971, 47,974 (Aug. 6, 2004). The SBA's interpretation of its own authority is subject to deference. *Chevron U.S.A., Inc. v. Natural Res. Def. Council,* 467 U.S. 837, 838

(1984). This Court should reject Plaintiffs' attempt to construe SBA's loan guaranty program to give the Agency broad authority over the decisions of individual businesses like C&H.

**2. SBA Did Not Violate NEPA**

**a. SBA's Loan Guaranty did not Render the C&H Facility a Federal Action Subject to NEPA**

There is a well-established two-prong inquiry for determining when there is sufficient federal involvement in an otherwise private undertaking to trigger NEPA. Under that inquiry an action is not federalized—and therefore does not require NEPA analysis—unless there is (1) significant federal funding or (2) federal "power, authority, or control" over the project. *See* Def. Br. at 22-23. [7] As set forth in detail in Defendants' opening brief, under this test the SBA's loan guaranty did not federalize the C&H facility such that NEPA analysis was required.

First, there is no question that SBA's loan guaranty does not constitute significant federal funding of the C&H facility. The guaranty represents an agreement with the lender to pay federal funds in the event of a default. In no event are the federal funds paid to C&H. *See Ctr. for Biological Diversity v. HUD,* 541 F. Supp. 2d at 1098; Def. Br. at 23-24. Indeed, in their reply, Plaintiffs do not contend that SBA has funded the C&H farm, and thus acknowledge that this federalization prong has not been met. Instead, Plaintiffs assert only that they need not

[7] As Plaintiffs note, Pl. Reply at 11, the Eighth Circuit has indicated that the threshold legal question of whether an action is subject to NEPA is reviewed for "reasonableness in the circumstances." *Goos v. ICC,* 911 F.2d 1283 (8th Cir. 1990) (quoting *Minn. Pub. Interest Research Grp. v. Butz,* 498 F.2d 1314 (8th Cir. 1974)). In *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989), however, the Supreme Court considered the standard of review for NEPA claims (including a claim that the agency failed to prepare, or to document its decision not to prepare, a supplemental Environmental Impact Statement) and expressly rejected any standard other than "arbitrary and capricious." 490 U.S. at 377 & n.23. Defendants believe that standard should apply to all NEPA claims, including the threshold consideration of whether NEPA applies. Nonetheless, as the Supreme Court also noted in *Marsh*, "the difference between the 'arbitrary and capricious' and 'reasonableness' standards is not of great pragmatic consequence." *Id.* at 377 n.23. In this case the standard of review is not determinative. Indeed, in *Center for Biological Diversity v. HUD,* 541 F. Supp. 2d 1091, 1096-96 (D. Ariz. 2008), *aff'd,* 359 F. A'ppx. 781 (9th Cir. 2009), the court employed "the less deferential standard of reasonableness" in reaching its conclusion that SBA's loan guaranties are not federal actions subject to NEPA.

demonstrate *both* federal funding *and* federal "power, authority, and control." Pl. Reply at 15 n.5.

Second, with regard to "power, authority, or control," the case law provides that the federal agency must exercise control or actual decision-making authority over how the project is designed and alternatives to the project. The fact that an agency has the "but-for" ability to simply veto the project altogether does not constitute control for NEPA purposes. *See* Def. Br. at 24-25. Here it is clear that SBA did not possess any control or decision-making authority over the design or operation of the C&H facility. The lender came to the SBA once C&H had a fully developed Nutrient Management Plan and an ADEQ permit governing its operations. The extent of SBA's action was to consider C&H's credit worthiness; the Agency did not exercise actual decision making authority over the facility's design or location. *See* Def. Br. at 24-25.

In their reply, rather than carrying their burden of showing SBA exercised control or decision-making authority over the C&H facility, Plaintiffs instead attempt to reformulate the inquiry into whether the Agency had "discretion" to control the private action. Pl. Reply at 14-15. Here, Plaintiffs submit, the SBA had discretion to control C&H because it has the "ability to refuse" to provide a loan guaranty. Pl. Reply at 15. This argument cuts far too broadly. As explained in Defendants' opening brief, the courts have made clear that "but for" control over a private project—the power to prevent or veto the project—is not the type of actual control needed to trigger NEPA. *See* Def. Br. at 24-26. While Plaintiffs focus on distinguishing *Department of Transportation v. Public Citizen*, 541 U.S. 752, 770 (2004), on grounds that there the agency lacked discretion to prevent certain operations, they ignore numerous cases where courts have found that an agency's discretionary 'but for' control over a private project—the "ability to refuse"—does not trigger NEPA. In *Ringsred v. City of Duluth*, 828 F.2d 1305 (8th Cir. 1987), for example, the Eighth Circuit found that although the Secretary of Interior could exercise "factual veto power" over a parking ramp construction project because his approval of contracts was required before the project could proceed, that power did not constitute the type of actual control over the development of the project that would trigger NEPA. Similarly, in

*Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269, 270 (8th Cir. 1980), the Corps of Engineers had "'but for' veto power" over a proposed 67 mile long transmission line because without a federal permit for the 1.25 miles of the project that crossed a navigable river the whole project could not proceed. There the Eighth Circuit held that such "but for" control did not constitute authority or control over the project sufficient to obligate the Corps to conduct a NEPA analysis for the entire 67 mile power line. *Id.* at 273. *See also Landmark West! v. U.S. Postal Serv.*, 840 F. Supp. 994 (S.D.N.Y. 1993) (holding that the Postal Service's 'but for' control over a project—unless Postal Service vacated existing building the project could not advance—did not subject the entire project to NEPA).

Under Plaintiffs' rubric of whether the agency had discretion to prevent the project through its "ability to refuse," all of these cases were wrongly decided, because in each case the federal agency could have blocked the whole project. But Plaintiffs' position is not the law. Even assuming that C&H would not have proceeded in the absence of SBA's loan guaranty and assuming that SBA could simply have refused to issue the guaranty to Farm Credit Services, that "veto" power did not federalize the C&H facility for purposes of NEPA.

In arguing that NEPA applies because SBA had discretion over the decision to issue a guaranty, Plaintiffs also assert that SBA could have imposed conditions on the issuance of the guaranty—presumably telling the lender that it would not issue the guaranty unless the lender directed the borrower to relocate the project or alter the proposed operation in some way. *See* Pl Reply at 2-4, 14-15. To the extent that such leverage is distinct from a "but for" veto authority, it mistakes the role of the SBA in the guaranty process.[8] As set forth above, the SBA has never interpreted its statutory authority or mission to include involving itself in deciding how individuals should configure their operations, or where their business would best be located. *See*

[8] *See Landmark West! v. U.S. Postal Serv.*, 840 F. Supp. 994, 1005 (S.D.N.Y. 1993) (holding that the fact that the Postal Service "might have been able to exercise its leverage to control the Project, but did not do so, does not implicate NEPA").

*Ctr. for Biological Diversity v.* HUD, 541 F.Supp. 2d at 1098-99 (noting SBA loan guaranties do not give the Agency control over the borrower, the property or the construction).

**b. SBA's SOP did not Mandate Preparation of an Environmental Assessment or Impact Statement**

In their reply Plaintiffs contend that the SBA's 1980 "Standard Operating Procedure" ("SOP") made the loan guaranty at issue here a major federal action subject to NEPA. Pl. Reply at 12-13. This claim fails. It is clear as a matter of law that issuing the challenged loan guaranty did not federalize the C&H farm and trigger NEPA obligations. The Agency's SOP does not alter that conclusion. Def. Br. at 23, n.18.

SBA's SOP makes clear that there is a general presumption that loan guaranties "are not ordinarily considered to be Federal actions which significantly affect the quality of the environment." 45 Fed. Reg. 7,358, 7,360 (Feb. 1, 1980) (¶ 7, ¶ 7(h)). Plaintiffs emphasize that while the SOP generally categorically excludes loan guaranties from preparation of an Environmental Assessment or Environmental Impact Statement, it also provides that for loan amounts in excess of $300,000, "an environmental assessment *may* be required." 45 Fed. Reg. at 7,360 (¶ 7(h)) (emphasis added). But this language is clearly discretionary, and, as noted in Defendants' opening brief, since the issuance of its 1980 SOP, the SBA has undertaken an analysis of the effects of its small business loan assistance programs on the environment which provides further support for SBA's conclusion that the loan guaranty in this case did not trigger NEPA obligations. In 2004, after reviewing its programs, the SBA concluded that "NEPA reviews pertaining to individual business loan guaranties need not be undertaken because an SBA guaranty of a business loan does not constitute a major federal action significantly affecting the quality of the environment and, thus, does not come within the purview of NEPA." 69 Fed. Reg. at 47,973. Based on that conclusion, the SBA proposed to formally revise its SOP to remove the language indicating that individual loan guaranties over $300,000 "may" require an environmental assessment. 69 Fed. Reg. at 47,976. Although the SBA never formally revised the 1980 SOP, the findings in the Agency's 2004 review provide compelling support for the

Agency's position in this case, that the loan guaranty here did not trigger obligations under NEPA. Indeed, SBA explicitly observed that "given the Agency's conclusions that the effects of guaranteed business loans over $300,000 do not have a significant impact on the environment . . . requiring individual environmental assessments of loans in excess of $300,000 that involve construction or the purchase of land would not, therefore, likely result in significantly greater protection of the environment." *Id*. at 47,975. Thus, read in conjunction with the Agency's 2004 findings, nothing in the SBA's SOP indicates that in issuing the loan guaranty challenged in this case, SBA triggered obligations to prepare a NEPA analysis of the impacts of the C&H farm.[9]

Finally, to the extent that the SOP might have otherwise required the SBA to prepare a NEPA analysis for the C&H farm, the SOP provides that "where other Federal Agencies or State or local governments have accepted an environmental assessment or impact statement, the SBA will not require any further environmental evaluation." 45 Fed. Reg. at 7,360 (¶ 6(d)). *See also id.* at 7,359 (¶ 4(b)) ("If, however, SBA's involvement begins only after environmental assessments are completed and accepted, then SBA will not require any additional environmental evaluation."). Here, the FSA completed its own environmental assessment of the C&H farm before SBA became involved. FSA signed its finding of no significant impact on August 24, 2012, at the close of the public comment period, and the FSA's State Environmental Coordinator ("SEC") concurred in the EA on October 1, 2012. This represents the completion of the FSA's environmental assessment process. *See* 7 C.F.R. § 1940.302(i)(3) (providing that for actions approved within the State Office, the Chief is responsible for preparation of a Class II assessment and may delegate that responsibility to the State Environmental Coordinator). For its part, SBA

[9] Plaintiffs also cite to an Appendix of NEPA guidelines that was issued by SBA shortly after the SOP. *See* Pl. Reply at 13 (citing 45 Fed. Reg. 79,621 (Dec. 1, 1980)). Nothing in the Appendix alters the arguments before the Court. The Appendix does not indicate that SBA, through loan guaranties, funds or controls projects like the C&H facility such that a NEPA analysis would be required. Nor does the Appendix expand any of the obligations under the SOP or eliminate the SOP's exclusion from NEPA analysis of those projects for which another agency has prepared a NEPA analysis (*see infra* at page 15-16). And, like the 1980 SOP, the Appendix must be read in light of the Agency's 2004 review.

received Farm Credit Service's application for an SBA guaranty on October 22, 2012. P-96. Thus, under the plain provisions of the SBA's SOP, the Agency was not required to prepare an Environmental Assessment for the C&H facility because another agency, the FSA, had done so.

In sum, the SBA has not violated NEPA. The Agency's loan guaranty to Farm Credit Services does not constitute funding or control sufficient to federalize actions related to the C&H facility. Nor did SBA's SOP—either as interpreted by SBA in 2004 or based on its exception for cases where another agency has prepared a NEPA analysis—require the Agency to prepare an Environmental Assessment or Environmental Impact Statement. Plaintiffs' motion for summary judgment on grounds that the SBA violated NEPA should thus be denied and Defendants' cross-motion granted.

### 3. SBA's Loan Guaranty Did Not Trigger Consultation Obligations Under The ESA

To trigger consultation obligations under Section 7(a)(2) of the Endangered Species Act, there must be both an "agency action" as defined under the statute and that action must be one which "may affect" a listed species or designated critical habitat. *See* Def. Br. at 27. As set forth in Defendants' opening brief, the SBA's issuance of a loan guaranty to Farm Credit Services for that bank's loan to C&H did not trigger consultation obligations under the ESA because it did not "authorize, fund or carry out" construction of the C&H facility and because it is too attenuated from the effects of the C&H facility to be considered the legal cause of any effect that facility may have on listed species. *Id.* at 28. In their reply, Plaintiffs fail to demonstrate otherwise.

First, it is clear—and Plaintiffs do not appear to dispute—that the SBA did not, through its loan guaranty, "authorize, fund or carry out" the construction or operation of the C&H facility. C&H did not need any permit or other authorization from SBA to build or operate its hog farm. *See* Def. Br. at 28. Nor has C&H received any funding from the SBA—the loan guaranty is no more than a conditional promise of payment *to the lender* in the event C&H

defaults. *See id.* at 23-24. Finally, the C&H facility was not "carried out" by the SBA, it was permitted by the State, and constructed and operated by private parties.

Rather than explaining how SBA's loan guaranty constitutes the authorization, funding or carrying out of the C&H facility, Plaintiffs accuse Defendants of "misguiding" the Court by allegedly focusing on the hog farm, rather than on whether the agency authorized, funded or carried out the loan guaranty. Pl. Reply at 46. But the loan guaranty is simply a financial instrument which of itself has no environmental impact. It is the hog farm that allegedly may affect listed species, and thus it is the federal relationship to the hog farm that is relevant. *See Karuk Tribe v. U.S. Forest Serv.*, 681 F.3d 1006, 1021 (9th Cir. 2012) ("First we ask whether a federal agency affirmatively authorized, funded, or carried out *the underlying activity*.") (emphasis added). The C&H farm is unquestionably a private action, and the consultation obligations of Section 7 apply to a private activity "only to the extent the activity is dependent on federal authorization." *Sierra Club v. Babbitt*, 65 F.3d 1502, 1512 (9th Cir. 1995). *See also Western Watersheds Proj. v. Matejko*, 468 F.3d 1099, 1109 (9th Cir. 2006) (holding BLM was not obligated to consult on water diversions where it "did not *fund* the diversions, it did not *issue* permits, it did no *grant* contracts, it did not *build* dams, nor did it *divert* streams"). Thus, in determining whether SBA was obligated to consult under the ESA, the question of whether the C&H farm was authorized, funded or carried out by the SBA is the appropriate and critical inquiry. In this case, there is no doubt that the SBA's action does not constitute authorization, funding or carrying out of the C&H facility. *See* Defs' Br. at 27-28.

Without a credible claim that the SBA has, through its loan guaranty, authorized, funded or carried out the C&H facility, Plaintiffs assert that SBA was obligated to consult under Section 7(a)(2) because the effects of the hog farm on listed species are an "indirect effect" of the loan guaranty that were "reasonably certain to occur." Pl. Reply at 49 (quoting 50 C.F.R. § 402.02). While an agency action subject to consultation can include "actions directly or indirectly causing modifications to the land, water, or air," 50 C.F.R. § 402.02(d), courts "must '*draw a manageable line* between those causal changes that may make an actor responsible for an effect

and those that do not.'" *Ctr. for Food Safety v. Vilsack*, 844 F. Supp. 2d 1006, 1018-1021 (N.D. Cal. 2012) (*quoting Public Citizen*, 541 U.S. at 767 (emphasis added)) aff'd 718 F.3d 829 (9th Cir. 2013)).[10]

In this case, the causal link between the SBA's issuance of the challenged loan guaranty and the C&H facility's alleged impacts on listed species is too attenuated to make the loan guaranty the legal cause of any actions that "may affect" listed species or designated critical habitat. In issuing the loan guaranty, SBA played no role in C&H's private decisions regarding the design or operation of the farm. *See Ctr. for Biological Diversity v. HUD*, 541 F. Supp. 2d at 1100 (noting that in issuing loan guaranties, "[t]he federal agencies are not involved in choosing the home for the homeowner or advising the business on which structure to purchase and/or renovate"). Nor did SBA exercise any regulatory authority over local land-use decisions, or the siting or operation of CAFOs in Arkansas. *See id.* at 1099 (noting agencies issuing loan guaranties had no authority over local development). Indeed, on facts not materially different than those in this case, the only court to have considered the question firmly concluded that SBA's issuance of loan guaranties was not the legal cause under the ESA of effects to species allegedly caused by the development that occurred subsequent to the issuance of the guaranties. *Id.* at 1101 (holding federal loan guaranties, including those issued by SBA, were "not the legal cause of harm to the listed species"); 359 F. App'x at 783 ("The agencies' loan guarantees . . .

[10] To the extent that Plaintiffs argue that SBA was required to make an affirmative "no effect" finding, that contention has no basis in the ESA or its implementing regulations. *See* Pl. Reply at 48. The ESA's regulations make clear that the triggering event for consultation is a determination that an action "may affect" listed species; the regulations say nothing about imposing a requirement on action agencies to document a "no affect" conclusion as a threshold factual matter. 50 C.F.R. §§ 402.02, 402.13, 402.14. To be clear, the consultation requirements are not triggered by any particular documented "finding," rather they are triggered by whether the proposed action may in fact affect listed species. As explained in Defendants' opening brief and herein, SBA's loan guaranty itself had no affect on listed species and any impacts resulting from the operation of the C&H facility are not legally caused by the SBA action. Moreover, as a factual and pragmatic matter, Plaintiffs' position defies common sense. If Plaintiffs' interpretation of the ESA was valid, then agencies would be tasked with memorializing "no effect" determinations countless times for the myriad agency actions that do not affect ESA-listed species.

cannot be held to be a legal cause of any effect on protected species."). There is no reason to depart from that conclusion in this case.

Moreover, in this case, not only does SBA not regulate the siting or operation of CAFOs, but there is a third-party regulatory agency which does, the ADEQ. Through its permitting process, ADEQ exercises ongoing regulatory authority over the design and operations of CAFOs in the State of Arkansas. *See* Def. Br. at 5-8. The intervention of a third party regulatory agency further attenuates the causal link between the SBA's loan guaranty and the impacts of the C&H facility. The court's decision in *Center for Food Safety v. Vilsack* is instructive. There, plaintiffs challenged United States Department of Agriculture Animal and Plant Health Inspection Service's ("APHIS") failure to consult under the ESA on its decision to de-regulate the use of "Roundup Ready Alfalfa." 844 F. Supp. 2d at 1009. This crop was genetically engineered to withstand application of glyphosate (the active ingredient in the herbicide "Roundup") so that farmers could apply the herbicide directly over an alfalfa field to remove weeds without harming the crop. *Id.* Among plaintiffs' allegations was that the indirect effect of the de-regulation decision would be an increase in the use of glyphosate which posed a threat to numerous listed species. *Id.* at 1018. The court concluded that because use of glyphosate was directly regulated by a third agency, the Environmental Protection Agency ("EPA"), and EPA rather than APHIS had the "authority to regulate where and how glyphosate is used," APHIS's decision to de-regulate Roundup Ready Alfalfa was not the legal cause of any increase in glyphosate use. *Id.* at 1020. The instant case is no different: it is the ADEQ, not SBA, that regulates where CAFOs may be located and how they are to operate. Under these circumstances, it would draw an unmanageable line, *id.* at 1018, to hold SBA is the legal cause of effects directly regulated by ADEQ.

Plaintiffs attempt to overcome the fact that SBA's action is not the legal cause of any effect on listed species by emphasizing that the threshold for consideration of indirect impacts is low. But the cases Plaintiffs cite are easily distinguished from the situation before the Court. In *Nat'l Wildlife Fed'n v. FEMA*, for example (*see* Pl. Reply at 49), plaintiffs challenged FEMA's

compliance with the ESA in implementing the National Flood Insurance Program ("NFIP"). 345 F. Supp. 2d 1151, 1154 (W.D. Wash. 2004). The court found that FEMA's administration of the program—which required flood prone communities to adopt and enforce floodplain management regulations in order to participate in the program—enabled FEMA to "guide development of proposed construction away from locations threatened by flood hazards and to otherwise improve the long-range land management and use of flood-prone areas." *Id.* at 1173 (quoting 42 U.S.C. § 4102(c)(2), (c)(4)). This sort of regulatory control over the development of CAFOs is simply missing from SBA's loan guaranty. Indeed, in holding that SBA's loan guaranties did not trigger consultation obligations under the ESA, the court in *Center for Biological Diversity v. HUD*, distinguished SBA's guaranties from the National Flood Insurance Program at issue in *Nat'l Wild Fed'n v. FEMA*, precisely because of the authority the flood insurance program gave FEMA to control where development would occur. *See* 541 F. Supp. 2d at 1101.

Nor does the Tenth Circuit's decision in *Riverside Irrigation District v. Andrews*, 758 F. 2d 508 (10th Cir. 1985), counsel that the SBA's loan guaranty is the legal cause of any effect on species listed under the ESA. In *Riverside* the court upheld the Army Corps of Engineers' denial of a permit to construct a dam based on the impacts to endangered species of the increased water consumption facilitated by the dam. Although indirect, the effects at issue in *Riverside* were far less attenuated than those at issue in this case. In *Riverside*, the on-the-ground action (construction of the dam) was directly subject to a federal permit, and thus the water impacts were only one step away from the federal act. Here in contrast, the federal act is a loan guaranty, and on-the-ground action took place only after private decisions by both Farm Credit Services and C&H. Moreover, *Riverside* did not involve a third party regulatory agency like ADEQ, which directly oversees operations of the C&H facility.

Finally, it bears reiterating that the Court need not stretch the ESA to make SBA liable for the private conduct of C&H in order to protect listed species. *See* Def. Br. at 30 n.23. Congress provided a direct route to protecting listed species put at risk by private activities through Section 9 of the Act, which prohibits "take" of such species by private actors. 16 U.S.C.

§ 1538. As the Ninth Circuit observed in *Sierra Club v. Babbitt*, in making the Section 7 consultation requirement applicable only to federal agencies and prohibiting the "taking" of listed species by private actors, "Congress has therefore indicated that when a wholly private action threatens imminent harm to a listed species the appropriate safeguard is through section 9, 16 U.S.C. § 1538, and not section 7, 16 U.S.C. § 1536." 65 F.3d 1502, 1512 (9th Cir. 1995)

In sum the SBA's loan guaranty did not authorize, fund or carry out the C&H facility, nor was the loan guaranty the legal cause of any actions that may affect ESA-listed species or critical habitat. Therefore, SBA's action fell well below the threshold needed to trigger obligations under Section 7(a)(2) of the ESA. Plaintiffs' motion for summary judgment on grounds that the SBA violated the ESA should be denied and Defendants' cross-motion granted.

### C. FSA Did Not Violate NEPA Or The ESA

#### 1. The FSA's Loan Guaranty Did Not Trigger Consultation Obligations Under The ESA Or An Obligation To Prepare An Analysis Pursuant To NEPA

As noted in the Defendants' opening brief, the factual nexus between the federal act of providing a loan guaranty and the private act of constructing and operating the C&H facility, is no less attenuated for FSA than it is for SBA. *See* Def. Br. at 31. The same facts that compel the conclusion that SBA's loan guaranty did not federalize the C&H facility under NEPA or trigger obligations under the ESA, also compel the conclusion that FSA's issuance of the loan guaranty to Farm Credit Services did not trigger obligations under either statute. *Id.* The fact that FSA prepared an EA under NEPA and attempted to engage in consultation under the ESA therefore does not preclude the Court from determining that as a statutory matter the loan guaranty extended by the FSA did not trigger obligations under either statute. *Id.*; *Kandra v. United States,* 145 F. Supp. 2d 1192, 1203 n.4 (D. Or. 2001) (rejecting the argument that by issuing an EA the agency had admitted the applicability of NEPA).

### 2. FSA Complied With NEPA In Preparing Its EA And FONSI

Because FSA's regulations provide that a loan guaranty to a facility the size of C&H's is "presumed to be major federal action," 7 C.F.R. § 1940.312, the FSA prepared an EA and, after concluding that the facility would not have significant impacts, issued a FONSI. Should the Court conclude that FSA was required by law to prepare a NEPA analysis in conjunction with the challenged loan guaranty, then the FSA's EA and FONSI demonstrate compliance with the statute.

#### a. Plaintiffs' NEPA Claims Have Been Waived

The Supreme Court and the Eighth Circuit have made plain that issues not exhausted in the public comment process are waived and cannot be pursued in subsequent judicial proceedings. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764 (2004); *Friends of the Norbeck v. U.S. Forest Serv.*, 661 F.3d 969, 974 (8th Cir. 2011). Here, there is no question that Plaintiffs failed to participate in either of the two comment periods offered by the FSA during the development of the EA and FONSI. Def. Br. at 10-11. Assuming the public comment process was adequate (an issue addressed below), Plaintiffs have waived their claims challenging the adequacy of the FSA's NEPA analysis.[11]

[11] Plaintiffs claim that the waiver doctrine is inapplicable because Defendants have asserted that the FSA's EA adequately addressed all issues raised by the Plaintiffs. Pl. Reply at 23. This argument blurs the question of whether the NEPA document is defensible on the merits with the question of waiver. In Plaintiffs' view, it would be impossible to both assert waiver and to defend the merits of the NEPA decision, because asserting that the EA adequately considered an issue would foreclose the argument that plaintiffs waived the issue by failing to raise it in the public comment process. This is not the law. The cases cited by Plaintiffs represent situations where waiver was found inapplicable because it was clear from materials in the record or in other public comments that the agency was aware of the concern now being raised in the litigation. *See Barnes v. U.S. Dep't of Transp.* 655 F.3d 1124, 1133 (9th Cir. 2011) (holding waiver not applicable where statements in the record showed the agency was aware of the issue); *'Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1093 (9th Cir. 2006) (same). Here there is no such evidence. Indeed, not only were the issues being raised by Plaintiffs now not brought to the Agency's attention in the public comment period on the EA and FONSI, but they also were not raised when the ADEQ's CAFO General Permit and C&H's application for coverage under that permit were made available for public comment. *See* Def. Br. at 6, 8 (discussing public comment periods for ADEQ procedures).

### b. The FSA Provided Appropriate Notice and Opportunity to Comment on the EA and FONSI

#### i. FSA Complied with its Regulations by Publishing Notice of the EA/FONSI for Three Days

The FSA, pursuant to its regulations at 7 C.F.R. § 1940.331(b)(3), published notice of the availability of the EA/FONSI for public review and comment for three consecutive days. Def. Br. at 43. Although Plaintiffs originally asserted, based on an unenforceable internal FSA handbook, that the FSA was obligated to run the notice in the paper for 15 days, Pl. Br. at 30, they appear to no longer to be pursuing that claim. *See* Pl. Reply at 18-19.

#### ii. FSA Complied with its Regulations in Publishing Notice Only in the Arkansas Democrat-Gazette

Plaintiffs continue to allege that the FSA was obligated by its regulations to publish notice in two separate newspapers, one of general circulation in the area and one that is "local or community oriented." Pl. Reply at 18 (quoting 7 C.F.R. § 1940.331(b)(1)). While the text of the FSA's regulation contemplates publication in more than one newspaper, the failure to do so is not, as Plaintiffs' insist, a *per se* violation of the regulation. The purpose of the FSA's notice regulation is to ensure that the interested public has "the opportunity [to provide] input into th[e environmental] review process before decisions are made." 7 C.F.R. § 1940.331(d). Nothing in the FSA's regulations precludes the FSA from determining in a given instance that for the purpose of informing the public the best newspaper of general circulation and the best local or community-oriented newspaper is the same paper. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (noting agency interpretations of its own regulations are entitled to deference). In this case, given the broad availability of the Democrat-Gazette and the lack of a single local paper that would have provided better notice, the FSA's decision to provide notice only in the Democrat-Gazette was not arbitrary or capricious. *See* Def. Br. at 44-45.

#### iii. 30-day Review of the FONSI was not Required

Plaintiffs' final allegation with regard to public notice is that the project falls within the "limited circumstances" under which a FONSI must be made available for public review for 30

days before the final decision is made because "[t]he nature of the proposed action is one without precedent." Pl. Reply at 19-21 (quoting 40 C.F.R. § 1501.4(e)(ii)). This claim fails.

The C&H facility is not an activity without precedent. Indeed, Plaintiffs acknowledge that there are approximately 300 ADEQ-permitted animal liquid waste facilities in the State of Arkansas, including six in the Buffalo River watershed. *See* Pl. Reply at 20; Joint Stip. (ECF No. 40) at ¶ 5, ¶ 7. Plaintiffs insist that despite the presence of other facilities in the watershed, the C&H facility is "without precedent" because it is larger than the existing facilities in the watershed. Pl. Reply at 20. But it is the "nature" of the proposed action that is germane. 40 C.F.R. § 1501.4(e)(2)(ii). Here Plaintiffs present no evidence that the greater size of the C&H facility alters its "nature" in a manner that would render it fundamentally different from other animal liquid waste facilities and trigger the special review provisions of 40 C.F.R. § 1501.4(e).

Despite acknowledging that the question of when an action is without precedent turns on the nature of the action's *environmental* impacts rather than on the legal regime under which it is authorized, Plaintiffs continue to assert that the C&H facility is without precedent because it is the first facility authorized under ADEQ's CAFO General Permit rather than ADEQ's Regulation No. 5. Pl. Reply at 20, 21. There is, however, no basis for Plaintiffs' claim that the ADEQ's decision to shift coverage of CAFOs from Regulation No. 5 to the CAFO General Permit renders the environmental impacts of the C&H facility unprecedented. In fact, ADEQ itself indicated when proposing the CAFO General Permit that the level of environmental protection for affected facilities would not be changed from Regulation No. 5 because the proposed rule "essentially continues current levels of protection." Joint Stip. at ¶ 4.

On this record, FSA was not arbitrary or capricious in concluding that the C&H facility was not "without precedent" and therefore a 30-day public comment period on the FONSI was not required. *See TOMAC v. Norton*, 433 F.3d 852, 861 (D.C. Cir. 2006) (noting agencies have "significant discretion in determining" how they comply with NEPA's public participation regulations in preparing an EA).

### c. FSA Properly Relied on C&H's Comprehensive Nutrient Management Plan and the ADEQ's CAFO General Permit in its EA and FONSI

In their reply, Plaintiffs focus much of their criticism on the form of the FSA's EA and its relationship to the C&H's Comprehensive Nutrient Management Plan ("CNMP" or "NMP"), the ADEQ's CAFO General Permit, and other materials in the administrative record. Pl. Reply at 24-33. In particular, Plaintiffs allege that the FSA has improperly relied on the NMP and the CAFO General Permit, and failed to make its own determination of the project's impacts. Pl. Reply at 24-31. As set forth below, these claims fail. First, the FSA properly incorporated the NMP and the ADEQ's General Permit into its analysis. Second, FSA satisfied its obligation to make an independent determination of the facility's impacts. Finally, the FSA's decision should be reviewed on the administrative record; Plaintiffs' suggestion that they be permitted to proffer factual testimony is inappropriate.

#### i. FSA Properly Incorporated the NMP and the General Permit

The FSA's EA and FONSI rely heavily on the information and conclusions contained in the C&H facility's NMP and on the ADEQ's CAFO General Permit (which makes the NMP binding on C&H). As set forth in Defendants' opening brief, this reliance is consistent with the NEPA regulations, which encourage agencies to incorporate by reference environmental documents prepared by other agencies and to avoid duplication between NEPA and state and local requirements. *See* 40 C.F.R. § 1502.21 ("Agencies *shall* incorporate material into an environmental impact statement by reference") (emphasis added); *Id.* at § 1506.2 (directing agencies to eliminate duplication with State and local procedures); Def. Br. at 32-33.

Plaintiffs' objection that the FSA cannot incorporate these documents into its analysis because the EA makes no claim of incorporation is unfounded.[12] Although the FSA's EA does

[12] Plaintiffs make a passing assertion that an agency may only incorporate by reference material that is "not of central importance." Pl. Reply at 30. This claim is not supported by the caselaw. *See, e.g., California ex. rel. Imperial Cnty Air Pollution Control Dist. v. U.S. Dep't of Interior*, Nos. 12-55856, 12-55956, 2014 WL 2038234, *7 (9th Cir. May 19, 2014) (allowing incorporation of multiple significant analyses).

not use the phrase "incorporation by reference," any reasonable reading of the document makes clear that the FSA intended to incorporate the NMP (which itself is an enforceable part of the ADEQ permit) into its analysis. *See California ex. rel. Imperial Cnty. Air Pollution Control Dist. v. U.S. Dep't of Interior* Nos. 12-55856, 12-55956, 2014 WL 2038234, *7, *8 (9th Cir. May 19, 2014) (noting the courts should not hold NEPA documents "'insufficient on the basis of inconsequential, technical deficiencies'" and declining to find an EIS invalid where, despite wording error, "[t]he non-NEPA documents were plainly incorporated by reference") (quoting *Or. Envtl. Council v. Kunzman*, 817 F.2d 484, 492 (9th Cir. 1987)); 40 C.F.R. § 1500.3 (noting that the Council on Environmental Quality Regulations for Implementing NEPA were promulgated with the "intention that any trivial violation of these regulations not give rise to any independent cause of action."). In this case, the EA makes plain FSA's intent to incorporate the NMP, referencing C&H's obligation to comply with its NMP no less than five times. *See* FSA-1037 (compliance with Comprehensive Nutrient Management Plan will prevent harm to endangered species); FSA-1038 ("CNMP is to be followed to ensure water quality is maintained"); FSA-1038 ("Compliance with the CNMP should keep emissions to a minimum"); FSA-1039 ("Applicants should comply with CNMP for land application"); FSA-1040 ("Applicants will need to comply with their CNMP.").[13] This is sufficient to satisfy NEPA.

**ii. FSA Made an Independent Determination that the C&H Farm Would Have No Significant Impact on the Environment**

FSA acknowledges that incorporation by reference does not absolve the Agency of its obligation to consider environmental effects and make an independent determination of whether its actions will have a significant impact on the human environment, and believes that in this case it satisfied that obligation. The FSA has certified that the materials included in the

[13] FSA emphasized the extent of the Agency's incorporation of the NMP and the other ADEQ permit related materials in correspondence with the National Park Service, explaining that in its view the "FONSI is an '*Executive Summary*' which contains the conclusions drawn during the assessment, as substantiated by information and documentation contained in the Class II Environmental Assessment File." FSA-1071 to FSA-1072.

administrative record, which include the NMP and the CAFO General Permit, were considered by the Agency during its decision-making process. ECF No. 23-4 (Defendants' Certification of the Administrative Record). In the absence of affirmative evidence to the contrary, the FSA is entitled to a presumption that it properly discharged its legal obligations. *See Akiak Native Cmty. v. U.S. Postal Serv.*, 213 F. 3d 1140, 1146 (9th Cir. 2000) ("agency's decision-making process is accorded a 'presumption of regularity'") (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971)).

Plaintiffs' allegation to the contrary amounts to a demand that FSA produce and include in the record a written analysis by the Agency of the adequacy of the NMP and the ADEQ's General Permit. But NEPA imposes no such obligation. The court's decision in *San Francisco Baykeeper v. U.S. Army Corps of Engineers*, 219 F. Supp. 2d 1001 (N.D. Cal. 2002), is illustrative. There, plaintiff alleged that the Army Corps of Engineers violated NEPA by basing its EA and FONSI on documents prepared by the permit applicant for a state environmental review process. *Id.* at 1012. As Plaintiffs do here, plaintiff in *Baykeeper* alleged that the Corps had "impermissibly adopted the data, analysis and conclusions in the [applicant's analysis] without any independent evaluation" and asserted that the Corps decision was invalid because there was "no evidence in the record that the Corps satisfied its obligation of independent evaluation." *Id.* at 1012-13. The *Baykeeper* court rejected this argument, finding that the Corps properly identified the documents on which it relied, and noting that "[a]bsent some indication that the Corps acted improperly, the Court will presume that the Corps' decision–making process was adequate and that it fulfilled its statutory and regulatory duty of independent evaluation." *Id.* at 1012. This Court should reach the same conclusion here.

While the FSA has not produced a separate study reviewing the NMP and CAFO General Permit, that omission does not suggest the Agency has not met its duty of independent evaluation, and absent evidence to the contrary, FSA's finding of no significant impact should be upheld.

### iii. FSA's Decision Can, and Should, be Upheld Solely on the Administrative Record

In asserting that the FSA has not met its duty of independent evaluation, Plaintiffs assert that Defendants have proffered rationales for the FSA's decision that are not supported by the administrative record. Pl. Reply at 31-32. While, as noted below, Defendants believe the rationales they have provided "may be reasonably discerned" from the administrative record, *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 658 (2007), they agree with Plaintiffs that it is not the role of the Court to independently analyze the record and speculate as to the FSA's rationale where the Agency has not provided an adequate explanation for its decision. Pl. Reply at 31. If this Court finds Plaintiffs have standing, and finds that FSA had an obligation to prepare an Environmental Assessment, and if the Court concludes that the record is not adequate to support the Agency's Environmental Assessment, then Defendants agree with Plaintiffs that the appropriate course of action is to remand the decision to the Agency.

Defendants disagree, however, with Plaintiffs' alternative suggestion that in lieu of remand, they could be permitted to "present factual evidence" to rebut Defendants' arguments. Pl. Reply. at 33; *see also* Pl. Reply at 31 n.16. This suggestion is unwarranted and inappropriate. While Defendants believe that the record is adequate for review of the FSA's decision, if the Court finds to the contrary, the law in this Circuit is clear that the proper course is to remand the decision to the Agency, not to create a new record based on factual testimony by the parties. *See Newton Cnty. Wildlife Ass'n v. Rogers*, 141 F.3d 803, 807 (8th Cir. 1998) ("If the agency record is for some reason inadequate [to explain the agency's decision], 'the proper course, except in rare circumstances, is to remand to the agency for additional investigation.'") (quoting *Fla. Power & Light*, 470 U.S. 729, 744 (1985)). *See also Voyageurs Nat'l Park Ass'n v. Norton*, 381 F.3d 759, 766 (8th Cir. 2004) (noting that exceptions to the rule of record review "apply only under extraordinary circumstances, and are not to be casually invoked unless the party seeking to depart from the record can make a strong showing that the specific extra-record materials falls

within one of the limited exceptions.").[14] Accordingly, Plaintiffs' request to proffer testimony should be rejected.

**d. The FSA Reasonably Considered Environmental Impacts**

The FSA gave reasoned consideration—in the context of an EA examining a private project—to the environmental impacts of the C&H facility. *See* Def. Br. at 34-36. In their reply brief, Plaintiffs fault the FSA for the extent to which the Agency's examination of the impacts is found in the administrative record rather than made plain by the EA itself. Pl. Reply at 33-35. The FSA's approach, however, comports with the standards of reasonableness. Under the APA's arbitrary and capricious standard of review, the courts "'will uphold a decision of less than ideal clarity if the agency's path may be reasonably discerned'" from the administrative record. *North Dakota v. EPA*, 730 F.3d 750, 768 (8th Cir. 2013) (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974)), *cert. denied*, 2014 WL 497654 (U.S. May 27, 2014). *See also Sierra Club v. Davies*, 955 F.2d 1188, 1193 n.11 and 1195 (8th Cir. 1992) (finding that although the "regional director did not articulate the basis for his decision," it could be discerned and upheld "[i]n light of all the information contained in the record"). On the grounds set forth in Defendants' opening brief, *see* Def. Br. at 34-36, Defendants submit that the FSA adequately considered the potential environmental impacts of the facility and that the FSA's reasoning may be reasonably discerned from the record.

[14] The cases cited by Plaintiffs, Pl. Reply at 33, overstate the extent to which extra-record evidence is permitted in APA proceedings. In *In re Guardianship & Conservatorship of Blunt*, 358 F. Supp. 2d 882, 893 (D.N.D. 2005), the testimony appears to have been taken before the court was fully apprised that the case sought judicial review under the APA, and the court, after being apprised of the standard of review, observed that "after-the-fact evidence can be considered to help understand the agency decision when the agency record is inadequate, *but only in the rare instances* when remand for creation or supplementation of the record is not the preferred option") (emphasis added). In *Earth Protector, Inc. v. Jacobs*, 993 F. Supp. 701, 707 (D. Minn. 1998), despite the language cited by Plaintiffs, the court ultimately declined to consider materials outside the record.

**e. The FSA Properly Addressed Alternatives**

As set forth in detail in Defendants' opening brief, the FSA was reasonable in considering in the EA only two alternatives, the proposed construction of the C&H facility and the alternative of no-action. *See* Def. Br. at 36-40. Where, as here, the project has been developed by a private party, has been found to have no significant environmental impact, and the agency has limited authority to implement alternatives, the courts have made clear that it is not arbitrary or capricious to only consider two alternatives. *See id*.

In reply, Plaintiffs allege that the FSA's discussion of the no-action alternative was inadequate. Pl. Reply at 38. But in so doing, Plaintiffs rely on the standards applicable to an EIS, rather than the less stringent standards applicable to an EA. S*ee* Pl. Reply at 38 (citing review of an EIS in *Friends of Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1128 (8th Cir. 1999)). Because projects proposed through an EA culminating in a FONSI have no significant impact on the environment, the duty to consider alternatives, including the need for no-action alternative as a comparative baseline is "less rigorous" than in the case of an EIS. *Earth Island Inst. v. U.S. Forest Serv.*, 697 F.3d 1010 (9th Cir. 2012). In *Western Watersheds Proj. v. Bureau of Land Management*, 721 F.3d 1264, 1274 (10th Cir. 2013), for example, the court upheld BLM's decision in an EA to reject the no-action alternative without analysis, noting that "[g]iven the different standards for an EIS and an EA, the absence of a detailed No Action analysis by itself does not render this FONSI arbitrary and capricious." *Id.* at 1274. *See also Oregon Natural Res. Council v. Lyng*, 882 F.2d 1417, 1423 n.5 (9th Cir. 1989) (noting the lack of a discussion of no-action alternative does not mean it was not considered seriously, "[i]t may only reveal that [the agency] believed that the concept of a no-action plan was self-evident").

Here, while the EA's discussion of the no-action alternative is quite short, it does provide a non-arbitrary basis for FSA's determination to reject it—the loss of financial benefit to the community—and because FSA found that the project does not have a significant environmental impact, there was no need for the Agency to prepare a detailed comparison of the comparative

environmental impacts of the proposed action versus the no-action alternative. *See, e.g., Western Watersheds Proj.*, 721 F.3d at 1274.

With regard to the range of action alternatives, Plaintiffs insist that the FSA was obligated to find alternative locations for the farm within the 100 mile radius in which Cargill expressed interest and to develop alternative project designs. Pl. Reply at 39. But NEPA does not impose this obligation on federal agencies in the context of an EA analyzing a project proposed by a private applicant. *See* Def. Br. at 37 (explaining agency's obligation to "accord substantial weight to the preference of the applicant . . . in the siting and design of the project."). It transcends any reasonable interpretation of NEPA to require FSA to locate alternative parcels of land for C&H to buy in proximity to landowners willing to allow the use of their fields for land application of farm waste. Similarly, because the design of the project, as permitted by the ADEQ, would not result in significant impacts, FSA was not obligated to consider alternative designs. *See Cent. S.D. Co-op Grazing Dist. v. U.S. Dep't of Agric.*, 266 F.3d 889, 897 (8th Cir. 2001) ("When an agency has concluded through an Environmental Assessment that a proposed project will have a minimal environmental effect, the range of alternatives it must consider to satisfy NEPA is diminished.").

FSA's examination of a no-action and one action alternative in its EA was reasonable in this case.

**f. The FSA Properly Addressed Mitigation**

Plaintiffs assert that the FSA violated NEPA by failing to include in the EA a discussion of mitigation measures that could be imposed to reduce impacts of the C&H facility. As explained in Defendants' opening brief, however, the duty to discuss mitigation is generally only applicable to EISs rather than EAs, Def. Br. at 40, and in this case there was no need for FSA to discuss or develop additional mitigation measures because FSA found that the project as designed and permitted by the ADEQ would not have significant environmental impacts, Def. Br. at 41.

In reply, Plaintiffs attempt to impose a duty to discuss mitigation on the FSA's EA by trying to shoehorn this case into the case law regarding mitigated-FONSIs. *See* Pl. Reply at 36-37. Normally, when an agency prepares an EA and finds a project will have no significant impacts it may issue a FONSI and has no obligation to discuss mitigation measures in the EA. *See Jensen v. Williams,* No. 08-2016, 2009 WL 1138800, at *14 (W.D. Ark. Apr. 27, 2009) (citing *Akiak Native Cmty v. U.S. Postal Serv.*, 213 F. 3d 1140, 1147 (9th Cir. 2000)). However, where the agency finds an action as proposed would likely have significant impacts, but that by imposing mitigation measures the impacts can be mitigated below the level of significance, the agency may issue a "mitigated-FONSI." When doing so, the agency must discuss the mitigation measures in the EA. *See id.* (citing *Envtl. Prot. Info Ctr. v. U.S. Forest Serv.,* 451 F.3d 1005, 1015 (9th Cir. 2006)).

Here, Plaintiffs err in attempting to construe FSA's FONSI as a mitigated FONSI.[15] This is not a case where FSA concluded the farm would have significant impacts and then imposed mitigation measures to reduce those impacts below the level of significance. Instead, FSA analyzed the project as developed by the applicant and permitted by the ADEQ. The Agency reached the reasonable conclusion that, *as proposed,* the farm would not have significant impacts and thus additional mitigation measures were not required.[16]

Plaintiffs also insist that the FSA's regulations required the Agency to separately analyze mitigation measures in the EA. Pl. Reply at 37. To the contrary, FSA's regulations, consistent with the CEQ NEPA regulations and the caselaw, only require discussion of mitigation in an EA

[15] The numerous cases cited by Plaintiffs for the proposition that an EA must address mitigation measures are all applicable only in the context of mitigated FONSIs. Pl. Reply at 36-37. Because the FSA is not relying on mitigation for its finding of no significant impact, these cases are irrelevant here.

[16] While the ADEQ permit imposes numerous measures on C&H to insure the facility does not have significant environmental impacts, those measures are requirements of Arkansas law, and from FSA's perspective are fixed design features of the project, rather than mitigation measures subject to separate analysis by the FSA. Put differently, it would make no sense for FSA to analyze the farm in the absence of the ADEQ permit requirements and then to treat the permit requirements as mitigation under NEPA, because there is no scenario in which the project can operate without adhering at a minimum to the ADEQ permit requirements.

where the Agency is relying on that mitigation to reach a finding of no significant impact—the mitigated-FONSI. For example, under its regulations FSA is to "[d]escribe any measure which will be required to be taken by [FSA] to avoid or mitigate the identified adverse impacts." 7 C.F.R. Pt. 1940, Subpt. G, Ex. H, XIX. Here FSA has not identified any adverse impacts that would require FSA to impose additional mitigation.[17] Because FSA concluded that the C&H Project as proposed will have no significant impacts and FSA is not relying on additional mitigation for its FONSI, the Agency was not required to discuss mitigation in its EA.

For the reasons set forth above, should the Court find that FSA was required to prepare an EA, the EA prepared by the FSA and its FONSI were not arbitrary or capricious and should be upheld.

**3. FSA Complied With The ESA**

The parties agree that a Federal agency may comply with its duties under section 7(a)(2) of the Endangered Species Act either by determining that its proposed action will have "no effect" on species listed under the Act, or by completing the process of consultation with the Fish and Wildlife Service ("FWS"). *Compare* Def. Br. at 48-49 *with* Pl. Reply at 41. Plaintiffs take the position, however, that in this case the FSA cannot assert that the C&H facility will have "no effect" on listed species because the record shows the Agency began—but failed to complete—the consultation process. Pl. Reply at 41-43. To the contrary, despite the confusion surrounding FSA's compliance efforts, the record supports a conclusion that the C&H facility will have no effect on listed species and that FSA did not violate the ESA.

Defendants have readily acknowledged that the record of FSA's compliance with the ESA in this case reflects confusion and miscommunication. *See* Def. Br. at 47. The record appears to reflect both an attempt to consult with FWS, *see* FSA-849, and a determination that

[17] Nor does 7 C.F.R. § 1940.318(g) require the Agency to discuss mitigation in an EA outside of the context of a mitigated–FONSI. That regulation requires that "consideration" be given to mitigation "throughout the assessment process," but only requires that mitigation measures which FSA ultimately decides to impose "be documented in the assessment."

the operation at C&H would have no effect on listed species. *See* FSA-1037 ("Any endangered species in this area will *not be harmed* by complying with the Comprehensive Nutrient Management Plan.") (emphasis added); FSA-1038 ("There will be *no impact* to wildlife and/or any threatened or endangered species based on a clearance determination by Arkansas Fish and Wildlife.") (emphasis added).

Plaintiffs insist that because of the confusion in the record and because FSA staff belatedly attempted to obtain FWS's concurrence in a finding that the hog farm "may affect, but [is] not likely to adversely affect" listed species, the Agency cannot now assert that the farm will have no effect on listed species. Pl. Reply at 42-43. In essence, Plaintiffs contend that even if the FSA erred in indicating that the project may affect listed species, that error is immutable, and the Agency's only option was to move forward with formal consultation. Neither the ESA nor the APA supports this contention.

Under the ESA, it is clear that an agency is not required to complete consultation and obtain concurrence from the FWS where its action will have no effect on listed species. *See* Def. Br. at 48 (citing, among others, *Newton Cnty. Wildlife Ass'n*, 141 F.3d at 810-11). And the fact that an agency attempted to consult does not preclude a finding that consultation was not required because the action will have no effect on listed species. In *National Ass'n of Home Builders*, for example, the Supreme Court held that the EPA's statement in the record that consultation was required did not preclude the agency from later asserting it was not.[18] 351 U.S. at 658-59. Nor does the APA mandate perfect consistency in an agency's position. Under the APA's arbitrary and capricious standard of review, a "'decision of less than ideal clarity'" must be upheld if its basis "'may be reasonably discerned'" from the administrative record. *Id.* at 658 (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286

[18] It is true, as Plaintiffs point out, Pl. Reply at 43 n.21, that in *National Association of Homebuilders*, the EPA had completed consultation before changing its mind and taking the position that no consultation was required. That fact, however, does not change the basic point that nothing in the ESA prevents an agency from taking the position that no consultation is required after initially seeking to consult.

(1974)). *See also San Luis Delta Mendota Water Auth. v. Jewell*, 747 F.3d 581, 604-06 (9th Cir. 2014) (deferring to agency judgment notwithstanding the decision and record being "disjointed" and "a mess").

Here, a conclusion that FSA's issuance of the challenged loan guaranty would have no effect on listed species can be "reasonably discerned" from the administrative record. *See* Def. Br. at 49-50. Although Plaintiffs deride the information cited by Defendants as "secondary sources"—in contrast, presumably, to a project-specific study conducted directly by the FSA—they point to no law prohibiting the use of such information or requiring more elaborate studies.[19] And tellingly, despite their criticism of the information used by FSA, Plaintiffs do not rebut the fact that the information cited by the FSA supports a finding of no effect. For example, with regard to the Rabbitsfoot mussel, the information in the record demonstrates that "few-to-no live individuals" have been found in the Buffalo River in the last ten years. FSA-861 to FSA-862. Similarly, with regard to the Snuffbox mussel, the FWS's listing decision indicates that in the last century only two individual mussels have been found in surveys of the Buffalo River, and those two were found in the lower reach of the River in Marion County. *See* Def. Br. at 50 (citing 77 Fed. Reg. 8,632, 8,649 (Feb. 14, 2012)). The physical distance of these species—if they occur in the Buffalo River at all—from the facility, coupled with the fact that the facility is subject to permit requirements designed to prevent water pollution, support the conclusion that the facility will have no effect on the species.

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[19] Indeed, under the ESA, agencies must make their judgments based on the best information available, not based on information that might be generated through new studies. *See e.g.*, *San Luis Delta Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602 (9th Cir. 2014) ("where the information is not readily available, we cannot insist on perfection: '[T]he best scientific data available…does not mean the best scientific data possible") (quoting *Building Indus. Ass'n v. Norton*, 247 F.3d 1241, 1246 (D.C. Cir. 2001)); *Heartwood, Inc. v. U.S. Forest Serv.*, 380 F.3d 428, 436 (8th Cir. 2004) (The requirement that agencies use the "best scientific and commercial data available," 16 U.S.C. § 1536(a)(2), does not require an agency to conduct new studies when evidence is available upon which a determination can be made.") (citation omitted).

Although the record on the issue is not ideal, it is not arbitrary or capricious, and is adequate to support a finding that the C&H facility will have no effect on listed species.

In sum, should the Court conclude that the FSA's loan guaranty federalized the C&H facility under NEPA, the EA and FONSI prepared by the Agency were adequate and should be upheld. To the extent that FSA's loan guaranty triggered obligations under Section 7(a)(2) of the ESA, the record supports a no effect determination.

### D. The Agencies Were Not Obligated To Consult With the National Park Service Under the Buffalo River Enabling Act Or Agency Regulations

Plaintiffs' final claim is that the Agencies violated the Buffalo National River Enabling Act by failing to consult with the National Park Service on the C&H facility. As set forth in Defendants' opening brief, this claim fails because the C&H facility is not a "water resources project" as is required to trigger obligations under the Buffalo National River Enabling Act, and because the C&H facility does not discharge to the Buffalo National River as required to trigger obligations under the FSA's regulations. Def. Br. at 50-55. Nothing in Plaintiffs' reply demonstrates otherwise.

The Buffalo National River Enabling Act, in language largely identical to the Wild and Scenic Rivers Act ("WSRA"), prohibits a federal agency from assisting "in the construction of any *water resources project* that would have a direct and adverse effect on the values for which such river is established." 16 U.S.C. § 460m-11 (emphasis added). The Act provides the Secretary of the Interior with the authority to determine whether a given water resources project would have a direct and adverse effect. *Id.* In their reply, Plaintiffs ask this Court to interpret this provision broadly—effectively reading the modifier "water resources" out of the law—and giving the Department of the Interior jurisdiction to preclude federal assistance to any type of "project" that might result in pollution reaching a tributary of the Buffalo River and eventually finding its way into the designated National River.[20] Pl. Reply at 54-55. Given that the

[20] Tellingly, while Plaintiffs criticize Defendants' definition of "water resources project" as "unduly narrow," they fail to provide a reading of the statute that does not simply render the language "water resources" superfluous. Under Plaintiffs' reading, the Act would apply to any

watershed that drains to the Buffalo National River encompasses an area of 1,335 square miles,[21] Plaintiffs' reading would result in untold burdens not only on federal agencies involved in projects, but on the National Park Service, which would be obligated to analyze each such proposal.

Plaintiffs' expansive interpretation of the Buffalo National River Enabling Act is, however, untenable. First, there is persuasive evidence before the Court that in utilizing the phrase "water resources project," Congress intended to focus on structures—such as dams and diversions—which could physically interfere with the free-flowing characteristics of the River. While there is not a definition in the statutory text of either the WSRA or the Buffalo National River Enabling Act, Plaintiffs ignore the fact that Congress did include a definition of "water resources project" by unanimous consent in the Congressional Record for the WSRA. That definition plainly refers to structures that make physical use of the river to interfere with its free flowing condition:

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

114 Cong. Rec. S. 28313 (daily ed. Sept. 26, 1968). Moreover, where Congress has provided a statutory definition of the phrase "water resources project," it has also made clear that the phrase contemplates diversions or impoundments that physically impact the free-flow of water. *See* Def. Br. at 52 n.44 (citing Water Resources Development Act of 2000, Pub L. No. 106-541, 114 Stat. 2572, 2595 (2000)). Where Congress uses the same language in two statutes, the Court

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type of project that would have a direct and adverse effect on the River. Pl. Reply at 54. This reading, however, violates the well-established principle that meaning must be given "if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotations and citations omitted).

[21] *See* Nat'l Park Serv., Buffalo National River Water Resources Management Plan 3 (2004), *available at* http://nature.nps.gov/water/planning/management_plans/buff_final_screen.pdf (last visited June 5, 2014).

may presume that the language was intended to have the same meaning in both statutes. *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005).

Second, Plaintiffs largely ignore the fact that, consistent with the statutory intent described above, the Interagency Wild and Scenic Rivers Coordinating Council, which is comprised of those agencies tasked with managing Wild and Scenic Rivers, defines "water resources projects," in a manner that contemplates structures that physically interfere with the river's free-flowing characteristics. *See* Def. Br. at 52-53.

Ignoring these authorities, Plaintiffs seek to expand the phrase "water resources project" to include the C&H facility by noting that in congressional testimony, the Secretary of the Interior indicated that water resources projects could include "sewage treatment plants." Pl. Reply at 56-57. This attempt falls short. First, the fact that the Secretary indicated that a sewage treatment plant could fall with the ambit of water resources projects is not inconsistent with a definition of that phrase that focuses on physical alteration of the free-flowing characteristics of the river: a sewage treatment plant could well be constructed in a manner that diverts water or otherwise interferes with the free-flow of a river. Second, as noted in Defendants' opening brief, *see* Def. Br. at 51 n.43, the 1967 testimony cited by Plaintiffs was, in fact, an effort by the Secretary to insure that the WSRA *not* be read to preclude sewage treatment facilities rather than an effort to expand the applicability of the statute. *See* H.R. Rep. No. 90-1623 at 40 (1968) ("Water resources project is a very broad term which includes sewage treatment plants, *and all of those should not be precluded*.") (emphasis added). Finally, the testimony of a non-legislator is generally not considered a binding indication of legislative intent, and certainly should not be read to contradict a later congressionally adopted report defining the term. *See Circuit City Stores v. Adams*, 532 U.S. 105, 120 (2001) (declining to base legislative interpretation on testimony by non-legislator at Senate subcommittee hearing); 114 Cong. Rec. S. 28311, 28313

(daily ed. Sept. 26, 1968) (adopting Senate Conference Report defining "water resources project").[22]

Plaintiffs also attempt to establish a violation of the Buffalo National River Enabling Act by citing to the FSA's regulations governing consultation for rivers on the Park Service's National Inventory of Wild and Scenic Rivers. *See* Pl. Reply at 54. As an initial matter, regardless of how the FSA's regulations define water resources project, that definition is in no way binding on the SBA. As set forth above, the statutory language and intent, and the definition proffered by the Interagency Wild & Scenic Rivers Council, make clear that the C&H facility is not a water resources project requiring consultation under the Buffalo National River Enabling Act and, as to the SBA, that is the end of the inquiry.

With regard to the FSA, to the extent that its Wild and Scenic Rivers Act regulations expand its obligations under the Buffalo National River Enabling Act, those regulations do not indicate that the C&H facility is a water resources project requiring consultation with the National Park Service. As Plaintiffs note, the FSA's definition of water resources project indicates that that Agency reads the term broadly to include "any type of construction" that would change the "physical, chemical, and biological characteristics of the waterway." 7 C.F.R. § 1940.302(j). Plaintiffs fail to note, however, that while broadening the types of structures and impacts to be considered, the FSA's definition also limits the physical locations of qualifying projects to those "within and along the banks" of the listed river or stream or which "involve withdrawals from, and discharges into" the listed rivers or streams. 7 C.F.R. § 1940.302(j). The FSA's regulations go on to provide that consultation is only required where the project: "(i) would be located within one-quarter mile of the banks of the river; (ii) involves withdrawing

[22] Plaintiffs emphasize that in *Sierra Club North Star Chapter v. Pena*, 1 F. Supp. 2d 971, 977-78 (D. Minn. 1998), the court deferred to an opinion by the Department of Interior's Solicitor's office which in turn repeats the Secretary's sewage treatment plant language. Pl. Reply at 57. As noted in Defendants' opening brief, however, the *Pena* case provides compelling support for the Defendants' position in this case, as the *Pena* court clearly ties "water resources projects" under the WSRA to those that would physically impact the listed river's free-flowing condition. *See* Def. Br. at 53-54.

water from the river or discharging water to the river via a point source; or (iii) would be visible from the river." *See* 7 C.F.R. pt. 1940, subpt. G, Exh. E.

Even under the expanded definition of water resources project, the FSA's regulations make clear that the C&H facility is not a water resources project that required consultation with the Park Service. Plaintiffs do not contend that the C&H facility is located within one-quarter mile of the banks of the Buffalo National River, that it would be visible from that river, or that it involved withdrawing water from the Buffalo National River. Thus, the only inquiry is whether the C&H facility involves discharging water to the Buffalo National River via a point source. Pl. Reply at 52. In their reply, Plaintiffs' attempt to broaden this inquiry into whether the C&H facility discharges into "waters of the state." Pl. Reply at 52. As explained in the Defendants' opening brief, the C&H facility is carefully designed to avoid any discharge, Def. Br. at 55, but even in the rare event of a discharge, the facility is certainly not going to discharge into the Buffalo National River, which is approximately six miles from the C&H facility. Def. Br. at 9. While it is true that a discharge into the Big Creek could eventually reach the Buffalo River there is no basis for an assumption that Congress, through the Buffalo National River Enabling Act, nor the FSA, through its regulations, intended to give the National Park Service the authority to review and potentially preclude federal assistance to any project in the 1,330 square mile Buffalo River watershed that could result in a discharge into a tributary that might eventually reach the Buffalo River.[23]

In sum, it is clear that the C&H facility is neither a water resources project requiring consultation under the Buffalo River Enabling Act nor a project that discharges into the Buffalo River such that consultation under the FSA regulation is required.

[23] In arguing that the C&H facility may discharge into the waters of the state, Plaintiffs include in their allegation of discharge the possibility of storm-based run-off from C&H's waste application fields. It is clear as a matter of law, however, that such runoff is not a "point source." *See* Def. Br. at 7 n.9. Any claim of discharge must be based on the operation of the facility itself.

### E. Should The Court Find a Legal Error, Further Briefing on Remedy is Warranted

For the reasons set forth above and in Defendants' opening brief, Defendants believe that the FSA and the SBA have acted in compliance with the law, and thus that no injunctive or other relief is necessary. If, however, the Court should find that it has jurisdiction over this case, and that there has been a violation of law, Defendants request that the Court allow the parties to provide further briefing on the appropriate remedy after having the opportunity to review the Court's decision on liability.

As noted in the jurisdictional section above, the attenuated relationship between the Agencies, the lender, and the borrower make the question of remedy in this case exceedingly difficult.[24] First, it is not clear that an injunction against loan guaranties would do anything to alleviate Plaintiffs' alleged injuries or any threat to endangered species because it would not alter the ongoing operations of C&H farm. *See Nat'l Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508, 1512, n.8 (9th Cir. 1994) (injunctive relief under the ESA only appropriate where the action to be enjoined poses a "definitive threat of future harm to protected species"). The only impact of such an injunction would be to make the lender, Farm Credit Services, less secure, such that if there was default during the term of the injunction the bank would not be able to obtain payment on the guaranties from the United States. Second, the authority of the Agencies to alter their loan guaranties, even in the wake of a judicial determination that the Agencies failed to comply with NEPA or the ESA is unclear. As noted above, the loan guaranties at issue here represent an "obligation supported by the full faith and credit of the United States," 7 U.S.C. § 1928 (a)-(b), which the Agencies are obligated to honor except in cases of fraud or

[24] The Court may find that the issuance of loan guaranties is closely enough linked to the operation of C&H to satisfy the jurisdictional prerequisites for standing but still find them insufficiently linked for the purposes crafting equitable relief. *See e.g., Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1171 n.6 (9th Cir. 2011) ("Of course, . . . a plaintiff may establish standing to seek injunctive relief yet fail to show the likelihood of irreparable harm necessary to obtain it.")

misrepresentation. Given these uncertainties, Defendants' respectfully submit that the question of remedy warrants further briefing should the Court find the Agencies have violated the law.

Defendants do note at this time that the Plaintiffs' reply brief misstates the applicable standards for injunctive relief in several respects.

First, to qualify for injunctive relief, Plaintiffs bear the burden of demonstrating:

> (1) that [they] ha[ve] suffered an irreparable injury; (2) that remedies available at law . . . 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.

*eBay Inc. v. MercExchange*, 547 U.S. 388, 391 (2006). Injunctive relief is an "extraordinary remedy" that does not issue as a matter of course upon the finding of a legal violation. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (holding an injunction is an "extraordinary remedy" that does not issue as a matter of course even "'though irreparable injury may otherwise result to the plaintiff'") (quoting *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 469, 500 (1941)).

Second, contrary to Plaintiffs' claim that "there is a presumption that injunctive relief should be granted" upon a finding of a NEPA violation, Pl. Reply at 68, the Supreme Court has explicitly held that the traditional four factor analysis must be applied in NEPA cases without any "thumb on the scale." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157 (2010). All four factors must be met. Indeed, the Supreme Court has made clear that courts may decline to grant injunctive relief for a NEPA violation where the public interest weighs against such relief, even if that means an irreparable injury goes unaddressed. *Winter v. NRDC*, 555 U.S. 7, 25-26 (2008).

Third, Plaintiffs err in suggesting that injunctive relief is *mandated* upon a finding of a violation of the ESA. Pl. Reply at 69. Although the ESA represents a Congressional determination that the balance of hardships and the public interest tip in favor of endangered species in cases arising under the ESA, courts remain free under the ESA to balance competing claims of injury and the public interest to fashion an appropriate equitable remedy. *Tennessee*

*Valley Authority v. Hill*, 437 U.S. 153, 193-94 (1978). *See also Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978 (8th Cir. 2011) (balancing the equities before awarding injunctive relief for NEPA and ESA violations).

Finally, any injunctive relief must be "narrowly tailored . . . to remedy only the specific harms shown by the plaintiffs, rather than 'to enjoin all possible breaches of the law.'" *Price v. City of Stockton*, 390 F.3d 1105, 1117 (9th Cir. 2004) (quoting *Zepeda v. INS*, 753 F.2d 719, 728 n. 1 (9th Cir. 1983)). *See also Nat'l Wildlife Fed'n v. NMFS*, 422 F.3d 782, 799-800 (9th Cir. 2005) (ESA injunction must be narrowly tailored to remedy alleged harm); *Nat'l Wildlife Fed'n.*, 23 F.3d at 1512 n.8 (injunctive relief under the ESA only appropriate where the action to be enjoined poses a "definitive threat of future harm to protected species"); *Thompson v. Edward D. Jones & Co.*, 992 F.2d 187, 189 n.2 (8th Cir. 1993) ("An order enforcing an injunction, including an order granting further injunctive relief, must be 'narrowly tailored to remedy the specific harm shown.'" (quoting *Nat'l Law Ctr. on Homelessness and Poverty v. U.S. Veterans Admin*., 765 F.Supp. 1, 6 (D.D.C. 1991), aff'd, 964 F.2d 1210 (D.C. Cir. 1992))); *Ornates-Hernandez v. Thornburgh*, 919 F.2d 549, 558 (9th Cir. 1990) ("an injunction must be narrowly tailored to give only the relief to which plaintiffs are entitled").

## III. CONCLUSION

For the reasons set forth herein and in Defendants' opening brief, Defendants respectfully request that the Court deny Plaintiffs' motion for summary judgment and grant Defendants' motion for summary judgment.

Respectfully submitted this 5th day of June, 2014.

SAM HIRCH
Acting Assistant Attorney General
United States Department of Justice

*/s/ Barclay T. Samford*
BARCLAY T. SAMFORD
Trial Attorney, Natural Resources Section
United States Department of Justice
Environment & Natural Resources Division

999 18th Street
South Terrace, Suite 370
Denver, Colorado 80202
(303) 844-1475 | Phone
(303) 844-1350 | Fax
Clay.Samford@usdoj.gov

OF COUNSEL:

Danny L. Woodyard
Attorney
Office of the General Counsel
United States Department of Agriculture

Gary Fox
Assistant General Counsel
Office of General Counsel
United States Small Business Administration

Attorneys for Defendants

**CERTIFICATE OF SERVICE**

I hereby certify that on June 5, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

Hannah Chang hchang@earthjustice.org

Joseph Henry Bates , III hbates@cbplaw.com

Kevin Cassidy cassidy@lclark.edu

Marianne Engelman Lado mengelmanlado@earthjustice.org

Monica Reimer mreimer@earthjustice.org

s/ Barclay T. Samford
BARCLAY T. SAMFORD
Trial Attorney, Natural Resources Section
United States Department of Justice
Environment & Natural Resources Division
999 18th Street
South Terrace, Suite 370
Denver, CO 80202
(303) 844-1475; | Phone
(303) 844-1350 | Fax
Clay.Samford@usdoj.gov