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

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

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR
MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

GLOSSARY OF ABBREVIATIONS

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

ADEQ	Arkansas Department of Environmental Quality
APA	Administrative Procedure Act
CEQ	Council on Environmental Quality
EA	Environmental Assessment
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FONSI	Finding of No Significant Impact
FSA	Farm Service Agency
FWS	U.S. Fish and Wildlife Service
NEPA	National Environmental Policy Act
NMP	Nutrient Management Plan
NPDES	National Pollution Discharge Elimination System
SBA	Small Business Administration
SOP	Standard Operating Procedure
USDA	U.S. Department of Agriculture

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

REGULATIONS

FEDERAL REGISTER

OTHER AUTHORITIES

INTRODUCTION

Federal Defendants ignored the law when they decided to commit the resources of the federal government to guarantee loans totaling more than $3.6 million for the construction of an unprecedented 6,500-swine concentrated animal feeding operation ("CAFO") in the watershed of this country's first national river. The treasured Buffalo River – its unique geology, clean waters, the wildlife it sustains, and the people who have been drawn to it – are at the heart of Plaintiffs' attempt in this action to set things straight. Defendants' failure to comply with both procedural and substantive mandates in the law resulted in undemocratic and flawed decisions that enabled and continue to make possible the presence of a pollution source that threatens air quality, surface water, groundwater, and the iconic Buffalo National River.

The perfunctory and ill-considered approval of federal financial assistance by the U.S. Department of Agriculture's Farm Service Agency ("FSA") and Small Business Administration ("SBA") cannot be squared with these agencies' obligations under the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4371 ("NEPA"); the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-44 ("ESA"); the Buffalo National River Enabling Act, 16 U.S.C. §§ 460m-8 to 460m-14; and regulations promulgated by the U.S. Department of Agriculture ("USDA"), 7 C.F.R. Pt. 1940, Subpt. G. This Court has the power to set aside agency action found to be arbitrary and capricious, an abuse of discretion, or not in compliance with law, and to enjoin any action in violation of the Endangered Species Act. Plaintiffs accordingly request that this Court declare the illegality of Defendants' actions and, unless and until Defendants comply with their legal obligations, enjoin the loan guarantees they approved.

STATEMENT OF FACTS

As required by Local Rule 56.1, Plaintiffs have submitted a concise statement of material facts with their motion for summary judgment. That statement is incorporated by reference and supplemented below.

I. THE BUFFALO NATIONAL RIVER

The 150-mile long Buffalo River originates in the Ozark National Forest and flows through the Ozarks in northwestern Arkansas – "through a land of mountains, past unique caves and waterfalls, old pioneer cabins, long abandoned homes of cliff dwellers and spectacular rock formations." *See* Answer to Amended Compl. ¶¶ 2, 67, ECF No. 20 ("Ans.").[1] In 1972, Congress designated 135 miles of the river as this country's first national river. Pub. L. No. 92-237, 86 Stat. 44 (March 1, 1972) (codified at 16 U.S.C. §§ 460m-8 to 460m-14); *see also* Ans. ¶ 1. Today, the Buffalo National River, encompassing 150 square miles along 135 miles of the Buffalo River, is a national park unit administered by the National Park Service (the "Park Service") that generates more than $38 million for the local economy. Ans. ¶¶ 2, 23, 70.[2] More than one million people flock to the Buffalo National River each year to enjoy its magnificent setting and wealth of recreational resources. *Id.* ¶ 70.

As described by former Secretary of the Interior Rogers Morton to the Senate,

> [t]he significance of the Buffalo River is . . . due to a splendid combination of favorable qualities. Massive bluffs and deeply entrenched valleys give the Buffalo the most spectacular setting of any stream in the Ozark region, and enable it to be classed among the most outstanding scenic of the free-flowing streams in the Eastern United States. With little residential or commercial development on its

[1] Nat'l Park Serv., The Nationwide Rivers Inventory 46 Segments for the State of Arkansas 2, http://www.gehwa.org/Wild%20&%20Scenic%20River%20Files/NRI/Arkansas%20NRI%2046S%201936M.pdf.

[2] In addition, a 15.8 mile segment of the Buffalo River is protected under the Wild and Scenic Rivers Act. *See* Ans. ¶ 24.

> banks, and with no municipal or industrial pollution, the Buffalo River is unspoiled.

S. Rep. No. 92-130 (May 19, 1971), *reprinted in* 1972 U.S.C.C.A.N. 1969, 1971. The Buffalo River and its tributaries "are one of the richest waterways in the Nation in terms of the total number of fish species." 1972 U.S.C.C.A.N. at 1972. Among the Buffalo River's unique features is the extensive karst geology that underlies the region. *See* Pls.' Mot. Req. Judicial Notice, ECF No. 30.[3] "Karst terrains are more likely to have sink holes, underground caverns, and greater porosity, all of which enhances the potential for groundwater movement and contamination." *Four Cnty. (NW) Reg'l Solid Waste Mgmt. Dist. Bd. v. Sunray Servs., Inc.*, 971 S.W.2d 255, 259 (Ark. 1998)

The Buffalo River's watershed also is home to four federally-protected species: the endangered Gray bat, the endangered Indiana bat, the endangered snuffbox mussel, and the threatened rabbitsfoot mussel. Ans. ¶ 69. The Gray bat and Indiana bat live in caves along the Buffalo River and forage for insects from the river and its tributaries. *Id.* The Gray bat, listed as an endangered species in 1976, is "more dependent upon caves for its existence" than perhaps any other bat. 40 Fed. Reg. 17,590, 17,590 (proposed Apr. 21, 1975); 41 Fed. Reg. 17,736 (Apr. 27, 1976) (final listing). The evidence at that time "suggest[ed] that entire breeding populations of the gray bat may disappear suddenly when numbers fall below a certain critical level." 40 Fed. Reg. at 17,591. In recent decades, the population of Gray bats in Arkansas has decreased by

[3] Plaintiffs' Motion Requesting Judicial Notice references the following documents to support this fact: U.S. Geological Survey, Geologic Mapping Studies at Buffalo National River, Northern Arkansas, http://esp.cr.usgs.gov/projects/buffaloriver/ (Ex. 7, ECF No. 30-7); Nat'l Park Serv., Dep't of Interior, Buffalo National River Water Resources Management Plan xi, 110-11 (2004), http://www.nature.nps.gov/water/planning/management_plans/buff_final_screen.pdf (Ex. 8, ECF No. 30-8).

61 percent. FSA-852.[4] The Indiana bat, which was deemed to be "threatened with extinction" in 1967, relies on riparian habitat for feeding and reproduction. 32 Fed. Reg. 4001 (Mar. 11, 1967); 40 Fed. Reg. 58,308, 58,309 (Dec. 16, 1975). Indiana bats hibernate in underground caverns during the winter – the "vast majority" of which are "caves located in karst areas of the east-central United States." 72 Fed. Reg. 19,015, 19,015 (Apr. 16, 2007). The Buffalo National River Superintendent has indicated that at least one cave inhabited by endangered bats is within a normal foraging distance of C&H Hog Farms, Inc. ("C&H"). FSA-1105.

The endangered snuffbox mussel is a freshwater mussel usually found in fast-moving water. 77 Fed. Reg. 8632, 8632-33 (Feb. 14, 2012). The species "has declined rangewide." *Id.* at 8649. "The elimination of this species from scores of streams and thousands of miles of stream reaches indicates catastrophic population losses and a precipitous decline in overall abundance." *Id.* The rabbitsfoot mussel was listed as a threatened species on September 17, 2013. *See* 78 Fed. Reg. 57,076, Ans. ¶ 130. The rabbitsfoot, which inhabits gravel bottom streams and rivers, FSA-860, "has been extirpated from approximately 64 percent of its historical range." 77 Fed. Reg. 63,440, 63,440 (proposed Oct. 16, 2012). The species' survival is limited by, among other things, poor water quality. *Id.* The U.S. Fish and Wildlife Service has indicated that "[t]he Buffalo River population [of rabbitsfoot mussel] is small and very susceptible to extirpation." *Id*. at 63,453.

II. THE C&H CONCENTRATED ANIMAL FEEDING OPERATION

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

[4] The "FSA" prefix to the Bates number indicates a document that is part of the Farm Service Agency's Administrative Record. Citations to the record with a "P" prefix indicate a document that is part of the Small Business Administration's Administrative Record.

approximately 0.7 miles west of the Mount Judea school. Ans. ¶ 89.[5] The two barns comprising the C&H facility confine 6,503 swine, which are expected to generate 2,090,181 gallons of manure and wastewater each year. P-632, Ans. ¶ 77. With its 2,503 swine over 55 pounds and 4,000 swine under 55 pounds, P-632, C&H is defined by regulation as a "Large CAFO." 40 C.F.R. § 122.23(b)(4)(iv). It is the first Large CAFO anywhere in the Buffalo River watershed. Ans. ¶ 3. C&H is operating under a contract with Cargill. *See* P-558; Ans. ¶ 3.

C&H's waste "treatment system" consists of pits beneath the two barns confining the animals, which drain manure and wastewater into two storage ponds: first into a "Settling Basin" and then into a "Holding Pond." FSA-729; P-653; Ans. ¶ 79. Testing by engineering consultants indicated that the first pond has a seepage rate of approximately 3,448 gallons per acre per day and the second pond a seepage rate of approximately 4,064 gallons per acre per day. P-731. Waste collected in these two open-air ponds is to be spread on 17 fields, or "approximately 630.7 acres" of land in the surrounding area. FSA-729, P-807, P-863; *see also* Attachment 1 to Pls.' Amended Compl., ECF No. 18-2. Nine of these fields (Fields 3-10 and 12) are adjacent to Big Creek, and USDA Erosion Calculation Records indicate that seven (Fields 3, 5, 6, 7, 9, 12, and 16) are "occasionally flooded." P-842 to 855; Ans. ¶ 81. At least three fields are adjacent to the Mount Judea school. *See* Attachment 2 to Pls.' Amended Compl, ECF No. 18-2.

C&H's Nutrient Management Plan ("NMP") is incorporated into C&H's permit, *see* FSA-730, and was before both Federal Defendants. *See* P-804 to P-946; FSA-222 to FSA-366. The NMP is problematic on its face. First, it is missing key permit terms. The NMP indicates that C&H will dispose of a majority of the swine waste – approximately 70 percent – on five

[5] Documents in the record identified the Mount Judea school but erroneously described it as being 1.103 miles from C&H. *See* FSA-141, P-726.

fields closest to the barns (Fields 5-9). Ans. ¶ 84; P-831.[6] Strikingly, the NMP contains no Phosphorus Index assessment for four of these fields (Fields 5, 6, 7, and 9). *See* FSA-248 (note blank rows in "P Index Range" column). These missing terms are necessary elements of C&H's permit. *See* FSA-739 (general permit requiring the NMP to comply with the Arkansas Phosphorus Index); P-817 to 818 (NMP noting that phosphorus application will follow the Arkansas Phosphorus Index).

According to the NMP, the waste generated by the 6,000 swine will amount to more than 92,000 pounds of nitrogen and more than 31,000 pounds of phosphorus each year. Ans. ¶ 77; P-823. Soil Analysis Reports prepared by the University of Arkansas's Division of Agriculture, which are included in the NMP, indicate that 15 of the 17 waste application fields (Fields 1-11, 13, 14, 16-17) already are at "optimum" or "above optimum" levels of phosphorus and recommend against additional phosphorus application on these fields. *See* P-886 to 902. In other words, according to the Soil Analysis Reports in its own NMP, only two of C&H's 17 waste application fields (Fields 12 and 15) are recommended to receive any amount of phosphorus. *See* P-897, 900. Thus, although the NMP is supposed to "[e]stablish protocols to land apply manure, litter or process wastewater . . . that *ensure appropriate agricultural utilization* of the nutrients," General Permit (FSA-739) (emphasis added), in fact C&H's NMP allows the application of thousands of pounds of phosphorus against the explicit

[6] The copy of the NMP in the FSA Administrative Record is more legible. *See* FSA-249. The 70 percent figure is obtained by totaling the value for each of the 17 fields in the Planned Application column of the "Field Nutrient Application Planning" table. *See* FSA-249 (for Fields 1-10); FSA-254 (for Fields 11-17). The total value for Planned Application for all 17 fields is 564.4. *See id.* The total value for Planned Application for Fields 5-9 alone is 405. *See* FSA-249. This constitutes 71.7 percent of the total planned application for all fields.

recommendation of the agricultural experts cited in its own permit. *See* P-829 to 839 (Nutrient Management Planner indicating the amount of waste application planned for each field).[7]

III. DEFENDANTS' REVIEW AND APPROVAL OF FINANCIAL ASSISTANCE TO C&H

A. FSA's Loan Guarantee

On December 17, 2012, FSA approved a 90 percent guarantee for a $1,302,000 farm ownership loan to C&H for the purchase of land and construction of C&H's operation. *See* Ans. ¶ 98, FSA-1114 to 1116. Prior to approving the guarantee, FSA prepared a "Class II Environmental Assessment," *see* FSA-1032 to 1043, and issued a Finding of No Significant Impact ("FONSI") dated August 24, 2012, *see* FSA-1029 to 1030.[8] The notices of availability of the draft Environmental Assessment ("EA") and of the FONSI were published only in the statewide Arkansas Democrat Gazette, and the FONSI was made available for comment for only 15 days. *See* FSA-1011, 1031; Ans. ¶ 102. The EA does not identify the nearby Mount Judea school or the Buffalo River in its description of the project site and affected environment. *See* FSA-1036 to 1040. The EA does not consider any action alternatives to the proposed action. *Id.* at 1036-37. The EA also does not identify any mitigation measures. *Id.* at 1040.

1. Communications with U.S. Fish and Wildlife Service

It is undisputed that FSA claims to have undertaken and completed "[i]nformal consultation with the U.S. Fish Wildlife Service" concerning impacts to species listed under the ESA. FSA-1029. It is also undisputed that the U.S. Fish and Wildlife Service ("FWS") has

[7] The version in the FSA's administrative record is more legible. *See* FSA-247 to 257.

[8] Class II actions "are presumed to be major Federal actions" and are defined to include "[f]inancial assistance for a livestock-holding facility or feedlot . . . having a capacity as large or larger than . . . 2,500 swine." 7 C.F.R. § 1940.312. FSA accordingly concluded that the proposed action "requires a Class II Environmental Assessment." *See* FSA-1037.

stated that it "never received an effects determination from the FSA, nor did the Service ever concur with any effects determination made by FSA." Ex. 1 to Declaration of Hannah Chang ("Chang Decl.").[9]

In a July 5, 2012, letter from FWS to the lender, Farm Credit Services of Western Arkansas ("Farm Credit"), FWS identified the Gray and Indiana bats as ESA-listed species and the rabbitsfoot mussel as a candidate species "known to occur in th[e] region" near Newton County. FSA-845. FWS's letter discussed the sensitivity of the karst landscape in the region and identified best practices for construction in karst terrain, including surveys for "karst features such as caves, sinkholes, losing streams, and springs." *Id.* at 845-48. FWS also noted that it "should be contacted for further evaluation to determine if [any identified] caves are used by sensitive or federally listed species." *Id.* at 846. FWS concluded its letter by emphasizing:

> The comments herein are for the sole purpose of providing technical assistance . . . . These comments and opinions should not be misconstrued as an "effect determination" or considered as concurrence with any proceeding [sic] determination(s) by the action agency in accordance with Section 7 of the ESA. . . .

FSA-848. FSA admits that apart from this letter, it had *no further communication* with FWS prior to FSA's issuance of the EA and FONSI. Ans. ¶ 125.

Despite this, FSA misrepresented in its EA that "[t]here is no critical habitat or endangered/threatened species located on the proposed site, located within the action's area of impact, or affected by the proposed action." FSA-1043 (referencing the "attached F&W clearance letter"). In fact, however, the administrative record contains no evidence that FSA reached an effects determination based on any independent assessment of its action. Instead,

[9] Federal Defendants have agreed that this document, along with the other two exhibits attached to the Declaration of Hannah Chang, may be considered by this Court in resolving Plaintiffs' claims. *See* Chang Decl. ¶ 5.

FSA's conclusion that listed species would not be affected rested *solely* on the July 5, 2012 letter from FWS. *See* FSA-1038 (stating in the EA that "[t]here 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).[10]

Communications after FSA's approval of the guaranteed loan to C&H confirm that FSA never received FWS's concurrence in any effects determination. On February 8, 2013, FWS informed Farm Credit that the Gray and Indiana bats as well as the snuffbox mussel were "known to occur" in the region around Newton County; that the rabbitsfoot mussel was now a proposed threatened species; and that the Buffalo River was proposed critical habitat for the rabbitsfoot mussel. FSA-839. About a month later, in a March 4th letter, FWS indicated that it had just learned on March 1, 2013, about FSA's EA and FONSI. *See* Ex. 1 to Chang Decl. Despite the fact that FSA had identified FWS as a cooperating agency in the EA, *see* FSA-1033, and the FONSI had claimed that "[i]nformal consultation with the U.S. Fish Wildlife Service was completed," FSA-1029, FWS stated in its letter that it had "never received a copy of FSA's EA" and "was not afforded the opportunity to review and comment on the draft EA." Ex. 1 to Chang Decl. FWS contested the EA's assertion that its assistance to C&H would have no impacts to listed species:

> As a matter of record, the Service 1) never received a copy of the draft EA, 2) never provided any comments on the draft EA, 3) never received an effects determination from FSA, and 4) never concurred with an effects determination for the aforementioned project.

Id. at 2.

[10] Defendants "admit that there is no agency called 'Arkansas Fish and Wildlife' and aver the cited reference refers to the U.S. Fish and Wildlife Service." Ans. ¶ 125.

On August 27, 2013, more than eight months after it had approved the guaranteed loan to C&H, FSA wrote to FWS. *See* Ex. 2 to Chang Decl. Describing "[t]he proposed action" as a "request [to] finance . . . a Cargill Hog unit," but simultaneously noting that "[c]onstruction is completed and the facility is currently operational," FSA requested FWS's concurrence "that this proposal 'May Affect but Not Likely to Adversely Affect' any endangered or threatened species that might be in the area of the project." *Id.* In an email response, FWS refused to concur in any effects determination. *See* Ex. 3 to Chang Decl.

2. Lack of consultation with the National Park Service

In a February 27, 2013 letter to FSA, the National Park Service demanded that the C&H project "be halted until we and the public and other stakeholders are afforded an opportunity to comment." FSA-1112. In its letter, the Park Service protested FSA's identification of the Park Service as a cooperating agency in the EA, as the Park Service had received the EA and FONSI on February 5, 2013 – months after the FONSI had been finalized and its guarantee approved. *Id.* at 1103. The Park Service identified 45 deficiencies with FSA's EA, including the denial of "[t]he rights of [the local Newton County] population to provide public input," *id.* at 1107; a "completely false" statement that the C&H operation would not significantly affect public health or safety, *id.* at 1108; and "no analysis" regarding C&H's environmental consequences, *id.* at 1109. The Park Service observed that the C&H facility "has the potential to significantly impact public safety and values," and found "the existing EA . . . so woefully inadequate that it should immediately be rescinded." *Id.* at 1108, 1112. In a March 29, 2013, response, FSA rebuffed the Park Service's request, concluding that the EA and FONSI "are supported by studies, reviews and approval by all relevant cooperating state and federal agencies . . . ." *Id.* at 1074.

B. SBA's Loan Guarantee

On November 16, 2012, SBA authorized a guarantee for 75 percent of a $2,318,200 loan "to assist" C&H in purchasing land and constructing buildings for its operation. *See* SBA Authorization (SBA 7(A) Guaranteed Loan) (P-17, P-20); P-17 (identifying the "SBA Loan Name" as "C&H Hog Farms, Inc."); P-1188. SBA's guarantee was necessary for C&H to obtain the requested loan. P-96 (letter from Farm Credit Services indicating that its approval of a loan to C&H was "subject to" the requested 75% guaranty from SBA); P-137 (SBA "Eligibility Questionnaire for Standard 7(a) Guaranty" indicating that "SBA may not provide financial assistance to any applicant able to obtain reasonable, non-federal financing . . . .").

SBA approved the loan guarantee based on information submitted by C&H as part of an SBA form entitled "Application for Business Loan," which C&H signed and dated October 17, 2012. *See* P-109 to P-112; *see also* P-112 (including a certification in the Application signed by C&H that "[t]his information is being submitted to a lender and SBA so they can decide to make a loan or give a loan guaranty, and that the lender and SBA are relying on this information"). The information submitted by C&H and that was before SBA included:

- C&H's "Business Plan," P-367-73
- Preliminary construction plans and specification, P-378 to P-392
- C&H's Storm Water Pollution Prevention Plan, P-615 to P-617
- C&H's Major Construction Approval Application, which included C&H's application to the Arkansas Department of Environmental Quality ("ADEQ") for coverage under the state CAFO General Permit, a "Design Report," "Site Specific Information," "Facility Plans," "Technical Specifications" for the two waste storage ponds, and the facility's NMP, P-629 to P-946.

Despite its access to this information and its awareness of the pending application for an FSA guarantee, *see* P-109, P-142, SBA admits that it did not undertake any environmental review

pursuant to NEPA in approving the requested loan guarantee. Ans. ¶¶ 95, 139. The record contains no communication between FSA and SBA regarding the proposed guaranteed loans, and FSA does not identify SBA as a cooperating agency in its EA. FSA-1033. SBA also admits that it did not consult with the National Park Service about the impacts of the C&H facility on the Buffalo River, and did not consult with FWS about the impacts on threatened and endangered species prior to authorizing the loan guarantee. Ans. ¶¶ 96-97.

LEGAL FRAMEWORK

I. FEDERAL DEFENDANTS' GUARANTEED LOAN ASSISTANCE

The Federal Defendants' loan guarantees were necessary for C&H to construct and operate its business. The "7(A) Guaranteed Loan" approved by SBA*, see* P-17, was authorized pursuant to Section 7(a) of the Small Business Act, which empowers SBA to provide financing to small businesses – "either directly or in cooperation with banks or other financial institutions through agreements to participate on an immediate or deferred (guaranteed) basis." 15 U.S.C. § 636(a); *see also* 13 C.F.R. § 120.1. In approving "guaranteed loans," SBA agrees "to participate in a loan on a deferred basis." 15 U.S.C. § 636(a)(2)(A); *see also* 13 C.F.R. § 120.2 (describing three types of "7(a) loans," including "[a] direct loan by SBA" and "[a] guaranteed loan (deferred participation) by which SBA guarantees a portion of a loan made by a Lender"). To be eligible for such business loan assistance from SBA, an applicant must be *unable to obtain the desired credit "on reasonable terms from non-Federal sources."* 13 C.F.R. § 120.101 (emphasis added); *id.* ("SBA requires the Lender . . . to certify or otherwise show that the desired credit is unavailable to the applicant on reasonable terms and conditions from non-Federal sources without SBA assistance."). Similarly, to be eligible for a guaranteed farm ownership loan from FSA, the applicant – that is, "the individual or entity applying for a loan or loan servicing under

either the direct or guaranteed loan program," 7 C.F.R. § 761.2 – must demonstrate that it "is unable to obtain sufficient credit elsewhere without a guarantee to finance actual needs at reasonable rates and terms." *Id.* § 762.120(h).

II. THE NATIONAL ENVIRONMENTAL POLICY ACT

NEPA, the "basic national charter for protection of the environment," makes environmental protection part of the mandate of every federal agency. 42 U.S.C. § 4332(2); 40 C.F.R. § 1500.1(a). Under NEPA, federal agencies are to take environmental considerations into account in their decisionmaking "to the fullest extent possible." 42 U.S.C. § 4332; *Flint Ridge Development Co. v. Scenic Rivers Association of Oklahoma*, 426 U.S. 776, 787 (1976); 40 C.F.R. § 1500.2. NEPA is implemented by regulations promulgated by the Council on Environmental Quality ("CEQ"), which are "binding on all Federal agencies," *id.* § 1500.3, and "entitled to substantial deference," *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979). The CEQ regulations set forth specific requirements to be met in complying with NEPA. *See* 40 C.F.R. §§ 1500.1-1508.28. The CEQ regulations allow agencies to adopt their own procedures to supplement and effectuate the CEQ regulations. 40 C.F.R. § 1507.3.

NEPA requires agencies to prepare an Environmental Impact Statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). If it is unclear whether a federal action will significantly affect the environment, agencies prepare an EA to "provide sufficient evidence and analysis for determining whether to prepare an [EIS] or a finding of no significant impact." 40 C.F.R. § 1508.9. Although an EA has been described as a "rough-cut, low-budget" EIS, an EA nevertheless is required to include "discussions of the environmental impacts of the proposed action," *Sierra Club. v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 991 (8th Cir. 2011), and must reflect that the agency "t[ook] a

'hard look' at the environmental effects of their planned action." *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 374 (1989); *see also Heartwood, Inc. v. U.S. Forest Serv.*, 380 F.3d 428, 431 (8th Cir. 2004). Ultimately, NEPA's "action-forcing" provisions serve dual purposes: to "ensure[] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts" and to "guarantee[] that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); *see also Minnesota Public Interest Research Group v. Butz*, 541 F.2d 1292, 1299-1300 (8th Cir. 1976).

III. THE ENDANGERED SPECIES ACT

The ESA includes both substantive and procedural provisions to protect and recover imperiled species and has been described by the Supreme Court as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). Species listed as "endangered" are those "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). "Threatened" species are those that are likely to become endangered within the foreseeable future. *Id.* § 1532(20). Section 7 of the ESA requires "all Federal departments and agencies" to insure that "any action authorized, funded, or carried out by" the agency is "not likely to jeopardize" any threatened or endangered species or adversely modify their critical habitat. 16 U.S.C. § 1536(a)(2).[11]

[11] An action jeopardizes a listed species if it "would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02.

To implement this substantive mandate, agencies are required to engage in a consultation process with the appropriate wildlife agency – FWS, in this case – to determine the impacts of the action on listed species. *See id.*; 50 C.F.R. § 402.01(b).[12] Pursuant to this procedural requirement, "[e]ach Federal agency" is affirmatively obligated to "review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat." *Id.* § 402.14(a). "Formal consultation" with FWS is required if the action agency determines that its action "may affect" listed species or critical habitat, and is completed when FWS issues a "biological opinion" indicating whether the action is likely to jeopardize the species. *See* 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(a), (h). An action agency need not undertake formal consultation if "as a result of the preparation of a biological assessment under § 402.12 or as a result of informal consultation with [FWS] under § 402.13, the Federal agency determines, *with the written concurrence of [FWS],* that the proposed action is not likely to adversely affect any listed species or critical habitat." *Id.* § 402.14(b)(1) (emphasis added).

The ESA authorizes individuals to bring suit for injunctive relief against any person, including agencies, "alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof." 16 U.S.C. § 1540(g)(1). District courts are empowered "to enforce any such provision or regulation." *Id.* Indeed, refusal to enjoin an action in violation of the ESA would "ignore[] the 'explicit provisions of the Endangered Species Act.'" *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982) (quoting *TVA v. Hill*, 437 U.S. at 173); *see also id.* ("The purpose and language of the statute limit[s] the remedies available to the District Court; only an injunction could vindicate the objectives of the [ESA].").

[12] The National Marine Fisheries Service is the other wildlife agency charged with administering the ESA. *See* 50 C.F.R. § 402.01(b).

IV. THE BUFFALO NATIONAL RIVER ENABLING ACT

In 1972, to conserve "an area containing unique scenic and scientific features" and to preserve the Buffalo River "for the benefit and enjoyment of present and future generations," Congress authorized the Secretary of the Interior to establish and administer the Buffalo National River as part of the national park system. 16 U.S.C. § 460m-8. The Buffalo National River Enabling Act specifies that

> no department or agency of the United States shall assist by loan, grant, license, or otherwise in the construction of any water resources project that would have a direct and adverse effect on the values for which such river is established, *as determined by the Secretary [of Interior]*. Nothing contained in the foregoing sentence, however, shall preclude licensing of, or assistance to, developments below or above the Buffalo National River or on any stream tributary thereto which will not invade the area or unreasonably diminish the scenic, recreational, and fish and wildlife values present in the area on March 1, 1972.

Id. § 460m-11 (emphasis added). This language is "virtually identical to section 7(a) of the Wild and Scenic Rivers Act." S. Rep. No. 92-130, 1972 U.S.C.C.A.N. at 1973; *see also id.* at 1975 ("[The Buffalo National River Enabling Act] contemplates that the Secretary of Interior shall develop and administer the Buffalo National River as part of the national park system, and section 4 of the bill . . . is adapted from an identical provision in section 7(a) of the Wild and Scenic Rivers Act . . . ."). The Wild and Scenic Rivers Act implements a Congressional policy recognizing that certain rivers "possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values" and establishes a commitment to protect these rivers and their immediate environment. 16 U.S.C. § 1271. *Compare* 16 U.S.C. § 460m-11, *with id*. § 1278(a).

V. USDA ENVIRONMENTAL PROGRAM REGULATIONS

USDA has promulgated regulations applicable to FSA that "integrate[] the requirements of NEPA with other planning and environmental review procedures required by law, or by

Agency practice," including the ESA and the Wild and Scenic Rivers Act. 7 C.F.R. § 1940.301(c); *see id.* Pt. 1940, Subpt. G "Environmental Program."[13] These regulations "must be met for guaranteed . . . [farm ownership loans]." *Id.* § 762.128(a).[14] Under these regulations, certain specified actions, including "[f]inancial assistance for a livestock-holding facility or feedlot . . . having a capacity as large or larger than . . . 2,500 swine," are defined as "Class II actions." *Id.* § 1940.312. Class II actions "have the potential for resulting in more varied and substantial environmental impacts" than identified Class I actions and consequently "are presumed to be major Federal actions." *Id.* The regulations set forth specific requirements for a Class II EA. *See id.* § 1940.318; *id.* Pt. 1940, Subpt. G, Ex H. In addition, several other relevant provisions are identified below.

A. Public Notice Requirements

Where Class II actions "are determined not to have a significant environmental impact," this determination – that is, the FONSI – is to be published "in the newspaper of general circulation in the vicinity of the proposed action and in any local or community-oriented newspapers within the proposed action's area of environmental impact" for "at least 3 consecutive days if published in a daily newspaper." 7 C.F.R. § 1940.331(b)(1), (3). The regulations also specify that individual copies of the FONSI are to be sent to "any State or Federal agencies planning to provide financial assistance to this or related actions," "any

[13] These regulations apply to the "Farmers Home Administration (FmHA) or its successor agency under Public Law 103–354." 7 C.F.R. § 1940.301. This successor agency is FSA. *See* Pub. L. No. 103–354, § 226, 108 Stat. 3178 (Oct. 13, 1994) (codified at 7 U.S.C. § 6932) (designating "Consolidated Farm Service Agency" as successor to FmHA); 61 Fed. Reg. 1109, 1109 (Jan. 16, 1996) (changing "the name of the Consolidated Farm Service Agency to the Farm Service Agency as a result of [USDA] reorganization").

[14] This provision refers to "FO," which is defined elsewhere in the regulations as a "Farm Ownership loan." *See* 7 U.S.C. § 761.2(a).

individuals, groups, local, State, and Federal agencies known to be interested in the project," and "affected property owners," among others. *Id.* § 1940.331(b)(1).

B. Requirement to Consult with the National Park Service Concerning Rivers on the Nationwide Rivers Inventory

The entire length of the Buffalo River is listed on the Nationwide Rivers Inventory of rivers that potentially qualify as wild, scenic, or recreational rivers. Ans. ¶ 25. Accordingly, the Buffalo is protected by procedures set forth in USDA regulations implementing the Wild and Scenic Rivers Act.[15] These regulations require that "[e]ach application for financial assistance . . . be reviewed to determine if it will affect a river or portion of it, which is . . . identified in the Nationwide Inventory prepared by the National Park Service . . . ." 7 C.F.R. § 1940.305(f); *see also id.* Pt. 1940, Subpt. G, Ex. E ¶ 1 ("For applications subject to [EAs], th[is] review shall be accomplished as part of the [EA].").

Specifically, the regulations require that FSA "*shall consult with the appropriate regional office of NPS* if the proposal . . . involves . . . discharging water to the river via a point source . . . ." *Id.* Ex. E ¶ 3 (emphasis added). If the Park Service advises upon consultation that the proposal "would have a direct and adverse effect on the values which served as the basis for the river's . . . designation for potential addition [to the wild and scenic rivers system]" or "would invade the river area or unreasonably diminish the scenic, recreational, and fish and wildlife values present in the area," FSA is required to "further consult with [the Park Service] in order to formulate adequate measures or modification to avoid or mitigate the potential adverse effect."

[15] The Wild and Scenic Rivers Act designates certain rivers as part of the wild and scenic rivers system, establishes a procedure for adding other rivers to the system, and provides guidance for the management of designated rivers. *See* 16 U.S.C. §§ 1271-87. Pursuant to this statute, the Park Service maintains the Nationwide Rivers Inventory as a register of river segments that potentially qualify for protection under the Wild and Scenic Rivers System. Ans. ¶ 31; *see also* 16 U.S.C. § 1276(d); *Ctr. for Biological Diversity v. Veneman*, 394 F.3d 1108, 1111 (9th Cir. 2003) (describing the Nationwide Rivers Inventory).

Id. ¶¶ 3, 8. Once the agencies concur on modifications to avoid or mitigate the adverse impacts, FSA "shall require that they be incorporated into the proposal as either design changes or special conditions to the offer of assistance." *Id.* ¶ 8. If, however, the Park Service "advises that the proposal will have an unavoidable adverse effect," FSA must deny the application. *Id.* ¶ 7.[16]

C. Requirement to Review for Compliance with Antidegradation

The Buffalo River is designated an Extraordinary Resource Water, which refers to a "beneficial use [that] is a combination of the chemical, physical and biological characteristics of a waterbody and its watershed which is characterized by scenic beauty, aesthetics, scientific values, broad scope recreation potential and intangible social values." *See* Ark. Pollution Control & Ecology Comm'n, Reg. No. 2, at 3-1, A-11 (2011), *available at* http://www.adeq.state.ar.us/regs/files/reg02_final_110926.pdf. Extraordinary Resource Waters are protected under the state's antidegradation policy through, among other things, water quality controls, protection of instream habitat, and encouragement of land management protective of the watershed. *See id.* at 2-1. USDA regulations prohibit FSA from "provid[ing] financial assistance to any activity that would either impair a State water quality standard . . . or that would not meet antidegradation requirements." 7 C.F.R. § 1940.304(h). To implement this requirement, the regulations require that "[e]ach application for financial assistance . . . be reviewed to determine if it would impair a State water quality standard or meet antidegradation requirements." 7 C.F.R. § 1940.305(k). "When necessary, the proposed activity will be modified to protect water quality standards. . . and meet antidegradation requirements." *Id.*.

[16] FSA's obligation to consult is a continuing one. *See* 7 C.F.R. Part 1940, Subpt. G, Ex. E. ¶ 10. ("Once completed, the consultation process shall be reinitiated by [FSA] if new information or modification of the proposal reveals impacts to a river within the System or Nationwide Inventory.").

STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Vatrett*, 477 U.S. 317, 322 (1986). The standard of review set forth in the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, applies to all the claims before this Court. *See* 5 U.S.C. § 704; *Sierra Club v. Kimbell*, 623 F.3d 549, 558-59 (8th Cir. 2010); *Nat'l Wildlife Federation v. Harvey*, 574 F. Supp. 2d 934, 943 (E.D. Ark. 2008). Under the APA, courts are directed to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

In determining whether an agency decision was "arbitrary or capricious," this Court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Marsh*, 490 U.S. at 378 (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977)). Although the Court may not substitute its own judgment for that of the agency, this inquiry must be "searching and careful," to "ensure that agency decisions are founded on a reasoned evaluation of the relevant factors." *Id.* (internal quotation marks omitted). The Court must set aside agency action if the agency:

> relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). When undertaking review under the APA, "[r]eviewing courts are not obliged to stand aside and

rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Nat'l Labor Relations Bd. v. Brown*, 380 U.S. 278, 291 (1965).

ARGUMENT

I. FSA VIOLATED NEPA AND ITS OWN REGULATIONS IMPLEMENTING NEPA

A. FSA Failed to Take a Hard Look at Environmental Impacts

FSA did not take a hard look at the impacts of its proposed assistance for the construction of C&H, in violation of NEPA and USDA regulations detailing the requirements for a Class II EA. *See Methow Valley*, 490 U.S. at 350. "The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences." 40 C.F.R. § 1500.1(c). NEPA accordingly requires federal agencies to consider fully the "environmental consequences" of a proposed action, *see id*. § 1502.16, including both direct impacts, which are "caused by the action and occur at the same time and place," and indirect impacts, which are "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." *Id*. § 1508.8(a), (b). USDA regulations require a Class II EA to consider, among other things, "all potential impacts associated with the construction of the project, its operation and maintenance, [and] the operation of all identified primary beneficiaries." 7 C.F.R. Pt. 1940, Subpt. G, Ex. H.[17]

The EA is characterized by the striking absence of any discussion of C&H's impacts– whether on water resources, air quality, or the neighboring community. *See* FSA-1032 to 1043.

[17] FSA identifies the primary beneficiaries as C&H and the six related individuals that "ma[k]e up" the company. *See* FSA-1036; *see also id.* at 1019 ("The primary beneficiaries are loan applicants C&H Hog Farms Inc., Jason and Tana Henson, Phillip and Julie Campbell, and Richard and Mary Campbell.").

FSA's utter failure to take a hard look at the environmental consequences of the proposed action – "to provide [farm ownership loan] funding for a Guaranteed loan" for C&H to purchase land and construct its two barns, FSA-1036 – begins with the agency's evident lack of understanding about the project area. USDA regulations require FSA to "[d]escribe the project site," including the identification of "[u]nique or sensitive areas," such as schools, rivers, parks, endangered species habitats "or other delicate or rare ecosystems." 7 C.F.R. Pt. 1940, Subpt. G, Ex. H. FSA's EA does not identify the nearby Mount Judea school, the Buffalo National River, the Extraordinary Resource Water designation of the downstream Buffalo River, the karst terrain,[18] or the cave inhabited by endangered Gray bats within foraging distance of C&H's waste application fields, *see* FSA-1105.

FSA's purported consideration of impacts to various identified resources, *see* FSA-1037 to 1040, does not withstand scrutiny, even under a deferential standard of review. This Court has noted that:

> [A] federal agency obligated to take into account the values . . . NEPA seek[s] to safeguard, may not evade that obligation by keeping its thought processes under wraps. Discretion to decide does not include a right to act perfunctorily or arbitrarily. . . . The agency must not only observe the prescribed procedural requirements and actually take account of the factors specified, but it must also make a sufficiently detailed disclosure so that in the event of a later challenge to the agency's procedure, the courts will not be left to guess whether the requirements of . . . NEPA have been obeyed.

Miller v. U.S., 492 F. Supp. 956, 963-64 (E.D. Ark. 1980) (citing *Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1971), and *Envtl. Defense Fund v. Froehlke*, 473 F.2d 346 (8th Cir. 1972)), *aff'd*, 654 F.2d 513 (8th Cir. 1981). Here, even *if* FSA had actually identified the impacts of assisting in the construction of a 6,500-swine CAFO on karst terrain in the watershed of a national park unit

[18] FSA's administrative record reflects that the July 5, 2012, letter from FWS alerted the agency to the karst geology of the region. *See* FSA-845 to 848.

and state-designated Extraordinary Resource Water – though there is no evidence in the record that it did so – the EA it prepared fails to provide "sufficiently detailed disclosure" to show that the agency did not act "perfunctorily or arbitrarily." The EA also clearly fails to follow USDA's own regulations governing Class II EAs. *See* 7 C.F.R. § 1940.318; *id.* Pt. 1940, Subpt. G, Ex. H (requiring, for instance, discussion of "all aspects of the project including primary beneficiaries' operations and known indirect effects which will affect water quality," including "whether or not the project would . . . fail to meet antidegradation requirements").

Indeed FSA's failure to identify the Buffalo National River, much less to discuss any potential impacts to the river, alone makes the EA arbitrary and capricious and not in accordance with law. It is well-established that "[a]n environmental assessment that fails to address a significant environmental concern can hardly be deemed adequate for a reasoned determination that an EIS is not appropriate." *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 154 (D.C. Cir. 1985) (citing *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council,* 435 U.S. 519, 553 (1978) ("NEPA places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action")). The agency's failure to identify and discuss potential impacts to the Buffalo National River is particularly egregious in light of Congress's clear intent in the Buffalo National River Enabling Act to protect the river, *see infra* Section IV.A, and this Circuit's emphasis on the importance of considering impacts to congressionally-protected areas. In *Sierra Club v. Kimbell*, this Circuit concluded that review of the impacts of the Forest Service's revision to a forest plan that affected only areas *outside* of the Boundary Waters Canoe Area Wilderness nevertheless must consider impacts on the wilderness area:

> NEPA made it our "national policy . . . to promote efforts which will prevent or eliminate damage to the environment and . . . to enrich the understanding of the ecological systems and natural resources important to the Nation." 42 U.S.C. § 4321. Like the Fourth Circuit, we believe this policy "is surely implicated when

> the environment that may be damaged is one that Congress has specially designated for federal protection."

623 F.3d at 560 (quoting *Nat'l Audubon Soc'y v. Dep't of the Navy,* 422 F.3d 174, 186–87 (4th Cir. 2005)). The Court concluded that "[t]he guiding policy of NEPA . . . requires that the Forest Service's assessment in this case include an evaluation" of impacts to the "unique biological features of this congressionally protected area." *Id.* (quoting *Nat'l Audubon Soc'y*, 422 F.3d at 187)). FSA's decision to assist C&H financially without considering the potential impacts of this action on the Buffalo National River thus was not made "based on a consideration of the relevant factors," *Marsh*, 490 U.S. at 378, and the agency acted arbitrarily and capriciously when it "entirely failed to consider an important aspect of the problem," *Motor Vehicle Mfrs. Ass'n of U.S.*, 463 U.S. at 43.

NEPA "does not prevent agencies from taking environmentally harmful action," but it does require that "the adverse environmental effects of the proposed action *are adequately identified and evaluated.*" *Kimbell*, 623 F.3d at 559 (quoting *Methow Valley,* 490 U.S. at 350)) (emphasis added). In this instance, FSA failed to identify and evaluate the impacts of the proposed action in violation of NEPA. Its failure to review the "application for financial assistance" to assess "if it would impair a State water quality standard or meet antidegradation requirements" also violated its own regulations. 7 C.F.R. § 1940.305(k); *see also id.* Pt. 1940, Subpt. G, Ex. H.

B. FSA's Analysis of Alternatives was Arbitrary and Capricious

FSA further failed to consider reasonable alternatives in its EA, as is required. *See* 42 U.S.C. § 4332; *Central S. Dakota Co-op. Grazing Dist. v. Sec'y of USDA*, 266 F.3d 889, 902 n. 3 (8th Cir. 2001); 40 C.F.R. § 1508.9(b). The discussion of alternatives "is the heart" of the environmental review under NEPA, and must include a "[n]o action alternative," "[o]ther

reasonable courses of actions," and "reasonable alternatives not within the jurisdiction of the lead agency." 40 C.F.R. §§ 1502.14(c), 1508.25(b)(2). USDA regulations specifically require that a Class II EA

> [d]iscuss the feasibility of alternatives to the project and their environmental impacts. These alternatives should include (a) alternative locations, (b) alternative designs, (c) alternative projects having similar benefits, and (d) no project.

7 C.F.R. Pt. 1940, Subpt. G, Ex. H, XVIII.

FSA concedes in its EA that "[a]lternative projects were not considered due to this being the most favorable location." FSA-1037.

> Alternative designs and alternative projects were not considered for the following reasons: Alternative locations and construction of new houses was not taken into consideration until they found this location to purchase. The location is in close proximity to the integrator's feed mill and processing plant. The applicant wishes to produce hogs for Cargill, while living in a rural area.

FSA-1036. Although the alternative section of an EA need not discuss "*all* proposed alternatives, no matter their merit," *La. Crawfish Producers Ass'n-W. v. Rowan*, 463 F.3d 352, 356-57 (5th Cir. 2006), the agency "is required to consider . . . reasonable, feasible alternatives," *Mo. Mining, Inc. v. ICC*, 33 F.3d 980, 984 (8th Cir. 1994).[19] This Court reviews an agency's range of alternatives and the extent to which they are discussed under a "rule of reason" that considers whether the NEPA review "adequately sets forth sufficient information to allow the decision-maker to consider alternatives and make a reasoned decision." *Friends of Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1128 (8th Cir. 1999). Here, it was unreasonable for FSA to refuse the consideration of any other action alternatives on the sole basis that the

[19] The record shows that there likely were reasonable, feasible alternative locations for the C&H operation. Cargill had expressed a preference to contract with farms anywhere within 100 miles of its feed mill, and the proposed location for C&H was 62 miles from a Cargill feed mill in London, Arkansas. *See* P-554.

applicant "wishes to produce hogs for Cargill, while living in a rural area," FSA-1036. *See Natural Res. Def. Council v. FAA*, 564 F.3d 549, 568 (2d Cir. 2009) ("In determining the existence of prudent alternatives, a reviewing agency should appropriately exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of a proposed project.") (internal quotation marks and citation omitted); *Van Abbema v. Fornell*, 807 F.2d 633, 642 (7th Cir. 1986) (finding that the agency did not take a hard look at alternatives where its analysis "evidences blind reliance on material prepared by the applicant").

For much the same reason, FSA's consideration of the no-action alternative also fails under a rule of reason. The EA's discussion of the no-action alternative states in its entirety:

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

FSA-1037. The discussion of alternatives under NEPA "should present *the environmental impacts* of the proposal and the alternatives in comparative forms," thereby "providing a clear basis for choice among options by the decisionmaker and the public." 40 C.F.R. § 1502.14 (emphasis added). The purpose behind the requirement to include a no-action alternative in particular is to provide a baseline against which action alternatives are assessed: "Without accurate baseline data, an agency cannot carefully consider information about significant environmental impacts . . . resulting in an arbitrary and capricious decision." *N.C. Wildlife Fed'n v. N.C. Dep't of Transp.*, 677 F.3d 596, 603 (4th Cir. 2012) (internal alterations and citation omitted). Here, FSA wholly failed to consider *any* environmental impact of a no-action alternative and consequently to identify a baseline by which to judge the preferred alternative – that is, the construction of a CAFO on the banks of Big Creek. This cursory discussion of the no-action alternative does not constitute the hard look required by NEPA.

C. FSA Failed to Consider Mitigation Measures

FSA did not identify any mitigation measures in the EA, in violation of NEPA. *See* 40 C.F.R. § 1502.16(h) (requiring the discussion of environmental consequences to include "[m]eans to mitigate adverse environmental impacts"); *see also id.* § 1502.14(f) (same). USDA regulations for Class II EAs state that "throughout the assessment process, consideration will be given to incorporating mechanisms into the proposed action for reducing, mitigating, or avoiding adverse impacts." 7 C.F.R. § 1940.318(g).

> Examples of such mechanisms which are commonly referred to as mitigation measures include the deletion, relocation, redesign or other modifications of the project elements; the dedication of environmentally sensitive areas which would otherwise be adversely affected by the action or its indirect impacts; . . . [and] protective measures recommended by environmental and conservation agencies . . . .

Id. These mitigation measures are to be "documented in the assessment" and "placed in the offer of financial assistance as special conditions." *Id.* The regulations further specify that "[i]f no feasible alternatives exist, . . . measures to mitigate the identified adverse environmental impacts will be included in the proposal." *Id.* § 1940.303(d).

The "Mitigation Measures" section of the EA states only that: "Mitigation is not required at this time. Applicants will need to comply with their CNMP [Comprehensive Nutrient Management Plan]." FSA-1040. As the Supreme Court has found, the "omission of a reasonably complete discussion of possible mitigation measures would undermine the 'action-forcing' function of NEPA." *Methow Valley*, 490 U.S. at 352. "Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects." *Id.* FSA's cursory assertion that "[m]itigation is not required at this time" – without any supporting evidence – does not constitute a hard look at the possible impacts associated with the proposed project and fails to "provide a reviewing court with the necessary

factual specificity to conduct its review." *See Comm. to Pres. Boomer Lake Park v. Dep't of Transp.*, 4 F.3d 1543, 1553 (10th Cir. 1993) (concluding that preparation of an EA "would be rendered meaningless if [it] were merely a vehicle for conclusory, self-serving findings").[20]

D. The FONSI is Arbitrary and Capricious.

The FONSI, with its conclusory and unsupported assertions, many of which are contradicted by facts in the record, epitomizes arbitrary and capricious decisionmaking. *See* FSA-1029 to 1030. This Court must review the FONSI to determine whether the decision not to prepare an EIS "accords with traditional norms of reasoned decisionmaking and that the agency has taken the 'hard look' required by NEPA." *Heckler*, 756 F.2d at 151. This Circuit relies on a four-factor test to determine whether an agency's decision to forego an EIS is arbitrary and capricious. *See Audubon Soc'y of C. Ark. v. Dailey*, 977 F.2d 428, 434 (8th Cir. 1992); *Choate v. U.S. Army Corps of Engineers*, 4:07CV01170-WRW, 2008 WL 4833113 (E.D. Ark. Nov. 5, 2008) (applying the test). This test considers (1) whether the agency "took a 'hard look' at the problem," (2) whether the agency "identified the relevant areas of environmental concern," (3) "as to the problems studied and identified, whether the agency made a convincing case that the impact was insignificant," and (4) "if there was impact of true significance, whether the agency convincingly established that changes in the project sufficiently reduced it to a minimum." *Dailey*, 977 F.2d at 434.

[20] To the extent FSA intended C&H's NMP to serve in lieu of mitigation, USDA regulations governing Class II EAs require that mitigation measures "must be documented in the assessment . . . and include an analysis of their environmental impacts and potential effectiveness." 7 C.F.R. § 1940.318(g). The EA contains no analysis of the impacts and effectiveness of the NMP. The administrative record also is devoid of any agency analysis of the NMP. In any event, the patent flaws in the NMP, including missing permit terms, *see* Statement of Facts at 5-7, renders any reliance on the NMP arbitrary and capricious.

FSA's FONSI fails this test. Agencies are to consider both "context and intensity" in weighing whether a project will significantly affect the quality of the human environment. *See* 40 C.F.R. § 1508.27 (identifying ten factors to be assessed in evaluating intensity, including "[u]nique characteristics of the geographic area," "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial," and "[t]he degree to which the action may adversely affect an endangered or threatened species or its habitat"). The FONSI references each of the ten factors, but addresses them only by making unsupported assertions about the anticipated lack of impact. *See* FSA-1029. The FONSI makes the bare assertion, for instance, that "[t]he preferred alternative would not significantly affect public health or safety," *id.*, despite facts in the record showing that thousands of gallons of untreated swine waste would be applied to land next to a school.[21] The FONSI further states – without support and despite the proximity of the Buffalo National River and the karst geology in the basin – that "[t]he preferred alternative would not significantly affect any unique characteristics," including "parklands," "wild and scenic rivers, or ecologically critical areas." *Id.* In short, the FONSI neither takes a hard look at the consequences of siting a 6,500-swine CAFO nor does it identify "relevant areas of environmental concern." The FONSI's failure to "accord[] with traditional norms of reasoned decisionmaking," *Heckler*, 756 F.2d at 151, renders it and FSA's decision not to prepare an EIS unlawful. *See* 5 U.S.C. § 706.

E. FSA Failed to Properly Notify the Public and Provide Opportunity for Comment

FSA failed to comply both with its own regulations and CEQ regulations governing public notice. One of the "fundamental principles" underlying NEPA is that "the public has the

[21] The Park Service expressed its view that C&H "has the potential to significantly impact public safety and values." FSA-1112.

right to review" an agency's consideration of environmental impacts. *Sierra Club v. USDA*, 777 F. Supp. 2d 44, 55 (D.D.C. 2011) (citing *Heckler*, 756 F2d at 147 (D.C. Cir. 1985) (citing *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87 (1983)). FSA's violation of the letter of its own regulations and CEQ regulations thwarted this right. Rather than publishing notice of a draft EA for 15 calendar days in a local newspaper and providing a full 30 days for comment on the FONSI before a final decision, FSA published only in a statewide paper for three days and provided only 15 days for comment on a FONSI it already had finalized.

FSA arbitrarily and capriciously disregarded its own regulations and policies concerning public notice of an EA and FONSI. USDA regulations require that FONSIs for Class II actions be published "in the newspaper of general circulation in the vicinity of the proposed action *and in any local or community-oriented newspapers within the proposed action's area of environmental impact*," 7 C.F.R. § 1940.331(b)(1), (3) (emphasis added).[22] The FSA Handbook on Environmental Quality Programs further specifies that notice of availability of a draft Class II EA must be published in a "local newspaper . . . for 15 calendar days," and that FSA must "provide copies of draft EA to other Federal agencies that have an interest in the activity." U.S. Dep't of Agric., FSA Handbook: Environmental Quality Programs 1-EQ (Rev. 2) at 3-23 (2009), *available at* http://www.fsa.usda.gov/Internet/FSA_File/1-eq_r02_a01.pdf ("FSA Handbook"). FSA blatantly ignored its own regulations and Handbook when it chose to: publish notice of the EA and FONSI only in the Arkansas Democrat-Gazette, a state publication based in Little Rock, Ans. ¶ 133; publish notice of the EA for only three days rather than fifteen, *see* FSA-1011; and not provide copies to interested federal agencies. As the Buffalo National River Superintendent

[22] The Newton County Times is a local publication that covers the Newton County area. *See* Pls.' Mot. Req. Judicial Notice, ECF No. 30 (attaching Ex. 9 (Newton County Times, About Us, http://newtoncountytimes.com/site/pages/about_us.html) to support this fact).

located in Harrison, Arkansas, asserted: "FSA did not contact [the Park Service], local residents, etc." and "[t]he rights of [the Newton County] population to provide public input have been denied." FSA-1107 to 1108; *see also id.* at 1112 (urging that the project "be halted until we and the public and other stakeholders are afforded an opportunity to comment").

In addition to FSA's failure to publish notice in a local or community-oriented newspaper, the agency violated NEPA regulations requiring that a FONSI be made available for public review for 30 days when "[t]he nature of the proposed action is one without precedent." 40 C.F.R. § 1501.4(e)(2)(ii). Prior to May 2012, ADEQ required all confined animal operations with a liquid waste management system to obtain *no-discharge* permits under the state's Regulation No. 5, which strictly prohibited any discharge to receiving waters. *See* Pls.' Mot. Req. Judicial Notice, ECF No. 30;[23] FSA-1051 (Regulation No. 5 stating: "Prohibition: The operator of a confined animal operation constructed and operated as authorized by permit in accordance with the provisions of this regulation shall not allow or cause a point source discharge from any part of the liquid animal waste management system."). Effective November 1, 2011, Arkansas created by rule a state General Permit ARG590000 for CAFOs under the Clean Water Act's National Pollution Discharge Elimination System ("NPDES") program. *See* FSA-730, 732. Facilities covered by the General Permit are authorized to discharge effluent into

[23] Plaintiffs' Motion Requesting Judicial Notice references the following documents to support this fact: EPA, State Compendium – Region 6: Programs and Regulatory Activities Related to Animal Feeding Operations 31-38 (May 2002), *available at* http://www.epa.gov/npdes/pubs/region6.pdf) (Ex. 1, ECF No. 30-1); Ark. Pollution Control & Ecology Commission, ADEQ, Statement of Basis and Purpose for Adoption of Amendments to Regulation No.5 (Docket No. 11-004-R) (May 11, 2012), *available at* http://www.adeq.state.ar.us/regs/drafts/reg05_draft_docket_11-004-R/reg05_draft_docket_11-004-R.htm (click on "05/11/2012 - Statement of Basis") (Ex. 2, ECF No. 30-2).

receiving waters. FSA-728 to 730.[24] C&H is the first, and so far only, CAFO permitted under the state's General Permit for CAFOs. *See* Pls' Mot. Req. Judicial Notice, ECF No. 30.[25] FSA's action therefore involved not only the construction of the first Large CAFO in the Buffalo River watershed, Ans. ¶ 3, but also the construction of the *only* CAFO authorized to discharge in the Buffalo River watershed and, indeed, in the entire state of Arkansas.[26]

The question of whether something is "without precedent" relates to the manner in which the "particular project will impact the environment." *Food & Water Watch, Inc. v. U.S. Army Corps of Engineers*, 570 F. Supp. 2d 177, 190-91 (D. Mass. 2008) (citing *Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of Army,* 398 F.3d 105, 115 (1st Cir. 2005)). Providing assistance necessary for the construction of the first CAFO authorized to discharge in the state and in the watershed of a national park unit and Extraordinary Resource Water could be expected

---

[24] As of May 2012, these facilities were exempted from Regulation No. 5 and its no-discharge prohibitions. *See* FSA-1044, 1048 (current Regulation No. 5, approved May 24, 2012, providing an exemption at Reg. 5.105 for CAFOs with a NPDES permit). *See also* Pls.' Mot. Req. Judicial Notice, ECF No. 30 (citing the following to support this fact: APC&E Comm'n, Petition to Initiate Rulemaking to Amend Regulation No. 5 (Docket No. 11-004-R) (Oct. 14, 2011), *available at* http://www.adeq.state.ar.us/regs/drafts/reg05_draft_docket_11-004-R/reg05_draft_docket_11-004-R.htm (click on "10/14/2011 - Petition to Initiate Rulemaking") (Ex. 3, ECF No. 30-3); APC&E Comm'n, Mark-up of Reg. No. 5 submitted to Ark. Pollution Control & Ecology Commission (Docket No. 11-004-R) (Oct. 14, 2011), *available at* http://www.adeq.state.ar.us/regs/drafts/reg05_draft_docket_11-004-R/reg05_draft_docket_11-004-R.htm (click on "10/14/2011 - DRAFT Regulation 5 Markup") (Ex. 4, ECF No. 30-4)).

[25] Pls.' Mot. Req. Judicial Notice references the following to support this fact: ADEQ - Database - Permit Data System (PDS) - Facility and Permit Information, http://www.adeq.state.ar.us/home/pdssql/pds.aspx (enter "ARG59000" in "Permit Number" field; click "Search") (last visited Mar. 5, 2014)) (Ex. 5, ECF No. 30-5); FSA-728 to 65 (C&H's Notice of Coverage under the CAFO General Permit ARG590000, followed by the General Permit itself).

[26] The Buffalo River watershed is wholly within the state of Arkansas. *See* Pls.' Mot. Req. Judicial Notice, ECF No. 30 (citing the following to support this fact: EPA, MyWATERS Mapper – Subbasin (HUC8): 11010005, http://watersgeo.epa.gov/mwm/?layer=LEGACY_WBD&feature=11010005&extraLayers=null (last visited Mar. 13, 2014) (Ex. 6, ECF No. 30-6).

to affect the environment in an unprecedented way.[27] The unprecedented nature of FSA's action necessitated that FSA's draft FONSI be made "available for public review . . . for 30 days before the agency makes its final determination whether to prepare an [EIS]." 40 C.F.R. § 1501.4(e)(2). FSA arbitrarily and capriciously ignored this requirement, however. It made the *final* FONSI – dated August 24, 2012, one day after the close of the 15-day public comment period on the draft EA – available for comment for only 15 days. *See* FSA-1031; Ans. ¶¶ 101-02. FSA's failure to comply with the law meant that contrary to NEPA's intent, environmental information was not made "available to public officials and citizens before decisions [we]re made and before actions [we]re taken." 40 C.F.R. § 1500.1(b).

II. SBA FAILED TO FULFILL ITS MANDATE UNDER NEPA

Under SBA procedures implementing NEPA, SBA was required to consider, at least, whether an EA should be prepared for its loan guarantee assistance to C&H. *See* SBA, National Environmental Policy Act Standard Operating Procedure 90 No. 57 (1980), *available at* http://www.sba.gov/sites/default/files/sop9057.pdf ("SBA SOP"). The agency failed entirely to undertake this consideration, in arbitrary and capricious disregard of NEPA and its own procedures, and as a result, SBA's loan guarantee for 75 percent of a $2,318,200 loan "to assist" C&H in purchasing land and constructing buildings was made "without observance of procedure required by law." 5 U.S.C. § 706; *see* P-17, P-20, P-1188.

The CEQ regulations implementing NEPA indicate that "[a]gencies shall prepare an [EA] when necessary under the procedures adopted by individual agencies to supplement these regulations." 40 C.F.R. § 1501.3. The procedures adopted by SBA to implement NEPA indicate

[27] In its critique of the EA, the Park Service noted: "FSA included a map of Newton County that clearly shows the Buffalo National River near the proposed hog farm. That probably should have meant something to the EA preparer." FSA-1111.

in turn that "[i]n all cases . . . where a proposed SBA action could potentially have a significant effect on the environment, an [EA] will be made and an [EIS] prepared when appropriate." SBA SOP § 1. The SBA SOP further states that:

> All SBA actions which individually or cumulatively have significant effect on the quality of the human environment are to be reviewed for possible environmental impacts. The types of actions subject to review under this part include: . . . new and continuing projects and program activities directly undertaken by SBA *or supported in whole [or] in part through Federal contracts, guarantees, loans, or other forms of funding assistance* . . . .

Id. § 6 (emphasis added). The categories of SBA actions that are ordinarily excluded from environmental review under NEPA include business loans and guarantees *except* "where loan proceeds for . . . [c]onstruction and/or purchase of land exceeds $300,000." *Id.* § 7(h). In these cases, the SOP indicates that "[a]n environmental assessment may be required." *Id.*

Based on its own procedures, then, SBA was obligated to assess whether it should prepare an EA for its guarantee of a loan exceeding two million dollars for construction and purchase of land. *See id*. SBA's procedures plainly contemplate the review of "new and continuing projects" that are *"supported in whole [or] in part through . . . [SBA] guarantees"* to determine whether the SBA action would have "individually or cumulatively" significant impacts on the quality of the environment. *Id.* § 6 (emphasis added). SBA had before it extensive information about the proposed project it was intending to support, including C&H's business plan, P-367 to 373, and its application for coverage under the state CAFO General Permit, which contained a "Design Report," "Site Specific Information," "Facility Plans," and the facility's NMP, P-629 to 946. Even a cursory review of these documents would have revealed that SBA's guarantee would support a project that would confine 6,503 swine, expected to generate more than 2 million gallons of manure and wastewater each year, all of which were to be stored in open-air ponds with a high seepage rate, then spread on lands – nearly all of

which were already saturated with phosphorus, and some of which were adjacent to a creek and occasionally flooded. *See* Statement of Facts at 5-7. SBA concedes, however, "that [it] did not prepare a NEPA analysis in connection with its approval of a loan guarantee to Farm Credit," Ans. ¶ 139, and the record contains no evidence that SBA considered whether it should prepare an EA reviewing the impacts of the project that SBA was supporting through its guarantee.

III. DEFENDANTS VIOLATED THE ENDANGERED SPECIES ACT BY FAILING TO ENSURE NO JEOPARDY TO PROTECTED SPECIES

In disregard of their affirmative obligations under the ESA, Defendants have never ensured, through completion of the consultation process, that C&H will not jeopardize the endangered Gray and Indiana bats, the endangered snuffbox mussel, and the threatened rabbitsfoot mussel. *See* 16 U.S.C. § 1536(a)(2). FSA claims to have completed informal consultation with FWS, FSA-1029, but it is undisputed that FWS denies having ever received or concurred in any effects determination. *See* Ex. 1 to Chang Decl. SBA, meanwhile, concedes that it never consulted with FWS at all. Ans. ¶ 180.

USDA regulations clearly specify that ESA's Section 7 mandate applies "to *all [FSA] applications for financial assistance*." 7 C.F.R. Pt. 1940, Supbt. G, Ex. D ¶ 1 (emphasis added); *see also* 7 C.F.R. § 1940.304(b) (reiterating that FSA "will not authorize, fund, or carry out any proposal or project that is likely to" jeopardize a listed species or adversely modify critical habitat). The informal consultation that FSA claims to have completed is intended to "assist the Federal agency in determining whether formal consultation" is necessary. 40 C.F.R. § 402.13(a). An agency undertaking informal consultation can avoid formal consultation only if it determines, "*with the written concurrence of [FWS]*, that the action is not likely to adversely affect listed species or critical habitat." *Id.* (emphasis added); *see also id.*§ 402.14(b)(1) (requiring "the written concurrence" of FWS with a determination that the proposed action is not likely to

adversely affect any listed species or critical habitat in order for an agency to be excepted from undertaking a formal consultation). These procedural requirements are to be "stringent[ly] enforce[d]" because they were "designed to ensure compliance" with the ESA's substantive mandate:

> The ESA's procedural requirements call for a systematic determination of the effects of a federal project on endangered species. If a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result. The latter, of course, is impermissible.

Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985) (citing *TVA v. Hill*, 437 U.S. 153).

Despite FSA's misrepresentations that it had obtained a "clearance determination by Arkansas Fish and Wildlife [sic]," FSA-1038, in fact, FWS has asserted that it "never received an effects determination from FSA" and "never concurred with an effects determination for the aforementioned project." *See* Ex. 1 to Chang Decl. The administrative record also contains no evidence that FWS arrived at an effects determination apart from its reliance on FWS's alleged "clearance." *See* FSA-1038. FSA thus stands in violation of the ESA for failing to ensure that the agency's assistance to C&H did not jeopardize the Gray bat, the Indiana bat, the snuffbox mussel, and the rabbitsfoot mussel known to occur in the area. *See* 16 U.S.C. § 1536(a)(2).

In failing to consult with FWS, Ans. ¶ 180, SBA, too, flouted the ESA. The ESA's "no jeopardy" mandate applies to SBA. Agency "action" subject to the ESA has been defined extremely broadly. It includes "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies," including "actions directly or indirectly causing modifications to the land, water or air." 50 C.F.R. § 402.02. Commenting on the language in Section 7, the Supreme Court has observed:

> One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words

> affirmatively command all federal agencies "to *insure* that actions *authorized, funded,* or *carried out* by them do not *jeopardize* the continued existence" of an endangered species or "*result* in the destruction or modification of habitat of such species . . . ." 16 U.S.C. § 1536 (1976 ed.). (Emphasis added.) This language admits of no exception.

TVA v. Hill, 437 U.S. at 173. In light of the breadth of Section 7 and on a record showing that C&H would spray two million gallons of waste on land underlain by karst and along a tributary to an Extraordinary Resource Water in an area where ESA-protected species are known to exist, any determination by SBA that its approval of a guaranteed loan necessary for the construction of C&H would not "directly or indirectly caus[e] modifications to the land, water or air," 50 C.F.R. § 402.02, surely is arbitrary and capricious.[28]

IV. DEFENDANTS IMPERMISSIBLY FAILED TO CONSULT WITH THE NATIONAL PARK SERVICE

Defendants did not consult with the Park Service prior to approving financial assistance to C&H. *See* Ans. ¶ 96; FSA-1103. As is set forth below, the assistance of the unprecedented construction of a Large CAFO in the watershed of a national park unit without first consulting with the Park Service was arbitrary, capricious, and in violation of both the Buffalo National River Enabling Act and USDA regulations protecting rivers on the Park Service's Nationwide Rivers Inventory. These oversights had substantive and detrimental consequences, as highlighted in the Park Service's scathing letter to FSA stating that agency's belief that C&H "has the potential to significantly impact public safety and values." FSA-1112.

[28] SBA likely will rely heavily on a District of Arizona case to argue that loan guarantees are not subject to review under the ESA. *See Ctr. for Biological Diversity v. HUD*, 541 F. Supp. 2d 1091 (D. Az. 2008), *aff'd*, 359 Fed. 781 (9th Cir. 2009). This case, affirmed in an unpublished Ninth Circuit decision, has never been cited much less relied upon outside of that Circuit. Unpublished decisions in the Ninth Circuit are not precedential. *See* Ninth Circuit Rule 36-3.

A. Defendants Violated the Buffalo National River Enabling Act

Defendants arbitrarily and capriciously disregarded the plain language of the Buffalo National River Enabling Act, which gives the Secretary of the Interior the right to make the determination whether a proposed water resources project "would have a direct and adverse effect" on the Buffalo National River. The statute prohibits the federal government from "assist[ing] by loan, grant, license, or otherwise in the construction of any water resources project that would have a direct and adverse effect on the values for which such river is established, as determined by the Secretary." 16 U.S.C. 460m-11. The enabling act specifies that "Secretary" refers to the Secretary of the Interior. *See id.* § 460m-8. The National Park Service is the agency within the Department of Interior charged with the responsibility for administering the national park system. *See id.* § 1.

The Park Service therefore has the prerogative to make a determination whether a proposed water resources project would have a direct and adverse effect on the Buffalo National River. Indeed, in a 2003 action before this Court involving a proposed dam on a tributary to the Buffalo National River, the U.S. Army Corps of Engineers suspended a permit it had previously issued for the dam, explaining:

> Representatives of the Department of Interior have met with the Corps and the Department of Justice several times to settle the disagreement between the Corps and the National Park Service on the meaning of [the Buffalo National River Enabling Act, 16 U.S.C. § 460m-8]. As a result, the Department of Justice, on behalf of the Administration, has decided that receipt of a determination from the National Park Service is required before the Corps may issue a final permit, *even if the Corps has been able to identify no potential unreasonable impact in its analysis under . . . the National Environmental Policy Act.*

Ozark Society v. Melcher, 248 F. Supp. 2d 810, 812-13 (E.D. Ark. 2003) (quoting U.S. Army Corps letter) (emphasis added).[29]

Although neither the Buffalo National River Enabling Act nor the Wild and Scenic Rivers Act explicitly define "water resources project," the language and context of the statutes provide insight into Congress's intent. *See King v. Saint Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (noting the "cardinal rule that a statute is to be read as a whole . . . since the meaning of statutory language, plain or not, depends on context") (citation omitted). Immediately after the sentence prohibiting water resources projects that adversely affect the Buffalo River, the enabling act states that "[n]othing contained in the foregoing sentence, however, shall preclude licensing of, or assistance to, developments below or above the Buffalo National River or on any stream tributary thereto which will not invade the area or unreasonably diminish the scenic, recreational, and fish and wildlife values present in the area on March 1, 1972." 16 U.S.C. § 460m-11. Congress's intent to protect the river was broad; it intended to preclude precisely those developments that would "invade the area or unreasonably diminish" the values of the river. In comments to Congress on Section 7 of the Wild and Scenic Rivers Act, which contains

[29] Nearly identical language in Section 7 of the Wild and Scenic Rivers Act has been uniformly construed to give the Secretary *administering the designated river*, rather than the agency proposing to assist the project, the responsibility for determining whether the project is consistent with the values of the designated river. *See* 16 U.S.C. § 1278 (prohibiting "water resources project that would have a direct and adverse effect on the values for which such river was established, as determined by the Secretary charged with its administration"); *see also Oregon Natural Res. Council v. Harrell*, 52 F.3d 1499, 1506 (9th Cir. 1995) (noting that "Congress intended to require the appropriate Secretary's consent"); *Swanson Mining Corp. v. FERC*, 790 F.2d 96, 104 (D.C. Cir. 1986) (noting the uncontested interpretation that gives the Secretary of Interior or Secretary of Agriculture "the responsibility for determining whether a proposed . . . project is consistent with the Wild and Scenic Rivers Act"); *Sierra Club North Start Chapter v. LaHood*, 693 F. Supp. 2d 958, 965 (D. Minn. 2010) (interpreting Section 7 to "require[] the National Park Service . . . to evaluate whether a 'water resources project . . . would have a direct and adverse effect' on a river's values").

substantially similar language,[30] the Department of Interior advised that "[w]ater resources project is a very broad term which includes sewage treatment plants . . . ." H.R. Rep. No. 1623, at 40 (1968). Because the Department of Interior (and the Park Service within it) – *not* FSA or SBA – is the agency charged with administering the Buffalo National River Enabling Act, this Court owes no deference to Defendants' construction of the statute, and instead must accord deference to the Department of Interior's interpretation. *See Chevron v. Natural Res. Defense Council*, 467 U.S. 837, 842 (1984); *Omar v. INS*, 298 F.3d 710, 714 (8th Cir. 2002) (finding that "a de novo standard is appropriate for review" of an agency's interpretation of a statute it does not administer), *overruled in part on other grounds*, *Leocal v. Ashcroft*, 543 U.S. 1 (2004).

Notably, USDA regulations define "water resource project" for purposes of the Wild and Scenic Rivers Act exceedingly broadly, to include:

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

7 C.F.R. § 1940.302(j) (emphasis added). The regulations bar FSA from "approv[ing] or assist[ing] developments (commercial, industrial, residential, *farming* or community facilities) located below or above a wild, scenic or recreational river area, or on any stream tributary thereto which will invade the area or unreasonably diminish the scenic, recreational, and fish and wildlife values present in the area." *Id.* § 1940.304(c) (emphasis added). Given the undisputed

[30] *See* 16 U.S.C. § 1278(a) ("Nothing contained in the foregoing sentence, however, shall preclude licensing of, or assistance to, developments below or above a wild, scenic or recreational river area or on any stream tributary thereto which will not invade the area or unreasonably diminish the scenic, recreational, and fish and wildlife values present in the area on the date of designation of a river as a component of the National Wild and Scenic Rivers System.").

facts in the record demonstrating the scale of the C&H operation and the location of its waste application fields next to Big Creek, a tributary to the Buffalo River, it was plainly arbitrary and capricious for FSA to conclude that it need not consult with the Park Service to determine the impacts of the proposed project.

B. FSA Violated its Own Regulations Requiring Consultation for Rivers on the Nationwide Rivers Inventory

In addition to violating the Buffalo National River Enabling Act, FSA failed to comply with its own regulations requiring that "[e]ach application for financial assistance . . . be reviewed to determine if it will affect a river or portion of it, which is . . . identified in the Nationwide Inventory prepared by the National Park Service . . . ." 7 C.F.R. § 1940.305(f). Specifically, FSA is required to "consult with the appropriate regional office of NPS if the proposal involves, among other things, "withdrawing water from the river or *discharging water to the river via a point source*." 7 C.F.R. Pt. 1940, Subpt. G, Ex. E ¶ 3 (emphasis added).[31]

C&H is a point source that is permitted specifically to discharge to surface waters. CAFOs are statutorily defined point sources under the Clean Water Act. 33 U.S.C. § 1362(14); 40 C.F.R. § 122.23(b)(4)(iv). The NPDES general permit under which C&H is operating specifically "applies to operations defined as [CAFOs] *that discharge*." FSA-732 (emphasis added); *id.* ("This permit covers any operation that meets the definition of a CAFO and discharges pollutants to waters of the state."). In contrast to "No-Discharge" permits issued by ADEQ's "No-Discharge Permit Section," the CAFO General Permit *authorizes discharges* from

[31] Whether the application is for a water resources projects is relevant to the "*purpose*" of the Park Service's review. *See* 7 C.F.R. Pt. 1940, Subpt. G, Ex. E ¶ 3. For water resources projects, the purpose of the review "shall be to determine whether the proposal would have a direct and adverse effect on" the river's values. *Id.* For other projects, the purpose of the review "shall be to determine if the proposal would invade the area or unreasonably diminish" the river's values. *Id.* This distinction is immaterial here, as the criteria for triggering consultation with the Park Service is the same for all projects. *See id.*

CAFOs to all receiving waters. *See* FSA-730. In light of these facts showing that C&H is a project that would discharge to waters, FSA's failure to "consult with the appropriate regional office of [the Park Service]" was arbitrary and capricious and not in compliance with the agency's own regulations. *See* 7 C.F.R. Pt. 1940, Subpt. G, Ex. E ¶ 3.

STANDING

Plaintiffs, Buffalo River Watershed Alliance, Arkansas Canoe Club, National Parks Conservation Association, and Ozark Society, have established their standing to bring this action. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.,* 528 U.S. 167, 181 (2000) (setting forth the standard for associational standing); *Sierra Club v. Army Corps*, 645 F.3d at 985-86. Each of the four Plaintiff organizations have missions that are relevant to the interests at stake and do not assert any claim or request any relief that requires the participation of individual members. *See* Decls. of Robert A. Cross, Debbie A. Doss, Emily A. Jones, and Jack Stewart (submitted with this memorandum of law). In addition, individual members of the Plaintiff groups have standing under Article III of the U.S. Constitution. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61 (1992) (setting forth the elements of Article III standing). These members suffer actual and imminent harm to a concrete and particularized interest that is caused by Defendants' actions challenged in this suit. *See* Decls. of Robert Allen, Pamela Fowler, Janet Nye, Laura Timby, Gordon Watkins (submitted with this memorandum of law). These injuries are redressable by this Court, which is authorized to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law," 5 U.S.C. § 706(2), and to enjoin violations of the Endangered Species Act, 16 U.S.C. § 1540(g)(1).

CONCLUSION

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

Respectfully submitted this 14th day of March, 2014,

/s/ Hannah Chang
Admitted *Pro Hac Vice*
Attorney for Plaintiffs
Earthjustice
48 Wall Street, 19th Floor
New York, NY 10005
Telephone: (212) 845-7382
Email: hchang@earthjustice.org

Marianne Engelman Lado
Admitted *Pro Hac Vice*
Attorney for Plaintiffs
Earthjustice
48 Wall Street, 19th Floor
New York, NY 10005
Telephone: (212) 845-7393
Email: mengelmanlado@earthjustice.org

Monica Reimer
Admitted *Pro Hac Vice*
Attorney for Plaintiffs
Earthjustice
111 South Martin Luther King Jr. Blvd.
Tallahassee, FL 32301
Telephone: (850) 681-0031
Email: mreimer@earthjustice.org

Kevin Cassidy
Admitted *Pro Hac Vice*
Attorney for Plaintiffs
Earthrise Law Center
P.O. Box 445

Norwell, MA 02061
Telephone: (781) 659-1696
Email: cassidy@lclark.edu

Hank Bates
Bar Number 98063
Attorney for Plaintiffs
Bates Pulliam PLLC
11311 Arcade Dr., Suite 200
Little Rock, AR 72212
Telephone: (501) 312-8500
Email: hbates@cbplaw.com