



June 12, 2013

Karen G. Mills, Administrator
U.S. Small Business Administration
403 3rd Street, S.W.
Washington, DC 20416

Linda R. Nelson, Director
U.S. Small Business Administration
Arkansas District Office
2120 Riverfront Drive, Ste. 250
Little Rock, AR 72202

Nique Carrington, Director
U.S. Small Business Administration
Little Rock Servicing Center
2120 Riverfront Drive, Ste. 100
Little Rock, AR 72202

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Re: 60-Day Notice of Intent to Sue: Endangered Species Act Violations Related to the U.S. Small Business Administration Loan Guarantee of C & H Hog Farm in Mount Judea, Arkansas

Dear Administrator Mills and Directors Nelson and Carrington:

On behalf of Arkansas Canoe Club, Buffalo River Watershed Alliance, National Parks Conservation Association, and the Ozark Society (collectively, "Citizen Groups"), I am writing to request that you take immediate action to remedy ongoing violations of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, by the U.S. Small Business Administration ("SBA"). SBA's \$2.3 million loan guarantee to C & H Hog Farms is a federal action that may affect the endangered snuffbox mussel, the endangered Gray bat, and the endangered Indiana bat, all of which occur in the Buffalo National River region of Arkansas. The SBA has not engaged in consultation with the U.S. Fish & Wildlife Service ("FWS") to ensure that its action does not jeopardize these listed species or destroy or adversely modify their critical habitat, as required by Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2). This letter constitutes notice required by Section 11(g) of the ESA, 16 U.S.C. § 1540(g), prior to commencement of legal action.

I. Factual Background

On November 16, 2012, Farm Credit of Western Arkansas ("Farm Credit") approved a loan to C & H Hog Farms, Inc. (loan number 5560615009) in the amount of \$2,318,200, for which the

SBA provided a loan guarantee. *See* Letter from Jeffrey O'Donald, SBA Loan Servicing Ctr., to Kevin Cassidy, Earthrise Law Ctr. (May 30, 2013) (attached hereto as Exhibit A). SBA's loan guarantee was in addition to a Farm Service Agency ("FSA") loan guarantee for \$1,302,000 to C & H Hog Farms. Farm Credit provided the loans, totaling more than \$3.6 million, and SBA and FSA guaranteed the loans, for C & H Hog Farms' purchase of 23.43 acres of land and construction and operation of a swine farrowing barn and a swine gestation barn in Mount Judea, Arkansas.

There is no evidence that SBA has had any communication with FWS, much less engaged in meaningful ESA Section 7 consultation. Pursuant to Section 7(a)(2) of the ESA, SBA was and is required to initiate and conduct consultation with FWS to ensure that SBA's guarantee of the \$2.3 million loan to C & H Hog Farms will not result in a project that jeopardizes endangered and/or threatened species or results in the destruction or adverse modification of designated critical habitat. 16 U.S.C. § 1536(a)(2). A Freedom of Information Act ("FOIA") request to SBA concerning its multi-million dollar loan guarantee and consultations with relevant agencies yielded no information. *See* Ex. A. In fact, in response to the FOIA request regarding records related to the \$2.3 million loan guarantee, SBA's Little Rock Loan Servicing Center responded that it had no records whatsoever. *See id.* ("Loan files are not generated for electronic loans, and therefore we have no records to produce.").

In a July 5, 2012 letter to Farm Credit, the FWS provided a list of threatened, endangered and candidate species known to occur in the region subject to potential effects from construction and operation of the swine facility. *See* Letter from Jim Boggs, FWS, to Dan Benton, Farm Credit (July 5, 2012) (attached hereto as Exhibit B). The list included the endangered Gray bat and Indiana bat, as well as the candidate species, rabbitsfoot mussel, as species known to occur in the region of the C & H Hog Farm. *Id.* FWS made clear that its letter "should not be misconstrued as an 'effect determination' or considered as concurrence with any proceeding determination(s) by the action agency in accordance with Section 7 of the ESA." *Id.*

In late January 2013, Farm Credit requested that FWS send a new letter to Farm Credit to clarify that the facility was near Mount Judea, not near Ponca as indicated in FWS's July 5, 2012 letter. On February 8, 2013, FWS sent Farm Credit an updated letter with the requested change identifying the facility's location as Mount Judea, along with two additional updates: (1) the federal status of the rabbitsfoot mussel had changed to proposed threatened and the Buffalo River had been proposed as critical habitat for the rabbitsfoot; and (2) the endangered snuffbox mussel was identified as a potentially affected species that had been inadvertently omitted from FWS's original July 5, 2012 letter. *See* Letter from Jim Boggs, FWS, to Linda Newkirk, FSA (Mar. 4, 2013) (attached hereto as Exhibit C).

II. Legal Background

Section 7(a)(2) of the ESA requires each federal agency ("action agency") to ensure that its actions are not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. 16 U.S.C. § 1536(a). The regulations implementing ESA Section 7 broadly define the scope of agency actions that are subject to consultation. An "action" means "all activities or programs of

any kind, authorized, funded or carried out, in whole or in part, by federal agencies.” 50 C.F.R. § 402.02.

Section 7 of the ESA establishes an interagency consultation process to assist federal agencies in complying with their duties to ensure against jeopardy to listed species or destruction or adverse modification of critical habitat. As a first step, the action agency must inquire of the FWS whether any threatened or endangered species may be present in the area of the proposed action. 16 U.S.C. § 1536(c)(1). An agency must initiate consultation under Section 7 whenever it takes an action that “may affect” a listed species. 50 C.F.R. § 402.14(a). As part of the consultation process, the action agency must either prepare a biological assessment and submit it for the FWS’s review or receive written concurrence from the FWS that the proposed action “is not likely to adversely affect listed species or critical habitat.” *Id.* §§ 402.13, 402.14(b). In fulfilling the requirements of the consultation process, federal agencies must use the best scientific and commercial data available. 16 U.S.C. § 1536(a)(2). Pending the completion of the consultation process, agency actions that may affect listed species cannot go forward. *See Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985) (“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.”).

III. Violations of Law

Under Section 7(a)(2) of the ESA, the SBA is required to ensure that its \$2.3 million loan guarantee to C & H farms is not likely to jeopardize the continued existence of any endangered species or destroy or adversely modify their critical habitat. *See* 16 U.S.C. § 1536(a). Three federally-listed endangered species are known to occur in the vicinity of the proposed swine facility: the Gray bat, the Indiana bat, and the snuffbox mussel.¹ Additionally, the rabbitsfoot mussel, a proposed threatened species, occurs in the region and the Buffalo National River is proposed as critical habitat for the rabbitsfoot. By failing engage in consultation with the FWS, the SBA has violated and continues to violate the ESA.

The SBA failed both to initiate and conduct consultation with FWS regarding the three ESA-listed species described above. *See* 16 U.S.C. § 1536(c)(1). Further, the SBA failed to confer

¹ The National Park Service also identified Gray bat habitat in the vicinity of the proposed hog farm in a February 27, 2013 letter to the FSA:

My staff is aware of at least one cave within normal foraging distance of the application field area which contains the endangered Gray bat. This species forages primarily over streams. We believe that any pollution of Big Creek resulting from this operation has the potential to have an adverse effect upon these bats.

Letter from Kevin Cheri, Nat’l Park Serv., to Linda Newkirk, Farm Services Agency (Feb. 27, 2013), available at

<http://buffaloriverwatershedalliance.wildapricot.org/Resources/Documents/Ltr%20to%20FSA%20State%20Executive%20Director%20022713.pdf>. In response, in a March 29, 2013 letter to the NPS, the FSA acknowledged that a Gray bat cave is located 2.5 miles from the proposed swine facility.

with FWS regarding the rabbitsfoot mussel, a species proposed to be listed under the ESA, and the critical habitat proposed to be designated for the rabbitsfoot. *See* 16 U.S.C. § 1536(a)(4). There is no evidence of any communication regarding the loan guarantee between SBA and FWS. Thus, it appears that SBA guaranteed the \$2.3 million loan with absolutely no consultation with the FWS. Accordingly, the SBA has taken no action whatsoever to ensure against jeopardy regarding these three endangered species, and thus has violated and continues to violate the ESA.

IV. Parties Giving Notice

The full name, address, and telephone number of the parties providing this notice are:

Arkansas Canoe Club
5 Sycamore Drive
Conway, Arkansas 72032
501-472-6873

The Buffalo River Watershed Alliance
632 Koen Forest Road
Jasper, AR 72641
870-715-0260


National Parks Conservation Association
777 6th St., NW, Suite 700
Washington, DC 20001-3723
202-223-6722

The Ozark Society
P. O. Box 2914
Little Rock, AR 72203
479-466-3077

V. Conclusion

If you would like to discuss the contents of this letter, or believe that anything contained herein is in error, please feel free to contact Kevin Cassidy at 781-659-1696 or cassidy@lclark.edu. Otherwise, please expect the Citizen Groups to file a lawsuit in United States district court upon the expiration of 60 days from the date of this notice.

Sincerely,



Marianne Engelman Lado
Hannah Chang

Earthjustice
156 William St., Suite 800
New York, NY 10038
212-845-7376

Kevin Cassidy
Eartrise Law Center
P.O. Box 445
Norwell, MA 02061
781-659-1696

Hank Bates
Carney Bates Pulliam PLLC
11311 Arcade Dr.
Little Rock, AR 72212
501-312-8500

On behalf of Citizen Groups

cc: Sally Jewell, Secretary of Interior

Exhibit A



U.S. SMALL BUSINESS ADMINISTRATION
LITTLE ROCK SERVICING CENTER
2120 RIVERFRONT DRIVE, SUITE 100
LITTLE ROCK, AR 72202-1747
(501) 324-5871
FAX (202) 481-6347

May 30, 2013

Kevin M. Cassidy
Staff Attorney
Earthrise Law Center
cassidy@lclark.edu.

Re: Freedom of Information Act Request, Tracking #2013-04479
Loan Name: C & H Hog Farms, Inc.

Dear Kevin M. Cassidy:

This is in reference to your recent Freedom of Information Act (FOIA) request received dated May 9, 2013, in which you requested "copies of any and all documents, records and communications of any kind, including but not limited to e-mails, interoffice memoranda, and notes, relating to the decision of the SBA to guarantee a loan to C&H Hog Farms in Newton County, Arkansas".

The loan that we have for the above referenced borrower is an "Electronic Loan." **Loan files are not generated for electronic loans, and therefore we have no records to produce.** However, I can tell you that loan #5560615009 was approved on 11/16/2012, in the amount of \$2,318,200.00. For further information regarding this loan please contact **FARM CR. SERVICES - WESTERN AR**, located at **P.O. BOX 1719, RUSSELVILLE AR 72811**.

In the future, if you wish to be treated as a first-party requester with regard to the release of information contained in a file you have requested, please provide this office with a signed release that should authorize the disclosure of proprietary business and/or personal information contained in the subject file. Otherwise, you will be treated as a third-party requester.

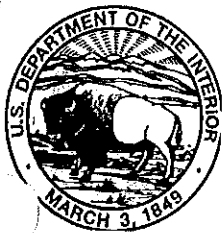
If you have any questions you can reach me at (501) 324-5871, ext. 300.

Sincerely,

Jeffery Todd O'Donald, J.D.
Paralegal Specialist

cc: Lisa Babcock, Chief, Freedom of Information/
Privacy Acts Office
U.S. Small Business Administration
409 Third Street, S.W.
Washington, D.C. 20416
(Via Email)

Exhibit B



IN REPLY REFER TO:

United States Department of the Interior

FISH AND WILDLIFE SERVICE
110 S. Amity Road, Suite 300
Conway, Arkansas 72032
Tel.: 501/513-4470 Fax: 501/513-4480



July 5, 2012

Reference: TA0629

Dan Benton
Farm Credit of Western Arkansas
129 W. Industrial Park Road
Harrison, AR 72601

Dear Mr. Benton:

The U.S. Fish and Wildlife Service (Service) has reviewed the information supplied in your letter dated June 26, 2012, regarding the proposed construction of a 2500 head swine facility near the City of Ponca, Newton County, Arkansas. Our comments are submitted in accordance with the Endangered Species Act (87 Stat. 884, as amended 16 U.S.C. 1531 et seq.).

The following federally listed threatened and endangered species are known to occur in this region: Gray bat (*Myotis grisescens*), and Indiana bat (*Myotis sodalis*). In addition, the candidate species rabbitsfoot (*Quadrula cylindrica cylindrica*) is also known to occur in this region.

Sediment and/or nutrient transport from the proposed project location may have direct, indirect, and/or cumulative effects to mussels, fish hosts, and/or their habitat(s). The effects of sedimentation and nutrients (e.g., ammonia, etc.) on mussels, fish, and their habitats are well documented in the scientific literature. Adverse effects associated with sedimentation and eutrophication from all phases of construction activities may be minimized and/or alleviated through proper implementation and maintenance of erosion control best management practices and maintaining vegetative buffers. Buffer width is dependent upon slope, vegetation type, and soil types. The Service can provide additional technical assistance on appropriate vegetative buffer widths upon request.

The following best management practices (BMPs) do not override other BMPs that may have been specified to use from other sources, but are in addition to those instructions.

Erosion and Sediment Control

BMPs should be implemented for all construction projects within karst landscapes. BMPs should include filter fences, straw bales, interceptor dikes and swales, sediment traps, ditch checks, detention basins, mulching, seeding, and/or revegetation as appropriate. Mats or netting should be applied on steep slopes and stream banks. Erosion and sediment control measures should be sized to handle at least the 25 year flood and 24-hour storm event. Erosion and sediment control BMP's should be implemented to prevent sediment and contaminants from entering groundwater.

It is important that construction plans reduce erosion and sedimentation into streams and karst features by:

- Identifying areas with potential for erosion problems prior to construction initiation.
- Avoiding wetlands and low lying areas.
- Restoring steep embankments with seed, mulch, fertilizer, and implementing erosion control measures such as silt fences, straw bales, matting, and sediment traps. Soil stabilization immediately after earth work is complete is critical.
- Restoring steep approaches to stream crossings by seeding, mulching, fertilizing, and implementing erosion control measures such as silt filter fences, ditch checks, straw bales, matting, and sediment traps. It is critical that restoration be implemented immediately after construction.
- On approaches to stream crossings, drainage control structures should be located at the top and base of the slope/bank. Runoff should be routed to stable slopes on either side of the right of way, or routed via temporary conveyance structures to the base of the approach slope where it can infiltrate into the stream bank and eventually seep back to the channel.

Construction in Sensitive Areas

As the true extent of the underground environment is difficult to clearly delineate, undiscovered karst features; such as cave openings, sinkholes, and underground passages may occur on or near a project site, even in previously developed areas. Therefore, the Service recommends the following precautionary measures be taken to avoid impacts to groundwater and sensitive or endangered species which may inhabit karst features not previously surveyed.

1. Survey existing and any new right-of-ways for karst features such as caves, sinkholes, losing streams, and springs.
2. Establish a natural area of 300 feet or greater around any cave, sinkhole, losing stream, or spring found during the survey (or during any aspect of project implementation). The Service should be contacted for further evaluation to determine if caves are used by sensitive or federally listed species.
3. If a cave is used by sensitive or federally listed species, the Service may request that the cave be mapped to determine if additional openings or passages may be affected by the project. The Service may recommend modifications of the proposed project to allow natural areas to be established. Incorporation of natural areas may be necessary to avoid impacts.
4. If caves or other openings are encountered during construction, the Service requests that work efforts cease within 300 feet of the opening. The opening should be adequately marked and protected from work activities, and the Service should be contacted

immediately. No fill materials should be placed into the opening until Service or Service approved personnel have the opportunity to inventory the site.

5. The Service should assess caves located prior to or during construction for sensitive/endangered species and provide recommendations before activities proceed.
6. No blasting should be permitted in the vicinity of any known karst feature without previous consultation.

Additional measures may be required for construction near sensitive areas including stream channels and karst features. Care should be taken when working around streams and karst features to prevent unnecessary damage to or removal of vegetation. If a cave or fracture is breached or surface water is rerouted into a karst feature, all activities should cease and the Service should be contacted to assess the situation and provide further consultation before proceeding.

Staging areas should be at least 300 feet away from streams, wetlands, and karst features. All streams, wetlands, and karst features adjacent to disturbed areas should be protected by the use of silt fence, straw bales, and other BMPs necessary to prevent sediment from entering water bodies. A combination of several measures may be necessary to decrease damage at stream crossings. In streams with enough flow, temporary in-stream settling ponds should be used to catch sediment generated by construction. Sediment should be removed as soon as construction is completed. For smaller streams or where appropriate, water could be bypassed through construction areas by the use of flume pipes, pumps, or coffer dams. Stream can be bypassed using directional drilling techniques, as discussed later.

Streams and karst areas should be restored and stabilized immediately following construction activities. Native plants, mats, netting, and other BMPs should be used to stabilize banks. Instream deflectors and anchored logs should be used in high velocity streams to protect vulnerable banks and allow for reestablishment of vegetation. Riprap revetment should also be used, if necessary, to help stabilize slopes in areas of high velocity stream flows. The use of riprap should, however, be minimized. Rock typical of the local geology should be used if available. Monitoring of BMP performance in critical areas, particularly at sensitive stream crossings and stream approach slopes should be conducted and documented on a routine basis prior to and after storms during construction and operation. Based on monitoring, additional BMPs or other improvements may be necessary to insure minimization of impact.

All efforts should be made to minimize stream alterations which could impact water quality and fish and wildlife resources. Construction along streams should not take place during fish spawning seasons if possible.

Stormwater

Stormwater concerns occur during construction and after the site is developed and stabilized. Threats to groundwater shift from sediment and fuel/oil/grease, to lawn chemicals, oil and grease from personal vehicles, brake dust, chip seals, roof tar, and other household contaminants. Plans should be made to address post construction stormwater contaminants.


The Arkansas Department of Environmental Quality and the Environmental Protection Agency oversee and permit stormwater runoff. In 2003, the Northwest Arkansas Regional Planning Commission developed the Northwest Arkansas Stormwater Quality Best Management Practices Preliminary Guide Manual for community use. The manual was developed with six control measures including public education and outreach, public participation and involvement, illicit discharge, detection and elimination, construction site runoff control, post-construction runoff control, pollution prevention, and good housekeeping. When open land is developed the hydrology of the site completely changes. Possible contaminants associated with development include sediment, nutrients, microbes, organic matter, toxic contaminants, trash, and debris. Each of these together or separately can pollute groundwater. Once contaminants leave the site and enter drainage within a groundwater recharge zone, whatever the water was carrying is now contributing to groundwater contamination threatens rare and endangered karst animals.

The Migratory Bird Treaty Act (16 U.S.C. 703-712) prohibits the taking, killing, possession, transportation, and importation of migratory birds, their eggs, parts, and nests, except when specifically authorized by the Department of the Interior. The Service also recommends following APLIC (Avian Power Line Interaction Committee) guidelines to prevent and reduce avian electrocution mortality. The APLIC guidelines recommend developing an APP (Avian Protection Plan) which is a document that outlines programs designed to reduce avian electrocution for specific utilities. The APP guidelines and principles are available on the website of APLIC at <http://www.aplic.org/>. If there is any proposed tree removal the Service recommends doing so during the winter months in order to protect nesting birds and bats.

The comments herein are for the sole purpose of providing technical assistance to the action agency or for individual pre-project planning assistance. These comments and opinions should not be misconstrued as an "effect determination" or considered as concurrence with any proceeding determination(s) by the action agency in accordance with Section 7 of the ESA. These comments do not authorize the "take" of a threatened or endangered species as defined under the ESA. In the absence of authorization (e.g., an ESA Section 10 Permit, a Biological Opinion with "incidental take" provisions, a finding concurrence letter, etc.) from the Service, both lethal and nonlethal "take" of protected species are in violation of the ESA.

We appreciate your interest in the conservation of endangered species. If you have any questions, please contact the Arkansas Ecological Services Staff at (501) 513-4487.

Sincerely,



~~Mr~~ Jim Boggs
Project Leader

Exhibit C



United States Department of the Interior

FISH AND WILDLIFE SERVICE
 110 S. Amity Road, Suite 300
 Conway, Arkansas 72032
 Tel.: 501-513-4470 Fax: 501-513-4480



March 4, 2013

Linda Newkirk
 Farm Services Agency
 700 West Capitol Avenue, Suite 3416
 Little Rock, Arkansas 72201-3225

Dear Ms. Newkirk:

The U.S. Fish and Wildlife Service (Service) was notified in a March 1, 2013, letter from the National Park Service (NPS) about a Farm Services Agency (FSA) Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) for C&H Hog Farms, Inc. The NPS raises several issues of concern to the Service in their letter to FSA dated February 27, 2012, pertaining to this EA and FONSI. Our comments are submitted in accordance with the Endangered Species Act (87 Stat. 884, as amended 16 U.S.C. 1531 et seq.).

According to a June 26, 2012, letter submitted to the Service from Farm Credit of Western Arkansas, FSA is providing a loan guarantee for the aforementioned farm. In a letter dated July 5, 2012, from the Service to Farm Credit of Western Arkansas, the Service provided a list of threatened, endangered and candidate species known to occur in the region subject to potential effects from construction and operation of the swine facility and some general best management recommendations to consider during project design. The final paragraph in the Service's July 5, 2012, letter, specifically states that our comments were provided for the sole purpose of providing technical assistance to the action agency (FSA) and should not be misconstrued to represent an "effect determination" or concurrence with any determination(s) by FSA in accordance with Section 7 of the ESA.

In late January, 2013, the Service received a phone request for a new letter from Dan Benton with Farm Credit of Western Arkansas. The purpose of the new letter was to clarify the facility was near Mt. Judea and not Poncea as originally identified in our July 5, 2012, letter. On February 8, 2013, the Service sent a new letter to Mr. Benton. Except for the reference to the nearest city, there were two additional changes in the February 8, 2013, letter. First, the federal status of rabbitsfoot changed to proposed threatened and the Buffalo River had been proposed as critical habitat for rabbitsfoot. Second, the endangered snuffbox occurs in the Buffalo River and was accidentally omitted from our original letter in 2012.

The Service never received a copy of FSA's EA for the aforementioned action. As such, the Service was not afforded the opportunity to review and comment on the draft EA. Under section 7 of the ESA and its implementing regulations, a federal action agency is not legally required to obtain concurrence from the Service for "no effect" determinations. However, "may affect" determinations, whether "not likely to adversely affect" or "likely to adversely affect", require

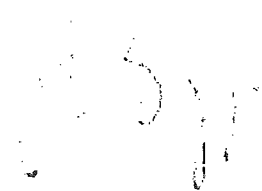
concurrency from the Service pursuant to section 7 of the ESA and its implementing regulations. The Service never received an effects determination from the FSA, nor did the Service ever concur with any effects determination made by FSA for the aforementioned project.

The NPS has indicated to the Service that FSA's EA states "There will be no impact to wildlife and/or any threatened or endangered species based on a clearance determination by Arkansas [sic] (United States) Fish and Wildlife Service". As stated above and to the contrary, the Service has not concurred with any FSA determination nor has the Service received any such request to concur with an effects determination by FSA for this project.

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. Pursuant to section 7 of the ESA, it is the responsibility of the federal action agency to make effect determinations and for projects that "may affect" federally listed species request concurrence from the Service.

If you have any questions, please contact Chris Davidson at (501) 513-4481.

Sincerely,



Jim Boggs
Field Supervisor,

cc: Kevin Cheri, National Park Service