



EARTHJUSTICE

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, DC INTERNATIONAL

June 6, 2013

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Washington, D.C. 20250

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700 W. Capitol Ave., Suite 3416
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VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

RE: FSA and SBA Loan Guarantee Assistance to C&H Hog Farm in Mount Judea, Arkansas

Dear Secretary Vilsack, Administrators Garcia and Mills, and Directors Newkirk and Nelson:

On behalf of the Arkansas Canoe Club, Buffalo River Watershed Alliance, National Parks Conservation Association, and The Ozark Society (collectively, the "Citizen Groups"), we request that the Farm Service Agency ("FSA") and Small Business Administration ("SBA") take corrective action to ensure that the environmental review and authorization of loan guarantee assistance to C&H Hog Farms ("C&H" or "the facility") located in Mount Judea, Arkansas, comply with the law. As is outlined in this letter, we believe that the review process undertaken by FSA and SBA in authorizing these loan guarantees violated the law, including the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370h; the National Historic Preservation Act, 16 U.S.C. §§ 470-470x-6; the Buffalo National River enabling act, Pub.

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L. No. 92-237, 86 Stat. 44 (1972) (codified at 16 U.S.C. §§ 460m-8 to 460m-14); and regulations set forth by the U.S. Department of Agriculture ("USDA"), 7 C.F.R. Pt. 1940, Subpt. G.¹

Due to improper public notice procedures, the Citizen Groups, whose members reside and recreate in and around Mount Judea and the Buffalo National River watershed, were not made aware of the proposed C&H facility until well after FSA and SBA had authorized loan guarantee assistance in the millions of dollars to the facility. This 6,500- pig Concentrated Animal Feeding Operation ("CAFO"), defined as a Large CAFO under applicable regulations, 40 C.F.R. § 122.23(b)(4)(iv), is under contract with Cargill and will be the very first CAFO of its scale anywhere in the Buffalo River watershed.² The facility will be located on the banks of a major tributary to the Buffalo National River – the country's first national river, a river designated on the Nationwide Rivers Inventory, a national park unit administered by the National Park Service ("NPS"), and a state-designated Extraordinary Resource Water.

As organizations with deeply-vested interests in the environmental quality of the Buffalo River watershed, and with members who are directly injured by the operation of the C&H facility, the Citizen Groups are extremely concerned about the facility and the impacts of its operations on the quality of the environment. Due to the lack of proper public notification and opportunity for comment, the Citizen Groups were unable to voice their concerns or to participate in FSA's and SBA's environmental review and decision-making processes. These concerns are outlined below. The Citizen Groups ask that effective action be taken, including but not limited to rescission of the loan guarantees, in order to remedy the legal violations identified.

I. Factual Background

The 150-mile Buffalo River flows through the heart of the Ozarks in northwestern Arkansas. Its headwaters originate within the Ozark National Forest, and the river runs "beneath magnificent multicolored cliffs which in the upper reaches extend nearly 700 feet above the river's clear, quiet pools and rushing rapids."³ The Buffalo River's watershed includes 700 species of trees and plants and provides habitat for 250 species of birds and a variety of animals, game, and aquatic life, including a thriving smallmouth bass fishery.⁴ More than one million people visit the Buffalo National Park each year to enjoy its spectacular setting

¹ The Citizen Groups also have previously informed FSA about its violations of the Endangered Species Act in a 60-day Notice of Intent to sue. The letter is attached hereto as Exhibit A for reference.

² It is also the first CAFO covered under the state of Arkansas's recently issued General Permit for CAFOs.

³ *Nationwide Rivers Inventory Arkansas Segments*, NPS, <http://www.nps.gov/nrcr/programs/rtca/nri/states/ar.html> (last visited May 30, 2013).

⁴ *Id.*

and unspoiled character.⁵ Visitors float the river, camp, visit historic homesteads and prehistoric sites, and hike the more than 100 miles of trails in the park.⁶ In 2011, these visitors generated over \$38 million in local economic benefits for the region.⁷

The upper 15.8 miles of the river are part of the nation's wild and scenic river system and are protected under the Wild and Scenic Rivers Act. *See* Pub. L. No. 102-275 § 2, 106 Stat. 123 (1992) (codified at 16 U.S.C. § 1274(a)(135)). The lower 135 miles of the river, along with the river's riparian zone, adjacent wetlands, and back channels, comprise a 150-square-mile national park unit, the Buffalo National River, administered by NPS. *See* Pub. L. No. 92-237, 86 Stat. 44 (Mar. 1, 1972) (codified at 16 U.S.C. §§ 460m-8 to 460m-14). The entire 150-mile length of the river is listed in NPS's Nationwide Rivers Inventory of rivers that potentially qualify as wild, scenic, or recreational river areas.⁸

A. The C&H Facility and its Faulty Nutrient Management Plan

The C&H CAFO is located on the banks of Big Creek, a major tributary of the Buffalo, at a point less than six stream miles from Big Creek's confluence with the Buffalo National River. The 6,500 pigs at the C&H facility will generate more than 2 million gallons of manure and wastewater annually. The waste produced will amount to more than 92 thousand pounds of nitrogen and more than 31 thousand pounds of phosphorus each year. According to the Nutrient Management Plan ("NMP"), this waste will be stored in two open-air, clay-lined waste storage ponds on site, then applied to 630 acres of surrounding land. Of the seventeen fields on which the C&H hog waste will be applied, ten are directly adjacent to Big Creek. Moreover, the application fields abut the Mount Judea Elementary School and the town of Mount Judea itself, surrounding the town on the west and south. The Arkansas Department of Environmental Quality ("ADEQ") approved coverage of the facility under the state General Permit for CAFOs effective August 3, 2012. Notwithstanding ADEQ's approval, the operation of this facility in the Buffalo River watershed and under its faulty NMP raises tremendous concerns about the facility's true environmental impacts.⁹

⁵ *See Buffalo Nation River Recreation Visitors*, NPS, [https://irma.nps.gov/Stats/SSRSReports/Park%20Specific%20Reports/Annual%20Park%20Visitation%20\(All%20Years\)?Park=BUFF](https://irma.nps.gov/Stats/SSRSReports/Park%20Specific%20Reports/Annual%20Park%20Visitation%20(All%20Years)?Park=BUFF) (last visited May 30, 2013).

⁶ *See Buffalo National River: Plan Your Visit*, NPS, <http://www.nps.gov/buff/planyourvisit/index.htm> (last visited May 30, 2013).

⁷ *See YUE CUI ET AL., ECONOMIC BENEFITS TO LOCAL COMMUNITIES FROM NATIONAL PARK VISITATION, 2011: NATURAL RESOURCE REPORT NPS/NRSS/ARD/NRR-2013/632* at 16 (Feb. 2013), *available at* <http://www.nature.nps.gov/socialscience/docs/NPSSystemEstimates2011.pdf>.

⁸ *See Nationwide Rivers Inventory Arkansas Segments*, NPS, <http://www.nps.gov/ncrc/programs/rtca/nri/states/ar.html> (last visited May 30, 2013).

⁹ The state General Permit and the NMP under which the C&H Facility will operate are attached to the Environmental Assessment ("EA") prepared by FSA. *See* EA Part 2 at 194, *available at*

The Buffalo River is located in a karst basin. The clay-lined waste storage pits may seep up to 5,000 gallons per acre per day.¹⁰ Infiltration of contaminants from the porous waste storage pits and the application of millions of gallons of waste on land is especially problematic in karst terrains, which, as the Supreme Court of Arkansas has recognized, “are more likely to have sink holes, underground caverns, and greater porosity, all of which enhances the potential for groundwater movement and contamination.” *Four County (NW) Reg’l Solid Waste Mgmt. Dist. Bd. v. Sunray Servs., Inc.*, 971 S.W.2d 255, 259 (Ark. 1998). Dr. John Van Brahana, a University of Arkansas professor and renowned expert on karst geology whose professional career included 28 years with the U.S. Geological Survey, recently described the geological formation underlying Mount Judea as honeycombed with caves, sinkholes, and underground springs.¹¹ Contaminants can travel through karst from feet to miles in a single day, ultimately polluting both groundwater and surface waters.

The C&H facility’s NMP includes Soil Test Reports prepared by the University of Arkansas Division of Agriculture. These Reports show that fifteen of the seventeen land application fields (fields 1-12, 14, and 16-17), comprising 87 percent of the waste application area, are already at “optimum” or “above optimum” levels of phosphorus.¹² For these fifteen fields, the University of Arkansas recommends no additional application of phosphorus. Despite this recommendation, the NMP attached to C&H’s general permit identifies the phosphorus recommendation for these fields as 57 pounds per acre. Application of manure to fields already saturated with phosphorus greatly increases the likelihood of nutrient run-off into surface waters – here, Big Creek and, further downstream, the Buffalo National River. Excess nutrients lead to eutrophication and algae blooms.

Although the General Permit requires that the NMP be in compliance with the Arkansas Phosphorus Index, C&H’s NMP inexplicably uses a nitrogen-based application standard for fields 5-9, which permits calculations of greater amounts of waste application than would have

<http://buffaloriveralliance.org/Default.aspx?pageId=1558368>. The EA is available in three parts at the above link. The EA itself has no page numbers, so any page numbers cited will refer to the corresponding PDF page of the particular part.

¹⁰ See C&H Notice of Intent 47, available at http://www.adeq.state.ar.us/ftp/ftproot/Pub/WebDatabases/PermitsOnline/NPDES/PermitInformation/arg590001_noi_and_nmp_20120625.pdf. (Page number refers to the PDF page as the document itself has no page numbers.)

¹¹ Mike Masterson, *Geoscientist: Hog CAFO a No-No*, MIKE MASTERSON’S MESSENGER (May 25, 2013), <http://mikemastersonsmessenger.com/geoscientist-hog-cafo-a-no-no/>.

¹² The Citizen Groups have raised these concerns about the NMP directly with ADEQ. See Letter from Hank Bates, Carney Bates & Pulliam PLLC, to Teresa Marks, ADEQ (May 15, 2013), available at <http://buffaloriveralliance.org/Resources/Documents/13.05.14%20-%20Ltr%20to%20Marks%20-%20ADEQ%20-%20sans%20attachments.pdf>. All citations to the facts cited are to C&H’s NMP, and excerpted in eight attachments to the Citizen Groups’ letter to ADEQ.

been calculated and permitted under the required phosphorus-based standard. Fields 5, 6, 7, and 9 are also directly adjacent to Big Creek, are occasionally flooded, and are already at or above optimum phosphorus levels. In fact, soil maps demonstrate that seven of the seventeen waste application fields, comprising 43 percent of the application area – specifically, fields 3, 5, 6, 7, 9, 12, and 16 – are “occasionally flooded” by Big Creek. All seven of the “occasionally flooded” fields are among the fifteen fields for which phosphorus levels are already at or above optimum levels.

Furthermore, the facility’s NMP indicates that 80 percent of phosphorus in the swine waste will be eliminated through “storage losses” in the two waste storage ponds. The phosphorus, in other words, would settle into the sludge at the bottom of the pond, leading to less phosphorus in the liquid waste applied to the fields. The land application rates are calculated with this assumption of an 80% loss of phosphorus. But the solids that accumulate in the waste storage pond are to be “desludg[ed] during each waste removal.” NMP Section B. The NMP provides that “[i]f or when pond desludging becomes necessary, [C&H] will land apply the solids at agronomic rates and in accordance with local, state, and federal regulations.” *Id.* The NMP does not indicate the appropriate agronomic rates for land application of sludge containing significantly more phosphorus than liquid waste.

In short, there are a number of reasons to believe that the NMP under which the C&H facility will operate does not adequately account for the amount of waste that will be produced by the CAFO or its potential effect on the environment. These inadequacies are extremely troubling in a karst region characterized by porous clay and underground drainage networks and on the banks of a major tributary to the Buffalo National River because such characteristics increase the likelihood that the waste will migrate and pollute both groundwater and surface water. In fact, Professor Van Brahana believes that safely retaining the tremendous amount of waste from the C&H facility in “the clay-lined lagoons proposed is highly unlikely.”¹³

B. The Role of FSA and SBA

Despite these unaddressed problems in the NMP, in December 2012, FSA authorized loan guarantee assistance requested by Farm Credit Service of Western Arkansas (“Farm Credit”) on behalf of C&H for 90 percent of a \$1,302,000 farm ownership loan. SBA guaranteed a separate farm ownership loan issued by Farm Credit to C&H in the amount of \$2,318,136. Under USDA regulations, FSA prepared a Class II EA dated September 26, 2012. We are as yet unaware of any environmental review undertaken by SBA, although SBA is subject to NEPA.

FSA published a notice of availability of the Draft EA from August 6 to August 8, 2012, in the Arkansas Democrat Gazette in Little Rock, Arkansas, over a hundred miles away from Mount Judea, and announced a fifteen-day comment period. The affidavit from the Arkansas Democrat-Gazette indicates only that the notice was published in Pulaski County. The notice of

¹³ Masterson, *supra* note 11.

availability was never published in a local newspaper in the vicinity of Mount Judea and Newton County. No public comments were received. The Finding of No Significant Impact ("FONSI") was signed by an FSA Farm Loan Manager on August 24, 2012. The notice of the FONSI was published in the Arkansas Democrat Gazette from August 25 to August 27, 2012. Again, the accompanying affidavit indicates only that the notice was published in Pulaski County. No notice was published in a local newspaper in the vicinity of Mount Judea and Newton County. And again, no public comments were received. The Final EA is dated September 26, 2012. Based on documents obtained from FSA through a Freedom of Information Act request, we understand that the guaranteed loan closed on December 3, 2012, and that FSA issued its loan guarantee for ninety percent of the \$1,302,000 loan to C&H on December 17, 2012.

FSA's EA is more than 600 pages long, but the only actual analysis by FSA is contained in the first several pages. The remaining pages are attachments of various documents, including the February 2011 NMP for the pre-existing C&C Hog Barn, the state permit issued in 2000 to the C&C facility, the state General Permit for CAFOs, and the most recent NMP for the new C&H facility. Immediately after the Table of Contents, FSA's analysis consists of five pages in an "Executive Summary."

The EA does not explicitly define a project site. In fact, its description of the proposed C&H facility as a 478.93 acre farm is inaccurate. In response to an NPS inquiry about the discrepancy between the 478.93 acre figure in the EA and the 630 acre figure used in the facility's NMP, FSA acknowledged in March 29, 2013 (well after the loan guarantee had issued) that in fact C&H "encompasses 670.4 acres of land of which 630.7 will be used for spreading" ¹⁴ To the extent the EA undertakes any analysis, therefore, it analyzes a site that is less than three-quarters the size of the actual proposed project site.

In addition to failing to define the project site, the EA fails to identify unique or sensitive areas in the nearby vicinity, such as the Mount Judea Elementary School, which abuts the land applications fields. The EA also does not mention, much less discuss, any potential consequences of the fact that the Buffalo River region is underlain by karst geology or that the downstream Buffalo National River is designated as an Extraordinary Water Resource subject to protection under the state's antidegradation policy.

The section entitled "Affected Environment and Environmental Consequences" includes ten sub-sections addressing different resource areas, such as biological resources, water

¹⁴ FSA Response to Assertions Contained in Letter of Kevin G. Cheri of February 27, 2013, Attachment A to Letter from Linda Newkirk, Arkansas State Exec. Dir., FSA, to Kevin G. Cheri, Superintendent, NPS 6 (Mar. 29, 2013), available at <http://buffaloriverwatershedalliance.wildapricot.org/Resources/Documents/FSA%20response%20to%20Kevin%20Cheri%2003.29.13.pdf>.

resources, cultural resources, soil resources, and air quality. For each of these ten resource areas, the EA includes a "Definition of Resource" and an "Affected Environment" section. Nonetheless, nowhere does the EA actually explain the existing environment or the anticipated impacts of the facility on the existing environment. Rather, the "Affected Environment and Environmental Consequences" section reads as conclusory and disjointed assertions about the facility's purported lack of impact.

The facility's presumed lack of impact, where discussed at all, is dismissed with reference to the facility's NMP. With respect to biological resources, for instance, the EA does not identify the endangered species FWS had indicated were present in the region. Instead, the EA states only that "[a]ny endangered species in this area will not be harmed by complying with the Comprehensive Nutrient Management Plan." EA at 6.¹⁵ For water resources, the EA again points to C&H's NMP, stating that "[t]he potential impact to the environment will be eliminated by following the Waste Management Plan. Water quality will be protected by producer's adherence to their [NMP]." EA at 7. Similarly for air resources, the EA notes that "[t]he majority of emissions will come from swine litter," but states that "[c]ompliance with the [NMP] should keep emissions to a minimum." *Id.* With regard to consideration of mitigation measures, the EA states: "Mitigation is not required at this time. Applicants will need to comply with their [NMP]." EA at 9. Despite its heavy reliance on C&H's NMP as the sole means of addressing the (unidentified) impacts of the C&H facility, the EA does not include any independent analysis or assessment of the adequacy or effectiveness of the NMP.

For cultural resources, FSA includes a single sentence: "[The State Historic Preservation Officer] has issued a blanket clearance letter for existing operations." EA at 7. The only potentially supportive documentation attached in the EA is a July 10, 2012, letter from FSA to the Arkansas Historic Preservation Program stamped by the Deputy State Historic Preservation Office ("SHPO") indicating that "[n]o known historic property will be affected by this undertaking. This effect determination could change should new information come to light." EA at 144. As it turns out, however, a June 26, 2012, letter from FSA to the SHPO requesting a review "concerning Archaeological or Historic importance" had incorrectly and misleadingly described the proposed action as a 23.43 acre site.¹⁶

The EA does not include any consideration of alternatives other than the proposed action. According to FSA, "[a]lternative projects were not considered due to this being the most favorable location." EA at 6. FSA further explains that "[a]lternative designs and alternative projects were not considered" because the proposed location "is in close proximity to the

¹⁵ FSA has previously been informed about the facts relevant to the three endangered species in the region (the Indiana bat, the Gray bat, and the snuffbox mussel) in the 60-day Notice of Intent to sue under the Endangered Species Act. See Exhibit A.

¹⁶ See Letter from Dan Benton, FSA, to Francis McSwain, SHPO (June 26, 2012) (attached hereto as Exhibit B). This document was not attached to the EA and was separately obtained by the Citizen Groups.

integrator's feed mill and processing plant" and "[t]he applicant wishes to produce hogs for Cargill, while living in a rural area." *Id.* at 5. Even assuming these are valid reasons for failing to analyze alternatives, which is "the heart" of the environmental review, 40 C.F.R. §§ 1502.14; 1508.9(b), this assertion fails to explain why alternative *designs* were not considered.

FSA's FONSI references each of the ten factors considered in assessing a project's "intensity," *see* 40 C.F.R. § 1508.27(b), in reaching its conclusion that the C&H facility would not have significant impacts. *See* EA at 12. The FONSI states, for instance, that the preferred alternative "would not significantly affect" any parklands, wild and scenic rivers, or ecologically critical areas. *Id.* The FONSI further asserts that the preferred alternative "does not involve effects to the quality of the human environment that are likely to be highly controversial"; "would not impose highly uncertain or involve unique or unknown risks"; "would not establish a precedent for future actions with significant effects"; and "does not threaten a violation of Federal, State, or local law or requirements imposed for the protection of the environment." *Id.* The FONSI also states that "[i]nformal consultation with the U.S. Fish Wildlife Service [sic] was completed" and that "[t]he preferred alternative would not have adverse effects on threatened or endangered species or designated critical habitat." *Id.* The FONSI further indicates that cultural and historical resources would not be adversely affected because "[c]onsultation with the State Historic Preservation Office was completed." *Id.* None of these assertions are supported by evidence in the record, however, and many are plainly erroneous.

C. Events following FSA and SBA Loan Guarantee Assistance

Despite the fact that the EA's cover sheet identifies NPS as a cooperating agency, NPS was not informed of FSA's environmental review and FONSI until February 2013. In a February 27, 2013, letter to the FSA State Executive Director, the NPS Superintendent for the Buffalo National River noted that NPS staff "never received word of the document" and that identifying NPS as a cooperating agency "is clearly in error" and "gives the public and agencies reviewing the document the un-realistic view that NPS is on-board with the conclusions of the EA."¹⁷ The NPS Superintendent clarified that "[i]n fact, nothing could be further from the truth."¹⁸ The letter proceeded to identify 45 problems with the EA.

Among the concerns NPS raised were the facility's impacts on Big Creek and the Buffalo National River. *See, e.g., id.* ¶ 40 ("[W]e feel that the [NMP] will not adequately protect water quality."); *id.* ¶ 26 ("We feel that FSA utterly failed to consider the impact of the swine waste on the residents of Mt. Judea, the people living downstream on Big Creek, or the people recreating within Buffalo National River."). In fact, NPS viewed the EA as "so woefully inadequately that

¹⁷ *See* Letter from Kevin G. Cheri, Superintendent, NPS, to Linda Newkirk, State Exec. Dir., FSA ¶ 1 (Feb. 27, 2013) (attached hereto as Exhibit C).

¹⁸ *Id.*

it should immediately be rescinded.” *Id.* ¶ 25. The letter concluded that “[b]ased on the significant number and degree of deficiencies identified” in the EA, “this project needs to be halted until [NPS] and the public and other stakeholders are afforded an opportunity to comment.” *Id.* ¶ 46.

It was at the time of NPS’s February 27, 2013, letter that members of the public in the affected area, including the Citizen Groups, found out about the ongoing plans to construct the now-approved and financed C&H CAFO. Since that time, the lack of public comments as a result of improper notice procedures – which FSA erroneously construed as a lack of controversy – has given way to a flood of protests, rallies, and letters to the editors as residents of Mount Judea and Newton County and visitors to the beloved Buffalo National River realized the extent to which they had been locked out of the decision-making process to authorize and finance a CAFO that directly impacts their lives.

On March 4, 2013, U.S. Fish and Wildlife Service (“FWS”), notified by NPS about FSA’s review and approval of assistance to C&H, wrote a letter to FSA clarifying that FWS too had “never received a copy of FSA’s EA” and “was not afforded the opportunity to review and comment on the draft EA.”¹⁹ FWS clarified “[a]s a matter of record” that it “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”²⁰

On March 6, 2013, the SHPO wrote a letter to FSA State Executive Director Newkirk informing FSA that the SHPO had not received a copy of the EA, FONSI, and supporting documents, and requesting a copy of these documents. In an April 11, 2013, letter to Director Newkirk, the SHPO noted that it “disagree[d] with” the EA’s characterization of the SHPO’s “blanket clearance letter.”²¹ On May 8, 2013, the SHPO followed up with Director Newkirk inquiring about “the nature, scope, and size of the proposed C&H Hog Farms, Inc. project.”²² The SHPO informed FSA that it had been contacted by “a number of concerned citizens . . . claiming that the project is much larger than the hog farm construction site (approximately 23 acres) that we received on July 17, 2012.”²³ Upon discovery that it had been misled, the SHPO requested in the May 8, 2013 letter that FSA send a detailed project description and topographic

¹⁹ Letter from Jim Boggs, FWS, to Linda Newkirk, FSA (Mar. 4, 2013) (attached hereto as Exhibit D).

²⁰ *See id.*

²¹ Letter from Martha Miller, SHPO, to Linda Newkirk, FSA ¶ 3 (Apr. 11, 2013).

²² *See* Letter from Martha Miller, SHPO, to Linda Newkirk, FSA (May 8, 2013) (attached hereto as Exhibit E).

²³ *Id.*

map “clearly delineating the project area.”²⁴ To date, the SHPO’s final review of the 670.4 acre area affected by C&H has yet to be finalized.

On March 21, 2013, the Arkansas Department of Health wrote a letter to ADEQ expressing its concern that water-borne pathogens from C&H’s land application sites “may pose a risk for body contact on the Buffalo National River, a popular recreational destination.”²⁵

II. Violations of Law

As is explained below, we believe that FSA and SBA have violated NEPA, the National Historic Preservation Act, the Buffalo National River enabling act, and their own regulations and procedures implementing NEPA. To the extent SBA did not undertake any environmental review of its guarantee for the \$2.3 million loan to the C&H facility, this lack of action requires an explanation. SBA is subject to NEPA and SBA’s NEPA Standard Operating Procedures do not categorically exclude environmental review of loan assistance to projects of this scale.²⁶ FSA’s EA and FONSI, moreover, are deeply flawed and inconsistent with both NEPA and USDA regulations, *see* 7 C.F.R. Pt. 1940, Subpt. G.

Critically, FSA failed to follow its own regulations requiring local public notice and proceeded through its environmental review and decision-making process with zero public input. USDA regulations implementing NEPA require that FONSI 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). FSA provided notice of availability of the EA and FONSI only in the Arkansas Democrat Gazette, a state publication based in Little Rock, Arkansas. No notice was published in a local paper in the vicinity of Mount Judea, and as a direct consequence, the Citizen Groups and their members who reside and recreate in Newton County and the Buffalo River watershed were unaware of the proposed project until well after FSA’s decision was made.

FSA also failed to take a hard look at and fully disclose the “environmental consequences” of the proposed action, including its direct, indirect, and cumulative impacts, as required by NEPA. *See* 40 C.F.R. § 1502.16; *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). As a starting point, an EA must include a description of the project site, which

²⁴ *Id.*

²⁵ *See* Letter from J. Terry Paul, Branch Chief Env’tl. Health, Ark. Dep’t of Health, to Mo Shafii, Permits Branch, ADEQ (Mar. 21, 2013), *available at* http://www.adeg.state.ar.us/ftpoot/Pub/WebDatabases/PermitsOnline/NPDES/PermitInformation/ARG590001_ADH%20Comment%20Letter_20130321.pdf.

²⁶ *See National Environmental Policy Act*, SBA, <http://www.sba.gov/content/national-environmental-policy-act-0> (last visited May 31, 2013).

should identify “unique or sensitive areas,” including schools, recreational areas, rivers, and endangered species habitats. See 7 C.F.R. Pt. 1940, Subpt. G, Ex. H. The Class II EA must then discuss environmental impacts of the proposed project, with an eye to “all aspects of the project including beneficiaries’ operations.” *Id.* FSA’s analysis in the EA fails to identify the direct impacts of the C&H facility. First, it does not delineate the precise project site analyzed in the EA, and fails to identify the nearby Mount Judea Elementary School, the Buffalo National River, the presence of neighboring and downstream residences, endangered Indiana and Gray bat habitat, and the underlying karst geology, among other things. Moreover, to the extent FSA intended to analyze “[t]he farm” as the project site, the agency erroneously described the farm as consisting of 478.93 acres, rather than 670.4 acres.

FSA also failed to adequately discuss the impacts on the environment of the proposed project – that is, the direct, indirect, and cumulative impacts of operating a 6500-swine CAFO on the banks of a major tributary to an Extraordinary Resource Water; storing more than two million gallons of hog waste in open air storage ponds; and applying this waste to over 600 acres of land, 87 percent of which already are at optimum or above optimum levels of phosphorus, and 43 percent of which are occasionally flooded by Big Creek. Contrary to USDA regulations, the EA does not “[e]valuate the adequacy of [solid waste management] techniques especially in relationship to air and water quality.” 7 C.F.R. Pt. 1940, Subpt. G, Ex. H. Moreover, FSA’s analysis in the EA does not mention, much less discuss, impacts of the project on the endangered species in the region or impacts such as “air emissions, noise, [and] odor” on “nearby residents and users of the project area and surrounding areas.” *Id.* FSA’s cursory assertions that no impacts exist do not constitute the hard look required under NEPA. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 350.

In addition, the EA fails to undertake the analysis of alternatives required under NEPA. See 40 C.F.R. §§ 1502.14(d), 1508.9(b); see also 7 C.F.R. § 1940.303(c); 7 C.F.R. Pt. 1940, Subpt. G, Ex. H. The EA does not consider the no-action alternative, nor does it identify any alternative locations or designs for the proposed facility. Indeed, FSA asserts that “[a]lternative projects were not considered due to [the identified location] being the most favorable location.” EA at 6. This supposition, unsupported by any evidence in the record, defeats the very purpose of NEPA’s call for an analysis of alternatives. It also fails to explain why alternative designs were not considered. FSA’s failure to consider any reasonable alternatives to the proposed C&H facility violates NEPA and its implementing regulations.

The EA also is deficient with respect to the consideration of mitigation mandated under NEPA. See 40 C.F.R. § 1502.16(h); see also *id.* § 1502.14(f). USDA regulations elaborate that where “no feasible alternative exists, . . . measures to mitigate the identified adverse environmental impacts *will be included in the proposal.*” 7 C.F.R. § 1940.303(d) (emphasis added). Examples of mitigation include “deletion, relocation, redesign or other modifications of the project elements.” *Id.* § 1940.318(g). The EA must include, moreover, “an analysis of the[] environmental impacts and potential effectiveness” of any mitigation measures that will be taken. *Id.* FSA’s analysis in the EA does not include any consideration of mitigation measures.

FSA simply concludes that “[m]itigation is not required at this time,” and points to C&H’s compliance with its NMP. EA at 9. To the extent the NMP was construed by FSA as a mitigation measure, the agency failed to analyze the environmental impacts and potential effectiveness of the NMP in violation of NEPA and USDA regulations.

“An agency’s decision not to prepare an EIS will be considered unreasonable if the agency failed to supply a convincing statement of reasons why potential effects are insignificant.” *Choate v. U.S. Army Corps of Eng’rs*, No. 4:07-CV-01170-WRW, 2008 WL 4833113, at *6 (E.D. Ark. Nov. 5, 2008) (citing *Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988)). Here, FSA’s FONSI is grounded in an unconvincing, unsupported, and in some instances clearly erroneous catalogue of why the ten factors considered in assessing an impact’s intensity weigh in favor of insignificant impacts. See 40 C.F.R. § 1508.27(b); see also 7 C.F.R. § 1940.314(a). For instance, FSA asserts that the C&H facility “would not significantly affect any unique characteristics,” including “parklands” and “ecologically critical areas.” EA at 12. Having failed even to identify the Buffalo National River and its status as an Extraordinary Resource Water in the EA, FSA offers no support for this assertion. Similarly, FSA asserts that the facility “would not impose highly uncertain or . . . unique or unknown risks.” *Id.* Yet, the EA fails to mention the underlying karst geology in the region, raising serious questions about the validity of this claim. The FONSI further contends that the impacts of the facility are not “likely to be highly controversial,” *id.*, but in fact, the public outcry since the discovery of the plans for the C&H facility proves just the opposite. FSA’s issuance of a FONSI and failure to prepare an EIS is consequently unsupportable.

In addition to violations of NEPA, FSA and SBA failed to comply with procedures required by the National Historic Preservation Act (“NHPA”). Under NHPA, agencies must consider “the effect of [an] undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register [of Historic Places].” 16 U.S.C. § 470f. Specifically, the federal agency “must make a *reasonable and good faith effort*” to identify historic properties, determine whether the identified properties are eligible for listing on the National Register, assess the effects of the federal undertaking on any eligible historic properties, determine whether the effects will be adverse, and avoid or mitigate any adverse effects. *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999) (citing Advisory Council on Historic Preservation regulations) (emphasis added). Here, FSA’s inaccurate description of the project as a 23.43 acre farm, when it was well aware that the facility encompassed 670.4 acres of application fields, was an outright misrepresentation and led to FSA’s improper approval of the loan guarantee assistance *before* it had properly ascertained the potential effect of the undertaking on historic properties.

Furthermore, FSA and SBA acted contrary to the Buffalo National River enabling act, which gives the Secretary of the Interior the prerogative to make a determination about whether a development on a stream tributary to the Buffalo National River will “invade the area or unreasonably diminish the scenic, recreational, and fish and wildlife values present in the area . . .” 16 U.S.C. § 460m-11. Here, despite misleadingly identifying NPS as a cooperating agency

in the environmental review, FSA never informed NPS of the proposed action or sought NPS's determination about the potential impacts of the C&H facility on the Buffalo National River. NPS's February 27, 2013, letter to FSA indicates that NPS in fact has significant concerns about the impacts of the approved facility on the Buffalo National River.

Separate and apart from its obligation under the Buffalo National River enabling act to consult with NPS, USDA regulations require that "[e]ach application for financial assistance . . . be reviewed to determine if it will affect a river or portion of it, which is . . . identified in the Nationwide Inventory prepared by the National Park Service (NPS) in the Department of the Interior (DOI)." 7 C.F.R. § 1940.305(f). Specifically, FSA must consult with the "appropriate regional office of NPS" if the proposal meets certain criteria, including "discharging water to the river via a point source." 7 C.F.R. Pt. 1940, Subpt. G, Ex. E ¶ 3. CAFOs are, by definition, a point source. See 33 U.S.C. § 1362(14). The C&H facility, moreover, is covered under the state general permit for CAFOs "that discharge and are located in the State of Arkansas." General Permit at 1 (EA at 403) (emphasis added). The permit contemplates at least occasional discharges of waste into surface waters. Under its own regulations, therefore, FSA was required to consult with NPS to determine if the C&H facility "will affect" the Buffalo River. See 7 C.F.R. § 1940.305(f). FSA failed to do so.

FSA also violated its own regulations requiring 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.* FSA failed to mention the Buffalo River anywhere in the EA, and consequently failed to identify this downstream Extraordinary Resource Water. FSA therefore did not review the C&H facility to determine whether it would meet antidegradation requirements, as mandated by USDA regulations.

III. Conclusion

All of these violations of law demand consideration and remedy. We understand from press accounts that the C&H facility already has started to accept pigs from Cargill and that full operation of the facility will begin in approximately two months. Time, therefore, is of the essence, and we request a meeting to discuss these concerns as soon as possible. USDA regulations indicate that "[w]hen comments are received after the action has been approved, the approving official will consider the environmental importance of the comments and the necessity and ability to amend" the action. 7 C.F.R. § 1940.318(m). The complete lack of public input to date, the inadequacy of the environmental review, and the severity of the potential environmental impacts at issue in this case warrant agency action to amend the EA, FONSI, and decision to authorize guarantee assistance.

The Citizen Groups request that FSA and SBA address the identified violations of law with effective action, including rescission of the loan guarantee assistance provided to C&H.

This letter is intended to notify you that unless acceptable solutions are implemented by **July 8, 2013**, the Citizens Groups will be forced to seek compliance with the law in court. The Citizen Groups would be happy to meet with you to discuss their concerns and potential solutions. If you have any questions or would like to set up a meeting, please contact Marianne Engelman Lado or Hannah Chang at the numbers below.

Sincerely,


Hannah Chang
Marianne Engelman Lado
Earthjustice
156 William St., Suite 800
New York, NY 10038
212-845-7376
mengelmanlado@earthjustice.org
hchang@earthjustice.org

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 the Citizen Groups

Exhibit A



EARTHJUSTICE

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, DC INTERNATIONAL

May 15, 2013

Tom Vilsack, Secretary
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Washington, D.C. 20250

Juan Garcia, Administrator
Farm Service Agency
U.S. Department of Agriculture
1400 Independence Ave., S.W.
STOP 0506
Washington, DC 20250-0506

Linda Newkirk
Farm Service Agency
Arkansas State Office
700 W. Capitol Ave., Ste. 3416
Little Rock, AR 72201-3215

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Re: 60-Day Notice of Intent to Sue: Endangered Species Act Violations Related to Farm Service Agency Loan Guarantee of C & H Hog Farm in Mount Judea, Arkansas

Dear Secretary Vilsack, Administrator Garcia, and Ms. Newkirk:

On behalf of the Arkansas Canoe Club, Buffalo River Watershed Alliance, National Parks Conservation Association, and The Ozark Society (collectively, the "Citizen Groups"), we request that you take immediate action to remedy ongoing violations of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, by the Farm Service Agency ("FSA") of the U.S. Department of Agriculture ("USDA"). FSA's loan guarantee to C & H Hog Farms is an action that may affect the endangered snuffbox mussel, the endangered Gray bat, and the endangered Indiana bat. FSA has not engaged in consultation to ensure that the action does not jeopardize these listed species 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, *id.* § 1540(g), prior to commencement of legal action.

I. Factual Background

In June 2012, Farm Credit Services of Western Arkansas ("Farm Credit") notified the United States Fish and Wildlife Service ("FWS" or "the Service") that it was considering a loan to C&H

156 WILLIAM STREET, SUITE 800 NEW YORK, NY 10038

T: 212.791.1881 F: 212.918.1556 E: neoffice@earthjustice.org W: www.earthjustice.org

Hog Farms, Inc., which would be guaranteed by FSA. *See* Letter from Dan Benton, Farm Credit, to Margaret Harney, FWS (June 26, 2012) (attached hereto as Exhibit A). Farm Credit would provide the loan, and FSA would guarantee that loan, for C & H Hog Farms' purchase of 23.43 acres of land and construction of a swine farrowing barn and a swine gestation barn in Mount Judea, Arkansas.

In a July 5, 2012 letter to Farm Credit, 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). FWS made clear that this 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.*

Without any further communication with FWS, FSA issued an Environmental Assessment ("EA") for the C&H Hog Farm on September 26, 2012, which indicated that "[i]nformal consultation with the U.S. Fish Wildlife Service was completed."¹ The EA further stated 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."²

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.

In a March 4, 2013, letter to FSA, sent after the National Park Service contacted FWS with its concerns about FSA's actions, FWS confirmed that it:

- 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 [C&H Hog Farms] project.

See Letter from Jim Boggs, FWS, to Linda Newkirk, FSA (March 4, 2013) (attached hereto as Exhibit C).

¹ The EA does not contain any page numbers, so we do not provide page citations to the EA. The EA is not publicly available online. It is on file with the signatories.

² FSA was likely referring to the U.S. Fish and Wildlife Service, although it is unclear what FSA meant by the term "clearance determination." There is no entity named "Arkansas Fish and Wildlife."

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)(2). The regulations implementing 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 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 undertakes a biological evaluation to determine whether the proposed action is likely to adversely affect identified species and must either receive written concurrence from FWS that the proposed action “is not likely to adversely affect listed species or critical habitat” or request formal consultation if the evaluation shows that adverse effects are likely. *Id.* §§ 402.13, 402.14(b)-(c). 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, FSA is required to ensure that its loan guarantee to C & H farms is not likely to jeopardize the continued existence of any endangered species. *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. *See* Ex. B. 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. *See* Ex. C at 1. By failing to initiate consultation, undertake a biological evaluation, obtain FWS’s written concurrence regarding potential effects on these species, or otherwise engage in consultation with FWS, FSA has violated and continues to violate the ESA.

In a June 26, 2012, letter, Farm Credit notified FWS that FSA would guarantee a loan to C & H Farms. *See* Ex. A. On July 5, 2012, FWS sent a letter to Farm Credit with a list of threatened, endangered and candidate species known to occur in the region. *See* Ex. B. The species identified were two endangered bats, the Gray bat (*Myotis grisescens*) and the Indiana bat (*Myotis sodalists*), as well as a candidate species, the rabbitsfoot mussel (*Quadrula cylindrica cylindrica*). In a February 8, 2013, letter to FSA, the Service informed FSA that the status of the

rabbitsfoot mussel had changed to proposed threatened and the Buffalo River had been proposed as critical habitat for the rabbitsfoot. *See* Ex. C at 1. The February 2013 letter additionally identified the snuffbox mussel as an endangered species occurring in the Buffalo River that had been inadvertently omitted from FWS's original July 2012 letter. *See id.*

In its EA, FSA stated, "[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 (see attached F&W clearance letter)." EA Attachment A. It is unclear what FSA meant by "F&W clearance letter." However, assuming the "F&W clearance letter" referred to the July 5, 2012, FWS letter to Farm Credit, that letter clearly stated that two endangered bats occur in the region. Moreover, the July 5, 2012, letter expressly stated that it was provided "for the sole purpose of providing technical assistance to the action agency or for individual pre-project planning assistance" and that the 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." Ex. B. Indeed, the Service made very clear in March 2013 that it

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 [C&H Hog Farms] project.

Ex. C at 2.³

FSA failed both to properly initiate and conduct consultation with FWS regarding the endangered Gray bat, the Indiana bat, and the snuffbox mussel. First, FSA relied wholly on Farm Credit's correspondence with FWS and did not itself communicate with FWS about potential impacts to listed species in the area of the proposed action. *See* 16 U.S.C. §1536(c)(1). Moreover, FSA neither received FWS's written concurrence that the project would not likely affect listed species nor undertook a biological evaluation to ascertain whether the identified species would likely be adversely affected. *See id.*; *see also* 50 C.F.R. §§ 402.13, 402.14(b)-(c). In fact, FWS explicitly informed FSA that it had *not* concurred with any determination made by FSA. *See* Ex. C at 2. Accordingly, FSA has taken no action to ensure against jeopardy regarding these three endangered species, and thus has violated and continues to violate the ESA.

³ Notably, the National Park Service ("NPS") 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 (*Myotis grisescens*). 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, NPS, to Linda Newkirk, FSA (Feb. 27, 2013) (attached hereto as Ex. D). 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.

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

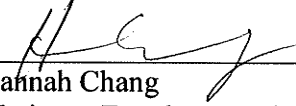
National Parks Conservation Association
777 6th St., NW, Suite 700
Washington, DC 20001
202-223-6722

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 suit in United States district court upon the expiration of 60 days from the date of this notice.

Sincerely,



Hannah Chang
Marianne Engelman Lado
Earthjustice
156 William St., Suite 800
New York, NY 10038
212-845-7376

Kevin Cassidy
Earthrise 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

cc: Sally Jewell, Secretary of Interior

Exhibit B



Harrison Branch

129 W Industrial Park Road • Harrison, AR 72601 • 870-741-2020

June 26, 2012

82772
FSA

State Historic Preservation Officer
Ms. Francis McSwain
1500 Tower Building
323 Center Street
Little Rock, AR 72201

Farm Credit Services of Western Arkansas is considering a loan request on the farm identified below. The proposed loan will have a Farm Service Agency guarantee. Your comments are required concerning Archaeological or Historic importance.

**Applicants: Jason T & Tana L Henson
Phillip & Julie Campbell
Richard & Mary Campbell**

Location: Section 26, Township 15 North, Range 20 West in Newton County, AR – 23.43 acres.

Project: Construct 2,500 head swine facility

We know of no structures 50 years old or older on this property or directly adjacent to the project area

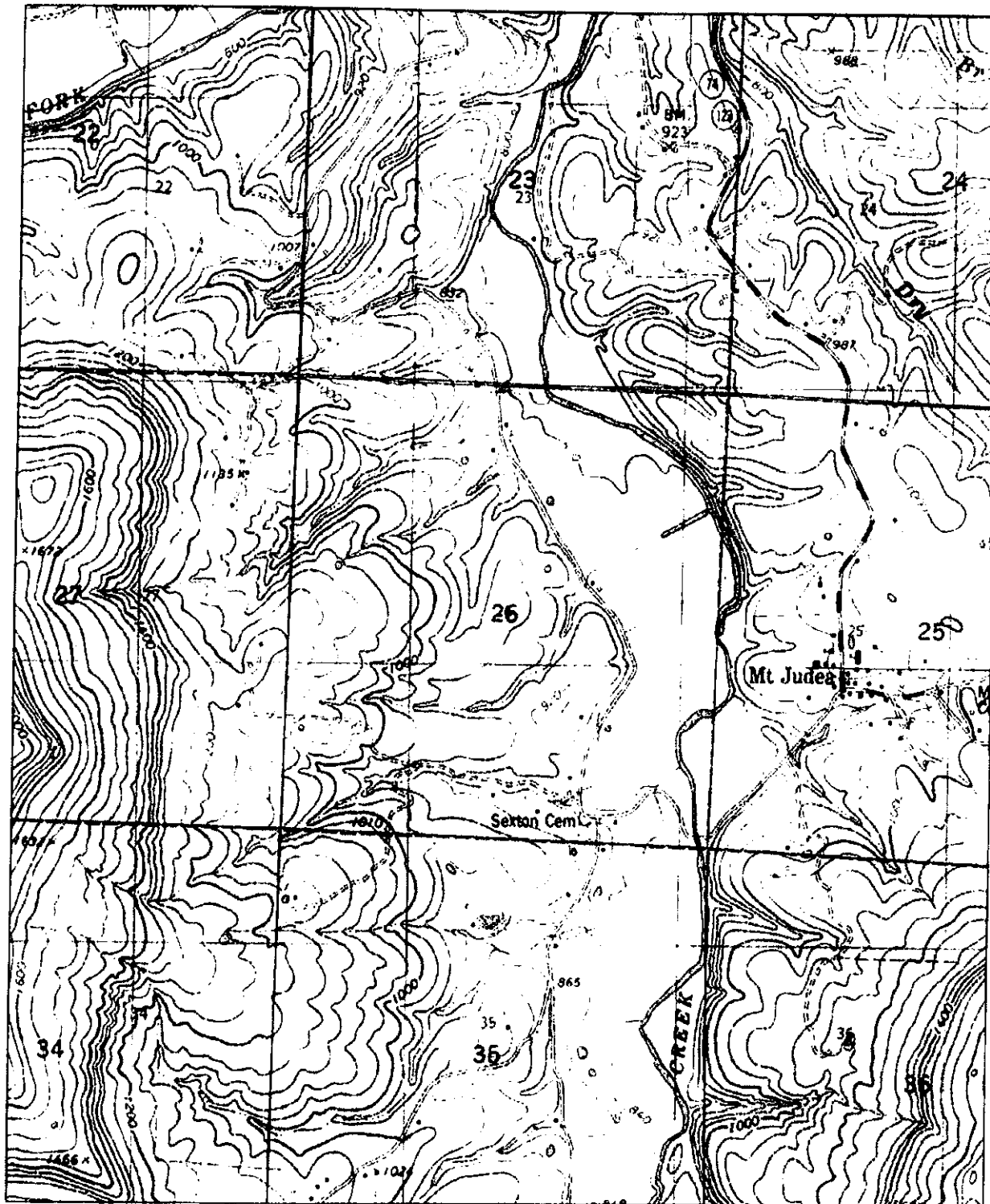
Attached are location maps and topo maps showing latitude & longitude. If you have any questions concerning the above, do not hesitate to contact Dan Benton @ 870-741-2020. As there is an application pending your review, please fax your response to 870-741-5851.

Sincerely,

A handwritten signature in black ink, appearing to read "Dan Benton", with a long horizontal flourish extending to the right.

Dan Benton
Assistant Vice President

DB/rla



Mt. Judea

Exhibit C



United States Department of the Interior

NATIONAL PARK SERVICE

Buffalo National River
402 N. Walnut, Suite 136
Harrison, AR 72601

IN REPLY REFER TO:

1.A.2 (BUFF)

February 27, 2013

Linda Newkirk
State Executive Director
Farm Services Agency
700 West Capitol Avenue, Suite 3416
Little Rock, AR 72201-3225

Dear Ms. Newkirk:

On February 5, 2013, Farm Loan Manager Lonnie Ewing hand delivered to Buffalo National River headquarters a copy of the Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) and supporting documentation for the C&H Hog Farms, Inc. project. My staff has given the documents an extensive review, and consider them to be very weak from an environmental point of view. We also believe your agency did not follow its own regulations in developing the EA, particularly related to the public communication standard. We have detailed the problems we found with these documents in a point-by-point format.

1. The coversheet indicates the National Park Service (NPS) is a cooperating agency. Since we never received word of the document, this is clearly in error. This gives the public and agencies reviewing the document the un-realistic view that NPS is on-board with the conclusions of the EA. In fact, nothing could be further from the truth. The Council on Environmental Quality regulations found at 40 CFR, Section 1501.6 discusses Cooperating Agencies. Section 1501.6(a)1 says: "The lead agency shall request the participation of each cooperating agency in the NEPA process at the earliest possible time." This regulation was ignored.
2. We believe the EA process used is not in line with the requirements set forth in FSA NEPA implementation regulations (7 CFR 1940, Part G), or regulations of the Council on Environmental Quality 40 CFR 1500-1508.
3. Section 1.0 of the EA indicates the farm will consist of 478.93 acres; however, the Comprehensive Nutrient Management Plan (CNMP) indicates waste will be land applied to 630 acres in addition to the 23.43 acres where the barns and waste ponds are to be located. We found this confusing.

4. Section 1.3 of the EA is supposed to cover "Regulatory Compliance". This section is blank, even though there are a number of other regulations that this EA has the potential to violate.
5. Section 1.4 of the EA is titled "Organization of EA". This section is also blank. This EA does not really provide any analysis backed up with any scientific reviews, documents, or best professional judgment. It appears to be based solely upon the opinions of the preparer. Using this section would have helped the preparers put together the document set in a logical order, and may have prevented some of the failures we have identified.
6. Section 2.1 of the EA discusses the "Proposed Action". This indicates there will be only 2,500 hogs on the farm. The 3 boars and 4,000 pigs that will be on the farm after the first litter cycle apparently do not count. The Comprehensive Nutrient Management Plan (CNMP) says 6,503 swine. This is an inconsistency in the documentation that is not explained.
7. Section 2.2 of the EA discusses alternatives. This is a one-alternative EA. Alternate locations are dismissed as the EA says they would not be favorable because the proposed location is in reasonable proximity to the feed mill and processing plant as well as the applicants residences. It also says the proposed project will eliminate any possible impact to the environment on an alternative location. This last statement may be true, but it does not belong in this section. That statement should be the result of analysis, not a foregone conclusion. According to 40 CFR 1502.14(a) "Agencies shall rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." We do not feel this regulation was followed.
8. Section 2.2.1 of the EA discusses the "No Action" alternative. A No Action alternative is needed to create a useful baseline of conditions for comparison to the action alternatives. The statement in this EA is that "the community will lose the potential financial benefits". This statement is not creating a baseline of condition; rather it is using the No Action Alternative as a platform for political opinion and does not present the public with factual information. The EA fails to describe the action, but rather; describes potential outcomes if the hog farm is not funded. This section is supposed to describe the alternative, not make assumptions about impact to the community, integrator, utility company, etc. This verbiage does not belong in this section, but should be in an analysis section.
9. Section 2.22 of the EA introduces Alternative A which is the action alternative. The EA says that alternative projects were not considered due to this being the most favorable location. These statements do not belong in a description of an alternative.

10. Section 3.1.1 of the EA discusses the Definition of the Biological Resources. The definition is as follows. "Vegetation, wildlife, and protected species including threatened and endangered species and their designated critical habitat." The next sentence says "Any endangered species in this area will not be harmed by complying with the Comprehensive Nutrient Management Plan." The document does not show how this environmental consequence was determined.
11. Section 3.1.2 of the EA discusses the Affected Environment for the Biological Resources. The 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 [sic] (Service). Since there is construction all environmental regulations will be followed." The letter from the United States Fish and Wildlife Service (USFWS) can be found buried about 100 pages back in the document. The original request letter came from Farm Credit Services of Western Grove, Arkansas to USFWS on 26 June 2012. This letter gave the correct legal description of the location. The USFWS replied on 5 July 2012. In their letter, USFWS inexplicably indicated the hog farm would be near Ponca, Arkansas. USFWS indicated that two endangered bats and the candidate Rabbitsfoot mussel were known in the region. They provided statements about erosion and sediment control, construction in sensitive areas, and storm water. At the end of the letter it says **"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 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."**

The EA does not describe where the affected environment is located. The affected environment would probably include all of the terrain of the hog farm as well as areas that may receive air and water pollution from the farm. It could also include areas where vehicle traffic down a gravel road will impact wildlife and vegetation. According to 7 CFR 1940.310, FSA only completed the first step by sending a letter to USFWS. By granting the loan without following through, FSA violated their own regulations, and did not properly comply with Section 7 of the Endangered Species Act.

My staff is aware of at least one cave within a normal foraging distance of the application field area which contains the endangered Gray bat (*Myotis grisescens*). 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. The Buffalo River contains the Rabbitsfoot

freshwater mussel. This mussel is a candidate to be listed on the Threatened and Endangered Species list. The Buffalo River is proposed critical habitat for this species. We believe that any pollution of Big Creek resulting from this operation has the potential to have a direct adverse impact upon the species, and has the potential to result in adverse modification of the proposed critical habitat.

12. Section 3.2.1 of the EA discusses the Definition of Water Resources. Water resources are defined as floodplains, wetlands, surface water quality, sole source aquifers and wild and scenic rivers. The EA states, "There are no wetlands on this farm and a CNMP (Comprehensive Nutrient Management Plan) is to be followed to ensure water quality is maintained and ensure there are no adverse impacts. This type of analysis belongs in the "Environmental Consequences" section of the EA, but that section does not exist.
13. Section 3.2.2 of the EA discusses the Affected Environment of Water Resources. The EA says "The potential impact to the environment will be eliminated by following the Waste Management Plan. Water quality will be protected by producer's adherence to their CNMP." This analysis information should be located in the "Environmental Consequences" section of the EA. It is unfortunate that the CNMP appears to be flawed by allowing fields to reach a phosphorus index (PI) of "High" and "Very High" risk level on 10 of the 17 fields (57% of the land application acres) within the first year of application. We do not believe the CNMP will protect water quality as written, there is simply too much phosphorus in the waste and not enough land to apply it on. The EA does not describe the location and extent of the affected environment. We believe the affected environment should include all of Big Creek adjacent to and downstream of the application fields as well as the Buffalo River downstream until all of the excess phosphorus can be assimilated. The EA does not describe the condition of the water resources. How can FSA say there will be no impact to water resources without knowing the baseline conditions, especially when a new nutrient management plan has to be developed each year because of the liquid manure and bio-solids being used?
14. Section 3.3.2 of the EA discusses the Affected Environment for Cultural Resources. The EA says SHPO has issued a blanket clearance letter for existing operations. We were unable to find documentation in the EA package to support this contention. The affected environment is not described.
15. Section 3.4.1 of the EA describes the Definition of Soil Resources. The soil resources are defined as "Highly Erodible Soils present within the area of impact."
16. Section 3.4.2 of the EA discusses the Affected Environment for Soil Resources. The EA states "According to NRCS-CPA-026E, there are no Wetlands present on the farm." This does not fit with the definition of the resource. The document does not describe the affected environment at all, it does not even define what the

- area of impact noted in Section 3.4.1 is. Under the definition of hydric soils (wetlands) in the USDA manual, almost any farm pond would meet the classification of wetland. Although man-made wetlands do not have the level of protection as does natural.
17. Section 3.5.1 of the EA does not define Air Quality. This section only defines potential sources of poor air quality. There is no description of the existing quality of the air. The EPA definition of air pollution has a component of odor.
 18. Section 3.5.2 of the EA discusses the Affected Environment for Air Quality. The document states "Compliance with CNMP should keep emissions to a minimum." This information, once again, belongs in an "Environmental Consequences" section. The document does not describe the affected environment. There is no mention of odor. Two fields are less than 1/16 of a mile from a public school, restaurant, and other private housing. The CNMP presents no site specific mitigation strategies, only general housekeeping-type recommendations. The opening statement says, "It may not be practical or feasible to eliminate all odor emissions from the operation, but it is possible to manage or mitigate the odor." They EA mention neither the surrounding community, nor the other citizens in the community.
 19. Section 3.6 of the EA, Socioeconomics, has an inadequate "Definition of Resource". The definition does not create a baseline of social or economic drivers of the local and regional community.
 20. Section 3.6.2 of the EA, Affected Environment, discusses population growth and impact. It states "There will be no impact to the area's public and community services as there will be no significant increase to the population after the completion of this project". There is no mention of losses of income to the people who use the Buffalo River as a source of income for ecotourism. There is no mention of loss of income or property values to people in the local community as a direct result of the odor and other pollutants from the hog farm.
 21. Section 3.7 of the EA, Environmental Justice, claims that there will be no impact to minority or low income populations as a result of this project. We believe this statement to potentially be false. Newton County is an economically disadvantaged area. The rights of this population to provide public input have been denied.
 22. Section 4.0 of the EA describes Cumulative Impacts. There is no real analysis of impact or cumulative impacts in this section. Section 4.3 appears to be based upon the opinion of the author and is not based upon any scientific review, expert opinion, or research. The immediate cumulative effects will be on the water resources of Big Creek and Buffalo River. There is ample scientific literature that

- examines the effects of CAFOs on ground and surface water and CAFOs have no positive effect.
23. Section 5.0 of the EA discusses Mitigation Measures. This section again refers back to the CNMP. We contend that the CNMP does not mitigate the effects of waste, but guides the producer on how to process the waste, possibly resulting in minimization of the impacts. This section lacks any substantive mitigation strategies.
 24. Section 7.0 of the EA shows the List of Persons and Agencies Contacted. The document mentions SHPO, USFWS, NRCS, ADEQ, EPA, and Arkansas National [sic] (Natural) Resource Commission. 7 CFR 1940.331(b)1 requires the FSA to send written notices to the following: “regional EPA office, any State and regional review agencies established under Executive Order 12372; the State Historic Preservation Officer; local radio stations and other news media; any State or Federal agencies planning to provide financial assistance to this or related actions or required to review permit applications for this action, any potentially affected Indian Tribe; any individuals, groups, local, State, and Federal agencies known to be interested in the project; affected property owners; and to any other parties that FHA or its successor agency (FSA) under Public Law 103-354 has identified to be so notified. It will also be posted at a readable location on the project site.” Since FSA did not contact NPS, local residents, etc., FSA violated this provision of the regulations.
 25. The FONSI, under Proposed Action, Item 1, states “Both beneficial and adverse impacts of implementing the preferred alternative have been fully considered within the EA. The beneficial impacts outweigh any adverse impacts.” We contend that the EA does not show any evidence that the potential impacts of the alternatives were reviewed or assessed with any scientific rigor or public input. We also contend the EA never identified clearly what the area of potential effect was. It is our belief that bullet 1 in the FONSI cannot be supported by the EA. We do not feel that the EA meets the minimum requirement for a Class II EA, according to FSA regulations for implementing NEPA. We feel the existing EA is so woefully inadequate that it should immediately be rescinded.
 26. The FONSI, under Proposed Action, Item 2 claims that the preferred alternative would not significantly affect public health or safety. We feel that FSA utterly failed to consider the impact of the swine waste on the residents of Mt. Judea, the people living downstream on Big Creek, or the people recreating within Buffalo National River. We feel the FSA statement is completely false because “Public Health” was not adequately analyzed.
 27. The FONSI, under Proposed Action, Item 3 contends that the preferred alternative would not significantly affect any unique characteristics which includes historic and cultural resources, parklands, prime farmlands, wetlands, wild and scenic

rivers, or ecologically critical areas. Our review of the document failed to uncover any substantial analysis to back up this contention. In fact, if FSA had taken the time to critically review the Comprehensive Nutrient Management Plan, we feel FSA would have discovered that many of the application fields are likely to attain high to very high phosphorus index risk values after the first year of land application. This would require the farm to find additional sites to spread waste. These additional sites may be located much more closely to these “unique characteristics”, but that was never analyzed as far as my staff could discern. Further, because the Buffalo River is on the Nationwide Rivers Inventory (NRI) it should have been considered. The candidate species Rabbitsfoot mussel is found in the Buffalo River, making it ecologically critical. There is an endangered bat cave near the proposed land application fields. These endangered gray bats very likely forage along Big Creek adjacent and downstream of the application fields. The EA supporting documents do not include a letter from SHPO showing completed consultation. FSA did not start consultation with USFWS. FSA only got information about the presence of endangered, threatened, and candidate species and critical habitat in the area. FSA never developed a biological assessment, or sought concurrence for this project.

28. The FONSI, under Proposed Action, Item 4 contends that the preferred alternative is not highly controversial. We have difficulty believing this statement. Broadcast applying hog waste to fields within a couple of hundred feet of the Mt. Judea School for up to three months of the year sounds quite controversial to our ears. We also contend that risking the pollution of Big Creek with phosphorus is quite controversial since it flows into America’s First National River.
29. The FONSI, under Proposed Action, Item 5 contends that the preferred alternative would not impose highly uncertain or involve unique or unknown risks. We have difficulty seeing how this statement can be made with the paucity of data and analysis presented in the EA.
30. The FONSI, under Proposed Action, Item 6 contends that the preferred alternative would not establish a precedent for future actions with significant effects. We feel that the preferred alternative is quite likely to establish a precedent if this EA and FONSI are not subject to further review.
31. The FONSI, under Proposed Action, Item 7 states that the preferred alternative is not related to other actions with individually insignificant but cumulative significant impacts. The cumulative impact section of the document is highly flawed. The document has no Environmental Consequences section. Because of this, no analysis is included in the document. Since no analysis is in the document, there is no way to compare alternatives, or determine cumulative impacts.
32. The FONSI, under Proposed Action, Item 8 contends consultation with SHPO was completed, but there is no record of this in the EA or appendices. The

FONSI further states that there would be no loss or destruction of scientific, cultural, or historical resources. We contend that fish who rely upon clean water fall into the category of scientific resource. We further contend that the EA and CNMP do not adequately protect these resources, making the FSA statement false.

33. The FONSI, under Proposed Action, Item 9 contends that the effects of implementing the preferred alternative on threatened and endangered species and designated critical habitat were addressed in the EA. That statement is clearly not true since there was no Environmental Consequences section in the EA to discuss impacts. FSA further contends that informal consultation with USFWS was completed. This appears to be far from the truth, setting up a violation of 7 CFR 1940.310, and potentially a violation of Section 7(a)2 of the Endangered Species Act.
34. The FONSI, under Proposed Action, Item 10 contends the preferred alternative does not threaten to violate Federal and state laws imposed for the protection of the environment. We contend that the proposed action has the potential to result in violations of the Endangered Species Act and ADEQ regulation 2.
35. The EA supporting documents includes a flow chart titled "AR Exhibit 3 (State Env. Guide)". This flow chart, if followed as it should be, tells the Agency to conduct a Class II assessment and serve public notices. According to 7 CFR 1940.318e "When identified impacts are difficult to quantify (such as **odor** and visual and **community impacts**) or controversial, a public information meeting should be held near the project site and the local area's concern about it. Whenever held, it should be announced and organized in the manner described in § 1940.331(c). However, a transcript of the meeting need not be prepared, but the preparer will make detailed notes for incorporation in the assessment. (See § 1940.331(c) of this subpart.)" The EA mentions odor as does the CNMP, but they never held any meetings to discuss this with the public. We feel that FSA failed to exercise its responsibility under these regulations.
36. The supporting documents also include another flow chart titled "AR Exhibit 4 (State Env. Guide)". This flow chart indicates that they prepared and published a Notice of Availability (NOA) on 6-8 August 2012 in the legal section of the Arkansas Democrat-Gazette. This is backed up with the ad copy. According to 7 CFR 1940.331(b)1. "With respect to notification within the project area, the applicant will be requested to publish a copy of the notice of intent and the date of the scoping meeting 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. The notice will be published in easily readable type in the nonlegal section of the newspaper(s)." Since FSA published in the legal section, of a statewide newspaper, and did not publish in a nonlegal section of a local or community-oriented newspaper, they violated this provision of FSA regulations.

This public notice opened up a 15 day comment period for the draft EA through 23 August 2012. No comments were received. FSA signed the Finding of No Significant Impact on 24 August 2012. FSA published a final NOA from 25-27 August 2012 in the legal section of the Arkansas Democrat-Gazette. FSA held an additional 15 day review and comment period. No comments were received and the document was signed by preparer Martha Gafford on 26 September 2012 and State Environmental Coordinator (SEC) on 01 October 2012. The document does have some other odd dates. It shows Tom Howard signed the document on 25 October 2012 as the concurring official. That particular page looks like it does not belong with the document.

37. The supporting documentation contains a flowchart titled "Wild and Scenic Rivers Review Process Flow Chart." It appears the EA preparer properly followed the flow chart, but FSA should have contacted NPS to see if we felt there would be adverse impacts to the Buffalo River because the Buffalo River, while not technically a "Wild and Scenic River" is in the Nationwide Rivers Inventory. FSA should update the flow chart to show "listed in the NRI" as one of the items in the first block. Under 7 CFR 1940, Subpart G, Exhibit E, 10. The consultation process should be re-initiated if new information or modification of the proposal reveals impacts to a river within the Wild and Scenic Rivers System or Nationwide Inventory.
38. 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.
39. The Request for Environmental Information for C&H Hog Farm, signed by Jason Henson 24 July 2012, may not have been accurately filled out. According to this document, which is essentially an affidavit:
 - a. Mr. Henson said there would be no grazing affected by the proposal or located within or adjacent to the project sites, yet in the NOI, some of the fields are for rotational grazing, and these application fields are part and parcel of the action and cannot be separated from the action.
 - b. Mr. Henson alleges no schools are affected when Mt. Judea School is very near one of the application fields.
 - c. Mr. Henson alleges no steep slopes are present or potentially affected even though the construction will be filling a steep slope at the head of a natural valley.
 - d. Mr. Henson alleges no floodplains will be affected even though these will be spreading fields.
 - e. Mr. Henson alleges no Wildlife will be affected, even though the fields are likely to begin leaching phosphorus into Big Creek after the first year of application.
40. The supporting documents include one titled "Environmental Assessment Attachment to 1940-20". The Water Quality section says, "The potential for

impact to water quality is limited to waste management. Adherence to the CNMP will aid in the protection of water quality. Strict compliance with the approved CNMP will prevent impact to ground water and surface water.” Sinkhole collapse is another potential impact to water quality, though waste management is the most likely problem as a result of overland flow during and following heavy rains. Since the CNMP appears to result in high to very high phosphorus indices on 10 of the 17 fields after one year of application, we feel that the CNMP will not adequately protect water quality.

41. The Solid Waste Management section of Attachment 1940-20 indicates the tract is located in a nutrient surplus area. Our review of the nutrient surplus areas of Arkansas does not support this.
42. Attachment to 1940-20, under Wildlife and Endangered Species says, “There is no known wildlife resource located in the project area or immediate vicinity. There are no known endangered or threatened species or habitat in the project area or its immediate vicinity.” There are surely wildlife in the project area and immediate vicinity. It is highly likely that Big Creek is used as a foraging area for the endangered gray bat (*Myotis grisescens*) since there is at least one roost cave in the project vicinity.
43. In Attachment to 1940-20, under Alternatives to the Proposed Project, FSA contends that “No Project” is not an alternative as applicants wish to produce hogs for Cargill Pork while living in a rural setting. “No action” is not a viable alternative. We believe that “No Action” is always a viable alternative and should never be disregarded.
44. In Attachment to 1940-20, under Cumulative Effects, the FSA did no analysis to will support the contention that “Cumulative impacts from litter and dead pig disposal will be minimized and are addressed in the CNMP. This proposal will have no effect on Historical/Cultural properties or Threatened/Endangered species as no construction is planned.” We contend that construction is clearly planned, and FSA failed to fully consult with SHPO or the USFWS according to their own documentation efforts.
45. We feel the Comprehensive Nutrient Management Plan for C&H Hog Farms is flawed. Our analysis of this document indicates that 57% of the land slated for application of liquid manure and bio-solids would attain a “high” or “very high” phosphorus index after the first year of application. Additional fields that are phosphorus poor would have to be found, or the phosphorus would have to be bound up with aluminum or some other method.

Based on the significant number and degree of deficiencies identified within this EA, we believed this project needs to be halted until we and the public and other stakeholders are afforded an opportunity to comment. We appreciate your immediate attention to this issue as this project has the potential to significantly impact public safety and values.

Sincerely,



Kevin G. Cheri
Superintendent

cc: John Berge, Acting Administrator for Field Operations, USDA, FSA
The Honorable John Boozman, Senator, U.S. Senate
The Honorable Mark Pryor, Senator, U.S. Senate
The Honorable Rick Crawford, Representative, U.S. Senate
The Honorable Steve Womack, Representative, U.S. Senate
U.S. Fish and Wildlife Service
Frances McSwain, Deputy State Historic Preservation Officer, AR Historic
Preservation Program
Tribes: Absentee Shawnee Tribe of Oklahoma; Caddo Tribe of Oklahoma; Cherokee
Nation of Oklahoma; Eastern Shawnee Tribe of Oklahoma; Osage Tribe of
Oklahoma; Quapaw Tribe of Oklahoma; The Shawnee Tribe; Tunica-Biloxi Tribe
of Louisiana; United Keetoowah Band of the Cherokee Indian Nation; Wichita
and Affiliated Tribes
Arkansas Mountain Paddlers
Backcountry Horseman Association
Buffalo National River Partners
Buffalo River Regional Chamber
Ozark Society
National Parks and Conservation Association

Exhibit D



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

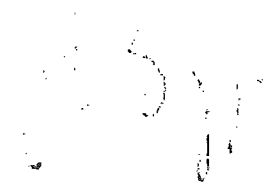
concurrency from the Service pursuant to section 7 of the ESA and its implementing regulations. The Service never received an effects determination from the FSA, nor did the Service ever concur with any effects determination made by FSA for the aforementioned project.

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

Exhibit E



THE DEPARTMENT OF ARKANSAS
HERITAGE

Mike Beebe
Governor

Martha Miller
Director

May 8, 2013

Ms. Linda Newkirk
State Executive Director
Farm Service Agency
U.S. Department of Agriculture
Federal Building, Room 3416
700 West Capitol Avenue
Little Rock, Arkansas 72201

-
- Arkansas Arts Council
 - *
 - Arkansas Natural Heritage Commission
 - *
 - Delta Cultural Center
 - *
 - Historic Arkansas Museum
 - *
 - Mosaic Templars Cultural Center
 - *
 - Old State House Museum
-

RE: Newton County – General
Section 106 Review – FSA
Proposed C&H Hog Farms, Inc. Project
in Newton County, Arkansas
AHPP Tracking Number 82772

Dear Ms. Newkirk:

This is a letter of inquiry regarding the nature, scope, and size of the proposed C&H Hog Farms, Inc. project in Newton County, Arkansas. Since our April 11, 2013 letter to you regarding this undertaking, a number of concerned citizens have contacted our office claiming that the project is much larger than the hog farm construction site (approximately 23 acres) that we reviewed on July 17, 2012. Therefore, please provide a detailed project description, a 1:24,000 scale USGS topographic map clearly delineating the project area, and clear color photographs of any standing structures that would be removed or demolished or are located adjacent to the project.

The area of potential effects (APE) as defined in 36 CFR Part 800.16(d) should include all areas that have the potential to directly or indirectly cause alteration in the character of historic properties. In this undertaking, the APE should include the hog farm construction site, lagoons or holding tanks, and the area proposed for land application of hog waste.

Thank you in advance for providing this additional information. If you have any questions, please contact George McCluskey of my staff at (501) 324-9880.

Sincerely,

Martha Miller
State Historic Preservation Officer



Arkansas Historic
Preservation Program



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tdd: 711

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website:

www.arkansaspreservation.com

An Equal Opportunity Employer

cc: Mr. Anthony G. Lopez, Advisory Council on Historic Preservation
Mr. Bennett Hortner, Farm Service Agency
Mr. Dan Benton, Farm Credit of Western Arkansas
Dr. Richard Allen, Cherokee Nation of Oklahoma
Ms. Larue Baker, United Keetoowah Band of Cherokee Indians
Dr. Andrea Hunter, Osage Nation
Mr. Kevin Cherri, Buffalo National River
Mr. Chris Colcasure, Arkansas Natural Heritage Commission
Ms. Theresa Marks, Arkansas Department of Environmental Quality
Dr. Ann M. Early, Arkansas Archeological Survey