

AUG 06 2013

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

JAMES W. McCORMACK, CLERK
By: _____
DEP CLERK

BUFFALO RIVER WATERSHED ALLIANCE;)
ARKANSAS CANOE CLUB; NATIONAL)
PARKS CONSERVATION ASSOCIATION; and)
OZARK SOCIETY,)

Plaintiffs,)

v.)

Civil Action No. 4:13-CV-450 DPM

UNITED STATES DEPARTMENT OF)
AGRICULTURE; UNITED STATES SMALL)
BUSINESS ADMINISTRATION; TOM)
VILSACK, in his official capacity as Secretary,)
United States Department of Agriculture; KAREN)
MILLS, in her official capacity as Administrator,)
Small Business Administration; JUAN GARCIA,)
in his official capacity as Administrator, Farm)
Service Agency; LINDA NEWKIRK, in her)
official capacity as Arkansas State Executive)
Director, Farm Service Agency; and LINDA)
NELSON, in her official capacity as Arkansas)
District Director, Small Business Administration,)

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

Defendants.)

)

This case assigned to District Judge Marshall
and to Magistrate Judge Young

1. The Buffalo River Watershed Alliance, Arkansas Canoe Club, National Parks Conservation Association, and Ozark Society (collectively, "Plaintiffs") challenge Defendants' environmental review and authorization of loan guarantee assistance to C&H Hog Farms ("C&H" or "the facility"), a large swine concentrated animal feeding operation ("CAFO"), located on a major tributary of the Buffalo National River, the country's first national river.

2. The 150-mile long Buffalo River flows through the heart of the Ozarks in northwestern Arkansas, from the Boston Mountains in the west to the White River in the east.

Its headwaters originate within the Ozark National Forest, and the river runs beneath magnificent cliffs that stand high above the river's clear, quiet pools and rushing rapids. One hundred thirty-five miles of the river, along with the river's riparian zone and adjacent wetlands, comprise a national park unit, the Buffalo National River, which is a destination for more than one million visitors each year and generates \$38 million for the local economy.

3. The C&H facility is located in a karst basin, characterized by underground drainage networks, and on the banks of Big Creek, a major tributary of the Buffalo River, in Mount Judea, Arkansas. Under a contract with Cargill, Inc., C&H will confine 6,500 pigs at a time in two barns. Sixty-five hundred pigs generate more than two million gallons of waste each year, all of which will be collected in two open-air waste storage ponds on site, then applied to approximately 630 acres of land surrounding the farm, much of which directly abuts Big Creek at a point less than six stream miles from its confluence with the Buffalo National River. C&H will be the first facility classified as a "Large CAFO" under federal regulations, *see* 40 C.F.R. § 122.23(b)(4), anywhere in the Buffalo River watershed.

4. Plaintiffs bring this litigation against the Farm Service Agency ("FSA") and Small Business Administration ("SBA") (jointly, "Defendants"), which approved more than \$3.4 million dollars of loan guarantee assistance for two farm ownership loans necessary for the construction and operation of the C&H facility. Defendants' rubber-stamping of the requested loan guarantees without taking the requisite hard look at environmental impacts, notifying and engaging the public, and consulting as necessary with sister agencies violated the requirements of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4375; the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544; and the Buffalo National River enabling act, *see* Pub. L. No. 92-237, 86 Stat. 44 (1972) (codified at 16 U.S.C. §§ 460m-8 to 460m-14).

Accordingly, this Court should invalidate FSA's Environmental Assessment ("EA") and Finding of No Significant Impact ("FONSI"), enjoin Defendants' guarantee assistance to C&H, and require environmental review and consultation in compliance with the relevant laws.

JURISDICTION AND VENUE

5. This action arises under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706; NEPA, 42 U.S.C. §§ 4321-4375; the ESA, 16 U.S.C. §§ 1531-1544; and the Buffalo National River enabling act, Pub. L. No. 92-237, 86 Stat. 44 (1972) (codified at 16 U.S.C. §§ 460m-8 to 460m-14).

6. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (action arising under the laws of the United States), 16 U.S.C. § 1540(g) (citizen suit to enjoin violations of the ESA), and 5 U.S.C. §§ 701-706 (judicial review of agency actions).

7. As required under the ESA, 16 U.S.C. § 1540(g)(2), Plaintiffs provided 60 days' notice of their intent to sue by letter sent to FSA on May 15, 2013. FSA has not remedied the violations set forth in that notice letter.

8. The Court may issue a declaratory judgment and further relief pursuant to 28 U.S.C. §§ 2201-2202.

9. Venue lies in the Eastern District of Arkansas, Western Division, pursuant to 28 U.S.C. § 1391(e), because FSA's Arkansas State Office and SBA's Arkansas District Office are located in this District; Defendant Linda Newkirk, the Arkansas State FSA Executive Director, resides in this District; and Defendant Linda Nelson, SBA's Arkansas District Director resides in this District.

PARTIES

10. Plaintiff Buffalo River Watershed Alliance (“the Alliance”) is a non-profit public interest citizen group that formed in early 2013 in direct response to the discovery that the C&H facility had been approved and was near completion on the banks of Big Creek. The Alliance’s address is 4059 CR 516, Huntsville, Arkansas 72740. The Buffalo River Watershed Alliance is organized by residents and stakeholders who live in the Buffalo River watershed, and the Alliance’s mission is to protect and preserve the Buffalo River watershed from threats caused by water and air pollution. Alliance members support closure and/or relocation of the C&H facility and a moratorium on any future CAFOs within the Buffalo River watershed. The Alliance also aims to monitor water and air quality in the watershed and to educate the general public about water and air quality in the watershed. The Alliance is comprised of over 500 members, including some who live in close proximity to C&H and to Big Creek and are vulnerable to the noxious odors and water quality impacts from the facility. The Alliance has created and maintains a website to serve as a document repository and communication tool for its supporters and the general public. *See* Buffalo River Watershed Alliance, <http://buffaloriveralliance.org/>.

11. Plaintiff Arkansas Canoe Club (“ACC”) is a non-profit recreational organization with more than 600 member households representing seven chapters in Arkansas, Louisiana, Oklahoma, and Texas. ACC’s address is P.O. Box 1843, Little Rock, Arkansas 72203. ACC is dedicated to participating in and promoting the sport of paddling, including through river cleanups and advocacy related to conservation and river access issues. ACC and its members serve as advocates on conservation matters by working with other organizations and state and federal government agencies to preserve and promote the health and natural beauty of streams

and rivers in Arkansas. ACC members enjoy paddling the rivers, streams, bayous, and lakes of Arkansas and beyond, including the Buffalo River and its tributary, Big Creek.

12. Plaintiff National Parks Conservation Association (“NPCA”), a nonprofit membership organization founded in 1919, is the leading national organization dedicated solely to protection of the national park system. NPCA is headquartered at 777 6th Street, N.W., Suite 700, Washington, D.C. 20001. NPCA’s Southeast regional office is located at 706 Walnut Street, Suite 200, Knoxville, Tennessee 37902. NPCA’s mission is to protect, preserve, and enhance the national park system, which includes the Buffalo National River. NPCA has more than 360,000 members across the country who care deeply about the shared natural and cultural heritage of the national park system and who want to preserve these lands, and the plants and wildlife in them, unimpaired for the enjoyment of present and future generations. NPCA’s Southeast regional office works to protect the national park units in Kentucky, Tennessee, Mississippi, Alabama, Georgia, the Carolinas, and Arkansas. Approximately 1,965 NPCA members live in Arkansas, where the Buffalo National River offers a treasured opportunity for recreation and enjoyment of the outdoors.

13. Plaintiff Ozark Society is a regional non-profit organization founded in 1962 to save the Buffalo River from dams proposed by the U.S. Army Corps of Engineers. The Ozark Society’s address is P. O. Box 2914, Little Rock, Arkansas 72203. The organization led the successful campaign to designate the Buffalo River as a national park unit, which culminated in the passage of the Buffalo National River enabling act in 1972. Since its founding, the Ozark Society has pursued a singular mission: to preserve the wild and scenic rivers, wilderness, and unique natural areas of the Ozark-Ouachita region, including the iconic Buffalo National River. The Ozark Society has approximately 800 member households, most of whom reside in

Arkansas, Louisiana, Oklahoma, and Missouri. Members of the Ozark Society float, fish, and swim the Buffalo River and hike, view wildlife, and camp on its shores.

14. Members of each of the Plaintiff organizations reside in, own businesses or property in, and/or regularly visit the Ozarks and derive tremendous satisfaction, and in some cases income, from the exceptional waters and healthy ecosystem of the Buffalo National River, its tributaries, and its watershed. These individuals are deeply concerned about the operation of a 6,500-pig CAFO in a karst basin and the effect that millions of gallons of waste will have on the air, waters, and ecosystem of the Buffalo National River and its watershed.

15. Defendants' authorization of loan guarantees to C&H Farms with inadequate public notice, no ESA consultation, and grounded in either no environmental review in the case of the SBA or a flawed EA and FONSI in the case of FSA causes direct injury to the economic, recreational, aesthetic, and conservation interests of the members of Plaintiff organizations. The agencies' actions deprived Plaintiffs and their members of their right to participate in the environmental review process and authorized assistance to an activity that threatens degradation of water quality, impairment of fish and wildlife habitat, diminished recreational enjoyment of the Buffalo River, and introduction of odor and air emissions – all of which will directly and detrimentally affect the members of Plaintiff organizations. These injuries are fairly traceable to the agencies' inadequate environmental reviews and concomitant decisions to guarantee loans to C&H and are redressable through this action to invalidate the EA, FONSI, and loan guarantee authorization.

16. Defendant United States Department of Agriculture (“USDA”) is a federal agency with its principal offices located at 1400 Independence Avenue, S.W., Washington, D.C. 20250. FSA, which approved the loan guarantee assistance at issue in this case, is an agency within the

USDA and has an Arkansas State Office located at 700 West Capitol Avenue, Room 3416, Little Rock, Arkansas 72201.

17. Defendant Tom Vilsack, the Secretary of Agriculture, has oversight authority for all actions taken by FSA. Secretary Vilsack is sued in his official capacity. His address is 1400 Independence Avenue, S.W., Washington, D.C. 20250.

18. Defendant Juan Garcia is Administrator of the Farm Service Agency, which is responsible for authorizing the loan guarantee at issue in this case. Administrator Garcia is sued in his official capacity. His address is 1400 Independence Ave., S.W., STOP 0506, Washington, D.C. 20250.

19. Defendant Linda Newkirk is the State Executive Director for the Arkansas state FSA office. Director Newkirk is sued in her official capacity. Her address is 700 West Capitol Avenue, Room 3416, Little Rock, Arkansas 72201.

20. Defendant SBA is a federal agency with its principal offices located at 409 Third Street, S.W., Washington, D.C. 20416, and an Arkansas District Office located at 2120 Riverfront Drive, Suite 250, Little Rock, Arkansas 72202. SBA approved loan guarantee assistance at issue in this case.

21. Defendant Karen Mills is Administrator of the SBA and has oversight authority over all actions taken by SBA. Administrator Mills is sued in her official capacity. Her address is 409 Third Street, S.W., Washington, D.C. 20416.

22. Defendant Linda Nelson is Arkansas District Director for SBA. Director Nelson is sued in her official capacity. Her address is 2120 Riverfront Drive, Suite 250, Little Rock, Arkansas 72202.

THE LEGAL FRAMEWORK

I. MANDATES TO PROTECT THE BUFFALO RIVER

23. The Buffalo National River is a “water-based national park unit”¹ administered by the National Park Service (“NPS” or the “Park Service”). *See* Pub. L. No. 92-237, 86 Stat. 44 (March 1, 1972) (codified at 16 U.S.C. §§ 460m-8 to 460m-14). It encompasses 150 square miles, or 95,730 acres, along 135 miles of the Buffalo River, and “the river, its riparian zone, adjacent wetlands, and back channels are the primary resources of the park.”²

24. Additionally, the upper 15.8 miles of the Buffalo River are part of the nation’s wild and scenic river system and 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)).

25. The entire 150-mile length of the Buffalo River is listed in the National Park Service’s Nationwide Rivers Inventory of rivers that potentially qualify as wild, scenic, or recreational river areas.³

A. The Buffalo National River Enabling Act

26. The Buffalo National River enabling act authorized the Secretary of Interior to establish and administer the Buffalo National River “for the purposes of conserving . . . an area containing unique scenic and scientific features, and preserving as a free-flowing stream an important segment of the Buffalo River in Arkansas for the benefit and enjoyment of present and future generations.” 16 U.S.C. § 460m-8.

27. Specifically, the Buffalo National River enabling act mandates that:

¹ *See* Nat’l Park Serv., Buffalo National River Water Resources Management Plan 1, 3 (2004) (“Management Plan”), *available at* http://www.nature.nps.gov/water/planning/management_plans/buff_final_screen.pdf.

² *Id.*

³ *See* Nat’l Park Serv., Nationwide Rivers Inventory Arkansas Segments, <http://www.nps.gov/ncrc/programs/rtca/nri/states/ar.html> (last visited Aug. 4, 2013).

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

16 U.S.C. § 460m-11 (emphasis added). This language is “virtually identical to section 7(a) of the Wild and Scenic Rivers Act.” S. Rep. No. 92-130, *reprinted in* 1972 U.S.C.C.A.N. 1969, 1973 (May 19, 1971).

28. The Park Service is authorized to make a determination about the impact of proposed developments on the Buffalo National River. In a 2003 action before this Court involving a proposed dam on a tributary to the Buffalo National River, the U.S. Army Corps of Engineers suspended a permit it had previously issued for the dam, explaining that “the Department of Justice, on behalf of the Administration, has decided that *receipt of a determination from the National Park Service is required before the Corps may issue a final permit, even if the Corps has been able to identify no potential unreasonable impact in its analysis*” *Ozark Society v. Melcher*, 248 F. Supp. 2d 810, 812-13 (E.D. Ark. 2003) (quoting U.S. Army Corps letter) (emphasis added).

29. In short, Defendants may not provide assistance to development on a tributary to the Buffalo National River that invades the area or unreasonably diminishes the park’s values, and it is the National Park Service – not Defendants – that is authorized by statute to make that impact determination.

B. USDA Regulations Protecting Rivers in the Nationwide Inventory

30. The Wild and Scenic Rivers Act implements a Congressional policy recognizing that certain rivers and their immediate environments “possess outstandingly remarkable scenic,

recreational, geologic, fish and wildlife, historic, cultural, or other similar values” and establishes a commitment to protect these rivers and their immediate environment “for the benefit and enjoyment of present and future generations.” 16 U.S.C. § 1271. The statute designates certain rivers as part of the wild and scenic rivers system, establishes a procedure for adding other rivers to the system, and provides guidance for the management of designated rivers. *See* 16 U.S.C. §§ 1271-87.

31. Under the Wild and Scenic Rivers Act, the Park Service maintains the Nationwide Rivers Inventory as “a national listing of potentially eligible river segments” that are free-flowing and have one or more outstandingly remarkable values.⁴ The entire length of the Buffalo River is listed on NPS’s Nationwide Rivers Inventory.

32. 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). The regulations set forth specific procedures for this review. *See id.* (referencing Part 1940, Subpt. G, Exh. E). For applications for water resources projects, “the purpose of this review shall be to determine whether the proposal would have a direct and adverse effect on the values which served as the basis for the river’s inclusion in the system or designation for potential addition.” 7 C.F.R. Pt. 1940, Subpt. G, Exh. E ¶ 3. For applications for projects other than water resources projects, the purpose of the review shall be to determine if the proposal would invade the river area or unreasonably diminish the scenic, recreational, and fish and wildlife values present in the area. *Id.*

⁴ *See* Nat’l Park Serv., Nationwide Rivers Inventory, <http://www.nps.gov/ncrc/programs/rtca/nri/hist.html#pd> (last visited Aug. 4, 2013).

33. In either case, USDA regulations require that FSA consult with the appropriate regional office of NPS if the proposal “involves withdrawing water from the river or discharging water to the river via a point source.” *Id.* Additionally, USDA regulations mandate that “[t]he reviewer shall consult in other instances when the likelihood of an impact on a river in the system is identified as part of the environmental review.” *Id.*

34. If the Park Service determines that the proposal “will have an adverse effect” on a river identified on the Nationwide Inventory, FSA “shall further consult with [the Park Service] in order to formulate adequate measures or modification to avoid or mitigate the potential adverse effect.” *Id.* ¶ 8. “Once concurrence is reached and documented with [the Park Service] regarding modifications, the State Director shall require that they be incorporated into the proposal as either design changes or special conditions to the offer of assistance.” *Id.*; *see also id.* ¶ 6.

35. If the Park Service “advises that the proposal will have an unavoidable adverse effect . . . on a river segment which is either included in the National Wild and Scenic Rivers System or designated for potential addition to the system, the [FSA] applicant will be informed by the reviewing office and the application denied on this basis.” *Id.* ¶ 7.

36. The consultation process required under USDA regulations “shall be reinitiated by [FSA] . . . if new information or modification of the proposal reveals impacts to a river within the [wild and scenic river] System or Nationwide Inventory.” *Id.* ¶ 10.

II. NEPA REVIEW REQUIREMENTS

37. In providing loan guarantee assistance, FSA and SBA must comply with NEPA, the “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a); *see also* 7 C.F.R. Pt. 1940, Subpt. G, 7 C.F.R. §§ 1940.301-.350; 7 C.F.R. § 762.128. “NEPA’s purpose is

to ensure a fully informed and well considered decision, and disclosure to the public that the agency has considered environmental concerns in its decisionmaking.” *Friends of the Norbeck v. U.S. Forest Serv.*, 661 F.3d 969, 973-74 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1973 (2012) (citing *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978), and *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983)).

38. Pursuant to NEPA, federal agencies must prepare an Environmental Impact Statement (“EIS”) before approving “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C). An EA is prepared to help determine whether a proposed activity is a major federal action significantly affecting the quality of the human environment. *See* 40 C.F.R. § 1501.4(c); *see also id.* § 1501.3(a).

39. SBA’s Standard Operating Procedure recognizes that “where a proposed SBA action could potentially have a significant effect on the environment, an environmental assessment will be made and an environmental impact statement prepared when appropriate.” SBA, Standard Operating Procedure Section 90 No. 57 (1980), <http://www.sba.gov/content/national-environmental-policy-act-0> (“SBA SOP”). SBA actions potentially subject to review under NEPA include “guarantees, loans, or other forms of funding assistance.” *Id.* ¶ 6(b). Additionally, SBA’s categorical exclusion of certain actions from NEPA review does *not* include loans and guarantees where loan proceeds for “[c]onstruction and/or purchase of land exceeds \$300,000.” *Id.* ¶ 7(h)(1).

40. Under USDA regulations, certain activities – deemed “Class II actions” – are identified as “hav[ing] the potential for resulting in more varied and substantial environmental impacts” than smaller scale activities and are therefore “presumed to be major Federal actions” for which an EA must be prepared. 7 C.F.R. § 1940.312. Actions requiring a Class II EA

include “[f]inancial assistance for a livestock-holding facility or feedlot located in a sparsely populated farming area having a capacity as large or larger than . . . 2,500 swine” *Id.* § 1940.312(c)(9). FSA must prepare a Class II EA for financial assistance to a livestock-holding facility or feedlot even with half this number of swine (e.g., 1,250 swine) where State water quality standards could be “potentially violate[d]” or where the facility is “located near a town or collection of rural homes which could be impacted by the facility, particularly with respect to noise, odor, visual, or transportation impacts.” *Id.* § 1940.312(c)(10).

A. Contents of the EA

41. An EA must “provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.” 40 C.F.R. § 1508.9(a)(1). In completing the EA, FSA is required to consider “all potential impacts associated with the construction of the project, its operation and maintenance, the operation of all identified primary beneficiaries, and the attainment of the project’s major objectives.” 7 C.F.R. Pt. 1940, Subpt. G, Exh. H.

42. The agency must consider both direct and indirect effects. *See* 40 C.F.R. § 1508.8. Effects include “ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems) [impacts],” as well as aesthetic, social, economic, and health impacts. *Id.*

43. In completing the EA, moreover, FSA is instructed to contact “appropriate experts from State and Federal agencies, universities, [and] local and private groups . . . as necessary for their views.” 7 C.F.R. § 1940.318(b). Where FSA “does not have sufficient data or expertise available within [the agency] to adequately assess the degree of a potential impact or the need for

avoidance or mitigation,” USDA regulations indicate that “[a]ppropriate experts *must be contacted . . .*” *Id.* (emphasis added).

1. Description of the project site and assessment of environmental impacts

44. The EA must include a description of the project site. *See* 7 C.F.R. Pt. 1940, Subpt. G., Exh. H. “The extent of the surrounding land to be considered depends on the extent of the impacts of the project, its related activities, and the primary beneficiaries.” *Id.* “Unique or sensitive areas must be pointed out” in the description of the project site. *Id.* These areas include schools, recreational areas, rivers, parks, steep slopes, endangered species habitats, and “other delicate or rare ecosystems.” *Id.*

45. The EA also must include discussions “of the environmental impacts of the proposed action.” 40 C.F.R. § 1508.9(b); *see also* 7 C.F.R. Pt. 1940, Subpt. G, Exh. H. For instance, the EA must discuss “all aspects of the project including beneficiaries’ operations and known indirect effects . . . which will affect air quality.” 7 C.F.R. Pt. 1940, Subpt. G, Exh. H. The EA also must “[e]valuate the impacts of the project on . . . existing water quality [of surface and/or underground water].” *Id.* This includes a discussion of “the project’s consistency with applicable State water quality standards,” and “whether or not the project would either impair any such standard or fail to meet antidegradation requirements for point or nonpoint sources.” *Id.* With respect to solid waste management, the EA must “[i]ndicate the kinds and expected quantities of solid wastes involved and the disposal techniques to be used,” and “[e]valuate the adequacy of these techniques especially in relationship to air and water quality.” *Id.*

46. USDA regulations further require that the EA “[i]ndicate all aspects of the project including construction, beneficiaries’ operations, and known indirect effects which will affect the natural environment including wildlife, their habitats, and unique natural features.” *Id.* The EA

also must “[d]iscuss how impacts resulting from the project such as . . . air emissions, noise, odor, etc. will affect nearby residents and users of the project area and surrounding areas.” *Id.*

2. Analysis of alternatives

47. “[T]he heart” of the environmental review is an analysis of alternatives to the proposed action. 40 C.F.R. §§ 1502.14; *see also id.* § 1508.9(b). USDA regulations emphasize that “[t]he objective of the environmental review will be to develop a feasible alternative with the least adverse environmental impact. The alternative of not proceeding with the proposal will also be considered particularly with respect to the need for the proposal.” 7 C.F.R. § 1940.303(c).

48. The alternatives considered “should include (a) alternative locations, (b) alternative designs, (c) alternative projects having similar benefits, and (d) no project.” 7 C.F.R. Pt. 1940, Subpt. G, Exh. H.

3. Consideration of mitigation

49. NEPA further requires consideration of “[m]eans to mitigate adverse environmental impacts.” 40 C.F.R. § 1502.16(h); *see also id.* § 1502.14(f). USDA regulations mandate that “throughout the assessment process, consideration will be given to incorporating mechanisms into the proposed action for reducing, mitigating, or avoiding adverse impacts.” 7 C.F.R. § 1940.318(g); *see also id.* § 1940.303(d). “Mitigation measure” is defined under USDA regulations as “[a] measure included in a project or application for the purpose of avoiding, minimizing, reducing or rectifying identified, adverse environmental impacts.” *Id.* § 1940.302(f). Examples of mitigation include “[p]rotective measures recommended by environmental and conservation agencies having jurisdiction or special expertise regarding the project’s impacts,” *id.* § 1940.302(f)(5), and “deletion, relocation, redesign or other

modifications of the project elements,” *id.* § 1940.318(g) (describing EA contents for Class II actions).

50. “Mitigation measures which will be taken must be documented in the [EA] . . . and include an analysis of their environmental impacts and potential effectiveness and placed in the offer of financial assistance as special conditions” 7 C.F.R. § 1940.318(g); *see also id.* Pt. 1940, Subpt. G, Exh. H, Pt. XIX.

51. FSA’s duties with respect to mitigation do not end with approval of the requested financial assistance. USDA regulations require that FSA undertake “postapproval inspection and monitoring of approved projects [to] ensure that those measures which were identified in the preapproval stage and required to be undertaken in order to reduce adverse environmental impacts are effectively implemented.” 7 C.F.R. § 1940.330(a). FSA is mandated to “directly monitor actions containing difficult or complex environmental special conditions.” *Id.* § 1940.330(c).

B. Requirement to Prepare an EIS

52. Where an EA shows that a proposed action would have a significant impact on the quality of the human environment, an EIS must be prepared. *See* 40 C.F.R. § 1501.4; *see also* 7 C.F.R. § 1940.314. To determine whether significant impacts exist, the agency must consider “both context and intensity.” 40 C.F.R. § 1508.27; *see also* 7 C.F.R. § 1940.314(a).

53. A proposed action’s significance “must be analyzed in several contexts such as . . . the affected region, the affected interests, and the locality.” 40 C.F.R. § 1508.27(a). Intensity “refers to the severity of impact” and requires evaluation of ten factors, including:

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to . . . park lands, . . . wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

...

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

Id. § 1508.27(b).

C. Public Notice and Opportunity to Comment

54. NEPA requires agencies to “[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures.” 40 C.F.R. § 1506.6. NEPA “binds federal officials to justify their plans in public, after a full airing of alternatives.” *Kuff v. U.S. Forest Serv.*, 22 F. Supp. 2d 987, 989 (W.D. Ark. 1998) (quoting *Simmons v. U.S. Army Corps of Eng’rs*, 12 F.3d 664, 666 (7th Cir. 1997)). “It thus blends a faith in technocratic expertise with a trust in democracy. Officials must think through the consequences of – and alternatives to – their contemplated acts; *and citizens get a chance to hear and consider the rationales that officials offer.*” *Id.* (emphasis added).

55. USDA regulations mandate in particular that where Class II actions are determined not to have a significant environmental impact, FSA “will require the applicant to publish a notification of this determination.” 7 C.F.R. § 1940.331(b)(3). Specifically, the finding of no

significant impact must 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.*” *Id.* §§ 1940.331(b)(1), (3) (emphasis added). The FSA Handbook on Environmental Quality Programs (“FSA Handbook”) reiterates that the Notice of Availability for the draft EA as well as for the final EA and FONSI must be published in a “local newspaper.”⁵

56. Moreover, where “[t]he nature of the proposed action is one without precedent,” the agency “shall make the finding of no significant impact available for public review . . . for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin.” 40 C.F.R. § 1501.4(e)(2)(ii).

III. REQUIREMENT TO CONSULT UNDER THE ESA TO AVOID JEOPARDY TO LISTED SPECIES

57. Section 7 of the ESA requires that federal agencies “insure that any action authorized, funded, or carried out by [the] agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical habitat]” 16 U.S.C. § 1536(a)(2). USDA regulations further reiterate that FSA “will not authorize, fund, or carry out any proposal or project that is likely to” jeopardize a listed species or destroy or adversely modify critical habitat. 7 C.F.R. § 1940.304(b). The regulations mandate that FSA “implement the consultation procedures required under section 7 of the Endangered Species Act.” *Id.* § 1940.305(e).

58. To comply with Section 7’s consultation requirements, “[e]ach Federal agency shall review its actions at the earliest possible time to determine whether any action may affect

⁵ FSA Handbook: Environmental Quality Program 1-EQ (Rev. 2) at 3-23, http://www.fsa.usda.gov/Internet/FSA_File/1-eq_r02_a01.pdf.

listed species or critical habitat.” 50 C.F.R. § 402.14(a). To accomplish this, the federal agency first “request[s] of [the Fish & Wildlife Service (“FWS”)] information whether any species which is listed or proposed to be listed may be present in the area of such proposed action.” 16 U.S.C. § 1536(c)(1). If a listed or candidate species “may be present,” the action agency must determine – in a biological assessment and/or through informal consultation – whether the proposed action may affect the listed species or critical habitat. *See* 50 C.F.R. §§ 402.12-13.

59. If “it is determined by the Federal agency, *with the written concurrence of the [FWS]*, that the action is not likely to adversely affect listed species or critical habitat,” then the consultation process is completed. *Id.* § 402.13(a) (emphasis added). If, on the other hand, consultation results in a conclusion that the action “may affect” listed species or critical habitat, then the agency must undertake formal consultation with FWS, which results in a Biological Opinion from FWS that includes, among other things, “[a] detailed discussion of the effects of the action on listed species or critical habitat,” and “[FWS’s] opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat.” *Id.* § 402.14(h). Where a jeopardy determination is made, the Biological Opinion “shall include reasonable and prudent alternatives, if any.” *Id.*

60. Where species proposed to be listed are involved, “[e]ach Federal agency shall confer with the [FWS] on any action which is likely to jeopardize the continued existence of any proposed species or result in the destruction or adverse modification of proposed critical habitat.” 50 C.F.R. § 402.10(a).

IV. USDA ENVIRONMENTAL PROGRAM REGULATIONS

A. Review and Prohibition of Assistance to Activities That Do Not Meet Antidegradation Requirements

61. The Buffalo River is designated an Extraordinary Resource Water subject to the state's antidegradation policy. *See* Ark. Pollution Control & Ecology Comm'n, Regulation No. 2, at 2-1, A-11 (2011).⁶

62. The designation as "Extraordinary Resource Waters" refers to a "beneficial use [that] is a combination of the chemical, physical and biological characteristics of a waterbody and its watershed which is characterized by scenic beauty, aesthetics, scientific values, broad scope recreation potential and intangible social values." *Id.* at 3-1. For such waters, the state implements an antidegradation policy pursuant to the Clean Water Act. *See id.* at 2-1.

63. USDA regulations explicitly prohibit FSA from "provid[ing] financial assistance to any activity that would either impair a State water quality standard, including designated and/or existing beneficial uses that water quality criteria are designed to protect, or that would not meet antidegradation requirements." 7 C.F.R. § 1940.304(h); *see also* FSA Handbook at 4-5 ("FSA will **not** approve actions or activities that could significantly affect surface water quality.").

64. To implement this requirement, FSA reviews "[e]ach application for financial assistance . . . 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, including designated and/or existing beneficial uses that water quality criteria are designed to protect, and meet antidegradation requirements." *Id.*

⁶ *See also* Management Plan at 116.

B. Additional Prohibitions

65. FSA is obligated under USDA regulations to “initiate the consultation and compliance requirements for the environmental laws, regulations, and Executive orders specified in the [EA] format.” 7 C.F.R. § 1940.318(h). An EA “cannot be completed until compliance with these laws and regulations is appropriately documented.” *Id.*

66. USDA regulations also mandate that a proposed action must be “denied or disapproved” if FSA determines that the action does not comply with environmental requirements, including the Clean Water Act and Wild and Scenic Rivers Act, and “there are no feasible alternatives (practicable alternatives when required by specific provisions of this subpart), modifications, or mitigation measures which could comply.” *Id.* § 1940.318(j).

FACTUAL BACKGROUND

V. THE BUFFALO NATIONAL RIVER

67. The Buffalo River “flows through a land of mountains, past unique caves and waterfalls, old pioneer cabins, long abandoned homes of cliff dwellers and spectacular rock formations.”⁷ In the words of former Secretary of the Interior Roger Morton, “[t]he significance of the Buffalo River . . . is due to a splendid combination of favorable qualities. Massive bluffs and deeply entrenched valleys give the Buffalo the most spectacular setting of any stream in the Ozark region, and enable it to be classed among the most outstanding scenic of the free-flowing streams in the Eastern United States. With little residential or commercial development on its banks, and with no municipal or industrial pollution, the Buffalo River is unspoiled.” S. Rep. No. 92-130, *reprinted in* 1972 U.S.C.C.A.N. 1969, 1971 (May 19, 1971).

⁷ Nat’l Park Serv., Nationwide Rivers Inventory Arkansas Segments, <http://www.nps.gov/ncrc/programs/rtca/nri/states/ar.html>.

