

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**

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

Defendants.)

)

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>.

68. 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.⁸ The river and its tributaries "are one of the richest waterways in the Nation in terms of the total number of fish species." *Id.* at 1972. Additionally, several species protected under the Endangered Species Act call the Buffalo River watershed home. The endangered Gray Bat (*Myotis grisescens*) and Indiana Bat (*Myotis sodalis*) live in caves along the Buffalo River and forage for insects from the river and its tributaries.⁹ The endangered snuffbox mussel and the proposed threatened rabbitsfoot mussels also are found in the Buffalo River, and the Buffalo River is proposed critical habitat for the rabbitsfoot mussel.

69. More than one million people, including members of Plaintiff organizations, visit the Buffalo National Park each year to enjoy its spectacular setting and unspoiled character.¹⁰ Park visitors float the river, canoe, fish, swim in its waters, camp, visit historic homesteads and prehistoric sites, view and photograph wildlife, and hike the more than 100 miles of trails in the park.¹¹ These visitors generate \$38 million in local economic benefit for the region.¹²

VI. THE C&H HOG FACILITY

70. C&H Hog Farms is located in Newton County, Arkansas, approximately 5.7 stream miles from the Buffalo River on the banks of a major tributary, Big Creek. This region is

⁸ *Id.*

⁹ See Management Plan at 69.

¹⁰ See Nat'l Park Serv. Visitor Statistics, [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 Aug. 5, 2013).

¹¹ See NPS, Buffalo National River, <http://www.nps.gov/buff/planyourvisit/index.htm> (last visited Aug. 5, 2013).

¹² See Press Release, NPS, Buffalo National River Tourism Creates \$38,000,000 in Local Economic Benefit (Feb. 26, 2013), available at <http://www.nps.gov/buff/parknews/buffalo-national-river-tourism.htm>.

characterized by karst geology and riddled with underground drainage networks.¹³ As the Supreme Court of Arkansas has recognized, “[k]arst terrains are more likely to have sink holes, underground caverns, and greater porosity, all of which enhances the potential for groundwater movement and contamination.” *Fourth Cnty. (NW) Reg’l Solid Waste Mgmt. Dist. Bd. v. Sunray Servs., Inc.*, 971 S.W.2d 255, 259 (Ark. 1998).

71. C&H’s owners are related individuals who previously operated a swine operation, C&C Hog Barn, that confined 312 sows, 4 boars, and 300 weaner pigs.¹⁴

72. In a Notice of Intent dated June 5, 2012, the President of C&H Hog Farm, Jason Henson, requested that a proposed new facility receive coverage under the state General Permit for CAFOs.¹⁵ As described in the Notice of Intent, the proposed C&H facility would confine 2,503 swine over 55 pounds and 4,000 swine under 55 pounds, which together would generate an estimated 2,090,181 gallons of manure, litter, and wastewater annually.

73. The state General Permit under which C&H requested coverage “applies to operations defined as Concentrated Animal Feeding Operations (CAFOs) that discharge and are located in the State of Arkansas.”¹⁶ The permit contemplates at least occasional discharges of waste into surface waters: “[w]henver rainfall events cause an overflow of process wastewater from a facility designed, constructed, operated, and maintained to contain all process-generated

¹³ Management Plan at 110.

¹⁴ See U.S. Dep’t of Agriculture, Environmental Assessment: C&H Hog Farms Inc. (Sept. 26, 2012) (“EA”), available at <http://buffaloriveralliance.org/Default.aspx?pageId=1558368>. The EA and its attachments do not contain page numbers, so pincites are not provided.

¹⁵ See NPDES Notice of Intent (NOI) Concentrated Animal Feeding Operations (CAFO) (“NOI”), available at http://www.adeq.state.ar.us/ftproot/Pub/WebDatabases/PermitsOnline/NPDES/PermitInformation/arg590001_noi_and_nmp_20120625.pdf.

¹⁶ See Arkansas Dep’t of Env’tl. Quality, State General Permit ARG590000 (2011) (“General Permit”) (attached to EA); see also *id.* (“This permit covers any operation that meets the definition of a CAFO and discharges pollutants to waters of the state.”).

wastewaters plus the runoff from a 25-year, 24-hour rainfall event at the location of the point source, any process wastewater pollutants in the overflow *may be discharged into Waters of the State.*¹⁷ Whenever discharges to surface waters occur, the general permit requires sampling and analysis.

74. On August 3, 2012, the Arkansas Department of Environmental Quality (“ADEQ”) notified C&H that the facility’s Notice of Intent for coverage under the state General Permit for CAFOs was complete and that the facility’s coverage under the General Permit was deemed effective as of that date and valid until October 31, 2016.¹⁸

75. As authorized under the General Permit effective August 3, 2012, the C&H facility will confine 6,503 swine with an average weight of 153.6 pounds each. These swine will include 2,100 gestation sows, 400 lactating sows, 3 boars, and 4,000 nursery pigs. The waste generated by these animals amounts to more than 92,000 pounds of nitrogen and more than 31,000 pounds of phosphorus each year.¹⁹

76. The general permit includes, as an enforceable permit condition, the facility’s site-specific Nutrient Management Plan (“NMP”). The NMP is intended to contain “practices and procedures necessary to implement the applicable effluent limitations and standards,” including the establishment of “protocols to land apply manure, litter or process wastewater in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater.”²⁰

¹⁷ *Id.* (emphasis added).

¹⁸ See Letter from Mo Shafii, Arkansas Dep’t of Env’tl. Quality, to Jason Henson, C & H Hog Farms (Aug. 3, 2012) (“Notice of Coverage”) (attached to EA).

¹⁹ See DeHaan, Grabs & Associates, LLC, Nutrient Management Plan for C&H Hog Farms (May 2012) (“NMP”) (attached to EA).

²⁰ See General Permit at 8 (attached to EA).

77. The C&H facility's "treatment system consists of in house shallow pits with a capacity of 759,542 gallons, a Settling Basin with a capacity of 831,193 gallons, and a Holding Pond with a capacity of 1,904,730 gallons."²¹ The gestation and farrowing barns are built with slatted floors and over shallow pits. The waste collected in these pits drains to the Settling Basin via a pipe, then subsequently drains into the Holding Pond via a pipe and an emergency overflow spillway.

78. The waste held in these two storage ponds is then applied to land. Indeed, "[a]ll animal wastes generated by this complex will be disposed of through land application."²² The waste will be applied on seventeen fields consisting of approximately 630 acres of land in the surrounding area. Ten of these fields are directly adjacent to Big Creek.²³

79. The 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, 16-17), comprising 87 percent of the waste application area, are already at "optimum" or "above optimum" levels of phosphorus.²⁴ For these fifteen fields, the University of Arkansas recommends that no additional phosphorus be applied. Notwithstanding this recommendation, the NMP attached to C&H's general permit identifies the phosphorus recommendation for these fields as 57 pounds per acre and accordingly permits application of phosphorus-laden swine waste on these fields.

²¹ See Notice of Coverage (attached to EA).

²² See DeHaan, Grabs & Associates, LLC et al., C&H Major Construction Approval Application at C-1 (May 18, 2012) (attached to NOI).

²³ See Google Earth Map (appended hereto as Attachment 1); see also NMP Section F Topographic Map (attached to EA).

²⁴ See NMP Section H, Soil Test Reports (attached to EA).

80. Additionally, soil maps demonstrate that seven of the seventeen waste application fields – specifically, fields 3, 5, 6, 7, 9, 12, and 16 – are “occasionally flooded” by Big Creek.²⁵ Notwithstanding this characterization, C&H denoted “#N/A” for Fields 5, 6, 7, and 9 under the “Flooding Frequency” column in its NMP. All seven of the “occasionally flooded” fields are among the fifteen fields for which phosphorus levels are already at or above optimum levels.

81. Although the General Permit requires that the NMP be in compliance with the Arkansas Phosphorus Index, C&H’s NMP uses a nitrogen-based application standard for fields 5-9 without explanation for this deviation. Fields 5, 6, 7, and 9 also happen to be fields directly adjacent to Big Creek that already are at or above optimum phosphorus levels and are occasionally flooded.

82. 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.²⁶ 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.

83. The solids that accumulate in the waste storage pond are to be desludged during each waste removal. The NMP provides that “[i]f or when pond desludging becomes necessary, Jason Henson will land apply the solids at agronomic rates and in accordance with local, state, and federal regulations.”²⁷ The NMP does not indicate the appropriate agronomic rates for land application of sludge containing significantly more phosphorus than liquid waste.

²⁵ See *id.* Section F (attached to EA); see also *id.* Section C, NRCS Erosion Calculation Records (attached to EA).

²⁶ See NMP Section C Arkansas Nutrient Management Planner at 1 (attached to EA).

²⁷ See NMP (attached to EA).

84. C&H's land application fields directly abut several homes and residences. But, despite the fact that application for coverage under the state general permit required identification of "separation distance from closest residences, businesses, [and] churches,"²⁸ C&H did not supply this information, and this information is nowhere to be found in the EA or its attachments.

85. Additionally, contrary to C&H's incorrect statement that Mount Judea School is located "1.103 miles to the east of the site,"²⁹ Mount Judea School in fact is located approximately 0.7 miles east of the C&H barns and is directly adjacent to several of C&H's land application fields.³⁰ As is evident in Attachment 2, the grounds of the school virtually abut four of the land application fields (Fields 1, 2, 3, and 7) on which C&H will be spreading swine manure. This fact was nowhere mentioned in C&H's application materials, NMP, or the EA.

VII. THE SMALL BUSINESS ADMINISTRATION'S ROLE

86. SBA approved loan guarantee assistance for a \$2,318,136 farm ownership loan to C&H.

87. In response to requests under the Freedom of Information Act for records related to SBA's loan guarantee assistance to C&H, SBA acknowledged that the loan was approved on November 16, 2012. To date, SBA has not made public any environmental review it undertook in approving the loan guarantee.

VIII. THE FARM SERVICE AGENCY'S ROLE

88. On September 27, 2012, FSA received an application from Farm Credit Services of Western Arkansas ("Farm Credit") on behalf of C&H for loan guarantee assistance on a

²⁸ See NOI at D-2.

²⁹ See *id.* at D-1.

³⁰ See Google Earth Map (appended hereto as Attachment 2).

\$1,302,000 farm ownership loan. The loan paperwork indicated that C&H would enter a contract with Cargill Pork for a twelve-year period. The guaranteed loan would be used to fund C&H's purchase of 23.43 acres of land and construction of a farrowing barn and a gestation barn.

89. Although Farm Credit's application for guarantee assistance was not received by FSA until September 27, 2012, FSA initiated its review process prior to this date. FSA prepared a Class II EA, and shortly after C&H received coverage under the state General Permit on August 3, 2012, FSA published the notice of availability of the Draft EA from August 6 to August 8, 2012.

90. The notice of availability of the Draft EA was published in the Arkansas Democrat Gazette in Little Rock, Arkansas, and announced a fifteen-day comment period. The notice of availability was never published in a local newspaper in the vicinity of Mount Judea, Arkansas. No public comments were received.

91. The FONSI was signed by Farm Loan Manager Lonnie Ewing on August 24, 2012, one day after the close of the fifteen-day public comment period.

92. The notice of the FONSI was published in the Arkansas Democrat Gazette from August 25 to August 27, 2012, and indicated that the public had 15 days to comment on the FONSI and EA. Again, no notice was published in a local newspaper in the vicinity of Mount Judea. And again, no public comments were received.

93. The Final EA is dated September 26, 2012. It was approved by the FSA State Environmental Coordinator on October 1, 2012.

94. The guaranteed loan closed on December 3, 2012. On December 17, 2012, FSA issued its loan guarantee for ninety percent of the \$1,302,000 loan to C&H.

A. The Environmental Review

95. FSA's EA is more than 600 pages, but the actual review by FSA is contained in the first several pages. The remaining pages are attachments of various documents, including the February 2011 Comprehensive Nutrient Management Plan 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.

96. Immediately after the Table of Contents, FSA's analysis consists of five pages in an "Executive Summary."

97. Nowhere does the EA explicitly define the project site. Moreover, the EA's description of the proposed C&H facility identified less than the full acreage of land on which hog waste from the CAFO would be spread. The EA also failed to identify unique or sensitive areas in the nearby vicinity, such as Mount Judea School or the Buffalo National River. The EA does not mention, much less discuss, any potential consequences of the fact that the Buffalo River region is underlain by karst geology.

98. The section entitled "Affected Environment and Environmental Consequences" includes ten sub-sections addressing different resource areas, such as biological resources, water 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. Nowhere does the EA 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, unsupported, and disjointed assertions about the facility's lack of impact.

99. With respect to biological resources, for instance, the EA did not identify any endangered or threatened species despite the fact that a July 5, 2012, letter from FWS had indicated that the endangered Gray bat and Indiana bat “are known to occur” in the Buffalo River region.³¹ 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.” The EA further indicates 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.”

100. No agency identified as “Arkansas Fish and Wildlife” exists.

101. For water resources, the EA again pointed 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 [Nutrient Management Plan].” The EA does not provide any evidence or analysis to support these assertions. The EA also does not acknowledge the fact that the downstream Buffalo National River is designated as an Extraordinary Resource Water subject to protection under the state’s antidegradation policy.

102. Similarly, for air resources, the EA noted that “[t]he majority of emissions will come from swine litter,” but concluded that “[c]ompliance with the [Nutrient Management Plan] should keep emissions to a minimum.” FSA provides no evidence or analysis to support this assertion. Despite the fact that USDA regulations require the EA to discuss the impacts of odor on nearby residents, *see* 7 C.F.R. Pt. 1940, Subpt. G, Exh. H, the EA makes no mention of odor. The attached NMP includes only an article identifying recommended best management practices to control odor, but provides no indication that any of these practices will be implemented at the C&H facility.

³¹ *See* Letter from Jim Boggs, FWS, to Dan Benton, Farm Credit of Western Arkansas (July 5, 2012) (“FWS July 5, 2012 Letter”) (attached to EA).

103. With regard to consideration of mitigation measures, the EA contained a single line: “Mitigation is not required at this time. Applicants will need to comply with their [NMP].” Despite its heavy reliance on C&H’s Nutrient Management Plan, the EA does not include any independent analysis or assessment of the adequacy or effectiveness of the NMP.

104. Furthermore, the EA did not consider alternatives other than the proposed action. According to FSA, “[a]lternative projects were not considered due to this being the most favorable location.” FSA further explained that “[a]lternative designs and alternative projects were not considered” because the proposed location “is in close proximity to the integrator’s feed mill and processing plant” and “[t]he applicant wishes to produce hogs for Cargill, while living in a rural area.” Although the EA contained a heading entitled “No Action Alternative,” this section contained only the following:

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

B. FSA’s Finding of No Significant Impact

105. The FONSI references each of the ten factors considered in assessing a project’s “intensity,” *see* 40 C.F.R. § 1508.27, in reaching its conclusion that the C&H facility would not have significant impacts. The FONSI states, for instance, that the preferred alternative “would not significantly affect” any parklands, wild and scenic rivers, or ecologically critical areas. 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.”

106. 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.”

107. Based on these unsupported, and in some cases clearly erroneous, assertions, FSA concluded that the proposed facility is not “a major Federal action significantly affecting the quality of the human environment.”

C. Failure to Consult with the National Park Service

108. The EA’s cover sheet erroneously identifies the National Park Service as a cooperating agency.

109. In a February 27, 2013, letter to the FSA State Executive Director, the NPS Superintendent for the Buffalo National River clarified that Park Service staff was not aware of the EA prepared by FSA until February 5, 2013, well after the loan guarantee assistance had been approved.³² In the letter, the NPS Superintendent stated that the Park Service “never received word of the document,” so identifying the Park Service 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.” The NPS Superintendent clarified that “[i]n fact, nothing could be further from the truth.” The letter explained that NPS staff believed the FSA “did not follow its own regulations in developing the EA, particularly related to the public communication standard,” and identified 45 problems with the EA.

110. Among the concerns NPS raised were the facility’s impacts on Big Creek and the Buffalo National River. Specifically, NPS expressed its belief that the NMP “will not adequately

³² See Letter from Kevin G. Cheri, Superintendent, NPS, to Linda Newkirk, State Exec. Director, FSA (Feb. 27, 2013), *available at* <http://buffaloriveralliance.org/Resources/Documents/Ltr%20to%20FSA%20State%20Executive%20Director%20022713.pdf>.

protect water quality” and 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.”

111. In the letter, the Park Service described the EA as “so woefully inadequately that it should immediately be rescinded.” 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 [the Park Service] and the public and other stakeholders are afforded an opportunity to comment.”

D. FSA’s Failure to Consult with FWS

112. In a July 5, 2012, letter to Farm Credit, the FWS provided a list of threatened, endangered, and candidate species known to occur in the region subject to potential effects from construction and operation of the C&H facility. The list identified the endangered Gray bat and Indiana bat, as well as the candidate species, rabbitsfoot mussel. 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.”³³

113. Without any further communication with FWS, FSA issued its EA on September 26, 2012, which indicated that “[i]nformal consultation with the U.S. Fish Wildlife Service was completed.” 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” – despite the fact that no such agency exists.

114. 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

³³ See FWS July 5, 2012, Letter (attached to EA).

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.

115. 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."

FIRST CAUSE OF ACTION
Violation of Administrative Procedure Act
(Failure to Comply with Public Notice Requirements)

116. Plaintiffs hereby reallege and incorporate each and every allegation in paragraphs 1 through 115.

117. USDA regulations implementing NEPA require that FONSI for FSA 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).

118. FSA provided notice of availability of the EA and FONSI only in the Arkansas Democrat Gazette, a state publication based in Little Rock, Arkansas. As a direct consequence, Plaintiffs and their members, who reside and recreate in Newton County and the Buffalo River watershed, were unaware of the proposed project until well after the agency's decision was made and were unable to participate in FSA's decision-making process.

119. FSA's failure to comply with its own regulations requiring public notice in local newspapers within the proposed action's area of environmental impact is arbitrary, capricious, an abuse of discretion, and not in accordance with law. 5 U.S.C. § 706(2)(A).

SECOND CAUSE OF ACTION
Violation of NEPA
(Failure to Comply with Public Notice Requirements)

120. Plaintiffs hereby reallege and incorporate each and every allegation in paragraphs 1 through 115.

121. NEPA regulations specify that 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). Here, the construction and operation of a Large CAFO in the Buffalo River watershed is an action without precedent, yet FSA's notice of the FONSI in the Arkansas Democrat Gazette provided the public only 15 days to comment.

122. FSA's failure to comply with NEPA's public notice requirements is arbitrary, capricious, an abuse of discretion, and not in accordance with law. 5 U.S.C. § 706(2)(A).

THIRD CAUSE OF ACTION
Violation of NEPA
(Failure to Undertake Any Environmental Review)

123. Plaintiffs hereby reallege and incorporate each and every allegation in paragraphs 1 through 115.

124. SBA is subject to the requirements of NEPA. *See* 42 U.S.C. § 4332; SBA SOP. Yet, the agency apparently undertook no environmental review in approving loan guarantee assistance in the millions to C&H.

125. SBA's failure to undertake any environmental review prior to approving loan guarantee assistance to C&H is arbitrary, capricious, an abuse of discretion, and not in accordance with NEPA and its implementing regulations. *See* 5 U.S.C. § 706(2)(A).

FOURTH CAUSE OF ACTION
Violation of NEPA
(Failure to Consider and Disclose Direct Effects)

126. Plaintiffs hereby reallege and incorporate each and every allegation in paragraphs 1 through 115.

127. NEPA requires federal agencies to take a hard look at and fully disclose the "environmental consequences" of a proposed action, including its direct impacts. *See* 40 C.F.R. §§ 1502.16; *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Direct impacts are those "caused by the action and occur at the same time and place." 40 C.F.R. § 1508.8(a). As a starting point, an EA must include a description of the project site, which should identify "unique or sensitive areas," including schools, recreational areas, rivers, and endangered species habitats. *See* 7 C.F.R. Pt. 1940, Subpt. G, Exh. H. An FSA 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.*

128. FSA's analysis in its Class II 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 School, the presence of neighboring and downstream residences, endangered species habitats, and the underlying karst geology, among other things. Moreover, the agency erroneously described the acreage of the project area.

129. Having failed to adequately describe the affected environment, the agency also failed to adequately discuss the direct impacts of the proposed project on the environment.

Contrary to FSA regulations, the EA did 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, Exh. H. The FSA’s analysis did not mention, much less discuss, impacts of the project on the endangered Indiana and Gray bats or impacts such as “air emissions, noise, [and] odor” on “nearby residents and users of the project area and surrounding area.” *Id.* The agency’s cursory assertions that no impacts exist do not constitute the hard look required under NEPA. *See Methow Valley*, 490 U.S. at 350; *Sierra Club v. U.S. Army Corps of Eng’rs*, 446 F.3d 808, 815 (8th Cir. 2006).

130. FSA’s failure to consider and disclose direct impacts is arbitrary, capricious, an abuse of discretion, and not in accordance with NEPA and its implementing regulations. *See* 5 U.S.C. § 706(2)(A).

FIFTH CAUSE OF ACTION
Violation of NEPA
(Failure to Consider and Disclose Indirect Effects)

131. Plaintiffs hereby reallege and incorporate each and every allegation in paragraphs 1 through 115.

132. NEPA requires federal agencies to consider the indirect effect of actions, which is defined as those effects that are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” 40 C.F.R. § 1508.8(b). USDA regulations implementing NEPA emphasize that FSA must consider in an EA “all potential impacts associated with the construction of the project [and] its operation and maintenance.” 7 C.F.R. Pt. 1940, Subpt. G, Exh. H. The 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).

133. FSA's EA fails entirely to identify the presence of the Buffalo River, much less the indirect impacts of operating a 6500-swine CAFO on the banks of a major tributary to the Buffalo National River. The EA also fails to identify any other indirect impacts of storing more than two million gallons of hog waste in karst terrain and applying this waste to more than 600 acres of land, the majority of which already are at optimum or above optimum levels of phosphorus and directly adjacent to Big Creek.

134. FSA's failure to examine indirect effects of the C&H facility is arbitrary, capricious, an abuse of discretion, and not in accordance with NEPA and its implementing regulations. 5 U.S.C. § 706(2)(A).

SIXTH CAUSE OF ACTION
Violation of NEPA
(Failure to Consider Reasonable Alternatives)

135. Plaintiffs hereby reallege and incorporate each and every allegation in paragraphs 1 through 115.

136. NEPA requires an analysis of alternatives to the proposed action. *See* 40 C.F.R. §§ 1502.14(d), 1508.9(b). USDA regulations implementing NEPA emphasize that “[t]he alternative of not proceeding with the proposal will . . . be considered particularly with respect to the need for the proposal.” 7 C.F.R. § 1940.303(c). Additionally, USDA regulations advise consideration of alternative locations, alternative designs, and alternative projects having similar benefits. 7 C.F.R. Pt. 1940, Subpt. G, Exh. H.

137. The EA failed to consider the no-action alternative as well as alternative locations and designs for the proposed facility. Indeed, FSA asserted 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

requirement for an analysis of alternatives. It also fails to explain why alternative *designs* were not considered.

138. FSA's failure to consider any reasonable alternatives to the proposed C&H facility is arbitrary, capricious, an abuse of discretion and not in accordance with NEPA and its implementing regulations. 5 U.S.C. § 706(2)(A).

SEVENTH CAUSE OF ACTION
Violation of NEPA
(Failure to Consider and Disclose Mitigation Measures)

139. Plaintiffs hereby reallege and incorporate each and every allegation in paragraphs 1 through 115.

140. NEPA mandates consideration of “[m]eans to mitigate adverse environmental impacts.” 40 C.F.R. § 1502.16(h); *see also id.* § 1502.14(f). USDA regulations further elaborate that, throughout the EA 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). Where “no feasible alternative exists, . . . measures to mitigate the identified adverse environmental impacts will be included in the proposal.” *Id.* § 1940.303(d). 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.*

141. FSA's analysis in the EA did not include any apparent consideration of mitigation measures. The agency simply concluded that “[m]itigation is not required at this time,” and pointed to C&H's compliance with its Nutrient Management Plan. EA at 12. To the extent the

NMP was construed by the agency as a mitigation measure, the agency failed to analyze the environmental impacts and potential effectiveness of the NMP.

142. FSA's failure to consider and analyze the impacts and effectiveness of any mitigation measures for the C&H facility is arbitrary, capricious, an abuse of discretion, and not in accordance with NEPA and its implementing regulations. 5 U.S.C. § 706(2)(A).

EIGHTH CAUSE OF ACTION
Violation of NEPA
(Failure to Prepare an EIS)

143. Plaintiffs hereby reallege and incorporate each and every allegation in paragraphs 1 through 115.

144. NEPA requires the preparation of an EIS for "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). "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*, 4:07CV01170-WRW, 2008 WL 4833113, *6 n.77 (E.D. Ark. Nov. 5, 2008) (citing *Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988)).

145. FSA's FONSI is grounded in an unconvincing recitation of why each of the ten factors considered in assessing an impact's intensity weigh in favor of insignificant impacts. The agency's assertions are unsupported by the record.

146. Accordingly, FSA's issuance of a FONSI and failure to prepare an EIS is arbitrary, capricious, an abuse of discretion, and not in accordance with NEPA and its implementing regulations. 5 U.S.C. § 706(2)(A).

NINTH CAUSE OF ACTION
Violation of the Endangered Species Act
(Failure to Undertake Section 7 Consultation)

147. Plaintiffs hereby reallege and incorporate each and every allegation in paragraphs 1 through 115.

148. Section 7 of the Endangered Species Act requires consultation with FWS to ensure that “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, do not jeopardize the continued existence of threatened or endangered species. 16 U.S.C. § 1536(a). A determination that an action is not likely to adversely affect listed species requires written concurrence from FWS. *See* 50 C.F.R. § 402.13(a).

149. FWS informed FSA that two endangered species – the Indiana and Gray bats – were present in the area potentially affected by C&H. Yet, without apparent further evaluation or consultation with FWS, FSA concluded in its EA that no endangered species would be affected by C&H. Subsequent to FSA’s approval of the loan guarantee assistance, moreover, FWS informed FSA of the presence of a third endangered species, the snuffbox mussel, in the vicinity of and potentially affected by the C&H facility.

150. FSA’s failure to consult properly with FWS to determine any potential impacts of C&H on the identified species violates the Endangered Species Act, and is arbitrary, capricious, an abuse of discretion, and not in accordance with the law. 5 U.S.C. § 706(2)(A); 16 U.S.C. § 1540(g).

TENTH CAUSE OF ACTION
Violation of Buffalo National River Enabling Act
(Failure to Consult NPS)

151. Plaintiffs hereby reallege and incorporate each and every allegation in paragraphs 1 through 115.

152. The Buffalo National River enabling act gives the Park Service 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. USDA regulations mandate, moreover, that FSA contact “appropriate experts from . . . Federal agencies . . . as necessary for their views.” 7 C.F.R. § 1940.318(b). “Appropriate experts” – in this case the National Park Service – “must be contacted . . . whenever [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.” *Id.*

153. Here, despite erroneously identifying NPS as a cooperating agency in the EA, FSA never informed the Park Service of the proposed action or sought the Park Service’s determination about the potential impacts of the C&H facility on the Buffalo National River. The Park Service’s February 27, 2013, letter to FSA indicates that the Park Service in fact has significant concerns about the impacts of the approved facility on the Buffalo National River.

154. FSA’s failure to seek and receive NPS’s determination about the C&H facility’s impact on the Buffalo National River is arbitrary, capricious, an abuse of discretion, and violates the Buffalo National River enabling act. 16 U.S.C. § 450m-11; *see* 5 U.S.C. § 706(2)(A).

ELEVENTH CAUSE OF ACTION
Violation of Administrative Procedure Act
(Failure to Consult NPS Regarding River on Nationwide Rivers Inventory)

155. Plaintiffs hereby reallege and incorporate each and every allegation in paragraphs 1 through 115.

156. 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, Exh. E ¶3.

157. 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.” Attachment D. The permit contemplates at least occasional discharges of waste into surface waters. Under its own regulations, therefore, FSA was required to consult with the Park Service to determine if the C&H facility “will affect” the Buffalo River. *See* 7 C.F.R. § 1940.305(f). However, FSA failed to notify the Park Service until after the EA and FONSI were finalized and the loan guarantee issued.

158. FSA’s failure to undertake the required consultation with the Park Service for a river in the Nationwide Inventory is arbitrary, capricious, an abuse of discretion, and not in accordance with law. *See* 5 U.S.C. § 706(2)(A).

TWELFTH CAUSE OF ACTION
Violation of Administrative Procedure Act
(Failure to review for compliance with antidegradation requirements)

159. Plaintiffs hereby reallege and incorporate each and every allegation in paragraphs 1 through 115.

160. Under USDA regulations, “[e]ach application for financial assistance . . . will 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 . . . designated and/or existing beneficial uses . . . and meet antidegradation requirements.”

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

162. FSA’s failure to undertake this required review is arbitrary, capricious, an abuse of discretion, and not in accordance with law. *See* 5 U.S.C. § 706(2)(A).

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Declare that SBA’s failure to undertake any environmental review prior to approving loan guarantee assistance to C&H is unlawful;
2. Declare that FSA’s EA and FONSI are unlawful and set them aside;
3. Declare that FSA and SBA failed to consult with the National Park Service to obtain a determination of the effects of the C&H facility on the Buffalo National River;
4. Declare that FSA failed to undertake the Section 7 consultation process required by the Endangered Species Act;
5. Enjoin implementation of Defendants’ loan guarantees;
6. Remand the matter to Defendants for an environmental review in compliance with the law;
7. Order FSA and SBA to consult with the National Park Service on the effects of the C&H facility on the Buffalo National River;

8. Order FSA to consult with FWS to ensure no jeopardy to species listed under the Endangered Species Act;

9. Award Plaintiffs their reasonable fees, costs, and expenses, including attorneys' fees associated with this litigation; and

10. Grant Plaintiffs such further and additional relief as the Court deems just and proper.

Respectfully submitted this 6th day of August, 2013,

Sincerely,



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Attachment 1



C&H HOG FACILITY
Manure Application Fields
1 -17
In Big Creek Watershed

Based on Information from C&H
Hog Facility's Nutrient Management
Plan

Scale = 0.5 mile

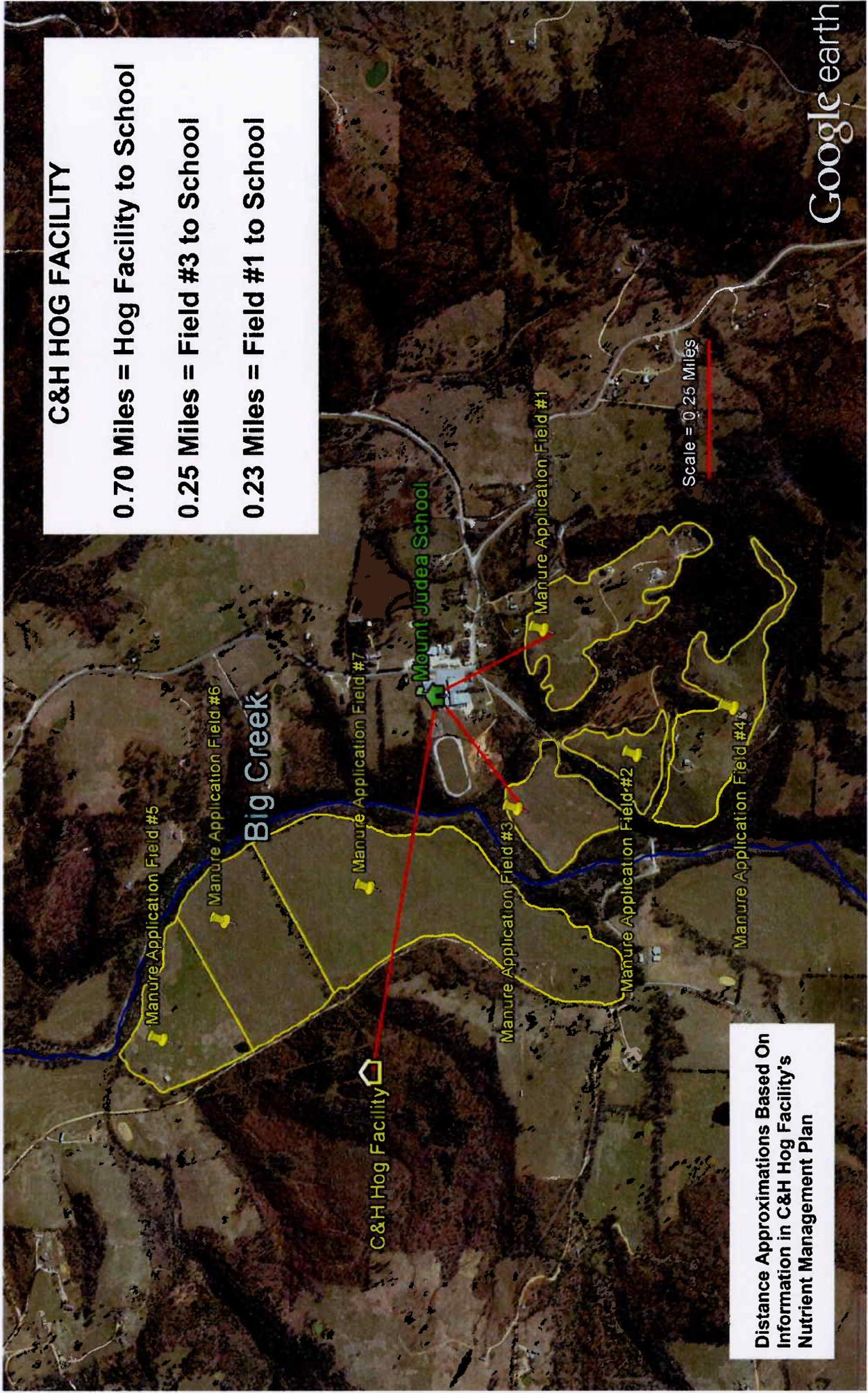
Attachment 2

C&H HOG FACILITY

0.70 Miles = Hog Facility to School

0.25 Miles = Field #3 to School

0.23 Miles = Field #1 to School



Distance Approximations Based On Information in C&H Hog Facility's Nutrient Management Plan