



May 6, 2013

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

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

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

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

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

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

On behalf of Buffalo River Watershed Alliance, National Parks Conservation Association, and The Ozark Society (collectively, the "Citizen Groups"), we request that you take immediate action to remedy ongoing violations of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, by the Farm Service Agency ("FSA") of the U.S. Department of Agriculture ("USDA"). FSA's loan guarantee to C & H Hog Farms is an action that may affect the endangered snuffbox mussel, the endangered Gray bat, and the endangered Indiana bat. FSA has not engaged in consultation to ensure that the action does not jeopardize these listed species or adversely modify their critical habitat, as required by Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2). This letter constitutes notice required by Section 11(g) of the ESA, *id.* § 1540(g), prior to commencement of legal action.

I. Factual Background

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

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

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

Without any further communication with FWS, FSA issued an Environmental Assessment ("EA") for the C&H Hog Farm on September 26, 2012, which indicated that "[i]nformal consultation with the U.S. Fish Wildlife Service was completed."¹ The EA further stated that "[t]here will be no impact to wildlife and/or any threatened or endangered species based on a clearance determination by Arkansas Fish and Wildlife."²

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

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

- 1) never received a copy of the draft EA, 2) never provided any comments on the draft EA, 3) never received an effects determination from FSA, and 4) never concurred with an effects determination for the [C&H Hog Farms] project.

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

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

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

II. Legal Background

Section 7(a)(2) of the ESA requires each federal agency (“action agency”) to ensure that its actions are not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. 16 U.S.C. § 1536(a)(2). The regulations implementing section 7 broadly define the scope of agency actions that are subject to consultation. An “action” means “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies.” 50 C.F.R. §402.02.

Section 7 of the ESA establishes an interagency consultation process to assist federal agencies in complying with their duties to ensure against jeopardy to listed species or destruction or adverse modification of critical habitat. As a first step, the action agency must inquire of FWS whether any threatened or endangered species may be present in the area of the proposed action. 16 U.S.C. § 1536(c)(1). An agency must initiate consultation under Section 7 whenever it takes an action that “may affect” a listed species. 50 C.F.R. § 402.14(a). As part of the consultation process, the action agency undertakes a biological evaluation to determine whether the proposed action is likely to adversely affect identified species and must either receive written concurrence from FWS that the proposed action “is not likely to adversely affect listed species or critical habitat” or request formal consultation if the evaluation shows that adverse effects are likely. *Id.* §§ 402.13, 402.14(b)-(c). In fulfilling the requirements of the consultation process, federal agencies must use the best scientific and commercial data available. 16 U.S.C. § 1536(a)(2). Pending the completion of the consultation process, agency actions that may affect listed species cannot go forward. *See Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985) (“If a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA’s substantive provisions will not result. The latter, of course, is impermissible.”).

III. Violations of Law

Under Section 7(a)(2) of the ESA, FSA is required to ensure that its loan guarantee to C & H farms is not likely to jeopardize the continued existence of any endangered species. *See* 16 U.S.C. § 1536(a). Three federally-listed endangered species are known to occur in the vicinity of the proposed swine facility: the Gray bat, the Indiana bat, and the snuffbox mussel. *See* Ex. B. Additionally the rabbitsfoot mussel, a proposed threatened species, occurs in the region and the Buffalo National River is proposed as critical habitat for the rabbitsfoot. *See* Ex. C at 1. By failing to initiate consultation, undertake a biological evaluation, obtain FWS’s written concurrence regarding potential effects on these species, or otherwise engage in consultation with FWS, FSA has violated and continues to violate the ESA.

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

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

In its EA, FSA stated, "[t]here is no critical habitat or endangered/threatened species located on the proposed site, located within the action's area of impact, or affected by the proposed action (see attached F&W clearance letter)." EA Attachment A. It is unclear what FSA meant by "F&W clearance letter." However, assuming the "F&W clearance letter" referred to the July 5, 2012, FWS letter to Farm Credit, that letter clearly stated that two endangered bats occur in the region. Moreover, the July 5, 2012, letter expressly stated that it was provided "for the sole purpose of providing technical assistance to the action agency or for individual pre-project planning assistance" and that the letter "should not be misconstrued as an 'effect determination' or considered as concurrence with any proceeding determination(s) by the action agency in accordance with Section 7 of the ESA." Ex. B. Indeed, the Service made very clear in March 2013 that it

1) never received a copy of the draft EA, 2) never provided any comments on the draft EA, 3) never received an effects determination from FSA, and 4) never concurred with an effects determination for the [C&H Hog Farms] project.

Ex. C at 2.³

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

³ Notably, the National Park Service ("NPS") also identified Gray bat habitat in the vicinity of the proposed hog farm in a February 27, 2013 letter to the FSA:

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

Letter from Kevin Cheri, NPS, to Linda Newkirk, FSA (Feb. 27, 2013) (attached hereto as Ex. D). In response, in a March 29, 2013 letter to the NPS, the FSA acknowledged that a Gray bat cave is located 2.5 miles from the proposed swine facility.

IV. Parties Giving Notice

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

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

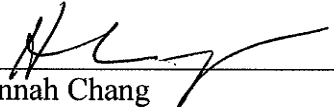
National Parks Conservation Association
777 6th St., NW, Suite 700
Washington, DC 20001
202-223-6722

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

V. Conclusion

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

Sincerely,


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

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

Hank Bates
Carney Bates Pulliam PLLC
11311 Arcade Dr.

Little Rock, AR 72212
501-312-8500

cc: Sally Jewell, Secretary of Interior

Exhibit A



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

June 26, 2012

U.S. Fish and Wildlife Service
Ms. Margaret Harney
110 South Amity Road
Suite 300
Conway, AR 72032

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

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

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

Project: Construct 2500 head swine facility.

We know of no wildlife or habitat that will be affected with this construction.

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

Sincerely,

A handwritten signature in black ink, appearing to read "D. Benton", written over a circular stamp.

Dan Benton
Assistant Vice President

DB/rla

Farms, Homes, Land...we do it ALL

Exhibit B



IN REPLY REFER TO:

United States Department of the Interior

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



July 5, 2012

Reference: TA0629

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

Dear Mr. Benton:

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

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

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

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

Erosion and Sediment Control

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

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

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

Construction in Sensitive Areas

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

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

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

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

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

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

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

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

Stormwater

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

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

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

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

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

Sincerely,



~~Mr~~ Jim Boggs
Project Leader

Exhibit C



INDEPENDENCE

United States Department of the Interior

FISH AND WILDLIFE SERVICE

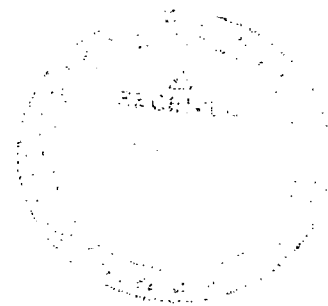
110 S. Amity Road, Suite 300

Conway, Arkansas 72032

Tel.: 501-513-4470 Fax: 501-513-4480



March 4, 2013



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

Dear Ms. Newkirk:

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

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

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

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

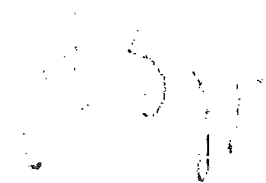
concurrency from the Service pursuant to section 7 of the ESA and its implementing regulations. The Service never received an effects determination from the FSA, nor did the Service ever concur with any effects determination made by FSA for the aforementioned project.

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

As a matter of record, the Service 1) never received a copy of the draft EA, 2) never provided any comments on the draft EA, 3) never received an effects determination from FSA, and 4) never concurred with an effects determination for the aforementioned project. Pursuant to section 7 of the ESA, it is the responsibility of the federal action agency to make effect determinations and for projects that "may affect" federally listed species request concurrence from the Service.

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

Sincerely,



Jim Boggs
Field Supervisor

cc: Kevin Cheri, National Park Service

Exhibit D



United States Department of the Interior

NATIONAL PARK SERVICE

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

IN REPLY REFER TO:

1.A.2 (BUFF)

February 27, 2013

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

Dear Ms. Newkirk:

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

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

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

10. Section 3.1.1 of the EA discusses the Definition of the Biological Resources. The definition is as follows. "Vegetation, wildlife, and protected species including threatened and endangered species and their designated critical habitat." The next sentence says "Any endangered species in this area will not be harmed by complying with the Comprehensive Nutrient Management Plan." The document does not show how this environmental consequence was determined.
11. Section 3.1.2 of the EA discusses the Affected Environment for the Biological Resources. The EA states, "There will be no impact to wildlife and/or any threatened or endangered species based on a **clearance determination** by Arkansas [sic] (United States) Fish and Wildlife [sic] (Service). Since there is construction all environmental regulations will be followed." The letter from the United States Fish and Wildlife Service (USFWS) can be found buried about 100 pages back in the document. The original request letter came from Farm Credit Services of Western Grove, Arkansas to USFWS on 26 June 2012. This letter gave the correct legal description of the location. The USFWS replied on 5 July 2012. In their letter, USFWS inexplicably indicated the hog farm would be near Ponca, Arkansas. USFWS indicated that two endangered bats and the candidate Rabbitsfoot mussel were known in the region. They provided statements about erosion and sediment control, construction in sensitive areas, and storm water. At the end of the letter it says "**The comments herein are for the sole purpose of providing technical assistance to the action agency or for individual pre-project planning assistance. These comments and opinions should not be misconstrued as an 'effect determination' or considered as concurrence with any proceeding determination(s) by the action agency in accordance with Section 7 of ESA. These comments do not authorize the 'take' of a threatened or endangered species as defined under the ESA. In the absence of authorization (e.g., an ESA Section 10 Permit, a Biological Opinion with 'incidental take' provisions, a finding concurrence letter, etc.) from the Service, both lethal and nonlethal 'take' of protected species are in violation of the ESA.**"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,



Kevin G. Cheri
Superintendent

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