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June 29, 2016

**Via U.S. Certified Mail, Return Receipt Requested and Email**

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First Service Bank  
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Linda R. Nelson, District Director  
U.S. Small Business Administration  
State District Office  
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Little Rock, AR 72202

Re: **Sixty-Day Notice of Intent to Sue the Farm Service Agency and Small Business Administration For Violations of Section 7 of the Endangered Species Act Concerning the Pink Mucket, the Rabbitsfoot Mussel, the Snuffbox Mussel, the Missouri Bladderpod, the Gray Bat, the Indiana Bat, and the Northern Long-eared Bat; Notice of Intent to Sue U.S. Fish & Wildlife Service for Violations of the Administrative Procedure Act 5 U.S.C. § 706**

Dear Sirs and Madams:

On behalf of Arkansas Rights Coalition, an Arkansas nonprofit organization (ARK), the Animal Legal Defense Fund (ALDF), a California nonprofit and 501(c)(3) organization, and Curtis Middleton, a resident of IZARD County, Arkansas, the undersigned hereby provide formal notice of sixty (60) days pursuant to Section 11(g) of the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (ESA), that the U.S. Department of Agriculture's Farm Service Agency (FSA) and the U.S. Small Business Administration (SBA) each have violated and continue to violate the provisions of the ESA as described below, and that unless such violations are remedied ARK, ALDF, and Mr. Middleton intend to bring suit under Section 11(g) against the FSA against the SBA and against the Fish and Wildlife Service to enforce such provisions in United States District Court, Eastern District of Arkansas. 16 U.S.C. § 1540(g) (this "Notice").

Although no prior notice is required to bring such claims, this Notice also details violations by the U.S. Fish and Wildlife Service (FWS) of the Administrative Procedure Act, 16 U.S.C. § 701 *et seq.*, for which ARK, ALDF, and Mr. Middleton intend to bring suit. These violations are detailed for informational purposes only and the allegations set out herein respecting such violations are indicated and set off by asterisks preceding and following such allegations.

#### The Tracy Poultry Project

FSA, SBA, and FWS have acted and are acting with respect to federal funding requests by a proposed poultry broiler operation ("the Tracy Poultry Project"), located at or near 1398 Imon Brown Road, IZARD County, Evening Shade, Arkansas 72532 (the "Tracy Poultry Project"). The Proposed Tracy Poultry Project will consist of six 43' x 600' poultry houses and will be owned and operated by Jerry and Amy Tracy. The Tracy Poultry Project is a proposed Federal action whereby FSA will provide a guarantee of, and SBA will provide funds to cover closing costs for, a loan or loans of funds from First Service Bank (the "Bank") to the Tracys for construction of the Proposed Tracy Poultry Project. *See* Environmental Assessment (Feb. 16, 2016) (EA). **Exhibit A.** In connection with issuing the EA, the FSA and SBA, through the Bank, allegedly consulted with FWS. According to the agencies, the Proposed Tracy Poultry Project is located in an area with seven threatened or endangered species, though no action area has been identified by any of the agencies.

#### ESA-Listed Species

At issue in this Notice are seven species listed by FWS as threatened or endangered under the ESA in the area of the Tracy Poultry Project. 50 C.F.R. § 17.11(h). The pink mucket (*Lampsilis abrupta*) is currently and was at all times relevant to this Notice listed as endangered under the ESA in the area of this Federal action. 41 Fed. Reg. 24062 (June 14, 1976); 50 C.F.R. § 17.11(h). The snuffbox mussel (*Epioblasma triquetra*) is currently and was at all times relevant to this Notice listed as an endangered species under the ESA in the area of this Federal

action. 77 Fed. Reg. 8632 (Feb. 14, 2012); 50 C.F.R. § 17.11(h). The rabbitsfoot mussel (*Quadrula cylindrica cylindrica*) is currently and was at all times relevant to this Notice listed as a threatened species under the ESA in the area of this Federal action. 78 Fed. Reg. 57076 (Sept. 17, 2013); 50 C.F.R. § 17.11(h). The Missouri bladderpod (*Physaria filiformis*) was listed as an endangered species under the ESA in 1987. 52 Fed. Reg. 679 (Jan. 8, 1987). The Missouri bladderpod was reclassified as threatened in 2003 and is currently and was at all times relevant to this Notice listed as threatened under the ESA in the area of this Federal action. 68 Fed. Reg. 59337 (Oct. 15, 2003). 50 C.F.R. § 17.11(h). The gray bat (*Myotis grisescens*) is currently and was at all times relevant to this Notice listed as an endangered species under the ESA in the area of this Federal action. 41 Fed. Reg. 17736 (April 28, 1976); 50 C.F.R. § 17.11(h). The Indiana bat (*Myotis sodalis*) is currently and was at all times relevant to this Notice listed as an endangered species under the ESA in the area of this Federal action. 32 Fed. Reg. 4001 (March 11, 1967); 50 C.F.R. § 17.11(h). The northern long-eared bat (*Myotis septentrionalis*) is currently and was at all times relevant to this Notice listed as a threatened species under the ESA in the area of this Federal action. 80 Fed. Reg. 17973 (April 2, 2015); 81 Fed. Reg. 1900 (Jan. 1, 2016); 50 C.F.R. § 17.11(h).

In addition, the Tracy Poultry Project is located in close proximity to an unnamed spring-fed tributary to the Piney Fork of the Strawberry River. The Piney Fork of the Strawberry River merges with the primary fork of the Strawberry River within the portion of the Strawberry River included in rabbitsfoot mussel critical habitat Unit RF 11. *See* Designation of Critical Habitat for the Neosho Mucket and Rabbitsfoot Final Rule, 80 Fed. Reg. 24691 (April 30, 2015); 50 C.F.R. § 17.95(f). The Strawberry River drains into the Black River.

#### The ESA Section 7 Inter-Agency Consultation Process

Under Section 7(a)(2) of the ESA, “Each Federal agency [action agency] shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such 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 habitat of such species which is determined by the Secretary . . .” 16 U.S.C. § 1536(a)(2). Section 7(a)(2) requires that “. . . each agency shall use the best scientific and commercial data available . . .” in fulfilling the requirements of the section. *Id.*

Under Section 7(c)(1) of the ESA, “To facilitate compliance with the requirements of subsection (a)(2) each Federal agency shall . . . request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action.” 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.02. By regulation, a

biological assessment is prepared for a "major construction activity" defined as a major Federal action significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act of 1969. 42 U.S.C. § 4321 et seq. (NEPA); 50 C.F.R. §§ 402.02 and 402.12(b).

In practice, the inquiry from the action agency as to the presence of a listed species in an "action area" is considered to be an initiation of "informal consultation" that is followed by the consulting agency's advice whether or not any listed species or critical habitat is present or is likely to be present. 50 C.F.R. § 402.12(c); *See* Endangered Species Act Consultation Handbook, U.S. Fish and Wildlife Service and National Marine Fisheries Service (March 1998) (Handbook) § 3.1 at 3-1 – 3-2, § 3.3 at 3-6 – 3-7. The consulting agency may provide the action agency with a "species list" identifying which listed species and critical habitat may be present in the action area, or concur in the identification of such species and habitat provided by the action agency. 50 C.F.R. § 402.12(d)(2); *See* Handbook § 3.3 at 3-6 – 3-7. Section 7(c)(1) of the ESA requires that the consulting agency must base its determination whether any listed species or critical habitat may be present in the action area on "the best scientific and commercial data available." 16 U.S.C. § 1536(c)(1). Section 7(a)(2) likewise requires both action and consulting agencies to use "the best scientific and commercial data available" to determine whether any listed species or critical habitat may be present in the action area. 16 U.S.C. § 1536(a)(2).

The action agency must prepare a biological assessment if a listed species or critical habitat "may be present" in the action area, and the biological assessment must address all listed species and critical habitat found in the action area, not just those that are likely to be affected. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.02; Handbook § 3.4 at 3-11[emphasis added]. Determination of the species that may be present and the effects thereon must take into account "all areas to be affected directly or indirectly by the Federal action, and not merely the immediate area involved in the action." 50 C.F.R. §§ 402.02 and 402.12. The biological assessment must evaluate the potential effects of the proposed action on listed and proposed species as well as designated and proposed critical habitat and determine whether such species and habitat are likely to be adversely affected by the action. 50 C.F.R. § 402.12(a). The effects of an action which must be evaluated in a biological assessment include the direct and indirect effects of the action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action. 50 C.F.R. § 402.02. As part of the consultation process, the action agency must use the best scientific and commercial data available in preparing a biological assessment. 16 U.S.C. § 1536(a)(2).

If the biological assessment indicates that a listed species or critical habitat is definitely present in the action area, but finds that the action is not likely to have adverse effect on such species or critical habitat, then the consulting agency may concur in such finding and formal consultation is not required. 50 C.F.R. § 402.12(k)(1); Handbook § 3.3 at 3-7. If the biological assessment indicates that the action may affect a listed species or critical habitat, then formal consultation is

required unless the Director concurs with a determination of the action agency that the action is not likely to adversely affect listed species or critical habitat. 50 C.F.R. § 402.14(a), (b); Handbook § 4.4 at 4-1. When an action may affect listed species or critical habitat, a conclusion that an action is not likely to adversely affect listed species or critical habitat is only appropriate where the effects are completely beneficial, insignificant, or discountable. Handbook § 2.2 at 2-6. An agency must make a “likely to adversely affect” determination and enter formal consultation “if any adverse effect to a listed species may occur as a direct or indirect result of a proposed action or its interrelated or interdependent actions” unless those effects will be “discountable, insignificant, or beneficial...” Handbook § 3.5 at 3-13 [emphasis added]; *See Florida Key Deer v. Stickney*, 864 F. Supp. 1222, 1228-1229 (S.D. Fla. 1994) (“the applicable threshold for triggering the formal consultation requirement is very low...any possible effect...triggers formal consultation requirements” *quoting, in part*, 51 Fed. Reg. 19,949-950 (Jun. 3, 1986)); and, *Romero-Barcelo v. Brown*, 643 F.2d 835 (1<sup>st</sup> Cir. 1981) (“[o]nce an agency has discovered that some action...for which it is responsible crosses the low threshold of possible effect, it must consult formally”), *rev’d on other grounds by Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982). Insignificant impacts are those that never reach the scale where take occurs and that a person would not be able to meaningfully measure, detect or evaluate. Handbook § 3.5 at 3-12 – 3-13. Discountable effects are those extremely unlikely to occur. Handbook § 3.5 at 3-13. If there is not enough information to determine the effects to species or critical habitat, benefit of the doubt is given to the species; the consulting agency must not concur and the action and consulting agencies must enter formal consultations. Handbook § 3.5 at 3-12. If the contents of a biological assessment or administrative record do not adequately support the “not likely to adversely affect” or “no effect” finding, that finding must be overturned. *See, e.g., House v. U.S. Forest Serv.*, 974 F. Supp. 1022, 1028-29 (E.D. Ky. 1997).

An action agency may designate a non-federal representative to conduct informal consultation or prepare a biological assessment, however ultimate compliance with Section 7 of the ESA remains with the action agency. 50 C.F.R. §§ 402.02, 402.08; Handbook at xiii, § 2.2(F) at 2-13 – 2-14.

If formal consultation is initiated by the action agency under 50 C.F.R. § 402.14(c), then the consulting agency shall undertake formal consultation with the action agency cumulating with the preparation of a Biological Opinion. 50 C.F.R. § 402.14(g); Handbook § 4.4 at 4-5 – 4-10.

In assessing agency compliance with the ESA, courts employ the “arbitrary and capricious” standard to determine if challenged agency action has violated the law. *National Wildlife Federation v. Harvey*, 440 F.Supp.2d 940, 953 (E.D. Ark. 2006) (citing *Cabinet Mountains Wilderness/Scotchman’s Peak Grizzly Bears, et al. v. Peterson*, 685 F.2d 678 (D.C. Cir. 1982)).

#### The Tracy Poultry Project Section 7 Consultation

To consult, the FSA, SBA, and FWS must first identify endangered and threatened species and designated or proposed critical habitat in a project area. 16

U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(c). Regarding the Tracy Poultry Project, the ESA Section 7 inter-agency consultation process commenced when FSA and SBA, through the Bank<sup>1</sup>, a private entity, obtained a list of species, and associated critical habitat, that may occur in the Tracy Poultry Project area or that could potentially be affected by activities in the location.<sup>2</sup> **Exhibit B at 3-4** (the Information for Planning and Conservation System (“IPaC”) Report). The IPaC Report was generated on December 22, 2015. **Exhibit B at 1**.

The IPaC Report species list included, *inter alia*, the snuffbox mussel, the rabbitsfoot mussel, the Missouri bladderpod, the gray bat, the Indiana bat, and the northern long-eared bat. IPaC Report at 3-4. The IPaC Report also noted that final critical habitat had been designated for the rabbitsfoot mussel but indicated that no critical habitat was located in the project area. IPaC Report at 3, 4. The IPaC Report explicitly stated:

This report is for informational purposes only and should not be used for planning or analyzing project level impacts. For project reviews that require U.S. Fish & Wildlife Service review or concurrence, please return to the IPaC website and request an official species list from the Regulatory Documents page. IPaC Report at 1, *accord* at 3.

Section 7 of the Endangered Species Act **requires** Federal agencies “to request of the Secretary information whether any species which is listed or proposed may be present in the area of such proposed action” for any project that is conducted, permitted, funded, or licensed by any Federal agency.

**A letter from the local office and a species list which fulfills this requirement can only be obtained by requesting an official species list from the Regulatory Documents section in IPaC.** IPaC Report at 5 [emphasis in original].

By letter dated January 13, 2016 the Bank requested FWS’s concurrence “on *First Service Bank’s* determination” that “the proposed action may affect, but is not

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<sup>1</sup> An action agency may designate a non-federal representative to conduct informal consultation or prepare a biological assessment, however ultimate compliance with Section 7 of the ESA remains with the action agency. 50 C.F.R. §§ 402.02, 402.08; Handbook at xiii, § 2.2(F) at 2-13 – 2-14. Although the organizations and individual providing notice hereunder are not aware of any FSA and/or SBA documentation formally recording such designation, on information and belief, the Bank has been appointed and has acted as FSA’s and SBA’s designated non-federal representative with respect to ESA consultations regarding the Tracy Poultry Project.

<sup>2</sup> Again, the actual delineation of the “action area” has not been identified.

likely to adversely affect the endangered species known to occur in IZARD County.” **Exhibit C at 2 (Bank’s Letter)** (emphasis added). The Bank’s Letter described the “proposed action” as a “[p]roposal” to “[c]onstruct 6 new 43’ x 600’ Broiler Poultry Houses...” the “total bird capacity per flock” of which “will be 30,400” and which “will have 5.75 flocks per year.” *Id. at 1*. The Bank identified the “endangered species known to occur in IZARD County” as the gray bat, the Indiana bat, the Northern long-eared bat, the scaleshell mussel, the rabbitsfoot mussel, the snuffbox mussel, and the Missouri bladderpod. *Id.* at 1-2. The Bank’s list of species is identical to those included in the IPaC Report; the Bank’s list of species did not include the pink mucket. The Bank indicated that the property subject to the Tracy Poultry Project is partially within a Special Flood Hazard Area, but stated that the proposed poultry houses “are not affected and are not in the floodplain.” *Id.* at 1.

The Bank also included a list of five best management practices (BMPs) “to reduce the potential effects to federally protected species that may result from erosion and sedimentation into streams during and after construction.” *Id. at 2*. One of the specified BMPs consists of implementation of BMPs included in the “NRCS Nutrient Management Plan and Comprehensive Nutrient Management Plan.” *Id.* Neither the NRCS Nutrient Management Plan nor the Comprehensive Nutrient Management Plan were developed at the time of the Bank’s Letter and to the knowledge of the persons giving notice, neither has been developed as of the date of this Notice. The letter also listed “Integrator Provisions” as a BMP but did not specify the content of such provisions. *Id.* In fact, under current Arkansas law, it appears that a nutrient management plan may not even be needed for the Tracy Poultry Project because the Strawberry River area is not currently designated as a nutrient surplus area. Thus the Bank’s stated reliance on a non-existent and possibly not required nutrient management plan is an improper basis for its decision.

By letter dated January 25, 2016, FWS informed the Bank that FWS concurred that the Tracy Poultry Project “may affect, but is not likely to adversely affect” the gray bat, the Indiana bat, the northern long-eared bat, the scaleshell, the pink mucket, the rabbitsfoot, and the Missouri Bladderpod. USFWS Concurrence Letter (Jan. 25, 2016) at 1 (**Exhibit D**). The Concurrence Letter did not discuss the snuffbox mussel nor the Tracy Poultry Project’s effects with respect to the snuffbox mussel, thus FWS did not concur with the Bank’s determination that the Tracy Poultry Project “may affect, but is not likely to adversely affect” the snuffbox mussel.

#### Violations of the ESA

Generally, the FSA and SBA, [the Bank], though the designated non-federal representative the Bank, have acted arbitrarily and capriciously in their respective implementation of the Section 7 inter-agency consultation process in the planning and authorization of the Tracy Poultry Project, resulting in numerous violations of the ESA as described below. *See* (A) through (C) and (E), below.

**(A) FSA and SBA, through the Bank, did not adequately identify endangered or threatened species, contrary to 16 U.S.C. § 1536(a)(2), (c)(1) and 50 C.F.R. § 402.12(c) [and interpretive guidance set out in the Handbook].**

Action agencies must use “the best scientific and commercial data available” to determine whether any listed species or critical habitat may be present in the action area of a proposed project. 16 U.S.C. § 1536(a)(2).

- By excluding the pink mucket from the Bank’s “determination,” FSA and SBA, through the Bank, violated 16 U.S.C. § 1536(a)(2), (c)(1) and 50 C.F.R. § 402.12(c) [and interpretive guidance set out in the Handbook] by ignoring the “best available scientific and commercial data available” to determine whether the pink mucket “may be present” in the Tracy Poultry Project action area, by determining that the pink mucket was not an ESA-listed species that “may be present” in the Tracy Poultry Project area, by failing to analyze fully the effects of the Tracy Poultry Project on the pink mucket and determine whether it was likely to be adversely affected by the implementation of the Tracy Poultry Project, and by failing to determine that implementation of the Tracy Poultry Project is likely to adversely affect the pink mucket and requires formal consultation and a biological opinion.
- By relying on the IPaC Report list of species listed under the ESA as endangered or threatened that “may occur” in the Tracy Poultry Project area or that “could potentially be affected by activities” in the location and by failing to request an “official species list” from FWS, FSA and SBA, through the Bank, violated 16 U.S.C. § 1536(a)(2), (c)(1) and 50 C.F.R. § 402.12(c) [and interpretive guidance set out in the Handbook] by failing to use the “best scientific and commercial data available” to determine whether the pink mucket “may be present” in the Tracy Poultry Project area, by determining that the pink mucket was not an ESA-listed species that “may be present” in the Tracy Poultry Project area, by failing to analyze fully the effects of the implementation of the Tracy Poultry Project on the pink mucket and determine whether it was likely to be adversely affected by implementation of the Tracy Poultry Project, and by failing to determine that implementation of the Tracy Poultry Project is likely to adversely affect the pink mucket and requires formal consultation and a biological opinion.

**(B) FSA and SBA, through the Bank, did not adequately evaluate the potential effects of the proposed action on listed and proposed species and designated and proposed critical habitat nor adequately determine whether such species and habitat are likely to be adversely affected by**



**the action, contrary to 16 U.S.C. § 1536(a)(2), (c)(1); 50 C.F.R. §§ 402.02, 402.12(a); [and interpretive guidance as set out in the Handbook]**

The action agency must prepare a biological assessment if a listed species or critical habitat “may be present” in the action area, and the biological assessment must address all listed species and critical habitat found in the action area, not just those that are likely to be affected. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.02; Handbook § 3.4 at 3-11[emphasis added]. Determination of the species that may be present and the effects thereon must take into account “all areas to be affected directly or indirectly by the Federal action, and not merely the immediate area involved in the action.” 50 C.F.R. §§ 402.02 and 402.12. Additionally, a biological assessment must be prepared for a “major construction activity” defined as a major Federal action significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act of 1969. 42 U.S.C. § 4321 et seq. (NEPA); 50 C.F.R. §§ 402.02 and 402.12(b). FSA and SBA, through the Bank, determined that ESA species may be present in the area of the Proposed Tracy Poultry Project. **Exhibit D at 1-2.** Additionally, the Tracy Poultry Project is a “major construction activity” under NEPA. **Exhibit A.** Accordingly, FSA and SBA were required to prepare a biological assessment with respect to the Tracy Poultry Project.

The biological assessment must evaluate the potential effects of the proposed action on listed and proposed species as well as designated and proposed critical habitat and determine whether such species and habitat are likely to be adversely affected by the action. 50 C.F.R. § 402.12(a). The effects of an action which must be evaluated in a biological assessment include the direct and indirect effects of the action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action. 50 C.F.R. § 402.02. As part of the consultation process, the action agency must use the best scientific and commercial data available in preparing a biological assessment. 16 U.S.C. § 1536(a)(2).

The Bank’s “determination,” and FSA’s and SBA’s reliance thereon, is wholly inadequate to fulfill the requirements of a biological assessment contrary to 16 U.S.C. § 1536(a)(2), (c)(1); 50 C.F.R. §§ 402.02, 402.12(a); [and interpretive guidance as set out in the Handbook]. The Bank’s “determination” is grossly deficient in its lack of evaluation and analysis of the effects of implementation of the Tracy Poultry Project on listed species and critical habitat. In the absence of a biological assessment which fulfills the requirements of the Endangered Species Act and its implementing regulations, including identification of all species and habitat at issue and a thorough analysis of the effects thereupon, which justifies the Bank’s “determination” according to the “best scientific and commercial data available,” FSA and SBA are required to engage in formal consultation with FWS culminating with the issuance of a biological opinion.

- By excluding consideration of the effects of implementation of the Tracy Poultry Project beyond “erosion and sedimentation into streams during and after construction,” generally excluding effects of implementation and operation of the Tracy Poultry Project beyond the construction phase, failing to analyze and account fully for the effects of the operation of the Tracy Poultry Project, and failing to address the effects of other activities that are interrelated or interdependent with the Tracy Poultry Project FSA and SBA, through the Bank, violated 16 U.S.C. § 1536(a)(2), (c)(1) and 50 C.F.R. §§ 402.02, 402.12(a) [and interpretive guidance set out in the Handbook] by failing to use the “best scientific and commercial data available” to determine whether any of the seven ESA listed species at issue in this Notice, or the critical habitat of the rabbitsfoot mussel, are “likely to be adversely affected” by implementation of the Tracy Poultry Project, by failing to analyze fully the direct and indirect effects of the implementation of the Tracy Poultry Project and interrelated and interdependent actions on these species and habitat and determine if such effects were likely to adversely affect them, and by failing to determine that implementation of the Tracy Poultry Project is likely to adversely affect these species and habitat and requires formal consultation and a biological opinion.
- By relying on the BMPs outlined in the Bank’s “determination” letter, including BMPs incorporated by reference to documents which are not yet in existence or are otherwise not sufficiently identified or considered, to “reduce the effects to federally listed species” from implementation of the Tracy Poultry Project, FSA and SBA, through the Bank, violated 16 U.S.C. § 1536(a)(2), (c)(1) and 50 C.F.R. §§ 402.02, 402.12(a) [and interpretive guidance set out in the Handbook] by failing to use the “best scientific and commercial data available” to determine whether any of the seven ESA listed species at issue in this Notice, or the critical habitat of the rabbitsfoot mussel, are “likely to be adversely affected” by implementation of the Tracy Poultry Project, by failing to analyze fully the direct and indirect effects of the implementation of the Tracy Poultry Project and interrelated and interdependent actions on these species and habitat and determine if such effects were likely to adversely affect them, and by failing to determine that implementation of the Tracy Poultry Project is likely to adversely affect these species and habitat and requires formal consultation and a biological opinion.
- By failing to identify, consider, account for, or otherwise assess fully FWS documentation and literature regarding the environmental stressors to, causes of population decline of, threats to, and vulnerabilities of, the seven ESA listed species at issue in this Notice, as well as other documentation and literature regarding the effects and impacts of agricultural waste and other sources of pollution and

disruption associated with poultry facilities, FSA and SBA, through the Bank, violated 16 U.S.C. § 1536(a)(2), (c)(1) and 50 C.F.R. §§ 402.02, 402.12(a) [and interpretive guidance set out in the Handbook] by failing to use the “best scientific and commercial data available” to determine whether any of the seven ESA listed species at issue in this Notice, or the critical habitat of the rabbitsfoot mussel, are “likely to be adversely affected” by implementation of the Tracy Poultry Project, by failing to analyze fully the effects of the implementation of the Tracy Poultry Project on these species and habitat and determine if such effects were likely to adversely affect them, and by failing to determine that implementation of the Tracy Poultry Project is likely to adversely affect these species and habitat and requires formal consultation and a biological opinion. Bats, for example, rely on insects as part of their diet; scientific research shows flies near concentrated animal feeding operations can carry contaminants such as pathogens or antibiotic resistant bacteria thus likely adversely affecting protected bat species. *See also* sources addressing industrial animal agriculture’s impacts on wildlife, pages 20-22 *infra*.

- By failing to assess the effects of implementation and operation of the Tracy Poultry Project on the Strawberry River (as described on page 2 *supra*), which is designated critical habitat for the rabbitsfoot mussel, FSA and SBA, through the Bank, violated 16 U.S.C. § 1536(a)(2), (c)(1) and 50 C.F.R. §§ 402.02, 402.12(a) [, and interpretive guidance set out in the Handbook] by failing to use the “best scientific and commercial data available” to determine whether implementation of the Tracy Poultry Project will result in the destruction or adverse modification of critical habitat of the rabbitsfoot mussel, by failing to use the “best scientific and commercial data available” to determine whether the rabbitsfoot mussel is “likely to be adversely affected” by implementation of the Tracy Poultry Project, by failing to analyze fully the effects of the implementation of the Tracy Poultry Project on the rabbitsfoot mussel and its critical habitat and determine if such effects were likely to adversely affect the rabbitsfoot mussel or its critical habitat, and by failing to determine that implementation of the Tracy Poultry Project is likely to adversely affect the rabbitsfoot mussel and its critical habitat and requires formal consultation and a biological opinion.
- By excluding the pink mucket from the Bank’s “determination,” FSA and SBA, through the Bank, violated 16 U.S.C. § 1536(a)(2), (c)(1) and 50 C.F.R. §§ 402.02, 402.12(a) [and interpretive guidance set out in the Handbook] by failing to analyze fully the effects of the Tracy Poultry Project on the pink mucket and determine whether it was likely to be adversely affected by the implementation of the Tracy Poultry Project,

and by failing to determine that implementation of the Tracy Poultry Project is likely to adversely affect the pink mucket and requires formal consultation and a biological opinion.

- By relying on the IPaC Report list of species listed under the ESA as endangered or threatened that “may occur” in the Tracy Poultry Project area or that “could potentially be affected by activities” in the location and by failing to request an “official species list” from FWS, FSA and SBA, through the Bank, violated 16 U.S.C. § 1536(a)(2), (c)(1) and 50 C.F.R. §§ 402.02, 402.12(a) [and interpretive guidance set out in the Handbook] by failing to analyze fully the effects of the implementation of the Tracy Poultry Project on the pink mucket and determine whether it was likely to be adversely affected by implementation of the Tracy Poultry Project, and by failing to determine that implementation of the Tracy Poultry Project is likely to adversely affect the pink mucket and requires formal consultation and a biological opinion.

**(C) FSA and SBA, through the Bank, arbitrarily and capriciously concluded that implementation of the Tracy Poultry Project is “not likely to adversely affect” the seven ESA listed species at issue in this Notice, and failed to conclude that implementation of the Tracy Poultry Project is “likely to adversely affect” such species and the critical habitat of the rabbitsfoot mussel, requiring formal consultation, contrary to 16 U.S.C. § 1536(a)(2), (c)(1), 50 C.F.R. §§ 402.12(a), (b) [and interpretive guidance set out in the Handbook].**

An agency’s determination as to whether a proposed action is “likely to adversely affect” listed species must be based on “the best scientific and commercial data available.” 16 U.S.C. § 1536(a)(2). If an action may affect a listed species or critical habitat, then formal consultation is required unless the Director concurs with a determination of the action agency that the action is not likely to adversely affect listed species or critical habitat. 50 C.F.R. § 402.14(a), (b); Handbook § 4.4 at 4-1. When an action may affect listed species or critical habitat, a conclusion that an action is not likely to adversely affect listed species or critical habitat is only appropriate where the effects are completely beneficial, insignificant, or discountable. Handbook § 2.2 at 2-6. An agency must make a “likely to adversely affect” determination and enter formal consultation “if any adverse effect to a listed species may occur as a direct or indirect result of a proposed action or its interrelated or interdependent actions” unless those effects will be “discountable, insignificant, or beneficial...” Handbook § 3.5 at 3-13 [emphasis added]; *See Florida Key Deer v. Stickney*, 864 F. Supp. 1222, 1228-1229 (S.D. Fla. 1994) (“the applicable threshold for triggering the formal consultation requirement is very low...any possible effect...triggers formal consultation requirements” quoting, *in part*, 51 F.R. 19, 949-950); and, *Romero-Barcelo v. Brown*, 643 F.2d 835 (1<sup>st</sup> Cir. 1981) (“[o]nce an agency has discovered that some action...for

which it is responsible crosses the low threshold of possible effect, it must consult formally”), *rev’d on other grounds by Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

Insignificant impacts are such that never reach the scale where take occurs and that a person would not be able to meaningfully measure, detect or evaluate. Handbook § 3.5 at 3-12 – 3-13. Discountable effects are those extremely unlikely to occur. Handbook § 3.5 at 3-13. If there is not enough information to determine the effects to species or critical habitat, benefit of the doubt is given to the species; the consulting agency must not concur and the action and consulting agencies must enter formal consultations. Handbook § 3.5 at 3-12. If the contents of a biological assessment or administrative record do not adequately support the “not likely to adversely affect” or “no effect” finding, that finding must be overturned. *See, e.g., House v. U.S. Forest Serv.*, 974 F. Supp. 1022, 1028-29 (E.D. Ky. 1997).

FSA and SBA, through the Bank, determined that the Tracy Poultry Project “may affect” the ESA listed species known to occur in Iazard County. **Exhibit D at 2.** However, FSA and SBA, through the Bank, also determined that the Tracy Poultry Project is “not likely to adversely affect such species. This “not likely to adversely effect” determination relies upon a wholly deficient and unlawful analysis and evaluation of the effects on such species, as detailed above. The Tracy Poultry Project is, in fact, likely to adversely affect the seven ESA listed species at issue in this Notice and cause the adverse modification or destruction of the critical habitat of the rabbitsfoot mussel and these violations, if not remedied, will jeopardize the survival and/or recovery of these species. FSA and SBA, through the Bank, provided insufficient data, analysis, and evaluation of the effects of the Tracy Poultry Project to conclude that implementation of the Tracy Poultry Project is ‘not likely to effect” these species or the critical habitat of the rabbitsfoot mussel. The effects of the Tracy Poultry Project cannot properly be categorized as “beneficial, insignificant, or discountable” to the species at issue in this Notice and their respective critical habitat. Accordingly, FSA and SBA should have determined that the Tracy Poultry Project is “likely to adversely affect” these species and entered into formal consultations with FWS.

- By excluding consideration of the effects of implementation of the Tracy Poultry Project beyond “erosion and sedimentation into streams during and after construction,” generally excluding effects of implementation and operation of the Tracy Poultry Project beyond the construction phase, failing to analyze and account fully for the effects of the operation of the Tracy Poultry Project, and failing to address the effects of other activities that are interrelated or interdependent with the Tracy Poultry Project FSA and SBA, through the Bank, violated 16 U.S.C. § 1536(a)(2), (c)(1) and 50 C.F.R. §§ 402.02, 402.12(a) [and interpretive guidance set out in the Handbook] by determining that implementation of the Tracy Poultry Project was “not likely to adversely affect” the seven ESA listed species at issue in this Notice (excluding the pink mucket), and by failing to determine that implementation of the Tracy Poultry Project is likely to adversely the

seven ESA listed species at issue in this Notice and the critical habitat of the rabbitsfoot mussel and requires formal consultation and a biological opinion.

- By relying on the BMPs outlined in the Bank's "determination" letter, including BMPs incorporated by reference to documents which are not yet in existence or are otherwise not sufficiently identified or considered, to "reduce the effects to federally listed species" from implementation of the Tracy Poultry Project, FSA and SBA, through the Bank, violated 16 U.S.C. § 1536(a)(2), (c)(1) and 50 C.F.R. §§ 402.02, 402.12(a) [and interpretive guidance set out in the Handbook] by determining that implementation of the Tracy Poultry Project was "not likely to adversely affect" the seven ESA listed species at issue in this Notice (excluding the pink mucket), and by failing to determine that implementation of the Tracy Poultry Project is likely to adversely affect the seven ESA listed species at issue in this Notice and the critical habitat of the rabbitsfoot mussel and requires formal consultation and a biological opinion.
- By failing to identify, consider, account for, or otherwise assess fully FWS documentation and literature regarding the environmental stressors to, causes of population decline of, threats to, and vulnerabilities of, the seven ESA listed species at issue in this Notice, as well as other documentation and literature regarding the effects and impacts of agricultural waste and other sources of pollution and disruption associated with poultry facilities, FSA and SBA, through the Bank, violated 16 U.S.C. § 1536(a)(2), (c)(1) and 50 C.F.R. §§ 402.02, 402.12(a) [and interpretive guidance set out in the Handbook] by determining that implementation of the Tracy Poultry Project was "not likely to adversely affect" the seven ESA listed species at issue in this Notice (excluding the pink mucket), and by failing to determine that implementation of the Tracy Poultry Project is likely to adversely affect the seven ESA listed species at issue in this Notice and the critical habitat of the rabbitsfoot mussel and requires formal consultation and a biological opinion. Bats, for example, rely on insects as part of their diet; scientific research shows flies near concentrated animal feeding operations can carry contaminants such as pathogens or antibiotic resistant bacteria thus likely adversely affecting protected bat species. *See also* sources addressing industrial animal agriculture's impacts on wildlife, pages 20-22 *infra*.
- By failing to assess the effects of implementation and operation of the Tracy Poultry Project on the Strawberry River (as described on page 2, *supra*), which is designated critical habitat for the rabbitsfoot mussel, FSA and SBA, through the Bank, violated 16 U.S.C. § 1536(a)(2), (c)(1)

and 50 C.F.R. §§ 402.02, 402.12(a) [and interpretive guidance set out in the Handbook] by determining that implementation of the Tracy Poultry Project is “not likely to adversely affect” the rabbitsfoot mussel, and by failing to determine that implementation of the Tracy Poultry Project is likely to adversely affect the rabbitsfoot mussel and its critical habitat and requires formal consultation and a biological opinion.

- By excluding the pink mucket from the Bank’s “determination,” FSA and SBA, through the Bank, violated 16 U.S.C. § 1536(a)(2), (c)(1) and 50 C.F.R. §§ 402.02, 402.12(a) [and interpretive guidance set out in the Handbook] by failing to determine that implementation of the Tracy Poultry Project is likely to adversely affect the pink mucket and requires formal consultation and a biological opinion.
- By relying on the IPaC Report list of species listed under the ESA as endangered or threatened that “may occur” in the Tracy Poultry Project area or that “could potentially be affected by activities” in the location and by failing to request an “official species list” from FWS, FSA and SBA, through the Bank, violated 16 U.S.C. § 1536(a)(2), (c)(1) and 50 C.F.R. §§ 402.02, 402.12(a) [and interpretive guidance set out in the Handbook] by failing to determine that implementation of the Tracy Poultry Project is likely to adversely affect the pink mucket and requires formal consultation and a biological opinion.

**\*<sup>3</sup>(D) FWS’ determination that the Tracy Poultry Project is “not likely to affect” the pink mucket, FWS’ Concurrence with the Bank’s determination that the Tracy Poultry Project is “not likely to affect” the rabbitsfoot mussel, the Missouri bladderpod, the gray bat, the Indiana bat, and the northern long eared bat, and FWS’ failure to determine that the Tracy Poultry Project is “likely to adversely affect” the seven ESA listed species at issue in this notice and the critical habitat of the rabbitsfoot mussel are each arbitrary and capricious, and contrary to law under Section 706 of the Administrative Procedure Act. 5 U.S.C. § 706\***

\*Under the judicial review provisions of the Administrative Procedure Act, 16 U.S.C. § 701, *et seq.*, agency action will be held unlawful and set aside if found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(a). FWS has acted arbitrarily and capriciously and abused its discretion in the conduct of the Tracy Poultry Project Section 7 consultation contrary to the letter of the ESA, within the meaning of 5 U.S.C. § 706(2)(a) as

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<sup>3</sup> Claims noted with an asterisk (\*) apply to FWS. *See supra* page 2.

follows:\*

- \*FWS's concurrence with the Bank's determination that the Tracy Poultry Project "may affect, but is not likely to adversely affect" the pink mucket is arbitrary and capricious, an abuse of discretion, and in violation of 16 U.S.C. §1536(a)(2),(c)(1) and 50 C.F.R. §§ 402.02, 402.12(a),(d), 402.14(a),(b), and interpretive guidance set out in the Handbook under 5 U.S.C. § 706(2)(a). This concurrence determination is wholly unsupported by the record. The Bank's "determination" with which FWS "concurs" is deficient and unlawful as detailed above, contains no mention of the pink mucket, and neither the Bank's "determination" nor FWS' concurrence letter contain any analysis of the effects of implementation of the Tracy Poultry Project on the pink mucket. Additionally, FWS' concurrence with respect to the pink mucket fails to account for and is inconsistent with the "best scientific and commercial data available" which indicates that construction and operation of the Tracy Poultry Project may affect and is likely to adversely affect the pink mucket. Further, FWS acted arbitrarily and capriciously and violated 16 U.S.C. §1536(a)(2), (c)(1) and 50 C.F.R. §§ 402.02, 402.12(a),(d), 402.14(a), (b), and interpretive guidance set out in the Handbook under 5 U.S.C. § 706(2)(a) by failing to determine that implementation of the Tracy Poultry Project was likely to adversely affect the pink mucket and by failing to prepare a biological opinion regarding the effects of implementation of the Tracy Poultry Project on the pink mucket. The effects of implementation of the Tracy Poultry Project with respect to the pink mucket cannot be properly characterized as "beneficial, insignificant or discountable" as required for a "may affect, but is not likely to adversely effect" determination. Additionally, insufficient information was presented and considered to determine the effects of implementation of the Tracy Poultry Project on the pink mucket. As a result, FWS was required to give the benefit of the doubt to the species, enter into formal consultation, and prepare a biological opinion.\*
- \*FWS' failure to determine whether the Tracy Poultry Project is likely to adversely affect the snuffbox mussel is arbitrary and capricious and in violation of 16 U.S.C. §1536(a)(2), (c)(1) and 50 C.F.R. §§ 402.02, 402.12(a), (d), 402.14(a), (b), and interpretive guidance set out in the Handbook under 5 U.S.C. § 706(2)(a). The Bank's "determination" letter determined that implementation of the Tracy Poultry Project "may affect, but is not likely to adversely affect" the snuffbox mussel but FWS' concurrence letter omits any mention, discussion, or determination with respect to the snuffbox mussel. Additionally, FWS' failure to determine that implementation of the Tracy Poultry Project is likely to adversely affect the snuffbox mussel fails to account for and is



inconsistent with the “best scientific and commercial data available” which indicates that construction and operation of the Tracy Poultry Project may affect and is likely to adversely affect the snuffbox mussel. Further, FWS acted arbitrarily and capriciously and violated 16 U.S.C. §1536(a)(2), (c)(1) and 50 C.F.R. §§ 402.02, 402.12(a),(d), 402.14(a), (b), and interpretive guidance set out in the Handbook under 5 U.S.C. § 706(2)(a) by failing to determine that implementation of the Tracy Poultry Project was likely to adversely affect the snuffbox mussel and by failing to prepare a biological opinion regarding the effects of implementation of the Tracy Poultry Project on the snuffbox mussel. The effects of implementation of the Tracy Poultry Project with respect to the snuffbox mussel cannot be not properly characterized as “beneficial, insignificant or discountable” as required for a “may effect, but is not likely to adversely effect” determination. Additionally, insufficient information was presented and considered in the Bank’s Letter to determine the effects of implementation of the Tracy Poultry Project on the snuffbox mussel. As a result FWS was required to give the benefit of the doubt to the species, enter into formal consultation, and prepare a biological opinion.\*

- \*FWS’ concurrence that the Tracy Poultry Project “may affect, but is not likely to adversely affect” the rabbitsfoot mussel, the Missouri bladderpod, the gray bat, the Indiana bat, and the northern long-eared bat is arbitrary and capricious and in violation of 16 U.S.C. §1536(a)(2), (c)(1); 50 C.F.R. §§ 402.02, 402.12(a), (d), 402.14(a), (b); and interpretive guidance set out in the Handbook under 5 U.S.C. § 706(2)(a). This concurrence determination is wholly unsupported by the record. The Bank’s “determination” with which FWS “concurs” is deficient and unlawful as detailed above, and neither the Bank’s Letter nor FWS’ concurrence letter contain sufficient analysis of the effects of implementation of the Tracy Poultry Project on the rabbitsfoot mussel, the Missouri bladderpod, the gray bat, the Indiana bat, or the northern long-eared bat, or the critical habitat of the rabbitsfoot mussel. Additionally, FWS’ concurrence with respect to the these species fails to account for and is inconsistent with the “best scientific and commercial data available” which indicates that construction and operation of the Tracy Poultry Project may affect and is likely to adversely affect these species and the critical habitat of the rabbitsfoot. Further, FWS acted arbitrarily and capriciously and violated 16 U.S.C. §1536(a)(2), (c)(1) and 50 C.F.R. §§ 402.02, 402.12(a), (d), 402.14(a),(b), and interpretive guidance set out in the Handbook under 5 U.S.C. § 706(2)(a) by failing to determine that implementation of the Tracy Poultry Project was likely to adversely affect the rabbitsfoot mussel, the Missouri bladderpod, the gray bat, the Indiana bat, and the northern long-eared

bat, and the critical habitat of the rabbitsfoot mussel and by failing to prepare a biological opinion regarding the effects of implementation of the Tracy Poultry Project on these species and habitat. The effects of implementation of the Tracy Poultry Project with respect to these species cannot be not properly characterized as “beneficial, insignificant or discountable” as required for a “may effect, but is not likely to adversely effect” determination. Additionally, insufficient information was presented and considered to determine the effects of implementation of the Tracy Poultry Project on the rabbitsfoot mussel, the Missouri bladderpod, the gray bat, the Indiana bat, the northern long-eared bat, and the critical habitat of the rabbitsfoot mussel. Bats, for example, rely on insects as part of their diet; scientific research shows flies near concentrated animal feeding operations can carry contaminants such as pathogens or antibiotic resistant bacteria thus likely adversely affecting protected bat species. *See also* sources addressing industrial animal agriculture’s impacts on wildlife, pages 20-22 *infra*. As a result FWS was required to give the benefit of the doubt to the species, enter into formal consultation, and prepare a biological opinion.\*

#### (E) “Best Available Science”

The use of sound science is paramount in the consultation process. As stated in the Handbook under “Consultation Framework:”

An overriding factor in carrying out consultations should always be the use of the best available scientific and commercial data to make findings regarding the status of a listed species, the effects of a proposed action on the species or critical habitat , and determination of **jeopardy/no jeopardy** to listed species or destruction or **adverse modification/no** destruction or **adverse modification** to designated critical habitats. Handbook § 1.2(c) at 1-7 [emphasis in original].

To assure the quality of the biological, ecological and other information used in the Section 7 consultation process, the Handbook further states:

This policy calls for review of all scientific and other information used to prepare biological opinions, incidental take statements, and biological assessments, to ensure that any information used to implement the Act is reliable, credible, and represents the best scientific and commercial data available.” Handbook at §1.2 at 1-7, *citing* Information Standards Under the Endangered Species Act, 59 Fed. Reg. 34271 (July 1, 1994) [emphasis added].

Case law in the Eighth Circuit is clear that the Section 7 “best available scientific and commercial data” standard requires that the consulting and action agencies must consider all available information. *Heartwood, Inc. v. U.S. Forest*

*Service*, 380 F.3d 428, 436 (8th Cir. 2004) (Agencies are required “to seek out and consider all existing scientific evidence relevant to the decision at hand. They cannot ignore existing data.”) (internal citations omitted). An agency will be granted discretion at to its conclusions on matters requiring a high level of expertise so long as the agency considers all relevant data. *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014).

In this case the FSA and SBA, through the Bank, \*(and the FWS with respect to actions alleged herein under the APA)\* have failed to meet the mandate to use the “best available scientific and commercial data” in the performance of their obligations under Section 7 of the ESA. These failures include, *inter alia*, the failure to consider relevant data that was readily available to them. The relevant data that the FSA, the FSB, and the Bank, \*(and the FWS with respect to actions alleged herein under the APA)\* failed to consider includes, but is not limited to, the following biological and other studies, correspondence, and other information and sources:

- Species Profile for the pink mucket including a “species occurrence” map *available at* [https://ecos.fws.gov/tess\\_public/profile/speciesProfile.action?sPCODE=F03X](https://ecos.fws.gov/tess_public/profile/speciesProfile.action?sPCODE=F03X) (showing occurrence in the Tracy Poultry Project area and listing IZARD County as area in which pink mucket is believed to occur).
- Recovery Plan for the Pink Mucket Pearly Mussel, (Jan. 24, 1985) *available at* [http://ecos.fws.gov/docs/recovery\\_plan/pink\\_mucket\\_rp.pdf](http://ecos.fws.gov/docs/recovery_plan/pink_mucket_rp.pdf) (detailing environmental stressors to freshwater mussels, including siltation from construction and agricultural activities and agricultural waste discharge).
- Determination of Endangered Status for the Rayed Bean and Snuffbox Mussels Throughout Their Ranges; Final Rule, 77 Fed. Reg. 8632 (Feb. 14, 2012) *available at* <https://www.gpo.gov/fdsys/pkg/FR-2012-02-14/html/2012-2940.htm> (listing Arkansas and Strawberry River as supporting extant populations of snuffbox mussel and detailing environmental stressors to freshwater mussels, including ammonia from animal feedlots and other agricultural contaminants, including nutrients, pesticides, pharmaceuticals and hormones)
- Species profile for the rabbitsfoot mussel including a “species occurrence” map *available at* [https://ecos.fws.gov/tess\\_public/profile/speciesProfile.action?sPCODE=F03X](https://ecos.fws.gov/tess_public/profile/speciesProfile.action?sPCODE=F03X)
- Designation of Critical Habitat for the Neosho Mucket and Rabbitsfoot, 80 Fed. Reg. 24961 (April 30, 2015) *available at* <https://www.gpo.gov/fdsys/pkg/FR-2015-04-30/pdf/2015-09200.pdf> (designating portion of Strawberry River as critical habitat for rabbitsfoot

- mussel and detailing environmental stressors to freshwater mussels, including runoff of excessive sediment, nutrients, and pesticides from adjacent land).
- Proposed Endangered Status for Neosho Mucket, Threatened Status for Rabbitsfoot, and Designation of Critical Habitat for Both Species, 77 Fed. Reg. 63440 (Oct. 16, 2012) *available at* <https://www.federalregister.gov/articles/2012/10/16/2012-24151/endangered-and-threatened-wildlife-and-plants-proposed-endangered-status-for-the-neosho-mucket-h-41>  
(Listing sedimentation and contaminants associated with agricultural activities as detrimental to freshwater mussels and concluding that the Clean Water Act is insufficient to protect the rabbitsfoot).
  - Reclassification of *Lasquerella filiformis* (Missouri Bladderpod) from Endangered to Threatened, 68 Fed. Reg. 59337 (Oct. 15, 2003) *available at* [http://ecos.fws.gov/docs/federal\\_register/fr4194.pdf](http://ecos.fws.gov/docs/federal_register/fr4194.pdf)  
(discussing presence in IZard County and including development and changes in land use among threats to the Missouri Bladderpod).
  - Missouri Bladderpod Recovery Plan (April 7, 1988) *available at* [http://ecos.fws.gov/docs/recovery\\_plan/880407.pdf](http://ecos.fws.gov/docs/recovery_plan/880407.pdf)  
(Listing development, conversion to crop fields, and changes in land management as among threats to Missouri Bladderpod).
  - Missouri Bladderpod 5-Year Review 2015 (Sept. 23, 2015) *available at* [http://ecos.fws.gov/docs/five\\_year\\_review/doc4743.pdf](http://ecos.fws.gov/docs/five_year_review/doc4743.pdf)  
(listing development and climate change as threats to Missouri Bladderpod).
  - Indiana Bat Draft Recovery Plan; First Revision (April 16, 2007) *available at* [https://ecos.fws.gov/docs/recovery\\_plan/070416.pdf](https://ecos.fws.gov/docs/recovery_plan/070416.pdf)  
(discussing habitat loss to development and agriculture and vulnerability to disease as among causes of population decline).
  - Gray Bat Recovery Plan (July 8, 1982) *available at* [https://ecos.fws.gov/docs/recovery\\_plan/820701.pdf](https://ecos.fws.gov/docs/recovery_plan/820701.pdf)  
(Listing deforestation, pesticides, insecticides and siltation of waterways over which bats forage as possible threats to gray bat).
  - Gray Bat Completed 5-Year Review (Sept. 30, 2009) *available at* [https://ecos.fws.gov/tess\\_public/profile/speciesProfile.action?sPCODE=A04J](https://ecos.fws.gov/tess_public/profile/speciesProfile.action?sPCODE=A04J)  
(listing pesticides and climate change among threats to the gray bat).
  - 4(d) Rule for the Northern Long-eared Bat; Final Rule, 81 Fed. Reg. 1900 (Jan. 14, 2016) *available at* <https://www.gpo.gov/fdsys/pkg/FR-2016-01-14/pdf/2016-00617.pdf>

- (Discussing pesticides, insecticides, and other contaminants, including pharmaceuticals and hormones, and tree removal as having likely or potential impacts to northern long-eared bat).
- Threatened Species Status for the Northern Long-eared Bat with 4(d) Rule, 80 Fed. Reg. 17973 (April 2, 2015) *available at* <https://www.gpo.gov/fdsys/pkg/FR-2015-04-02/pdf/2015-07069.pdf> (Discussing pesticides, insecticides, and other contaminants, tree removal, and climate change as having likely or potential impacts to northern long-eared bat).
  - Publicly-available resources addressing the environmental and health impacts of large poultry operations like the proposed Tracy Poultry Project, for example:
    - Impact of CAFOs on Rural Communities by John Ikerd – Professor Emeritus of Agricultural & Applied Economics University of Missouri Columbia (July 26, 2008).
    - Big Chicken Pollution and Industrial Poultry Production in America, The PEW Environment Group (2011).
    - CAFOs and Environmental Justice, Environmental Health Perspectives (June 2013).
    - Modeling Ammonia Dispersion from Multiple CAFOs Using GIS, RTI International (2004).
    - National Emission Inventory – Ammonia Emissions from Animal Husbandry, US EPA (2004).
    - Understanding Concentrated Animal Feeding Operations and Their Impact on Communities, National Association of Local Boards of Health (2010)
    - Antibiotic resistance enterococci and staphylococci isolated from flies collected near confined poultry feeding operations, Science of the Total Environment (April, 2009).
    - Spread of *Musca domestica* (Diptera: Muscidae), from Two Caged Layer Facilities to Neighboring Residences in Rural Ohio, Entomological Society of America (2005).

Additionally, throughout the U.S. there are areas where endangered species habitats and agricultural livestock operations with operating permits overlap. As discussed above, the area of the Tracy Poultry Project suffers from a similar overlap, and the effects must be considered. Clearing land for industrial animal agricultural operations destroys or degrades wildlife habitat, can cause erosion, can create fertilizer and nutrient runoff into water bodies thereby degrading water quality and causing pollutants to enter aquatic ecosystems and disrupting wildlife. Contaminants associated with industrial animal agriculture operations can be potentially toxic to species. For example:

- Antibiotic-resistant bacteria have been found in wild animals, which can come into contact with waste from industrial animal agricultural operations, and spread

disease throughout a local ecosystem. *See* Radhouani, H. et al. 2014. *Potential Impact of Antimicrobial Resistance in Wildlife, Environment, and Human Health*. *Frontiers in Microbiology*. Available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3913889/>.

- Several studies have documented a higher concentration of antibiotic-resistant microbes among wild geese, deer, and birds that come into contact with swine lagoons or disease vectors (such as flies) that frequent feeding operations. *See* Rogers S, Haines J. 2005. *Detecting and Mitigating the Environmental Impact of Fecal Pathogens Originating from Confined Animal Feeding Operations: Review*. U.S. EPA: Office of Research and Development.
- Furthermore, studies at National Wildlife Refuges in Nebraska and Oklahoma found fecal bacteria in surface water that were often resistant to antibiotics commonly administered to livestock. *See* abstract of U.S. Geological Survey 1998. Concentrated Animal Feeding Operations: What's the Big Stink? Available at [https://www.nwhc.usgs.gov/information\\_desk/history.jsp](https://www.nwhc.usgs.gov/information_desk/history.jsp);
- Disturbingly, wildlife harboring antibiotic-resistant bacteria tends to be in greater concentrations near human habitations. *See* Cristóbal-Azkarate, J., Dunn, J., Day, J., Amábile-Cuevas, C. 2014. *Resistance to Antibiotics of clinical Relevance in the Fecal Microbiota of Mexican Wildlife*. *PLOS one*. Abstract available at <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0107719>.
- Acute pollution from spills and accidents also poses a threat to ecosystems. For example, in 1998, an 11 million gallon spill of liquid waste from a large poultry farm damaged a wetland vernal pool system in the Merced National Wildlife Refuge, killing endangered vernal pool fairy shrimp (*Branchinecta lynchi*) and vernal pool tadpole shrimp (*Lepidurus pochardi*). *See* U.S. Fish and Wildlife Service 1999. CAFOs Feed a Growing Problem. *Endangered Species Bulletin*, January/February 1999, Vol. XXIV No. 1. Copy available at <http://www.thefreelibrary.com/CAFOs+Feed+a+Growing+Problem.-a054466913>.

Lastly, the effects of poultry operations on wildlife in Arkansas *have already been recognized*. *See Exhibit E*, Hollerman, John T. "In Arkansas Which Comes First, the Chicken or the Environment?" 6 *Tul. Env'tl.L.J.* 21 (1992) (noting fish populations dramatically impacted by poultry production, transmission of disease through manure and dead birds). Poultry operations pose particular risks to wildlife for transmission of diseases such as histomoniasis, avian pox, avian cholera, coligranuloma diseases, infections with worms, and parasites. *Id.*

**Conclusion**

In conclusion, we request of FSA and SBA that you advise us if you intend to remedy any of the violations of the ESA described above within 60 days of the date of this letter. Please contact Attorney Elisabeth Holmes, listed below, if you have any questions regarding the discussion above or would like to discuss this matter with the parties providing this notice.

Sincerely,



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Enclosures: Exhibits A - E  
cc: Clients