

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

BUFFALO RIVER WATERSHED)	
ALLIANCE,)	Case No. 3:23-cv-03012-TLB
a non-profit corporation,)	
)	
Plaintiff,)	COMPLAINT FOR VACATUR OF
)	ILLEGAL AGENCY DECISION,
v.)	DECLARATORY AND INJUNCTIVE
)	RELIEF
UNITED STATES FOREST SERVICE,)	
an agency of the United States Government,)	(Pursuant to the Administrative Procedure Act, 5
TIMOTHY E. JONES, District Ranger,)	U.S.C. §§ 551 <i>et seq.</i> ; and the National
)	Environmental Policy Act, 42 U.S.C. §§ 4321 <i>et</i>
Defendants.)	<i>seq.</i>)
)	

INTRODUCTION

1. This is a civil action brought by Plaintiff Buffalo River Watershed Alliance (“BRWA”) under the National Environmental Policy Act (“NEPA”) (42 U.S.C. § 4321, *et seq.*) and the Administrative Procedure Act (“APA”) (5 U.S.C. §§ 551 *et seq.*). BRWA challenges the October 27, 2021, Decision Notice (“DN”), including the Finding of No Significant Impact (“FONSI”) and the related Environmental Assessment (“EA”), signed by District Ranger Timothy E. Jones on behalf of Defendant United States Forest Service (together “Forest Service” or “Service”), approving the Robert’s Gap Project (“the Project”). The Project consists of a prescribed burn, logging, and chemical herbicide treatment in the Ozark-St. Francis National Forests within the Headwaters Buffalo River watershed (USGS hydrologic unit code 1101000502). This watershed contains the Buffalo River, which flows north through the Upper Buffalo Wilderness in the eastern portion of the Project and continues to flow into the Buffalo National River as it leaves the National Forest. Because the Forest Service became aware of significant new circumstances

and information regarding the Indiana bat and admitted the need for baseline water quality information regarding numerous streams within the Project area after it finalized the EA but before it approved the Project, BRWA also challenges the Service's failure to prepare a supplemental EA or supplemental Environmental Impact Statement ("EIS") and its continuing failure to do so.

2. The challenged decision approves the prescribed burning, logging, and woodland herbicide treatment of approximately 40,000 acres of forest within the Headwaters Buffalo River watershed, including the known habitat of the Indiana bat, an Endangered species. Implementation of the Project will result in the loss of Cedar, Oak, and Pine trees, destruction of old growth forest as eighty six percent of the Project contains forest stands 70 years old or more, wildlife habitat, and potential degradation of water quality. The terrestrial features of the area, including the steep slopes with erodible soils atop the highly permeable ground karst structure makes both surface and groundwater susceptible to contamination. Furthermore, Project implementation would cause significant impairment of outdoor recreation activities in the Project including hiking, kayaking, and photography, and negatively impact the aesthetic and social aspects of the Buffalo River watershed's current and beloved sense of place and natural beauty.

3. To prevent the Forest Service from burning, logging, and applying herbicides in ways that will degrade forest and water quality, which provides essential wildlife habitat to the Indiana bat, recreation and fulfillment to surrounding communities, and will result in violations of the Forest Service's duties under NEPA, Plaintiff seeks from this Court an order and judgment:

- a. Declaring that the Forest Service's DN/FONSI for the Robert's Gap Project violates NEPA, 42 U.S.C. §§ 4321 *et seq.*, and declaring that the Service's failure to prepare a Supplemental Environmental Assessment ("SEA") or Supplemental Environmental Impact Statement ("SEIS");

to account for significant new circumstances or information also violates NEPA, and are arbitrary, capricious, an abuse of discretion, and/or not in accordance with law under the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2)(A) and are a continuing failure to act under § 706(1);

- b. Declaring that the Forest Service must conduct either a SEA or SEIS;
- c. Vacating and setting aside the Forest Service’s illegal DN/FONSI as an illegal agency action under the APA;
- d. Permanently enjoining the Forest Service from implementing the Robert’s Gap Project until the agency complies with NEPA;
- e. Enter preliminary and permanent injunctive relief to ensure that the Forest Service complies with NEPA, and specifically to ensure that the Forest Service and its agents take no further actions toward proceeding with the challenged Robert’s Gap Project until they have complied with NEPA;
- f. Awarding Plaintiff its reasonable attorneys’ fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412; and
- g. Grant such further relief as the Court deems just and equitable.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this action pursuant to 5 U.S.C. §§ 701–706 (APA) and 28 U.S.C. §§ 1331 (federal question) and 2412 (costs and fees). Plaintiff has challenged a final agency action as defined by the APA, 5 U.S.C. § 704, and also challenges the Forest Service’s failure to act under 5 U.S.C. § 706(1). Plaintiff has exhausted all required administrative remedies provided by the Forest Service. Plaintiff thus seeks judicial review of final administrative actions of the Forest Service. *See* 5 U.S.C. § 704 (actions reviewable).

5. Venue is properly vested in this Court pursuant to 28 U.S.C. 1391(b) because the logging, prescribed burning and herbicide application falls within the Western District of Arkansas, specifically Newton and Madison Counties. Because the Robert's Gap Project is being carried out in part within Newton County, within the Harrison Division, local venue is properly vested in the Harrison Division of this Court.

PARTIES

6. Plaintiff **BUFFALO RIVER WATERSHED ALLIANCE** is a 501(c)(3) non-profit organization dedicated to preserving and protecting the pristine water and air quality of the Buffalo River (153 miles in length) which flows north from the Robert's Gap Project, and leads to the 135 mile segment of the Buffalo River that is designated as a National River, the first national river to be designated in the United States. BRWA's mission is to educate and advocate for the protection of the Buffalo River and its associated watershed, the Headwaters Buffalo River watershed, including the area of within the Robert's Gap Project, by monitoring and addressing adverse environmental impacts to the river and watershed. BRWA members and supporters have and will continue to utilize the Headwaters Buffalo River watershed and the Ozark-St. Francis National Forest for vocational, educational, and recreational activities. BRWA members and many supporters reside near and/or regularly visit the area within the Robert's Gap Project and intend to continue to use and enjoy these areas frequently and on an ongoing basis in the near and distant future. BRWA and its members fear that their use and enjoyment of these public lands and rivers will be substantially diminished due to the environmental impacts of the Robert's Gap Project. BRWA and its members are harmed by the potential degradation of the land, Endangered species, and water, which are all innately tied to their aesthetic enjoyment, recreational, and vocational use of the area.

7. BRWA has an organizational interest in the proper and lawful management of the Robert's Gap Project. BRWA's aesthetic, recreational, and vocational interests have been and will be adversely affected and irreparably injured if Defendants continue to act as alleged herein, and affirmatively implement the decision that Plaintiff challenges. These are actual, concrete injuries caused by Defendants' failure to comply with mandatory duties under NEPA and other federal laws. BRWA's injuries would be redressed by the relief sought.

8. BRWA has participated extensively in administrative actions to protect Plaintiff's interests within the Robert's Gap Project. BRWA actively participated in the administrative process by submitting comments in 2020 for the Robert's Gap Project and has exhausted any and all available administrative remedies. BRWA also submitted a May 24, 2021 demand letter underscoring the need to conduct a supplemental NEPA analysis due to the significant new changed circumstances and information concerning the discovery of the Indiana bat in the Project as well as the water quality monitoring. Reviewable final agency action and inaction/failure to act exists that is subject to this Court's review under 5. U.S.C. §§ 702, 704, and 706.

9. Defendant **UNITED STATES FOREST SERVICE** is an administrative agency within the United States Department of Agriculture and is charged with managing the public lands and resources of national forests in accordance and compliance with federal laws and regulations. The Forest Service is an agency within the meaning of the APA, 5 U.S.C. § 551.

10. Defendant **TIMOTHY E. JONES**, District Ranger, is the official responsible for deciding the type and extent of management activities in the Project. He signed the final DN and FONSI in this case. Defendant Jones is sued only in his official capacity.

STATUTORY AND REGULATORY FRAMEWORK

National Environmental Policy Act (42 U.S.C. §§ 4321–4370(h))

11. Congress enacted the NEPA in 1969, directing all federal agencies to assess the environmental impacts of proposed actions that significantly affect the quality of the human environment. NEPA seeks to “promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man.” 42 U.S.C. § 4321. As such, NEPA obligates agencies to make available to the public high-quality information, including accurate scientific analysis, expert agency comments, and public comments, “before decisions are made and before actions are taken.” 40 C.F.R. § 1500.1(b) (2019).¹ The Court may review agency action taken pursuant to NEPA under the APA. 5 U.S.C. §§ 702, 704, 706.

12. NEPA’s public disclosure goals are twofold: (1) to ensure that the agency has carefully and fully contemplated the environmental effects of its action; and (2) to ensure that the public has sufficient information to review, comment on, and challenge (if necessary) the agency’s action. *See* 42 U.S.C. §§ 4321, 4332. NEPA requires that “environmental information is available to public officials and citizens before decisions are made and before actions are taken.” 40 C.F.R. § 1500.1(b) (2019). NEPA also requires agencies to “make diligent efforts to involve the public in preparing and implementing their NEPA procedures.” *See* 40 C.F.R. § 1506.6.(a) (2019). NEPA documents need to be written in plain language so that decision makers and the public can readily understand them.

13. NEPA requires all federal agencies to prepare a “detailed statement assessing the environmental impacts of all “major Federal actions significantly affecting the quality of the

¹ The Council on Environmental Quality (“CEQ”) promulgates regulations to implement NEPA that are binding on all federal agencies. Those regulations are found at 40 C.F.R. §§ 1500–1508. The CEQ amended its regulations effective September 14, 2020. *See* 40 C.F.R. § 1506.13 (2020) (effective date). However, this Project was developed and analyzed under the earlier 2019 version of the CEQ regulations. Because the 2020 regulations are not retroactive and the Forest Service’s NEPA analysis followed the 2019 version of the regulations, BRWA cites to the 2019 regulations throughout this Complaint.

human environment.” 42 U.S.C. § 4332(C). An EA can be created to aid the agencies in determining whether a proposed activity will significantly affect the quality of the human environment. 40 C.F.R. §§ 1501.4(b) (2019), 1508.9 (2019). The role of the EA is to determine whether an EIS is needed or if a FONSI is appropriate. *Id.*

14. To determine the significance of a federal action, CEQ regulations require agencies to look to both the context and the intensity of the action. 40 C.F.R. § 1508.27 (2019). Context refers to the significance of the action regarding society as a whole, the affected region, the affected interests, and the locality. For site-specific actions, significance usually depends upon the effects in the locale. Both short- and long-term effects are relevant to the action’s context. *Id.* § 1508.27(a) (2019). The intensity of the action is evaluated based on several factors, including, but not limited to, the degree to which the action affects public health or safety, the degree to which the effects on the quality of the human environment are likely to be highly controversial, and the degree to which the possible effects on the human environment are highly uncertain or involve unknown characteristics. *Id.* § 1508.27(b) (2019).

15. For a federal agency to make a FONSI, it must present reasons why the action “will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared.” 40 C.F.R. § 1508.13 (2019). The FONSI must include the EA “or a summary of it and shall note any other environmental documents related to it.” *Id.*

EA and EIS Requirements

16. All EAs must include (1) a description of the need for the Project, (2) a description of the proposed action and alternative(s), (3) a discussion of the environmental impacts of the proposed actions and alternative(s), and (4) a note of the agencies and persons who were consulted throughout the process. 36 C.F.R. § 220.7(b). Importantly, an EA needs to “provide sufficient

evidence and analysis for determining whether to prepare an [EIS] or a [FONSI].” 40 C.F.R. § 1508.9(a)(1) (2019).

17. NEPA requires that all agencies “study, develop, and describe appropriate alternatives to recommend courses of action.” 42 U.S.C. § 4332(2)(E). This requirement “extends to all such proposals, not just ... [environmental] impact statements.” 40 C.F.R. § 1507.2(d) (2019). The EA shall also provide sufficient evidence and analysis of the environmental impacts of the proposed action, as well as the alternative(s). 36 C.F.R. § 220.7(b)(3)(i).

18. Accurate scientific analysis is essential to NEPA implementation. 40 C.F.R. § 1500.1(b) (2019). “NEPA requires that the agency provide the data on which it bases its environmental analysis. Such analyses must occur before the proposed action is approved, not afterward... [W]ithout [baseline] data, an agency cannot carefully consider information about significant environment impacts.” *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1083–85 (9th Cir. 2011) (an agency’s “plans to conduct surveys and studies as part of its post-approval mitigation measures,” in the absence of baseline data, results in a failure to take the requisite “hard look” at environmental impacts). A failure to conduct a baseline analysis on the relevant environmental conditions renders an EIS or EA insufficient. *See Great Basin Res. Watch v. Bureau of Land Mgmt.*, 844 F.3d 1095 (9th Cir. 2016); *see also Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 993 (9th Cir. 2016) (applying NEPA’s hard look requirement to EAs).

19. After completing an adequate EA, the agency shall prepare either an EIS or a FONSI. An agency must prepare an EIS when it determines that the action has the potential to significantly affect the environment. 36 C.F.R. § 220.6(c). A FONSI will be prepared if the action

causes no significant effect to the human environment; but the agency must provide a convincing statement of reasons to explain how the impacts are insignificant. 40 C.F.R. § 1508.13 (2019).

20. NEPA requires federal agencies to conduct supplemental NEPA analyses when either one of two circumstances occurs: “when the agency makes substantial changes to the proposed action that are relevant to the environmental concerns” or “when there are significant new circumstances or information relevant to the environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(c)(1)(i) and (ii) (2019); *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 373–74 (1989) (supplemental analysis is required when the new information bears on the “human environment in a significant manner or to a significant extent not already considered”). While agencies do not need to supplement “every time new information comes to light,” they must take a “hard look” at new information that bears on the “human environment in a significant manner or to a significant extent *not already considered*.” *Marsh*, 490 U.S. at 373–74 (emphasis added). When new information arises, the Eighth Circuit requires agencies to consider the information and reach a reasoned judgment as to whether the new information presents environmental effects not already considered. *Arkansas Wildlife Fed’n v. U.S. Army Corps of Engineers*, 431 F.3d 1096, 1104 (8th Cir. 2005).

21. The requirement to conduct supplemental NEPA analysis applies to both an EA and an EIS. *Idaho Sporting Cong. v. Alexander*, 222 F.3d 562, 566 (9th Cir. 2000) (“[W]e have repeatedly warned that once an agency determines that new information is significant, it must prepare a supplemental EA or EIS.”) (emphasis added); *Price Rd. Neighborhood Ass’n v. United States Dep’t of Transp.*, 113 F.3d 1505, 1508–09 (9th Cir. 1997) (“[I]f the environmental impacts resulting from the design change are significant or uncertain, as compared with the original design’s impacts, a supplemental EA is required.”) (emphasis added).

***United States Forest Service Project-Level Pre-decisional Administrative Review Process
Regulations (36 C.F.R. Pt. 218)***

22. The Forest Service provides regulations establishing a pre-decisional administrative review (also known as objection) process for proposed actions of Forest Service projects documented with a Decision Notice. 36 C.F.R. § 218.1.

23. Objections are written documents seeking pre-decisional administrative review of a proposed project implementing a land management plan that are documented with an EA or DN and can be filed by those who have submitted written comments to the specific project during the commenting opportunity. *Id.* § 218.2.

24. These regulations note that certain projects are subject to legal notice and the opportunity to comment, among these projects for which a revised EA is prepared based on consideration of new information or changed circumstances. *Id.* § 218.22(d). This not only provides the public with an opportunity to comment but ensures that the right to file an objection is maintained for those who comment. *Id.* § 218.5.

Administrative Procedure Act (5 U.S.C. §§ 701–706)

25. Section 702 of the APA, 5 U.S.C. § 702, provides a private cause of action to any person “suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.”

26. Under section 704 of the APA, 5 U.S.C. § 704, “final agency action” is reviewable. A final agency action is one that marks the consummation of the agency’s decision-making process and one by which rights or obligations have been determined from which legal consequences flow. *Bennet v. Spear*, 520 U.S. 154, 177–78 (1997).

27. Under section 706 of the APA, 5 U.S.C. § 706, “The reviewing court shall – (1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set

Page 10: COMPLAINT FOR VACATUR, DECLARATORY AND INJUNCTIVE RELIEF

aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; ... [or] (D) without observance of procedure required by law ...”

28. NEPA does not contain specific judicial review provisions, and the Forest Service’s actions governed by that statute are therefore subject to judicial review under the APA.

ADDITIONAL FACTS GIVING RISE TO THE PLAINTIFF’S CAUSE OF ACTION

29. The Robert’s Gap Project spans a 40,000-acre tract of Forest Service land within the Headwaters Buffalo River watershed in Arkansas. The Robert’s Gap Project affects approximately 8,000 acres of timber thinning and harvest, 11,000 acres of prescribed burning, and 3,000 acres of chemical herbicide treatment, as well as over 30 miles of road construction and 20 miles of dozer lines for fire breaks.

30. The Headwaters Buffalo River watershed, USGS hydrologic unit code 1101000502, contains the Buffalo River, a 135-mile segment of which is America’s first National River. The importance of the Buffalo River to the surrounding community is underscored in its status as a Wild and Scenic River and Extraordinary Water Resource in the area of the Project. Final EA at III-4. There are over 313 miles of streams within the Project and the Forest Service notes that both the Buffalo River and the Kings River are classified as Extraordinary Water Resources. Final EA at III-4. These waters are known for their scenic beauty, aesthetics, scientific value, broad scope recreation potential, and intangible social values. Final EA at III-4. Both water and land within the entire area of the Robert’s Gap Project provides important habitat for fish and wildlife, including the Indiana bat. Additionally, the land surrounding these waters is known for its karst limestone topography, which is highly porous and permeable in nature.

31. The area of the Robert's Gap Project is a popular and much cherished site in the Ozark-St. Francis National Forests. Robert's Gap is responsible for bringing many visitors to the forest to recreate in the form of hiking, kayaking, and camping among other activities, and to enjoy the natural beauty of the area.

32. The Final EA for the Robert's Gap Project was published in March of 2021.

33. The Final DN/FONSI was signed by Defendant Jones on October 27, 2021.

34. BRWA previously submitted timely, written comments on September 1, 2020 regarding the Robert's Gap Project.

35. BRWA submitted timely objections for the Robert's Gap Project on May 20, 2021. Through its response to objections, the Forest Service dismissed all of BRWA's substantive and legal objections on August 5, 2021.

Endangered Indiana bat

36. In July of 2021, before the Forest Service dismissed BRWA's objection and before the Service issued the DN and FONSI, the Service discovered an Indiana bat maternity colony within the area of the Robert's Gap Project in the Headwaters Buffalo River watershed. The Service was not aware of this colony when it proposed amendments to the Ozark-St. Francis Forest Plan in 2019; when it conducted a Biological Assessment ("BA") pursuant to the Endangered Species Act ("ESA") and EA pursuant to NEPA evaluating the potential effects of the amendments on the Indiana bat in early 2020; and adopted the amendments in March of 2021.

37. The BA conducted in 2020 also found that the amendments to the Ozark-St. Francis Forest Plan ("Bat Amendments") "may affect" or were "likely to adversely affect" the Indiana bat, which triggered a Section 7 jeopardy consultation under the ESA. Therefore, in March of 2021, a Biological Opinion ("BiOp") was completed, which noted that prescribed burns would have a

harmful effect on bats but concluded that the Bat Amendments ultimately would not jeopardize the Indiana bat. BiOP at 31, 33. This conclusion was made before the Indiana bat maternity colony was found in the area of the Project.

38. The Indiana bat maternity colony was discovered in the area of the Robert's Gap Project approximately five months after the Service adopted the Bat Amendments and circulated the Robert's Gap Final EA to the public. Three months later, in October of 2021, the Service issued its DN/FONSI authorizing the Robert's Gap Project, but without conducting any public supplemental NEPA analysis regarding the new information concerning the Indiana bat maternity colony within the Robert's Gap Project.

39. On or about August 13, 2021, before the Service finalized its approval of the Project, BRWA submitted a Freedom of Information Act ("FOIA") request to the Forest Service which sought, among other records:

- 1) Any documents, records, or reports, including a Supplemental Information Report ("SIR"), that evaluates, analyzes, or otherwise discusses the ecological importance and/or significance of the discovery of an Indiana bat maternity colony in the area of the Project relative to the overall impacts of the Project to the environment.
- 2) Any documents, studies, reports, or scientific literature relied upon to support or create any such document described above in the first request.

No documents were provided to BRWA by the Forest Service in response to this FOIA request that explained the agency's decision to not undertake additional NEPA analysis. There was no SIR, or even an email that explained why the Forest Service chose not to pursue supplemental

analysis. *See Alexander*, 222 F.3d at 566–68. Overall, there is no evidence of actual consideration of these issues by the Forest Service.

40. However, in the Final DN/FONSI, the Forest Service added measures that were supposed to protect the Indiana bat maternity colony. The DN/FONSI outlined additional mitigation measures without explaining their necessity or how the measures will prevent significant impacts to the maternity colony. Activities that are likely to disturb maternity colonies, such as timber harvest, operation of heavy equipment, or prescribed burns, were originally prohibited, in the Forest Plan, within a quarter mile of the maternity colony from March 15 to August 15, but the DN/FONSI extended the season to October 15 without explaining why the additional two months amount to adequate protection. DN/FONSI at 8 10–11. Even if these measures are expected to potentially benefit the Endangered species, such impacts are still relevant under NEPA, and therefore the Forest Service must analyze and describe the impacts in an SEA or EIS. *See* 40 C.F.R. § 1508.8 (2019) (“Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.”).

41. The DN/FONSI claimed to rely on protections enumerated in the Forest Plan Amendment for Bat Conservation (“Bat Conservation Amendment”), which was created before the discovery of the colony, and which only considered the “potential for Indiana bat maternity trees” instead of analyzing the effects of the actual colony that was discovered. Robert’s Gap DN/FONSI at 8. The Forest Service continued to rely on the pre-discovery Final EA, BiOp, and Bat Conservation Amendment, instead of completing the required additional analysis through an SEA or EIS.

42. Not all changes are potentially beneficial. For instance, within the Bat Conservation Amendment, for sensitive bat areas like caves, the Forest-Wide Standard (“FW”) 52 changed from “avoiding adverse impacts” from prescribed burns to “minimizing such adverse impacts.” Forest Plan Amendment for Bat Conservation Environmental Assessment at 2–4. Further, FW was changed from an obligation to *engage in informal consultation* with the U.S. Fish and Wildlife Service (“FWS”) for all actions within primary conservation zones to an obligation to *coordinate* with FWS for actions within primary conservation zones. *Id.* at 2–5.

43. NEPA requires “that the agency provide the data on which it bases its environmental analysis,” requiring that the agency must analyze the relevant information “before the proposed action is approved, not afterward.” *N. Plains Res. Council*, 668 F.3d at 1083. The Service had no knowledge of the Indiana bat maternity colony until July 2021, so when it adopted its Final EA in March 2021, there was no analysis of this subsequent information to ensure no significant environmental impacts. Instead, the additional protective measures offered in the DN/FONSI are only a form of mitigation, and “[m]itigation measures may help alleviate impact after [beginning the project], but do not help to evaluate and understand the impact before [starting the project].” *Id.* at 1084. Pursuant to NEPA, the discovery of the bat maternity colony is new information that needs to be a part of the initial decision-making process, rather than an afterthought in the DN/FONSI, or an addition through a separate process pursuant to the ESA.

44. The Forest Service did not, however, merely follow the guidance of the Bat Conservation Amendment. Instead, the agency incorporated additional arguably protective measures within the DN/FONSI to attempt to aid in the protection of the Indiana bat. Doing so demonstrates that the Bat Conservation Amendment, made prior to the discovery of the maternity colony, itself was not sufficient to protect the Indiana bat. Although NEPA regulations allow an

agency to avoid preparing a complete EIS by first preparing an EA then issuing a FONSI, 40 C.F.R. § 1508.9, the inadequate EA and underlying record here do not support the Defendants' DN/FONSI.

45. In sum, neither the presence of the maternity colony nor the adequacy of the additional supposed protections was considered in the Final EA or Bat Amendments BiOp. Instead, the Final EA and DN relied upon the conservation measures contained in the Bat Amendments, as well as several last-minute measures placed within the DN/FONSI itself, to support the Service's FONSI. *See* Robert's Gap DN/FONSI at 8.

Water Quality

46. The DN/FONSI also included provisions for quarterly baseline water quality monitoring within the area of the Project. DN/FONSI at 8. This sort of post-decision promise reveals that the agency had already determined it would move forward with the Robert's Gap Project, even though the Final EA did not contain the necessary data on baseline turbidity, pH, conductivity, and temperature of the water necessary to determine what potential significant impacts could occur. Plainly stated, it is impossible to determine impact if one does not know what baseline they are starting from. During the objection process, BRWA filed a timely objection to the Forest Service EA due to the lack of baseline water quality analysis, which demonstrated the need to do an SEA or SEIS. Ultimately, the Service delayed implementation of the Project until September 1, 2022, in order to collect the necessary baseline samples. *Id.* Subsequently, on November 18, 2022, the Forest Service conceded that they were obligated to monitor water quality. They gave a public water quality monitoring presentation outlining the plan to test for herbicides including glyphosate, triclopyr, imazapyr, and metsulfuron methyl. The monitoring for presence of herbicides such as glyphosate in the water, contradicts the Forest Service conclusion in the EA

that “soil microbes will break down *any* remaining herbicide residue that reaches the soil.” Final EA at III-2.

47. The environmental review also lacked a baseline analysis of runoff and failed to equally analyze runoff in both the herbicide and no herbicide alternatives within the Final EA. In the “No Herbicide Use” (Alternative 2) within the Final EA, the Forest Service concluded that the use of no herbicides would increase the runoff by six percent from baseline levels. Final EA at III-6. However, no information has been made publicly available about the level of baseline runoff, so based on the EA and DN/FONSI there is no analysis to substantiate this finding of an increase in runoff.

Herbicide Use

48. In their comments to the Forest Service, BRWA refers to the settlements that the Bayer company has entered due to plaintiffs that have developed non-hodgkin’s lymphoma following the application of Bayer’s glyphosate herbicide in plaintiffs’ surrounding environment. These class action settlements demonstrate the gravity of the scientific question at hand and the potential impacts on public health. Further, in BRWA’s September 2020 comments and May 2021 objection letter specifically, Plaintiffs contested the use of another herbicide listed in the Final EA, triclopyr, by raising the April 2021 Ninth Circuit ruling compelling the EPA to issue a final rule concerning chlorpyrifos tolerances by August 2021. Both triclopyr and chlorpyrifos each create the chemical derivative TCP, which has been cited by the Environmental Protection Agency and US Department of Health and Human Services as reasonably anticipated to be a human carcinogen. Further, the Environmental Protection Agency lists triclopyr on its list of emerging contaminants, on par with other contaminants such as polyfluoroalkyl substances (“PFAS”).

49. Defendants acknowledge that there is strong community opposition to the application of herbicides, but notably the terms glyphosate and triclopyr/chlorpyrifos are omitted from the DN/FONSI, in favor of a euphemism of sorts in the general term ‘herbicide.’ Between the Final EA and the DN/FONSI, Defendants modified the area that herbicides such as Glyphosate will be used on, specifically reducing the application in MA2D Upper Buffalo Dispersed Recreation Area to zero. DN/FONSI at 1. This modification implicitly demonstrates the potential impacts to persons such as plaintiffs and the community and underscores the need to rely on updated science.

Request for Supplemental Environmental Assessment

50. On May 24, 2022, BRWA sent out a request for additional NEPA analysis to Tom Vilsack, the U.S. Secretary of Agriculture; Mike Mulford, the NEPA Coordinator for the Big Piney Ranger District; and Timothy E. Jones, the District Ranger who signed the DN/FONSI. The letter asked that the Service prepare and circulate for public comment and review either a SEA or EIS to address the failure to conduct a baseline analysis for water quality and failure to adequately address the discovery of an Indiana bat maternity colony within the Project. BRWA never received a response from the Service.

PLAINTIFF’S CLAIMS FOR RELIEF

(Violations of APA and NEPA)

51. The Forest Service violated the APA and NEPA by arbitrarily and capriciously failing to 1) take a hard look at the Buffalo National River, 2) take a hard look at water quality, 3) take a hard look at the impacts to the Indiana bat, 4) provide an Opportunity for Public Comment, 5) rely on updated science, 6) produce an SEA or EIS, 7) act on a continuing basis with regard to

producing an SEA or SEIS, and finally 8) analyze new circumstances, instead issuing a Finding of No Significant Impact.

52. Plaintiff realleges and incorporates by reference all preceding paragraphs into each of the counts set forth below.

Count 1

(Failure to Take a Hard Look at the Buffalo National River in violation of APA and NEPA)

53. The Forest Service failed to take a hard look at the impacts to America's first National River, the Buffalo National River, prior to issuing the EA and the DN/FONSI. Therefore, its conclusion that the Robert's Gap Project would not lead to degradation of the river was arbitrary and capricious.

54. The area of the Project encompasses the Headwaters Buffalo River watershed, USGS watershed number 110100050202, which includes the Buffalo River, designated as a wild and Scenic River in the Project. The Buffalo River flows north through the Upper Buffalo Wilderness in the eastern part of the Project and continues to flow into the Buffalo National River as it leaves the national forest. Final EA at III-3. While a meeting with three specialists from the Buffalo National River took place, there is no demonstrated analysis of the substance of that meeting or materials to show that any analysis took place. DN/FONSI at 12.

55. The Forest Service's failure to take a hard look at the Buffalo National River in its Final EA and DN/FONSI was arbitrary, capricious, and not in accordance with NEPA and its implementing regulations. 5 U.S.C. § 706(2)(A).

Count 2

(Failure to Take a Hard Look at Water Quality in violation of APA and NEPA)

56. The Forest Service failed to conduct a baseline analysis of the water quality in the Headwaters Buffalo River watershed before issuing the EA and the DN/FONSI. Therefore, its conclusion that the Robert's Gap Project would not lead to degradation was arbitrary and capricious and requires supplemental NEPA analysis to remedy.

57. In the NEPA process, a failure to conduct a baseline analysis on the relevant environmental conditions renders an EIS or EA insufficient. *See Great Basin Res. Watch*, 844 at 1095; *see also Klamath-Siskiyou Wildlands Ctr.*, 387 F.3d at 993 (applying NEPA's hard look requirement to EAs). It is not enough that the Forest Service promised to establish water quality monitoring in its DN/FONSI. Robert's Gap DN/FONSI at 8. Delaying the Project to obtain these water samples is an admission by the Forest Service that it must obtain this baseline information *before it begins* activities with the potential to significantly impact water quality such as logging, prescribed burning, and herbicide application.

58. Despite the Service's belated effort to obtain baseline information, it is too late. NEPA requires agencies obtain baseline information *before* an agency issues its final decision on whether the project can move forward. There is no record of water testing or sampling available to the public, yet the Service concluded that the impacts of this Project "are not expected to contribute to the degradation of the current water quality." EA at III-7. Without adequate baseline data, there is not a way to accurately determine effects, making a "hard look" impossible.

59. The Forest Service's failure to take a hard look at water quality within the Headwaters Buffalo River watershed in its Final EA and DN/FONSI was arbitrary, capricious, and not in accordance with NEPA and its implementing regulations. 5 U.S.C. § 706(2)(A).

Count 3

(Failure to Take a Hard Look at the Impacts to the Indiana bat in violation of APA and NEPA)

60. While the DN/FONSI outlined additional protections to be used in response to the July 2021 discovery of a maternity colony, neither the impact to the actual maternity colony nor the adequacy of the additional protections were considered in the Final EA or any of the associated documents issued to comply with the ESA.

61. While superficially some of these changes may appear to give additional protection, they ultimately do not protect the Indiana bat from significant impacts that will occur because of the Robert's Gap Project. Further, if the Bat Conservation Amendment were adequately protective, as the Forest Service claims in the DN/FONSI, then the agency would not need to implement additional mitigation measures. Therefore, by adding these additional measures, the Forest Service is implicitly admitting that the existing protective standards from the Bat Conservation Amendment were insufficient to begin with.

62. Because the Forest Service failed to analyze the Robert's Gap Project as it will specifically affect the Indiana bat maternity colony found in the Project, the agency has violated NEPA and the APA.

63. The Forest Service's failure to analyze and disclose direct impacts to the Indiana bat is arbitrary, capricious, an abuse of discretion, and not in accordance with NEPA and its implementing regulations. 5 U.S.C. § 706(2)(A).

Count 4

(Failure to Provide an Opportunity for Public Comment in violation of APA and NEPA)

64. NEPA requires agencies to make diligent efforts to involve the public in preparing and implementing their NEPA procedures. 40 C.F.R. § 1506.6(a). “A proposed project or activity for which a supplemental or revised EA ... is prepared based on consideration of new information or changed circumstances” is subject to legal notice and the opportunity to comment 36 C.F.R. § 218.22(d).

65. After the March 2021 Final EA was published by Forest Service, new information, namely, the discovery of the Indiana bat maternity roost, arose in July 2021. Defendants deprived the public of the opportunity to comment on this significant change in circumstances. For the first time, the October 2021 DN/FONSI raised the discovery of the Indiana bat maternity roost, yet no one was given an opportunity to comment and/or object to the measures adopted. Further, the lack of water quality analysis in the Final EA, which also took the form of a last-minute incorporation into the DN/FONSI, deprived the public of the ability to comment on the methodology. Plainly, because the Indiana bat maternity roost and the water quality monitoring were not in the Final EA and there was never a SEA or EIS, the public was never able to weigh in via public comment regarding these significant last-minute changes.

66. Given NEPA’s goal of allowing and encouraging public scrutiny, the Defendants improperly denied the public a chance to engage with Defendants and comment on the changed circumstances. 40 C.F.R. § 1500.1.

67. In the absence of such public scrutiny, Defendants’ DN/FONSI is arbitrary, capricious, and not in accordance with NEPA and its implementing regulations. 5 U.S.C. § 706(2)(A).

Count 5

(Improper Reliance on Outdated Science in violation of APA and NEPA)

68. It is essential to NEPA that scientific analysis within NEPA documents is of high quality. 40 C.F.R. § 1500.1(b). An agency's analysis cannot rest on outdated science.

69. Comments submitted by BRWA to the District Ranger in September of 2020 stressed the serious health risks, including cancer, which application of herbicides contained in the EA and selected in the DN/FONSI, such as glyphosate and chlorpyrifos pose. Comments referred to class action settlements due to carcinogenic outcomes associated with application of glyphosate and the Ninth Circuit compelling the EPA to issue a final rule on chlorpyrifos.

70. Despite being presented with conflicting information about the science on primary herbicides for use in the Project, Defendants cited only two studies in the Final EA prepared in 2007 and 2014. Final EA at III 15-20. Further, in the DN/FONSI, Defendants conclude that there will be no impacts on public health and safety, citing back to the EA. DN FONSI at 15.

71. The lack of quality analysis due to the Service's dismissal of newer conflicting science regarding the potential dangers of the selected herbicides is arbitrary, capricious, and not in accordance with NEPA and its implementing regulations. 5 U.S.C. § 706(2)(A).

Count 6

(Failure to Produce a Supplemental Environmental Assessment or Environmental Impact Statement in violation of APA and NEPA)

72. The Forest Service violated NEPA by failing to produce a SEA or SEIS after issuing a Final EA and DN/FONSI in 2021. A SEA or SEIS is necessary because the Service did not make a reasoned judgment by choosing not to prepare supplemental analysis regarding the discovery of the Indiana bat maternity colony within the Robert's Gap Project and the lack of baseline water quality analysis in the Final EA.

73. Failing to supplement the EA with additional information based on the discovery of the Indiana bat maternity roost is a violation of NEPA, as this is a significant new circumstance relevant to environmental concerns. 40 C.F.R. § 1502.9(c)(1)(ii). The discovery of the maternity colony after the adoption of the Final EA is a “significant new circumstance” that requires a SEA or SEIS under NEPA.

74. In addition, the Forest Service also failed to collect and analyze any baseline water quality samples prior to issuing its EA. Within the EA, the Forest Service concluded, “the impacts from this Project are not expected to contribute to the degradation of the current water quality.” EA at III-7. At this point, without any water samples, the Forest Service had no data to support any knowledge of baseline water quality, so its conclusion that there was no impact was unsupported and fundamentally flawed. Thus, the failure to carry out additional environmental analysis, in the form of an SEA or SEIS—that incorporated baseline water quality from the start, rather than a last-ditch effort in the DNFONSI—is illegal.

75. Thus, the Forest Service “unlawfully withheld or unreasonably delayed” a required agency action through failing to produce an SEA or SEIS in light of new information and circumstances. 5 U.S.C. § 706(1).

76. In the alternative, if the Forest Service affirmatively and finally decided not to prepare an SEA or SEIS, that final agency action was arbitrary, capricious, and not in accordance with NEPA and its implementing regulations. 5 U.S.C. § 706(2)(A).

Count 7

(Continuing Failure to Act in not preparing an SEIS in violation of APA and NEPA)

77. Federal regulations require agencies to produce supplements to either draft or final environmental impact statements when there are substantial changes or significant new

circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. 40 C.F.R. § 1502.9(c)(1)(i–ii).

78. The Forest Service has continued to violate NEPA by failing to produce a SEIS or SEA analyzing the significant new circumstances and information relevant to environmental concerns that the both the Indiana bat and lack of baseline water data bring up. This is further emphasized by the Forest Service’s lack of response to Plaintiff’s May 2021 demand letter that laid out the changed circumstances including the discovery of the Indiana bat maternity roost in the Project and the lack of baseline water quality analysis in the EA.

79. After issuing a Final EA and DN/FONSI in 2021, a SEA or SEIS is necessary because the Forest Service did not make a reasoned judgment in choosing not to prepare supplemental analysis regarding the discovery of the Indiana bat maternity colony within the Robert’s Gap Project and the lack of baseline water quality data.

80. Thus, the Forest Service “unlawfully withheld or unreasonably delayed” a required agency action through failing to produce an SEA or SEIS in light of new information and circumstances. 5 U.S.C. § 706(1).

81. In the alternative, if the Forest Service affirmatively and finally decided not to prepare a SEIS, that final agency action was arbitrary, capricious, and not in accordance with NEPA and its implementing regulations. 5 U.S.C. § 706(2)(A).

Count 8

(Improper Assessment of a Finding of No Significant Impact in violation of APA and NEPA)

82. A FONSI can be prepared if the Defendants determine, on the basis of an EA, that an EIS is not required because there will be no significant effects to the human environment from the proposed action. 40 C.F.R. § 1501.4(e). To determine the significance of a federal action, CEQ

requires that the agencies look to both the context and intensity of the action. 40 C.F.R. § 1508.27 (2019).

83. The DN/FONSI prepared in this case was improper because the March 2021 EA on which it was based, was plainly inadequate due to the lack of baseline water quality analysis and improper analysis of conflicting science and protective measures for the Indiana bat. In terms of intensity factors, at least five of the intensity factors within the DN/FONSI are significant. To begin with, various chemical herbicides that the Forest Service has included in the Project have been caught up in class action litigation, have had closely related chemicals banned by the EPA, and have been cited by the EPA and the U.S. Department of Health and Human Services as likely to cause cancer in humans. This implicates the intensity factors of the degree with which public health and safety are affected, the degree to which the effects on the human environment are likely to be highly controversial, and the degree to which the effects on the human environment are uncertain or involve unique or unknown risks.

84. Further, the intensity factor of unique characteristics of the geographic area is directly implicated due to the presence of important and fragile ecosystems in the Project area. The Buffalo River flows north through the Upper Buffalo Wilderness in the eastern part of the Project, where it is designated as a Wild and Scenic River and Extraordinary Water Resource, and then continues to flow into the Buffalo National River as it leaves the national forest. Final EA at III-3. The area within the Project also contains the Kings River, an Extraordinary Water Resources, in addition to over 313 miles of streams and fragile water ecosystems such as bogs, with sensitive plant species and soils and hydrology prone to damage. Final EA at II-20. Finally, the impacts on an Endangered species, the Indiana bat are not quantified within the NEPA review process because the discovery of the Indiana bat in the Project followed the Final EA and the Forest Service never

carried out a SEA. In sum, the totality of these intensity factors shifts the balance of the impacts of the project to significant and shows the Forest Service did not provide sufficient support for a FONSI as a result of their actions.

85. BRWA raised substantial questions about whether the Project will have a significant effect on the environment including the surrounding natural and human communities.

86. Defendants' DN/FONSI was arbitrary, capricious, and not in accordance with NEPA and its implementing regulations. 5 U.S.C. § 706(2)(A).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court:

- A. Declare that the Forest Service's DN/FONSI for the Robert's Gap Project violates NEPA, 42 U.S.C. §§ 4321 *et seq.*, declaring that failure to provide SEA and DN/FONSI failed to account for significant circumstances which constitutes a failure to act under § 706(1); and is arbitrary, capricious, an abuse of discretion, and/or not in accordance with law under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A);
- B. Declaring that the Forest Service must conduct either a SEA or SEIS;
- C. Vacating and setting aside the Forest Service's illegal DN/FONSI as an illegal agency action under the APA;
- D. Permanently enjoining the Forest Service from implementing the Robert's Gap Project until the agency complies with NEPA;
- E. Enter preliminary and permanent injunctive relief to ensure that the Forest Service complies with NEPA, and specifically to ensure that the Forest Service and its

agents take no further actions toward proceeding with the challenged Robert's Gap Project until they have complied with NEPA;

- F. Awarding Plaintiff its reasonable attorneys' fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412; and
- G. Grant such further relief as the Court deems just and equitable.

Respectfully submitted on this 21st day of February 2023.

Joseph Henry (Hank) Bates, III
ABN 98063
Carney Bates & Pulliam, PLLC
519 W. 7th Street
Little Rock, AR 72201
Telephone: (501) 312-8500
Fax: (501) 312-8505
E-mail: hbates@cbplaw.com

Thomas Buchele (*pro hac vice forthcoming*)
Earthrise Law Center
Lewis & Clark Law School
10101 S. Terwilliger Blvd.
Portland OR 97219-7799
Telephone: (503) 768-6736
Email: tbuchele@lclark.edu

*Attorneys for Plaintiff
Buffalo River Watershed Alliance*