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

BUFFALO RIVER WATERSHED ALLIANCE, Plaintiff, v. U.S. FOREST SERVICE & TIMOTHY E. JONES, District Ranger, Defendants.	Case No. 3:23-cv-03012-TLB **FEDERAL DEFENDANTS' REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT** **ORAL ARGUMENT REQUESTED**

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INTRODUCTION

Federal Defendants are entitled to summary judgment. The Forest Service engaged in a thorough environmental review of the Robert's Gap Project on the Ozark-St. Francis National Forests ("Ozark-St. Francis") under the National Environmental Policy Act ("NEPA"). The Project's Decision Notice and Finding of No Significant Impact ("DN/FONSI") should be affirmed.

In Counts One-Three of the Amended Complaint, BRWA would have the Court invalidate the DN/FONSI based on alleged omissions in the Forest Service's environmental assessment ("EA") that BRWA failed to raise in its public comments on, or administrative objections to, the Project, as mandated by statute and Forest Service regulations. BRWA concedes in its response to Federal Defendants' cross-motion for summary judgment that it was required by statute to administratively exhaust the claims it seeks to bring in litigation but asks that its failure be excused. Because a party cannot seek to invalidate a decision based on objections that were not presented to the agency for review, however, the Court should strictly apply exhaustion.

But even if Counts One-Three could proceed to the merits, BRWA's challenge to the agency's review of the Project's potential effect on the Buffalo National River, potential herbicide contamination, and potential effect on water quality fails because the agency adequately assessed each of these potential effects in the record. BRWA seeks to distract the Court from that record, asserting that the Court's review is limited to just the EA. Yet Section 706 of the Administrative Procedure Act ("APA") is clear that judicial review is of the "whole record," not just the EA. Furthermore, NEPA's regulations and this Circuit's precedent recognize that an EA should be a "brief" and "concise" document. An EA thus cannot be expected to recount every issue and question that was assessed in the agency's environmental analysis.

BRWA's Counts Six and Seven, which allege the Forest Service failed to supplement the Robert's Gap EA, also fall short. In Count Six, BRWA asserts that the voluntary background water testing that is now completed—and revealed no trace of herbicide contamination—requires that the agency supplement the EA to analyze potential herbicide contamination and a potential increase in sediment. But the Forest Service has already analyzed both potential effects of the Project, and BRWA has failed to point to any new information that the agency has not previously considered that would trigger a duty to supplement.

Nor has BRWA pointed to any new information that the Forest Service has not already considered regarding the Indiana bat maternity colony (Count Seven). It is true that the maternity colony was discovered after the EA was completed and thus could not have been addressed in the Forest Service's analysis of the Project. But the Forest Service prepared Indiana Bat Conservation Forest Plan Amendments ("Bat Plan Amendments") specifically to account for the possibility that a colony might be present on the Ozark-St. Francis and to establish protections that would be implemented to protect a colony in projects like the Robert's Gap Project. Once the maternity colony was discovered, the agency implemented the protections and tiered to the amendments' environmental analysis in the Project's DN/FONSI, just as it had intended in the amendments.

And because the Bat Plan Amendments were developed through the full complement of NEPA environmental review and public participation, the Court should reject BRWA's repeated claim it had no opportunity to provide input on the Bat Plan Amendments (Count Four). Similarly, no public participation was required for the baseline water quality monitoring conducted after the Project's EA was completed to monitor project implementation (Count

Three). Permitting public participation in a decision to supplement would unduly prolong the NEPA process.

That leaves Count Eight, which repackages Counts One-Three to assert that the Forest Service was required to prepare an environmental impact statement ("EIS"), rather than an EA, in assessing the Project's potential effect on the environment. But the Forest Service fully examined the project's potential impacts on the Buffalo National River, herbicide contamination, and water quality and reached the well-reasoned conclusion that the Project would not have significant effects requiring an EIS. Federal Defendants are thus entitled to judgment on that count.

The Court should grant Federal Defendants summary judgment on all counts, deny BRWA's cross-motion in its entirety, and allow this critical forest health project to proceed.

ARGUMENT

I. BRWA Cannot Pursue Claims One–Three Because it Did Not Raise them in Public Comments or in the Mandatory Administrative Objection Process

In seeking summary judgment on Counts One-Three, BRWA continues to insist that the Forest Service's EA disregarded the Project's potential effect on the Buffalo National River because the agency did not devote a separate section of the EA to that river. *See* Pls.' Reply in Supp. of Summ. J. and Resp. to Defs.' Cross-Mot. for Summ. J. ("Pls.' Resp."), ECF No. 47, 20-23. BRWA also continues to assert that the EA did not evaluate potential herbicide contamination because the EA did not disclose that management activities had not occurred in the area in the last forty years. *Id.* at 22. And lastly, BRWA insists that the EA failed to properly evaluate the Project's potential effect on water quality because the EA did not include project-specific baseline or background water quality sampling for the area. *Id*. at 30-31. Because BRWA raised none of these claims in its Project comments or objections, Counts One-Three should be

dismissed under the APA's exhaustion doctrine and because they are waived and forfeited. *See* Fed. Defs.' Mem. in Supp. of Cross-Mot. for Summ. J. ("Fed. Defs.' Cross-Mot.") 19-23.

A. BRWA Raised None of the EA's Alleged Omissions in its Objections

The Court should not be misled by BRWA's argument that it raised the issues it now pursues in litigation in its administrative objections, or that its failure to do so is only a failure to "incant magic words." *See* Pls.' Resp. 15 (quoting *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 965-66 (9th Cir. 2002)). Even though it had the Final EA when it made its objections, BRWA's written objections requested that [1] no herbicides be used in the Project; [2] expressed concern that the Project may pose a danger to endangered and threatened species, including bat species; and [3] expressed concern that the Project may adversely impact recreation in the area. AR_1798-1799 (Objections). None of the EA's alleged omissions were mentioned.

And during the objection resolution meeting, which the agency additionally so that it could understand and address, if possible, public concerns with the Project, BRWA expressed concern that the Buffalo River watershed would be adversely impacted from herbicides and increased runoff and sediment. AR_1855-1856. BRWA also expressed concern that increased sediment resulting from the Project and the Project's herbicides would adversely impact threatened or endangered bat species in the Project area. AR_1856-1857. Finally, BRWA questioned the Project's effect on water quality, from "runoff and channeling from roads"—and to air quality, from "[a]irborne particulates" associated with prescribed burning. AR_1857. BRWA again did not mention the EA's alleged omissions during the objection resolution meeting.

The Forest Service prepared a written response to the objections BRWA raised in its written objections and at the meeting. AR_1860-1870. As to the Buffalo National River, the

Forest Service explained that the Forest Plan's Forest-Wide and Management Area standards, and Project designs would adequately protect water quality—including downstream of the Project area, in the Buffalo National River. AR_1860. And that response referenced the Project's EA, where those Forest Plan standards were explained. *Id*. (referencing Chapter II, Parts D-G of Final EA, AR_1739-1740)). The Forest Service could not respond to BRWA's further unexpressed concern—that the EA was deficient because it did not devote a specific section to the Buffalo National River—because it was not made during the mandatory objection process.

That BRWA's objections referenced the Buffalo National River, does not satisfy its obligation to explain "how the objector believes the environmental analysis or draft decision *specifically* violates law, regulation, or policy," as BRWA asserts in its response. 36 C.F.R § 218.8(d)(5) (emphasis added). Pls.' Resp. 16-17. At no point in the objection process did BRWA present the claim that it seeks to pursue now, that the Project's EA violates "law, regulation, or policy" by not devoting a separate section to the Buffalo National River. Because a party "who wish[es] to participate [in an administrative process must] structure their participation . . . so that it alerts the agency to [its] position and contentions," that argument was waived. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc*., 435 U.S. 519, 558 (1978)). Simply referencing the river or questioning the Project's impact on that river, does not change that result; an "administrative proceeding should not be a game or a forum to engage in unjustified obstructionism by making a cryptic and obscure reference [to a challenge] . . . and then, after having failed to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters." *Id*.

BRWA did not need to await the Forest Service's decision or FOIA response to learn that the agency had not undertaken management practices in the area in the past forty years. Pls.'

Resp. 17. The Project's scoping notice made clear from the outset that "little forest management [had] occurred in the project area" in the "last 25 years." AR_1210. BRWA was thus on clear notice of the Project's long overdue treatments well before the objection period. This is thus not a case in which the agency had "'independent knowledge of the issues,'" as BRWA asserts. Pls.' Resp. 17 (quoting *Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1092 (9th Cir. 2006)). Indeed, BRWA is local to the area and purports to be interested in the local environment, including the river. BRWA thus likely knew when the Forest Service last undertook treatments in the area even without the added notice in the scoping notice or any agency announcement.

Nor did BRWA's objections question the EA's lack of baseline or background water sampling. Indeed, rather than raise that objection so that the agency could consider it, BRWA applauded the agency's agreement to conduct such testing in the Project decision. AR_1896.

Lastly, BRWA's public comments did not preserve the challenge to the EA's alleged omissions. Pls.' Resp. 16. At the time BRWA filed its comments, it had the draft EA. AR_1299 (Public Notice of Availability of Draft EA); AR_1300-1357 (Draft EA). And yet BRWA's comments raised none of the EA's alleged omissions in its comments. *See* AR_1358-1364 (BRWA's Comments. To properly exhaust the administrative objection process, moreover, a party must file written objections, not just public comments. 36 C.F.R. § 218.8; *see also Native Ecosystems Council v. Lannom*, CV No. 21-22-M-DWM, 2022 WL 1001493, at *3 (D. Montana April 4, 2022) (recognizing that Forest Service regulations require "'objection,' not just comments." (quoting 36 C.F.R § 218.8(d)(5))). Thus, even if BRWA had raised these concerns in its comments, that would not excuse its obligation to file written objections under the agency's regulations.

B. Statutory Exhaustion under Section 6912(e) is not Subject to Balancing

As for BRWA's failure to exhaust, BRWA concedes that it was "[required] to exhaust available administrative remedies [under the APA] before bringing issues to federal court." *See* Pls.' Resp. 13. BRWA also agrees that its statutory exhaustion obligation "includes [the] appeal procedures established by the Secretary of Agriculture pursuant to 7 U.S.C. § 6912(e)." *Id*. Nor could BRWA contend otherwise, considering that Section 6912(e) states that "a person shall exhaust all administrative appeal procedures . . . before the person may bring an action in a court . . . ." 7 U.S.C. § 6912(e). Yet, citing Judge Arnold's concurring and dissenting opinion in *Madsen v. United State Department of Agriculture*, 866 F.2d 1035 (8th Cir. 1989), BRWA asks the Court to take a "balanced approach" to APA exhaustion that weighs the consequences of dismissal. Pls.' Resp. 14. But *Madsen* does not excuse BRWA's failure to exhaust here.

Plaintiff there "elected not to take full advantage of administrative procedures permitting him to challenge wheat yields assigned to his farm" and instead opted to challenge the wheat yields for the first time in litigation. *Madsen*, 866 F.2d at 1037. The agency argued that the complaint should be dismissed because the plaintiff failed to exhaust his administrative remedies. *Id*. Writing for the panel majority, Judge Fagg agreed with the government that plaintiff's failure to administratively exhaust precludes judicial review because plaintiff should be "accountable" for his choice not to exhaust. *Id*. at 1037. The *Madsen* court thus rejected BRWA's balancing approach. Applying that decision here similarly mandates dismissal of Counts One-Three.

Judge Arnold's dissenting opinion also agreed that "[t]he rule requiring a litigant to exhaust administrative remedies before seeking judicial review of agency action is based on principles of sound judicial administration." *Id*. at 1038. Judge Arnold thus recognized that equitable principles have no place when, as here, exhaustion is governed by "a specific statutory

requirement" like Section 6912(e). *Id*. True, Judge Arnold's dissenting opinion would balance the parties' interests when "the exhaustion doctrine may foreclose *any* judicial review." *Id*. at 1039 (emphasis in original). But those principles are not at issue here because applying the exhaustion doctrine would only preclude review of only three of the complaint's eight counts. And, of course, Judge Arnold was dissenting. The binding authority in the Eighth Circuit mandates that claims not exhausted in the administrative process may not be pursued in litigation.

Furthermore, Forest Service regulations require a party file written objections to a project that describe with particularity "how the objector believes the environmental analysis or draft decision specifically violates law, regulation, or policy." 36 C.F.R § 218.8(d)(5). Because of the regulations' clear mandate, other courts have taken a strict approach to Section 6912(e) exhaustion. *See e.g., Kleissler v. U.S. Forest Serv.*, 183 F.3d 196, 202 (3d Cir. 1999) (recognizing that under Section 6912(e) "claims raised at the administrative appeal and in the federal complaint must be so similar that the district court can ascertain that the agency was on notice of, and had an opportunity to consider and decide, the *same* claims now raised in federal court.").

BRWA complains that the Third Circuit's approach to exhaustion in *Kleissler* is too strict and should not be followed here. Pls.' Resp. 18-19. But *Kleissler* recognized that strictly applying administrative exhaustion is necessary because the Supreme Court has long recognized that exhaustion furthers sound judicial administration by: [1] "avoid[ing] 'premature interruption of the administrative process'"; [2] allow[ing] the agency to "'develop the necessary factual background;'"[3] giv[ing] the agency the "'first chance' to exercise its discretion,' and properly defer to the agency's expertise"; [4] provid[ing] the agency with "an opportunity to 'discover and correct its own errors"'; and [5] deter[ing] the deliberate flouting of administrative processes.'" *Kleissler*, 183 F.3d at 201 (quoting *McKart v. United States*, 395 U.S. 185, 194-95 1999)).

The Court should reject BRWA's request to be excused from its duty to exhaust and follow *McKart*, *Madsen*, *Kleissler* and the other cased cited in Federal Defendant's opening brief and dismiss Counts One-Three under the exhaustion doctrine alone. *See also Forest Guardians v. U.S. Forest Serv*., 641 F.3d 423, 431 (10th Cir. 2011) (recognizing that plaintiff must exhaust under 7 U.S.C. § 6912(e) before bringing claims in federal district court); and *Native Ecosystems Council v. Kimbell*, No. CV 04-127-M-DWM, 2006 WL 8430971, at *10-11 (D. Mont. Aug. 29, 2006) (recognizing that party may not pursue claims that were not exhausted during agency's mandatory objection process). The cases BRWA relies on in its response are not to the contrary. *See* Pls.' Resp. 14-15 (citing *Protect Our Comm. Found. v. LaCounte*, 939 F.3d 1029, 1037 (9th Cir. 2019) (addressing waiver rule, not exhaustion); *Wyo. Lodging & Rest. Ass'n v. U.S. Dep't of Interior*, 398 F. Supp. 2d 1197, 1211 (D. Wyo. 2005) (addressing waiver, not exhaustion).

The Court should thus dismiss Counts One-Three for these threshold reasons alone.

II. The Court Reviews the "Whole Record" under the APA, not Just the EA

But even if BRWA could overcome its failure to exhaust and waiver, BRWA's challenge to the DN/FONSI in Counts One-Three of the Amended Complaint still fails under the APA's deferential arbitrary and capricious standard of review. The Forest Service's record shows that it adequately considered the Project's potential effect on the Buffalo National River, potential herbicide contamination, and water quality in the administrative record and determined that Project would not have any significant potential effects on the resources in the Project area. *See* Fed. Defs.' Cross-Mot. 23-31. Thus, the Court should "affirm" the Forest Service's DN/FONSI under NEPA under the APA's standard. *Sierra Club v. E.P.A*., 252 F.3d 943, 947 (8th Cir. 2001).

A. The "Whole Record" Supports the Forest Service's DN/FONSI

The Forest Service adequately considered the Project's potential effects throughout the Project area and on the Buffalo National River. The Project's EA evaluated each of the alternatives' potential effect on water quality in the analysis area. AR_1745-1753 (EA Water Quality Analysis); AR_1918-1927 (Draft EA Water Quality Analysis). And to assess the Project's effect on sediment in the watershed, the Forest Service used the Water Resource Analysis for Cumulative Effects ("WRACE") model. *See* AR_1928-1974 (WRACE Model Information). Based on this analysis, the Forest Service determined that the Project's direct and indirect impacts are not likely to degrade the current water quality in the analysis area, including the Buffalo National River. AR_1750 (EA).

As explained in the EA, the Forest Service's analysis included potential effects on water quality in or downstream of the area, including the "Buffalo National River, [that] flows north through the Upper Buffalo Wilderness in the eastern part of the project area and becomes the Buffalo National River as it exits the National Forest." *See* AR_1746 (Robert's Gap Watershed Map). The United States Department of Interior's National Park Service, the agency that manages that river, reviewed the Forest Service's water quality analysis in the Draft EA and "determined that none of the proposed actions [under the Robert's Gap Project] have the potential to significantly impact resources of [the Buffalo National River]." AR_1392.

As for potential herbicide contamination, the EA lists the EPA-approved herbicides that would be applied under the Project, by treatment and chemical, along with a risk assessment for herbicides that would be applied in the project area. AR_ 1730 (identifying type of treatment and chemical); AR_1762-1770 (herbicide risk assessment). Moreover, the Forest Service has long conducted project-specific water quality monitoring for herbicides. AR_1975-1987 (Herbicide

Monitoring Policy and Supporting Test Results). Because that monitoring consistently revealed no contamination from the chemical application of herbicides above EPA-concern levels, the Forest Service adopted a policy of only undertaking project-specific testing for herbicides "where determined to be necessary." AR_1975. The Forest Service relies on the Forest Plan's standards that require protective measures and application methods to protect the area from herbicide contamination. *See* AR_0154-0155 (Forest Plan Forest Wide Standards for herbicides and herbicide application methods); AR_0157 (Forest Wide Standards for management activities in Karst features); AR_0170 (Forest Wide Standards for Fire Management activities); and AR_1762-1770 (Final EA discussion of Project herbicides). The Forest Service thus initially decided there was no need to undertake baseline testing for the Robert's Gap Project.

But to address the request of another party, the Forest Service agreed to conduct baseline or background water quality testing in the Project area before Project implementation so that it could monitor any changes to the watershed during the Project. AR_1905. And the Forest Service did so even though it expected the sampling to reveal no trace of herbicide contamination. Consistent with those expectations, the Forest Service's now completed testing detected no herbicide contamination at the locations tested. *See* Decl. of Richard Monk ("Monk Decl."), ECF No. 46-1 ¶¶ 3-5. The EA and record thus show that the Forest Service adequately analyzed the potential effects that BRWA complains that the agency did not consider and found no significant impacts.

B. There is No NEPA Exception to Section 706's "Whole Record" Review

Rather than confront the record that supports the Forest Service's environmental analysis and DN/FONSI on the issues presented in Counts One-Three, BRWA persists in arguing that the Court must limit its review to the four corners of the EA, ignoring the broader administrative

record. Pls.' Resp. 10-13. But in making "determinations" under Section 706(2), including the "arbitrary and capricious" standard in Section 706(2)(A), "the court shall review the *whole record* or those parts of it cited by a party[,]" not just the EA. 5 U.S.C. § 706 (emphasis added).

BRWA cites no statutory language in either the APA or NEPA that would support its argument that NEPA review is limited to the EA itself because no such language exists. BRWA instead maintains that NEPA's implementing regulations somehow constrain the Court's review. Pls.' Resp. 11. To the contrary, those regulations specifically direct that an EA should be a "concise public document" that serves to "[b]riefly provide sufficient evidence and analysis for determining whether to prepare" an EIS or FONSI. 40 C.F.R. § 1508.9(a). Thus, an EA could never embody the Forest Service's entire environmental analysis for a Project. Accepting BRWA's view would require that an EA address every issue, or include or reference every supporting document, rendering an EA no longer "concise" or "brief," as the regulations direct.

For that reason, the Eighth Circuit has recognized that "[a]n EA cannot be both concise and brief and provide detailed answers for every question" that may arise. *Sierra Club v. U.S. Forest Serv.*, 46 F.3d 835, 838 (8th Cir. 1995). BRWA quibbles with that Circuit ruling in its response, asserting that the *Sierra Club* panel "appeared to confine its review to statements and analysis in the EA." Pls. Resp. 11. But the *Sierra Club* court elsewhere made clear that its decision is based on the entire "administrative record," not just the EA, consistent with Section 706's express instruction that judicial review consider the "whole record." 46 F.3d at 838.

BRWA also continues to stake its position on a truncated citation to one sentence in the Ninth Circuit's *Oregon Natural Desert Association* decision, asserting that "'the EA . . . is where the [agency's] defense of its position must be found.'" Pls.' Resp. 10 (quoting *Or. Nat. Desert Ass'n v. Rose*, 921 F.3d 1185, 1191 (9th Cir. 2019). But *Oregon Natural Desert Association* states

in full that "[t]he EA itself contains virtually no references to any material in support of or in opposition to its conclusions, even though the EA is where the [agency's] defense of its position must be found." 921 F.3d at 1191 (quotation omitted). This full quote makes clear that an EA may satisfy NEPA by referencing materials that support its conclusions in the "whole record," just as the Forest Service did here. As discussed above, the Project EA explained the Forest Service's water quality analysis, including the modeling it used to determine any potential increases in sediment from Project activities. The Forest Service's EA also explained the water quality analysis it undertook, as well as its evaluation of potential herbicide contamination.

Indeed, even if the Court were to look to non-binding Ninth Circuit (rather than Eighth Circuit) precedent, as BRWA insists, the Ninth Circuit, too, has consistently recognized that agencies do not have to include all analysis of every issue within the four corners of the EA or EIS prepared under NEPA. *See League of Wilderness Defs. Blue Mountains Biodiversity Project v. Allen*, 615 F.3d 1122, 1136 (9th Cir. 2010) (NEPA review "must concentrate on the issues that are truly significant to the action . . ., rather than amassing needless detail." (quotation omitted)); *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1129 (9th Cir. 2012) ("The purpose of an EA is not to compile an exhaustive examination of each and every tangential event that potentially could impact the local environment. Such a task is impossible, and never-ending."). The Court should thus apply *Sierra Club* and this precedent and reject BRWA's plea to create some form of NEPA exception to the APA's "whole record" review rule.

C. NEPA Encourages Tiering to the Forest Plan's Environmental Analysis

NEPA also "encourages agencies to tier a subsequent [EA] to an EIS to save money and time by avoiding repetitive inquiries, 40 C.F.R. § 1502.20, and to help the agency 'focus on the issues which are ripe for decision and exclude from consideration issues already decided or not

yet ripe.'" *Ark. Wildlife Fed. v. U.S. Army Corp. of Eng'rs*, 431 F.3d 1096, 1101 (8th Cir. 2005) (quoting 40 C.F.R. § 1508.28). The Forest Service did just that by following the Forest Plan standards and tiering to the full analysis of those standards in the Forest Plan FEIS in addressing the Buffalo National River, guarding against herbicide contamination, and protecting water quality.

Despite that, BRWA complains that following the Forest Plan's standards "leav[es] it up to the public to figure out which standards actually apply to the site-specific Robert's Gap Project, and which standards address specific impact issues." Pls.' Resp. 13. But BRWA was fully informed of the Forest Plan standards the agency would apply to the Project. The Forest Plan, which is publicly available, includes specific standards to protect designated wild and scenic rivers such as the Buffalo National River. *See* AR_0161-0163 (Forest-Wide Standards) and AR_0175 (Management Area Standards). And the Forest Service's written response to BRWA's objections specifically explained that the Forest Plan's Forest-Wide and Management standards (Project designs) would apply to the Project and adequately protect water quality in the area. AR1860 (referencing Chapter II, Parts D-G of Final EA, which is found at AR_1739-1740).

BRWA asserts that the "EA makes no attempt to address how any standard actually addresses the site-specific impacts from the Project." Pls.' Resp. 13 (quoting *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 810 (1999)). But the cases that BRWA cites recognize that "[t]he tiering regulations generally assume that the subsequent site-specific action is consistent with the previously studied broad scale plan." *N. Alaska Envtl. Ctr. v. U.S. Dep't of the Interior*, 983 F.3d 1077, 1092 (9th Cir. 2020). Thus, where, as here, "the EIS addresses the same major issues that the proposed action raise[s]," the agency may tier to that EIS, rather than undertake a repetitive project-specific review in the project EA. *See Missouri ex rel. Schmitt v.*

U.S. Dep't of the Interior-Bureau of Land Reclamation, No. 2:20-cv-4018-NKL 2021 WL 3878995, at *14 (W.D. Missouri April 24, 2021) (distinguishing *Muckleshoot* where Forest Plan EIS addressed water supply project impacts of withdrawals and uses in both upper and lower reaches of Missouri River). Adopting BRWA's tiering argument would require an agency to undertake the very "repetitive inquiries" NEPA's regulations discourage. *Ark. Wildlife Fed.,* 431 F.3d at 1101.

BRWA also maintains that NEPA's implementing regulations, 40 C.F.R. § 1502.20 (2019), required the Forest Service to specifically incorporate in the EA the programmatic environmental analyses it relies on in the Project decision. Pls.' Resp. 12. But this elevates form over function: The regulations only require that the agency "summarize the issues discussed in" a programmatic document like a Forest Plan EIS "in a subsequent statement or environmental assessment." 40 C.F.R. § 1502.20 (2019). This was done to "cut down on [the] bulk" of environmental assessments and later statements, not to impose additional burden. *Id*. § 1502.20.

And, in any event, the Forest Service followed NEPA's regulations by referencing in the EA the Forest-Wide Standards and Management Area standards established by the Forest Plan that would apply to vegetation management under the Project. *See e.g.*, AR_1717 ("The Forest Plan identifies Forest-Wide Standards (pages 3.1-3.21) and Management Area (MA) Standards (pages 3.22-3.38) that will be applied to all methods of vegetation management. This direction is incorporated into this EA's design criteria."); AR_1739 ("In order to protect the environment and lessen possible negative impacts, the measures contained in the Forest-Wide (FW) and Management Area (MA) Standards of the Forest Plan would be applied to the [proposed action ("PA")] and Alternatives and are incorporated in this EA. Best Management Practices (BMP) for Water Quality Protection (Arkansas Forestry Commission, 2002) would also apply as standard

protective measures for all proposed actions."); AR_1750 ("With the application of the Arkansas Forestry Commission's BMPs for Water Quality Protection, current Forest Plan standards, and the site specific protection measures noted in this EA, the activities of the PA and Alternatives 2 and 3 should not result in sizeable effects to the water resources"). The Forest Plan FEIS, which is also publicly available, explains that "[r]esource protection has been integrated into the forest-wide standards for soil, water, watersheds, aquatic, riparian, wetlands, and floodplains at various scales ranging from forest-wide to site-specific. This direction would result in maintaining or improving these resources and affected beneficial uses." AR_399. These repeated references fully satisfy the regulation's requirements, as well as NEPA's public participation requirements.

Finally, BRWA contends that the Forest Plan's FEIS failed to analyze the management standards in the Plan. Pls.' Resp. 26-27. Yet as explained above, the Forest Service's environmental analysis of the Forest Plan standards, is not limited to the four corners of the Forest Plan FEIS. The record includes the "whole record" supporting the Forest Plan FEIS. BRWA concedes that it has not challenged and cannot challenge the environmental analysis in the FEIS here because that challenge is time-barred by the APA's six-year statute of limitations found in 28 U.S.C. § 2401(a). *Id*. Had BRWA done so, the Forest Service would have lodged an administrative record supporting the standards. BRWA cannot make a backdoor legal challenge to the Forest Plan's FEIS that it agrees it is time-barred from now pursuing directly in this case.

D. The Forest Service Adequately Analyzed the Project's Potential Effects on the Buffalo National River in the EA and Potential Herbicide Contamination

BRWA asserts that the Forest Service's analysis of the Buffalo National River is not set forth in the EA itself. Pls.' Resp. 21. To the contrary, the Forest Service's EA explains the agency's water quality analysis and includes a map of the area covered by the analysis area, which specifically identifies the Wild and Scenic River among the area analyzed. AR_1745-

1746, 1793. And, in any event, as explained, the Court's review is not limited to the EA's four corners. The Court's review is instead based on the "whole record," which supports the agency's analysis.

BRWA also seeks to minimize the United States Park Service's determination that "none of the proposed actions [under the Project] have the potential to significantly impact resources of [the Buffalo National River]." AR_1392. BRWA contends that the management agency's determination "offers only conclusions that do not merit deference." Pls.' Resp. 20 n.9. But that argument does not rebut the fact that the agency with the statutory responsibility to manage the river concurred that the Project's management activities will not significantly affect that resource.

BRWA also repeatedly contends that the Forest Service was required to devote a separate section of the Project EA and Forest Plan's EIS to the Buffalo National River because it is a unique geographic area and congressionally designated scenic river. Pls.' Resp. 21-22, 25-26. NEPA, however, does not mandate such a labeling exercise. The Forest Service can integrate that discussion into its overall environmental analysis of a project or forest plan; it need not devote a separate section to how it will protect congressionally designated areas. *See Sierra Club v. Kimbrell*, 623 F.3d 549, 560 (8th Cir. 2010) (holding that NEPA does not require that Forest Service evaluate the potential impact of Forest Plan on congressionally designated Boundary Waters Canoe Area Wilderness in a "separate section" of Forest Plan Final EIS). *Kimbrell* also specifically rejected BRWA's argument that the "unique characteristics of the geographic area intensity factor requires such a special section" because that intensity factor does not "address the content" of the agency's environmental analysis. Pls.' Resp. 1; *Kimbrell*, 623 F.3d at 560.

BRWA alleges the WRACE model used by the Forest Service did not address potential increases in sediment to the Buffalo National River—and that the agency did not respond to that argument in its opening brief. Pls.' Resp. 22 n.10. But the agency's opening brief explained that the EA stated that the water quality analysis, including the WRACE modeling for potential increases in sediment, included the "downstream impact of sediment on the Buffalo National River." *See* ECF No. 46 at 11, 24 (citing EA, AR_1750-1752). The brief also explained that, based on that analysis, the agency concluded that the Project's direct and indirect impacts are not likely to contribute to degradation of the current water quality in the Buffalo National River. *Id*.[1] The Court should reject BRWA's argument to the contrary and its meritless waiver argument.

BRWA further accuses the Forest Service of improperly requiring BRWA to "connect the dots" regarding how the Forest Plan's standards and Project design criteria protect karst landscapes in the Buffalo National River from herbicide contamination. Pls.' Resp. 4, 23. In fact, BRWA had ample access to that information during the NEPA process. Those standards are made clear in the Forest Plan, which is readily available on the agency's public website. AR_0157 (Forest Wide Standards for management activities undertaken around Karst features).

The Forest Service's written response to BRWA's objections also further explained that "[b]ecause karst sites provide rapid transport of groundwater with minimal filtration, design criteria for herbicides call for buffers around karst features. This includes the stipulation that the

[1] BRWA also seeks to critique the Forest Service's WRACE modeling analysis, claiming that it should not be considered because the "modeling information and results were not specifically cited in the EA or made available to the public during the NEPA process." Pls.' Resp. 12. But the model is fully described in the EA, along with other information about the model's application and results. *See* AR-1749-1752 (EA). The EA cannot be expected to include every step of how the agency used the WRACE model to arrive at its determinations. BRWA's argument to the contrary just reveals the extreme and unsupported legal position it tries to stake out here.

handling and mixing of concentrated active chemicals will occur outside of karst sites" in the area. AR_1862. The Forest Service additionally explained that Project's design features include buffers around karst sites where herbicides cannot be used, handled, or mixed. *Id*.

The EA also explained that any herbicide "effects can be minimized or avoided by adhering to Forest-wide standards, site-specific protective measures, prudent hygiene, proper handling, worker protection standards, site specific protective measures, and following label application rates." AR_1770. Based on all these considerations, the agency also explained that there was very little risk of herbicide contamination from the Project's "label recommended application rates and methods." *Id.* The EA also explained that "none of the proposed herbicides are persistent in the environment." AR_1770. Therefore, there is little chance that herbicides would move into the groundwater or surface water downstream of the application areas in any event.

Finally, BRWA attempts to carry its burden of showing that the Forest Service's FONSI was arbitrary and capricious by speculating that herbicide spills may occur "in or near" "highly permeable karst structure" in the Buffalo National River. Pls.' Resp. 22. But BRWA "cannot simply doubt the FONSI determination without pointing to more than speculative impacts" that conflict with the Project's explicit protections in those landscapes. *Sierra Club*, 46 F.3d at 839. And here the Forest Plan's standards and Project designs require buffers around karst features and restrict the handling and mixing of herbicides in karst landscapes in the Buffalo National River area. AR_0157 (Forest Wide Standards); AR_1862 (Agency Response to Objections).

The Court should thus reject BRWA's various attacks on the Forest Service's analysis of the Project's potential effects on the Buffalo National River and herbicide contamination.

E. BRWA's Baseline Water Quality Claim Is Now Moot and Governed by the Standard for Supplemental NEPA Review Which it Fails to Satisfy

The Court should also reject BRWA's argument that the Forest Service is required to conduct further environmental analysis because the agency has now completed post-decision baseline or background water quality sampling. *See* Pls.' Resp. 28-31. *Great Basin Resource Watch*, which BRWA relied on in its opening brief, recognizes that "[a]n agency need not conduct measurements of actual baseline conditions in every situation." *Great Basin Res. Watch v. Bureau of Land Mgmt*., 844 F.3d 1095, 1101 (9th Cir. 2016). An agency can instead rely on reasonable alternative monitoring methods, so long as they are explained in the record. *Id*.

Here, the record shows that, for years, the Forest Service conducted project-specific water quality monitoring for herbicides. AR_1975-1987 (Herbicide Monitoring Policy and Supporting Historical Results). Indeed, the Forest Plan's FEIS recognized the same thing. *See* AR_388 ("Monitoring for herbicide concentrations following use has been a continuous policy on [the Ozark-St. Francis] for the last 10 years. Results have not documented any significant concentrations of herbicides or off-site movement[.] Other monitoring efforts found that . . . concentrations of herbicide (triclopyr) in ephemeral streams with State [Best Management Practices] protections were very small and well below any significant risk concentration"). Because the results of that monitoring revealed no herbicide contamination above EPA-concern levels in the watershed, the Forest Service originally decided not to undertake water quality sampling for this Project because further monitoring and sampling would likely lead to the same results. There was nothing arbitrary and capricious about the Forest Service's original determination, which was both reasonable and explained in the record. *See* Fed. Defs.' Cross-Mot. 29-31.

But even if there were, that issue is now moot or harmless error because the Forest Service has completed voluntary post-decisional baseline water sampling. And the testing results confirm no contamination. *See* Monk Decl., ECF No. 46-1 ¶¶ 3-5; *see also* 7 (results).

At most, therefore, BRWA's water sampling claim now is a failure to supplement claim because its previous "hard look" claims are now moot. The duty to supplement, however, is triggered only when new information arises after a decision is made that is "substantial" and presents a "seriously different picture of the environmental impact" of the action at issue. *Ark. Wildlife Fed.*, 431 F.3d at 1102 (internal quote and citation omitted). The water quality testing results do not present a different picture of the of the Project's environmental effects. To the contrary, they confirm the agency's initial determination that no such testing was necessary.

BRWA maintains in its response that the testing results reveal the Buffalo National River's "pristine waters" and thus the need to conduct further analysis for potential herbicide contamination and increased sediment. Pls.' Resp. 30-31. But that watershed is no more "pristine" than the other parts of the watershed. And in any event, the Forest Service already extensively analyzed potential increases in sediment and herbicide contamination from the Project—and concluded in the DN/FONSI that neither presents a significant environmental risk.[2]

The Court should grant Federal Defendants summary judgment on Counts One-Three. The Court should also reject BRWA's failure to supplement claims in Counts Six and Seven that seek to impose a duty to supplement the EA to address the now-completed water quality testing.

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[2] Contrary to BRWA's suggestion, Pls.' Resp. 5-6, the testing results are properly before the Court because a failure to supplement claim necessarily embraces post-decisional information. *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000). As noted, moreover, the testing results are also relevant to mootness and harmless error and, thus, the Court's Article III and APA jurisdiction, respectively. The testing results thus are properly before the Court for that additional reason. *See Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002) (holding that extra-record material can be considered on questions that are critical to court's jurisdiction).

III. The Court Should Also Reject BRWA's Indiana Bat Maternity Claims

For many of the same reasons, the Court should reject BRWA's various Indiana bat maternity colony claims that stem from the agency's discovery of the colony after the Forest Service's EA. BRWA's response seeks to explain its arguments, and confuse the matter, but the record is clear: To address the discovery of the Indiana bat maternity colony after the EA, the Forest Service incorporated into the Project decision the Bat Plan Amendment's conservation measures which fully complied with NEPA and the Endangered Species Act. AR_1903-1904.

A. The Forest Service Fully Complied with NEPA by Incorporating the Bat Amendments into the Robert's Gap Project Decision to Address the Discovery of the Indiana Bat Maternity Colony in the Project Area

There was nothing arbitrary and capricious about the Forest Service's decision not to supplement the EA and to apply the protective Bat Plan Amendments to the Project in the DN/FONSI. The Biological Analysis ("BA") for the amendments recognized that the agency would need to undertake resource management activities in projects in the coming years to fulfill Forest Plan goals, and to restore forest health by increasing resiliency to insect, disease, and wildfire. *See* AR_4205; AR_4212-4219 (BA). Thus, the Forest Service developed the Bat Plan Amendments to address the potential adverse impact that management activities may have on the Indiana bat, including a bat maternity colony, should one be found, as here. AR_4202 (BA).

True, at the time the Forest Service completed the EA for the Bat Amendments and the EA for the Robert's Gap Project, Forest Service monitoring had found no bat maternity colony on the Ozark-St. Francis. But such sites had been found to the south, east, and west of the Forest. *See* AR_4211; AR_4265-4266; and AR_4301. The Forest Service thus recognized the possibility that maternity sites could also be found on the Ozark-St. Francis and developed Plan amendments to protect of any such sites. And when a site was discovered in the Project area, the

agency incorporated the amendment's protections into the Project decision to ensure that "the proper protective measures [for a colony] are in place and will not delay project implementation if one is found." AR_4301-4302 (Bat Plan Amendment EA); AR_1903-1904 (DN/FONSI).

B. None of BRWA's Indiana Bat Maternity Colony Claims Have Merit

BRWA's response repeatedly stresses that the maternity colony was discovered after the EAs for the Project and the Bat Plan Amendments were issued, but otherwise fails to grapple with the record or set forth any basis for its various Indiana bat claims. As for its "hard look" claim, BRWA fails to even confront, much less challenge, the EA for the Bat Plan Amendments which assessed the extra protections for the colony under NEPA and provided the public with an adequate opportunity to provide input on the standards during the objection process discussed above.

Nor does BRWA support its failure to supplement claims. Again, the duty to supplement under NEPA is triggered only when new information arises that was not already considered by the agency that is "substantial" and presents a "seriously different picture of the environmental impact" of the action at issue. *Ark. Wildlife Fed.*, 431 F.3d at 1102 (internal quote and citation omitted). The presence of the colony was not new information that the agency had not already considered; the Forest Service's BA for the amendments recognized from the outset that additional Forest Plan standards were necessary to protect a bat colony in a project such as the Robert's Gap Project. *See* AR_4205; AR_4212-4219 (BA). Nor did the discovery of the colony present a "seriously different picture of the environmental impact" of the Project because the protective measures were put in place in anticipation that a colony would be found and to protect any such colonies from significant harm from management activities. AR_4301-4302 (BA).

BRWA's continued claim that the Forest Service did not determine "whether or not it had to complete supplemental NEPA analysis before making a final decision for the Project" likewise ignores the DN/FONSI that specifically incorporated the amendments. *Compare* Pls.' Resp. 39 and AR_1903-1904 (DN/FONSI). Nor can it be squared with the administrative record that shows, as early as the July 27, 2021 objection resolution meeting, the Forest Service specifically addressed the discovery of the Indiana bat maternity colony, and advised BRWA and other attendees at the meeting of its decision. The Forest Service clearly communicated during that meeting that the presence of the colony was not "new information" that triggered a supplemental analysis "because the scenario was anticipated [by the agency] and protective measures for maternity colonies were included in the [then] recent Bat Plan Amendments EA." AR_1857.

That announcement was followed by the Forest Service's August 5, 2021 objection response letter, where the Forest Service again informed BRWA that it would be following the Bat Plan Amendments in the DN/FONSI to address the colony, rather than supplement. AR_1869. Rather than asserting that the agency had a duty to supplement, as it does now, BRWA stated that it was "pleased to see" that the agency agreed to include those measures in the DN/FONSI. AR_1896. And in contrast to its litigation position now, BRWA later acknowledged the agency's decision not to supplement and that it was made because the discovery of the maternity colony was "not a significant change" that triggered a duty to supplement. AR_8647. The Forest Service's decision was thus clearly and consistently set forth in the administrative record.

BRWA also continues to insist that the two other measures that were included in the DN/FONSI to protect the colony triggered a duty to supplement the Robert's Gap NEPA analysis. Pls.' Resp. 41-43. The first protective measure—which provided for a two-month

extension of the protections afforded maternity roost trees in Forest Plan standard FW-163, from August 15 to October 15—was a discretionary measure undertaken pursuant to the Fish and Wildlife Service's ("FWS's") Biological Opinion ("BiOp") for the Bat Amendments. AR_1905, 4282-4283. The extension was included because site-specific monitoring revealed "emergence counts at the site" after August 15. AR_6627. BRWA asserts that the agency must conduct a further "site-specific" analysis of this measure under NEPA before proceeding with Project implementation. Pls.' Resp. 42. But as noted, the Bat Plan Amendments were specifically developed to address activities like those in the Project. *See* AR_4202, AR_4205; AR_4212-4219 (BA).

BRWA also asserts that further analysis was necessary because the bats were using the maternity colony outside the timeframe envisioned by the Forest Service when it assessed FW-163. Pls.' Resp. 42. The FWS's BiOp, however, contemplated that "discretionary activities" may be necessary "to avoid or minimize the adverse effects of a proposed action." AR_4282. And the measures "allow overlap between seasonal use designations to account for variable bat use," such as the post-August 15 emergence of the maternity colony that the agency's monitoring detected. AR_4283. The protective measure was thus fully contemplated by the BiOp.

BRWA also asserts that the Court may not rely on the BiOp because it was prepared pursuant to Endangered Species Act consultation, not NEPA's procedural requirements. Pls.' Resp. 42. But the standards that underlie the measure resulted from the Bat Plan Amendments' EA, the Forest Service's BA, and Endangered Species Act consultation. Taken together, these analyses satisfy the agency's NEPA obligations to analyze effects to Federally listed species. *See San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 650 (9th Cir. 2014) ("Congress specifically contemplated that an agency could comply with NEPA while discharging

its duties under Section 7 of the ESA." (citing 16 U.S.C. § 1536(c)(1)); *Conservation Cong. v. Finley*, No. 11-4752-SC, 2012 WL 2989133, at *12 n.11 (N.D. Cal. June 28, 2012), *aff'd* 774 F.3d 611 (9th Cir. 2014) ("For the purposes of evaluating Plaintiffs' NEPA claims, the Court also considers the disclosures and analysis in the Forest Service's Biological Assessment, which is cited in the [environmental analyses].").

"To protect other potential roost trees" for the colony, the second protective measure in the DN/FONSI created "a protection zone encompassing the colony's known foraging and maternity roost tree[.]" AR_1905. "Within this area, snags over 9" [diameter at breast height] that have bat roost characteristics, such as peeling bark, cracks, or cavities will [be removed only] during the hibernation season (Dec. 1 – March 14) or after an emergency survey confirms bats are not roosting in the tree before removal between March 15th and November 30th." *Id*. This was a clarification of the site-specific application of FW-163, which states that, "[i]f Indiana bat maternity trees are discovered within the Forests, those trees, *and other* trees *used by the colony* would be protected." AR_4331(emphasis added). It, too, thus stemmed from the Bat Plan Amendments.

BRWA contends that supplementation and additional public participation was necessary for this clarification because FWS 163 was too vague to provide adequate protection to the maternity colony. Pls.' Resp. 43. But that claim is a substantive challenge to the Bat Plan Amendments, which BRWA could have made during the Bat Plan Amendment objection period.[3] It cannot do so now—in litigation that does not even challenge the Bat Plan Amendments.

[3] BRWA also has no right to participate in the Forest Service's decision not to supplement the EA because of the background water testing under the DN/FONSI. Pls.' Resp. 49-51. "'The public comment process . . . is not essential every time new information comes to light after [a NEPA document] is prepared.'" *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000) (first alteration in original) (quoting *California v. Watt*, 683 F.2d 1253, 1269 (9th Cir.

C. The Court Should Dismiss BRWA's Section 706(1) Claims

Lastly, the Court should summarily reject BRWA's repeated argument that a NEPA failure to supplement claim constitutes a continuing violation subject to review under Section 706(1) of the APA, 5 U.S.C. § 706(1). Pls.' Resp. 7-10, 38. A failure to act claim under Section 706(1) is like a request for a mandamus remedy and can only proceed where there is a "specific, unequivocal command" and when "ordering . . . a precise, definite act . . . about which [an official] has no discretion whatever." *Norton v. S. Utah Wilderness All.* ("SUWA"), 542 U.S. 55, 62-63 (2004) (alternations in original) (internal quotes and citations omitted). Section 706(1) applies to agency action that is "compelled by law to [occur] within a certain period." *Id*. at 65.

Courts are not empowered under Section 706(1) of the APA to order that agencies comply with broad "statutory mandates" such as NEPA. *Id.* at 66-67. "The principal purpose of the APA limitations" in Section 706(1) "is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." *Id*. Properly viewed, a failure to supplement claim is a claim that the agency's existing analysis is insufficient under Section 707(2)(A)'s deferential arbitrary and capricious standard, not a claim the agency has failed to take a discrete nondiscretionary action under Section 706(1)'s mandamus-like standard.

BRWA argues in its response that the Forest Service's reliance on *SUWA* in explaining the limits of Section 706(1) APA review is "almost frivolous." Pls.' Resp. 7. But the Eighth Circuit, too, has recognized that *SUWA* is of "controlling significance" in understanding the limits of

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1982)). Just as an obligation to prepare a supplemental NEPA document every time any new information surfaced would render the NEPA process "intractable," *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 373 (1989), so too would an obligation to permit public involvement regarding supplementation. And in any event, as noted, the concerns BRWA expresses in its briefing, potential herbicide contamination and increased sediment, were analyzed in full.

Section 706(1) review and relief. *Org. of Competitive Mkts. v. U.S. Dep't of Agric*., 912 F.3d 455, 462 (8th Cir. 2018). Consistent with the discussion in the Forest Service's opening brief, the Eighth Circuit explained there that Section 706(1) review is limited to "extraordinary situation[s]" limited to "discrete agency action that [an agency] *is required to take*." *Id*. (quoting *SUWA*, 542 U.S. at 64). Section 706(1) is thus reserved for "extraordinary situations" that would trigger mandamus relief under the All Writs Act, as mandated by *SUWA* and the APA. *Id*.

BRWA also asserts that Section 706(1)'s limits did not apply to the failure to supplement claim at issue in *SUWA*. Pls.' Resp. 8. But BRWA ignores that in discussing a NEPA failure to supplement claim, the *SUWA* Court was clear that the obligation was to take a "'hard look' at the new information to assess whether supplementation might be necessary." *SUWA*, 542 U.S. 55, 73 (2004) (citing *Marsh*, 490 U.S. at 385). And in *Marsh*, the Court ruled that a failure to supplement claim is reviewed under 706(2)(A)'s arbitrary and capricious deferential standard. *Marsh*, 490 U.S. at 376-77. The Eighth Circuit thus follows *SUWA* and *Marsh*, and *Organization of Competitive Mkts.,* in recognizing that a NEPA failure to supplement claim is subject to review under Section 706(2)(A), not Section 706(1) of the APA. *See Ark. Wildlife Fed.,* 431 F.3d at 1104 (evaluating an agency's alleged failure to supplement claim under Section 706(2)(A) and concluding that agency "did not act arbitrarily or capriciously in refusing to prepare" supplemental EIS based on new information). BRWA's claim to the contrary has no support.

And for all these reasons, Federal Defendants are additionally entitled to summary judgment on Counts Three and Four, and Counts Six and Seven, that assert various NEPA claims stemming from the Forest Service's discovery of the Indiana Bat maternity colony and the Forest Service's voluntary decision to undertake background water quality sampling for the Project.

IV. The Forest Service's DN/FONSI Was Not Arbitrary or Capricious

Finally, Federal Defendants are entitled to summary judgment regarding Count Eight. BRWA suggests that *Audubon Soc'y of Cent. Ark.* requires the Court to analyze the FONSI independently of the administrative record to determine if the agency made a "'convincing case'" that the Project's impact was insignificant. Pls.' Resp. 51 (quoting *Audobon Soc'y of Cent. Arkansas v. Dailey*, 977 F.2d 428, 434 (8th Cir. 1992). But the Eighth Circuit in *Audobon Soc'y of Cent. Arkansas* ruled that "the court has the responsibility to verify the agency's conclusion [that a project would not have a significant environmental impact] follows the premises the agency relies on" in the administrative record. *Audobon Soc'y of Cent. Arkansas,* 977 F.2d at 434. And that review is subject to the same deferential arbitrary and capricious standard that governs BRWA's "hard look" claims, which requires BRWA to show that the FONSI was rendered in "'clear error of judgment.'" *Id*. at 434 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 416 (1971)). Because the Forest Service's FONSI follows from the analysis of Project's potential effects in the record, the Court should affirm the FONSI.

CONCLUSION

For all these reasons, the Court should deny BRWA's motion for summary judgment in its entirety and grant judgment for Federal Defendants on all claims.

Respectfully submitted this 23rd day of April 2024.

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