

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

BUFFALO RIVER WATERSHED ALLIANCE;)
ARKANSAS CANOE CLUB; NATIONAL PARKS)
CONSERVATION ASSOCIATION; and OZARK)
SOCIETY,)

Plaintiffs,)

V.)

Civil No. 4:13-cv-0450 DPM

UNITED STATES DEPARTMENT OF)
AGRICULTURE; UNITED STATES SMALL)
BUSINESS ADMINISTRATION; TOM VILSACK, in)
his official capacity as Secretary, United States)
Department of Agriculture; MARIA CONTRERAS-)
SWEET, in her official capacity as Administrator,)
Small Business Administration; JUAN GARCIA, in his)
official capacity as Administrator, Farm Service)
Agency; LINDA NEWKIRK, in her official capacity as)
Arkansas State Executive Director, Farm Service)
Agency; and LINDA NELSON, in her official capacity)
as Arkansas District Director, Small Business)
Administration,)

Defendants.)

**FEDERAL DEFENDANTS’ PROPOSED RESPONSE TO PLAINTIFFS’
MEMORANDUM OF LAW REGARDING THE SCOPE OF INJUNCTIVE RELIEF**

In their Memorandum of Law Regarding the Scope of Injunctive Relief, Plaintiffs ask the Court to impose on the Defendant Agencies different deadlines for complying with the National Environmental Policy Act (“NEPA”) and for completing consultation under the Endangered Species Act (“ESA”). Pl. Mem. at 8 [ECF No. 53].¹ Federal Defendants submit this response to address the limited issue of the *sequencing and coordination* of NEPA and ESA review – an issue not addressed in Defendants’ brief on the scope of injunctive relief, but made relevant by Plaintiffs’ request for different deadlines for compliance with both acts.

Federal agencies normally strive to coordinate and concurrently comply with Section 7 of the ESA and NEPA. *See* 50 C.F.R. § 402.06 (“Consultation, conference, and biological assessment procedures under section 7 may be consolidated with interagency cooperation procedures required by other statutes, such as the National Environmental Policy Act (NEPA).”). This coordination avoids duplicative analyses and streamlines compliance with both statutes. In particular, the NEPA process of identifying and considering alternative actions allows the action agency to determine what its proposed action will be for purposes of consultation under the ESA. *See* 40 C.F.R. 1502.14 (NEPA requires identification and consideration of alternative actions).

Plaintiffs’ proposed deadlines, however, make the appropriate coordination of the two statutes impossible by requiring the completion of ESA consultation well in advance of completion of NEPA analysis. One of the principle purposes of NEPA is to ensure that information about a proposal’s environmental impacts is made available to the agency and the public before a final action is selected. *See* 40 C.F.R. § 1500.1(b). Plaintiffs’ proposed injunction undermines this process by effectively requiring the Agencies to determine what their proposed action will be within the first 30 days after the Court’s order and then to complete

¹ Federal Defendants’ objections to the imposition of any deadline are set forth in Defendants’ Supplemental Brief on the Scope of Injunctive Relief [ECF No. 52].

consultation on that action within an additional 90 days, well *before* the proposed action can be fully developed, analyzed and presented to the public under NEPA.²

While Defendants believe that imposition of any judicial deadline is unwarranted, they respectfully ask that should the Court impose a deadline, it should impose a single deadline under both acts, so that the Agencies can properly coordinate compliance.

Respectfully submitted this 7th day of November, 2014.

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² Plaintiffs note that 16 U.S.C. § 1536(b)(1)(A) sets forth a timeline for the FWS and the action agency to complete *formal* consultation within 90 days of initiation, but neglect to note that the agencies frequently engage in considerable discussion and informal consultation before initiating formal consultation. *See* 50 C.F.R. § 402.13. Notably, if formal consultation is required, the statute allows the FWS and the action agency to extend that time “as is mutually agreeable.” 16 U.S.C. § 1536(b)(1)(A). *See also* 50 C.F.R. § 402.14. Agencies frequently use informal consultation and extend the time for formal consultation to better coordinate the NEPA and ESA processes, as well as to consider complexities presented in the proposed action.

Defendants also note that consultation under the ESA is the obligation of both the action agencies, here the Small Business Administration (“SBA”) and Farm Service Agency (“FSA”), and the consulting agency, here the U.S. Fish and Wildlife Service (“FWS”), 16 U.S.C. § 1536(a), and that by seeking an order mandating completion of consultation by a date certain, Plaintiffs seek an order governing the non-Defendant Fish and Wildlife Service.

United States Department of Agriculture

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United States Small Business Administration

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