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May 24, 2022

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**RE: Demand for Supplemental Environmental Assessment or Preparation of an
Environmental Impact Statement for the Robert's Gap Project in the Ozark-St.
Francis National Forests, Big Piney Ranger District**

Dear Secretary Vilsack et al.:

We are writing on behalf of our client, the Buffalo River Watershed Alliance, an environmental non-profit organization, to request that the U.S. Department of Agriculture and U.S. Forest Service rescind the Decision Notice and Finding of No Significant Impact

("DN/FONSI") for the Robert's Gap Project ("the Project") in the Ozark-St. Francis National Forests, Big Piney Ranger District. In order to comply with the National Environmental Policy Act ("NEPA"), the Department and its sub-agencies, including the U.S. Forest Service, must prepare and circulate for public review and comment a supplemental environmental assessment ("SEA") or an environmental impact statement ("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, an endangered species. The Environmental Assessment ("EA") and DN/FONSI did not address the water quality baseline analysis issue, and the Forest Service failed to conduct the necessary analysis of impacts to bats when the maternity colony was discovered after issuance of the final EA but before the final DN/FONSI, and failing to do so is a failure to comply with NEPA.

The Buffalo River Watershed Alliance believes that the EA is insufficient for a variety of reasons. The document fails both to address the current water quality baseline and to adequately protect the Indiana Bat maternity colony that was discovered by the Forest Service in July of 2021. The Forest Service did not complete a full analysis of all potential significant impacts the Project could have on the environment before issuing its DN/FONSI, and therefore must issue an SEA or EIS to fully satisfy NEPA.

I. NEPA Clearly Requires the Forest Service to Produce an SEA or EIS.

NEPA requires federal agencies to conduct supplemental NEPA analysis when one of two circumstances occurs: "when the agency makes substantial changes to the proposed action that are relevant to 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)¹; *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 373-374 (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."). The latter standard is implicated here.

The requirement to conduct supplemental NEPA analysis applies not only to EISs, but to EAs as well. *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).

The significance of new information depends on the degree to which the new information could alter or further inform the agencies' decision making. *Marsh*, 490 U.S. at 374. While

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 letter.

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.*” *Id.* at 373-374 (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).

The Forest Service did not make a reasoned judgment by choosing to not prepare supplemental analysis regarding the discovery of the Indiana Bat maternity colony within the project area. As a part of its August 13, 2021, Freedom of Information Act (“FOIA”) request, the Buffalo River Watershed Alliance asked to receive, among other things:

- 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 Project area 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 request #1.

No documents were provided which explained the agency’s decision to not undertake additional NEPA analysis. There was no Supplemental Information Report, or even an email that explained why the agency chose not to pursue supplemental analysis. *See Alexander*, 222 F.3d at 566-568. There is no evidence of actual consideration of this issue by the Forest Service.

Additionally, the agency’s failure to conduct a baseline analysis of water quality is arbitrary and capricious in violation of NEPA. “NEPA aims (1) to ensure that agencies carefully consider information about significant environmental impacts and (2) to guarantee relevant information is available to the public.” *N. Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1085 (9th Cir. 2011), quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). “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*, 668 F.3d at 1083-85.

II. Significant New Information Regarding the Indiana Bat Maternity Colony Requires Additional NEPA Analysis.

The March 2021 Final EA adopted by the Forest Service does not analyze the effects of the Project on the Indiana Bat maternity roost that was discovered within the Project area in July of 2021. Failing to supplement the EA with this additional information is a failure to comply with NEPA. Although the Forest Service completed a Biological Opinion (“BO”) in March of 2021, this consultation undertaken pursuant to the Endangered Species Act (“ESA”) was completed *before* the discovery of an actual maternity colony. The discovery of the maternity colony after the adoption of the Final EA is a “significant new circumstance” that requires a SEA

or EIS under NEPA. It is new information that needs to be a part of the initial decision-making process, rather than an afterthought in the DN/FONSI.

However, the Forest Service still moved forward on the Project instead of completing further analysis and issued the DN/FONSI three months after the discovery of the colony, in October of 2021. Additionally, the DN/FONSI claimed to rely on protections enumerated in the Forest Plan Amendment for Bat Conservation (“Bat Conversation 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 Robert’s Gap DN/FONSI claims the discovery of an actual maternity colony was not a significant change, *id.* at 10-11, and therefore the Forest Service could just continue to rely on the pre-discovery Final EA, BO, and Bat Conservation Amendment, instead of completing the required additional analysis through an SEA or EIS. The Forest Service did not, however, merely follow the guidance of the Bat Conservation Amendment. Instead, the agency incorporated additional protective measures within the DN/FONSI to aid in the protection of the Indiana Bat. Doing so suggests that the Bat Conservation Amendment itself was not sufficient to protect the bat. Moreover, as is noted above, the Forest Service has neither internally or within an external document actually analyzed why these additional measures were necessary and why they are sufficient to protect Indiana bats.

While the DN/FONSI outlined additional protections that would be used in response to the discovery of the maternity colony, neither the presence of the maternity roost 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. Instead, the DN/FONSI outlines additional mitigation measures without explaining why these additional measures are necessary and how these measures will prevent significant impacts to the endangered species. For example, activities that may disturb maternity colonies, such as timber harvest, operation of heavy equipment, or prescribed burns, were originally prohibited 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 only an additional two months will offer adequate protection. *Id.* Even if these additional measures are expected to be overall beneficial to the species, beneficial impacts are still relevant under NEPA, and therefore the Forest Service needs to analyze and describe the impacts with an SEA or EIS.

Not all changes are potentially beneficial, however. For instance, alterations to Forest-Wide Standard (“FW”) 52 in the Bat Conversation Amendment changed the standard from *avoiding* adverse impacts from prescribed burns to sensitive bat areas like caves to *minimizing* such adverse impacts. Forest Plan Amendment for Bat Conservation Environmental Assessment at 2-4. Further, FW 64 was changed from an obligation to *engage in informal consultation* with the U.S. Fish and Wildlife Service (“USFWS”) for all actions within primary conservation zones to an obligation to *coordinate* with USFWS for action within primary conservation zones. *Id.* at 2-5.

While superficially 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

Project. Further, if the Bat Conversation Amendment was adequately protective like the Forest Service claims in the DN/FONSI, then the agency would not feel the 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 Conversation Amendment were insufficient to begin with.

Further, because NEPA requires “that the agency provide the data on which it bases its environmental analysis,” the agency must analyze the relevant information “before the proposed action is approved, not afterward.” *N. Plains Res. Council*, 668 F.3d at 1083. Because the Forest Service was not aware of the Indiana Bat maternity colony before it adopted its Final EA, the research and analysis necessary to ensure no significant environmental impacts would occur was not completed. 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.

III. The Forest Service Failed to Analyze Baseline Water Quality Which is Required to Satisfy NEPA.

The Forest Service failed to conduct a baseline analysis of the water quality in the Buffalo River watershed before issuing the DN/FONSI, therefore its conclusion that the Project would not lead to degradation was arbitrary and capricious, and requires supplemental information to remedy this error. As previously stated, “NEPA requires that the agency provide the data upon which it bases its environmental analysis. Such analyses must occur before the proposed action is approved, not afterward.” *N. Plains Res. Council*, 668 F.3d at 1083 (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).

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. This sort of post-decision promise means that the agency had already determined it would move forward with the Project, even though the Final EA did not contain the necessary data on baseline turbidity, pH, conductivity, and temperature of the water quality in order to determine what potential significant impacts would occur. Ultimately, the Forest Service delayed implementation of the Project until September 1, 2022 in order to collect the necessary baseline samples. *Id.* Delaying the Project in order to obtain these water samples is an admission by the Forest Service that it must obtain this baseline information *before it begins logging*. Despite this belated effort to obtain baseline information, it is too late. NEPA requires agencies to obtain baseline information *before it issues its final decision* on whether the project can move forward in the first place. There is no record of water testing or sampling available to the public, yet the Forest Service concluded that the impacts of this Project “are not expected to contribute to degradation of the current water quality.” EA at III-7. This

conclusion is not based on any analysis, and is therefore arbitrary and capricious. It is impossible to determine that a Project will have no detrimental effects to water quality if it is unclear what the water quality is to begin with.

IV. Conclusion

Because NEPA requires federal agencies to conduct supplemental NEPA analysis when there are significant new circumstances or information relevant to the environmental concerns, the Forest Service is required to supplement its Final EA with either an SEA or EIS in order to comply with NEPA. 40 C.F.R. § 1502.9(c)(1)(ii). In particular, the Forest Service failed to include an appropriate analysis of the recently-discovered Indiana Bat maternity colony within either its Bat Conversation Amendment or the Final EA itself, and the agency also entirely failed to conduct a baseline analysis of the water quality within the Project area before determining that there would be no significant impact to the water. These two deficiencies make the Forest Service's determination that no significant impacts will occur from the Project an arbitrary and capricious decision.

We look forward to a timely response to this request.

Sincerely,



Tom Buchele
Earthrise Law Center

On behalf of Buffalo River Watershed Alliance