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

BUFFALO RIVER WATERSHED ALLIANCE, a non-profit corporation **PLAINTIFF**

VS. **CASE NO. 3:23-cv-03012-TLB**

UNITED STATES FOREST SERVICE, an agency of the United States Government; TIMOTHY E. JONES, District Ranger, **DEFENDANTS**

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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APA ..... Administrative Procedure Act

BRWA ..... Buffalo River Watershed Alliance

CAFO ..... Concentrated Animal Feeding Operation

CEQ ..... Council on Environmental Quality

DN ..... Decision Notice

EA ..... Environmental Assessment

EIS ..... Environmental Impact Statement

ERW ..... Extraordinary Resource Water

ESA ..... Endangered Species Act

FOIA ..... Freedom of Information Act

FONSI ..... Finding of No Significant Impact

FRCP ..... Federal Rules of Civil Procedure

NEPA ..... National Environmental Policy Act

SEA ..... Supplemental Environmental Assessment

INTRODUCTION AND FACTUAL BACKGROUND

A decade ago Plaintiff, Buffalo River Watershed Alliance ("BRWA"), filed suit in federal district court in Little Rock to protect the Buffalo National River from harm threatened by a large hog Concentrated Animal Feeding Operation ("CAFO") that several federal agencies were facilitating and that was located along a tributary to the Buffalo River, a few miles outside the Buffalo National River's boundaries. Among other things, that lawsuit successfully sought to require those federal agencies to comply with the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, by fully disclosing the CAFO's potential adverse impacts on the Buffalo National River. *See Buffalo River Watershed All. v. Dep't of Agric.*, No. 4:13-cv-450-DPM, 2014 WL 6837005, at *1 (D. Ark. Dec. 2, 2014), attached as Ex. 1 to Buchele Decl. Now BRWA once again comes before this Federal District Court to protect the Buffalo National River from a potentially greater threat, the approval of a large new logging project, again just outside the National River's boundaries, in the headwaters of that River within the Ozark-St. Francis National Forests. BRWA once again invokes the federal agency's obligation under NEPA to fully disclose and consider this Project's impacts, in particular potential significant impacts the Project could have on the Buffalo National River's high-quality waters and the biodiversity of its watershed, which includes key habitat for the endangered Indiana bat.

On October 27, 2021, District Ranger Timothy Jones, on behalf of the United States Forest Service (together "the Forest Service," "the Service," or "Defendants") signed a Decision Notice and Finding of No Significant Impact ("DN/FONSI") approving the Robert's Gap Project ("the Project"), which includes prescribed burning, logging, road building and herbicide use within the

Ozark-St. Francis National Forests. AR 1914, 1716, 1730.[1] The nearly 40,000-acre Project area includes the Headwaters Buffalo River watershed (USGS hydrologic unit code 1101000502), which ultimately flows into the Buffalo National River. AR 1715, 1745, 1746. In addition to the headwaters of the Buffalo River, the Project area is also very popular with recreational users because it includes the iconic Hawksbill Crag (also known as Whitaker Point), the Upper Buffalo Wilderness area, and numerous hiking and mountain bike trails. AR 1715. Implementation of the Project will result in the loss of Cedar, Oak, and Pine trees; destruction of old growth forest and wildlife habitat; and potential degradation of water quality, due in part to the area's highly permeable karst hydrogeology. *See* AR 0354, 0483, 1899–1901. The Project includes approximately 10,000 acres of various types of commercial logging, 11,000 acres of prescribed burning, and over 2,000 acres of chemical herbicide treatment, as well as over 30 miles of road construction and 20 miles of dozer lines for prescribed fire breaks. *See* AR 1903, 1730, 1737, 1898–1901.

The Forest Service developed the Project and assessed its potential environmental impacts using an Environmental Assessment ("EA") published in March of 2021. AR 1712. The Project is located within the headwaters of the Buffalo National River, yet in its EA, the Forest Service only mentioned the Buffalo National River once. AR 1746. The EA acknowledged the Buffalo River's designation as an Extraordinary Resource Water ("ERW"), which becomes the Buffalo National River as it exits the National Forests, AR 1746, but failed to note its additional designation as a

[1] The Service filed the index to the Administrative Record with the Court, *see* ECF No. 21-2, and a revised index, ECF No. 29-2. BRWA will cite to the documents listed on the revised record index as "AR 8644–8649," referencing the bates numbering inserted by the Service in the lower right-hand corner of each page. As required by the Court's Scheduling Order, ECF No. 22, after briefing is concluded the Parties will provide the Court with a Joint Appendix containing all record documents cited by the parties in their summary judgment briefing.

Wild and Scenic River. See below, at page 22 (citing Act of Congress making designation). The EA then completely failed to disclose or analyze any of the Project's potentially significant impacts on the Buffalo National River. Further, the EA did not discuss current water quality in the Project area, *see* AR 1745–1753, but did reluctantly acknowledge increased sediment pollution from logging, roads, and burning activities for up to three years after those activities occur. AR 1748–1749. Despite this, the EA ultimately concluded "the direct and indirect impacts from this project are not expected to contribute to degradation of the current water quality." AR 1749. The EA's minimal water quality analysis did not mention the local karst hydrogeology at all, nor did it discuss herbicide use in the Project area and how it could travel through the karst. *See* AR 1745–1753. The EA discussed herbicides mainly as a risk to human health, rather than as a threat to the ecosystem. *See* AR 1762. The EA did not disclose that the Forest Service had not applied herbicides within the Project area for the past 40 years, *see* 1762–1770, 2588, and the subsequent DN/FONSI disclosed, for the first time, that the Forest Service would be collecting and analyzing baseline water quality data from the Buffalo River's headwaters. AR 1905. The DN/FONSI disclosed that all decisions regarding where, how, and when to collect that baseline water quality data would be decided internally by Defendants, *id.,* rather than through a public NEPA analysis that is subject to public comment and judicial review.

When the final EA was published, members of the public who had previously commented on the draft EA, as required by Forest Service regulations, had the opportunity to object to the scope of the final EA until May 28, 2021. AR 1794, 1795. However, after the opportunity for public objection had ended but before the final decision was released, the Forest Service discovered significant new information: the first endangered Indiana bat maternity colony within the Ozark-St. Francis National Forests generally and within the Robert's Gap Project area specifically. AR

6628. Such a significant discovery should have triggered additional environmental analysis under NEPA, either through a Supplemental EA ("SEA") or an Environmental Impact Statement ("EIS") that analyzed and disclosed, with an opportunity for public comment, how the Project would impact this endangered resource and whether the Project needed to be changed to protect it. Instead, the Forest Service simply added two measures intended to protect the maternity colony from Project activities to its final decision, the DN/FONSI, changing the scope of the proposed action from that which the public had anticipated. AR 1905. The Forest Service suggested no additional formal NEPA analysis was necessary because it had updated its Forest Plan Amendment for Bat Conservation ("Bat Plan Amendments") in March of 2021, four months before the discovery of the colony. AR 1905, 6593–6601. However, the Forest Service's previous analysis only evaluated the "potential effects" Forest Plan activities would have on a maternity colony, which is all the Service could do at the time, as the colony had not yet been discovered. AR 1913. The public had no opportunity to evaluate or comment on the new measures included in the DN/FONSI.

On May 24, 2022, BRWA sent the Forest Service a letter demanding that it conduct public supplemental NEPA analysis pursuant to 40 C.F.R. § 1502.9(c) (2019)[2] regarding changes to the

[2] 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 May 20, 2022, and previously amended its regulations effective September 14, 2020. *See* 85 Fed. Reg. 43,304, 43,304 (July 16, 2020); 87 Fed. Reg. 23453, 23453 (April 20, 2022). However, this Project was developed and analyzed under the earlier 2019 version of the CEQ regulations. Because the 2020 and 2022 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 Brief. *See Bair v. Cal. Dep't of Transp.*, 982 F.3d 569, 577 n.20 (9th Cir. 2020) ("Because [the agency] applied the previous [CEQ] regulations to the Project, so do we. Unless otherwise indicated, the regulations cited herein are the versions in effect when the district court rendered its decision."). *See also State of Mo., ex rel. Ashcroft v. Dep't of Army, Corps of Eng's*, 526 F.Supp. 660, 670 n.4 (D. Mo. 1980)

Project and new information regarding the Indiana bat and baseline water quality sampling data. AR 8644–8649. BRWA did not have any legal obligation to demand supplemental NEPA analysis, yet it hoped the Forest Service would be prompted to take additional NEPA analysis in response to its letter as a part of the agency's ongoing duty under NEPA. *See Cold Mountain v. Garber*, 375 F.3d 884, 892 (9th Cir. 2004) ("NEPA… imposes on federal agencies an ongoing duty to issue supplemental environmental analyses."); *Price Rd. Neighborhood Ass'n, Inc. v. U.S. Dep't of Transp.,* 113 F.3d 1505, 1509 (9th Cir. 1997) ("NEPA also imposes a continuing duty to supplement previous environmental documents."). The Forest Service never responded to BRWA's demand for additional analysis, nor is there any indication in the administrative record that it even considered Plaintiff's request and its legal obligations under NEPA to supplement its existing, incomplete NEPA analysis.

Most fundamentally, the Forest Service's EA violates NEPA by failing to take the required "hard look" at the Project's potential significant impact on the Buffalo National River even though the Project's extensive ground-disturbing activities will take place in the headwaters of that River (Count 1). The EA's overall cursory analysis of water quality is equally flawed because, for example, it does not address the impacts of new herbicide use on water quality in an area with extensive karst hydrogeology and failed to disclose that it had not used herbicides in the Buffalo River's headwaters area for 40 years. Those flaws were compounded when the Service admitted for the first time in its DN/FONSI that it lacked baseline water quality data for the Project area's streams. An agency cannot truly evaluate the significance of a proposed action's impacts unless it knows just how currently unimpaired the waters it is impacting are. The agency's attempt to

(where an agency took an action before the CEQ regulations were amended, the court applied the earlier version of the regulations because the newer regulations were "not retroactive").

remedy its lack of baseline water quality data by gathering that data after it approved the Project turns NEPA—which requires analysis and disclosure of impacts before a decision is made—on its head (Count 2). That change to the Project along with the new information it will generate triggered the Service's mandatory obligation under NEPA to conduct supplemental NEPA analysis, as did its discovery of the endangered Indiana bat maternity colony within the Project area after it had completed its EA but before it approved the Project (Counts 3, 6 and 7). But instead of conducting such public supplemental NEPA analysis, the Forest Service violated NEPA's clear public disclosure and participation requirements by conducting an entirely internal analysis that led to a decision to change the Project by adding two new Indiana bat protection measures. And the Service's NEPA violations are continuing ones as it decides, without public participation, how, when, and what water quality data to gather (Counts 4, 6 and 7). Finally, the Forest Service's Finding of No Significant Impact is indefensible when it and its supporting EA totally fail to address the Project's proximity to the Buffalo National River and the impacts to the newly discovered Indiana bat maternity colony (Count 8). Such a large Project in the headwaters watershed for a National River and including rare, key habitat for an endangered species required a much more thorough public analysis, disclosure of impacts, and a more robust public comment process in a complete EIS.

ARTICLE III STANDING

BRWA followed the Forest Service's regulations and properly submitted a comment within 30 days of the Service publishing legal notice of its draft EA. 36 C.F.R. §§ 218.25(a)(1)(i), (3)(i)–(v); AR 1358–1364. Doing so preserved BRWA's ability to object to the final EA and draft DN/FONSI, which it did so within 45 days of the publication date of both documents. 36 C.F.R. § 218.24(b)(5)–(6); 36 C.F.R. § 218.26(a); AR 1795–1801. Because BRWA submitted both a valid

comment and a valid objection, it has exhausted its recourse under the Service's pre-decisional administrative review regulations, and has maintained its right to bring this litigation against Defendants. *See* 36 C.F.R. § 218.1; 36 C.F.R. § 218.11(b)(2).

BRWA has Article III standing to bring this action because its members have standing to sue in their own right, the interests BRWA seeks to protect are germane to its purpose, and individual members' participation is not necessary for the Court to provide relief. *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 181 (2000); Watkins Decl. at ¶ 11. BRWA's members have standing because they have suffered an injury in fact that was caused by the challenged action, and those injuries are likely to be redressed by the requested relief. *Laidlaw*, 528 U.S. at 180–82. BRWA's board members hike, canoe, fish, float, photograph and view scenery and wildlife, and engage in other aesthetic, educational, observational, spiritual, and recreational activities within the Ozark-St. Francis National Forests, including the Project area and adjacent lands. *See* Watkins Decl. at ¶¶ 15, 16; Ray Decl. at ¶¶ 8–12; Olesen Decl. at ¶¶ 13–16. *See generally Laidlaw*, 528 U.S. at 180–81. Taking advantage of the pristine water in and around the Project area, BRWA's board members canoe and float near the headwaters of the Buffalo National River within the Project area. Watkins Decl. at ¶ 15; Ray Decl. at ¶ 10. BRWA's board members also hike to and around the Hawksbill Crag, otherwise known as Whitaker Point, an iconic feature located within the Project area. Watkins Decl. at ¶ 15; Ray Decl. at ¶ 9.

Implementation of the Project will likely cause BRWA's board members to stop using some areas or to use them significantly less often because of aesthetic and environmental harms to those areas by authorized Project activities. Ray Decl. at ¶ 13; Olesen Decl. at ¶ 16; Watkins Decl. at ¶ 16. Their interests are thus directly threatened by the Robert's Gap Project, Watkins Decl. at ¶¶ 16–19, Ray Decl. at ¶¶ 13–15, Olesen Decl. at ¶¶ 15–18, constituting injury in fact. These injuries

were caused by the illegal EA and associated 2021 DN/FONSI. Had the Forest Service conducted a proper NEPA analysis, its decision may have been different. Watkins Decl. at ¶ 20; Ray Decl. at ¶ 16; Olesen Decl. at ¶ 18. *See Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 975–76 (9th Cir. 2003). *See also Sierra Club v. U.S. Army Corps of Eng'rs*, 446 F.3d 808, 816 (8th Cir. 2006) ("Injury under NEPA occurs when an agency fails to comply with that statute… The injury-in-fact is increased risk of environmental harm stemming from the agency's allegedly uninformed decision-making."). As such, causation and redressability are satisfied and BRWA's members have standing.

STANDARD OF REVIEW

Judicial review of agency action under NEPA is governed by the APA. *Friends of the Norbeck v. U.S. Forest Serv.*, 661 F.3d 969, 973 (8th Cir. 2011) ("While NEPA does not authorize a private right of action, the Administrative Procedure Act (APA) permits judicial review of whether an agency's action complied with NEPA."); 5 U.S.C. §§ 701 *et seq.* Under the APA, reviewing courts must hold unlawful and set aside agency actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," 5 U.S.C. § 706(2)(A), or "compel agency action unlawfully withheld." *Id.* § 706(1). The APA governs reviewing courts under summary judgment as well, and "[w]hen reviewing an agency's final decision, the court's duty on summary judgment is to determine whether the evidence in the administrative record permitted the agency to make that decision as a matter of law." *Nw. Env't Advoc. v. U.S. Env't Prot. Agency*, 855 F.Supp.2d 1199, 1204 (D. Or. 2012). *See also Occidental Eng'g Co. v. Immigr. & Naturalization Serv.*, 753 F.2d 766, 769–70 (9th Cir. 1985) ("However, the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did."). Under this standard, the

reviewing court has the responsibility to verify that the agency's conclusion follows from the premises that the agency relied upon. *Audubon Soc'y v. Dailey*, 977 F.2d 428, 434 (8th Cir. 1992).

In determining whether an agency decision was arbitrary, capricious, or unlawfully withheld, this Court "must consider whether the decision was based on a consideration of the relevant factors and whether there was a clear error of judgment." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989) (quoting *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 416 (1917), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977)). Although the Court may not substitute its own judgment for that of the agency, this inquiry must be "searching and careful," to "ensure that agency decisions are founded on a reasoned evaluation of the relevant factors." *Marsh*, 490 U.S. at 378. The Court must set aside agency action if the agency:

> Relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). When undertaking review under the APA, "[r]eviewing courts are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Nat'l Labor Rel. Bd. v. Brown*, 380 U.S. 278, 291 (1965).

SCOPE OF REVIEW

BRWA's claims are reviewed under two different sections of the APA. 5 U.S.C. §§ 701 *et seq*. Counts 1 through 4 and Count 8 that challenge the sufficiency of the Forest Service's final EA and final DN/FONSI—the final agency action claims—are reviewed under § 706(2) of the APA,

which prohibits final agency actions that are arbitrary, capricious or contrary to law.[3] Counts 6 and 7 that challenge the Service's failure to supplement its NEPA analysis in light of significant new information or changed circumstances—the supplemental NEPA analysis claims—are reviewed under § 706(1) of the APA, which allows Plaintiff to challenge agency action unlawfully withheld. Each of these sections has a different standard for what documents a court may consider when making its determinations regarding the legal validity of BRWA's claims.[4]

I. Administrative Procedure Act Section 706(2) Claims

Five of Plaintiff's claims are reviewed under the APA's "arbitrary and capricious" standard. *See* 5 U.S.C. § 706(2)(A). Such claims are reviewed based on the Defendants' administrative record, subject to any order of the Court to complete the record, strike documents from the record, and supplement the record with extra-record evidence. *Id.* § 706. Judicial review under the APA must be based upon the review of the "whole record" developed during an agency's decision-making process. *See id.* (providing that in reviewing such claims "the court shall review the whole record or those parts of it cited by a party"). The whole administrative record "consists of all documents and materials directly or *indirectly* considered by agency-decisionmakers and includes evidence contrary to the agency's position." *In re United States*, 875 F.3d 1200, 1206 (9th Cir. 2017) (quoting *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989)), *judgment vacated on other grounds*, 138 S. Ct. 443 (2017). *See also Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993). Thus, the record is "not necessarily limited to 'those documents that the *agency* has compiled and submitted as 'the' administrative record.'" *In re United States*, 875 F.3d

[3] BRWA does not seek judgment on Count 5, ECF No. 15 at ¶¶ 70–74.
[4] Plaintiff and Defendants disagree about the proper scope of the administrative record for each of Plaintiff's claims. Because of this, the Parties reached an agreement to brief disputes regarding the administrative record in summary judgment briefing, rather than in a separate, earlier motion. ECF No. 27 at 1.

at 1206. "An incomplete record must be viewed as a 'fictional account of the actual decisionmaking process[,]'" because "[i]f the record is not complete, then the requirement that the agency decision be supported by 'the record' becomes almost meaningless." *Portland Audubon Soc'y v. Endangered Species Comm'n*, 984 F.2d 1534, 1548 (9th Cir. 1993).

The administrative record consists only of documents that were considered by the agency, whether directly or indirectly, *before* the decision was made. "The focal point for judicial review should be the administrative record *already in existence*, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (emphasis added); *see also Rochling v. Dep't of Veterans Aff.*, 725 F.3d 927, 936 (8th Cir. 2013) ("It is well-established that judicial review under APA is limited to the administrative record that was before the agency when it made its decision." (quoting *Voyageurs Nat'l Park Ass'n v. Norton*, 381 F.3d 759, 766 (8th Cir. 2004)). Thus, for final agency action claims, the administrative record must consist only of documents that were "before the [decisionmaker] at the time he made his decision." *Volpe*, 401 U.S. at 420. "By confining judicial review to the administrative record, the APA precludes the reviewing court from conducting a de novo trial and substitution its opinion for that of the agency." *Rochling*, 725 F.3d at 936 (quoting *Voyageurs*, 381 F.3d at 766).[5]

II. Administrative Procedure Act Section 706(1) Claims

Section 706(1) claims are not limited to a fixed administrative record, for either Party, "because there is no final agency action to demarcate the limits of the record." *Friends of the*

[5] Consistent with the Parties' Stipulation regarding disputed record documents, the attachments to the Buchele Declaration include Plaintiff's proposed additions to the record, which Defendants may dispute during summary judgment briefing. *See* ECF No. 28. The Stipulation also allows both parties to cite a limited number of post-decisional documents, those under tabs FS0039 and FS0042 in the Administrative Record, when addressing BRWA's Section 706(2) claims. ECF No. 28 at ¶ 3.

Clearwater v. Dombeck, 222 F.3d 552, 560 (9th Cir. 2000); *accord, S.F. BayKeeper v. Whitman*, 297 F.3d 877, 886 (9th Cir. 2002); *Indep. Mining Co. v. Babbitt*, 105 F.3d 502, 511 (9th Cir. 1997). *See also W. Watersheds Project v. Pool*, 942 F.Supp.2d 93, 101 (D. D.C. 2013) (explaining "in a challenge to final agency action judicial review is ordinarily limited to the administrative record at the time of the agency's decision, but that is not the case in a challenge to an agency's *failure* to act" because "if an agency fails to act, there is no 'administrative record' for a federal court to review." (internal citations omitted)). Because such § 706(1) failure to act claims are not limited to an administrative record tied to a specific point in time, the Parties may use any documents to support their arguments for or against these two claims. *See, e.g., Marsh*, 490 U.S. at 385 (noting that the plaintiff's supplemental EIS claim was based upon two post-decisional documents offered by the plaintiff and that the agency defendant "had a duty to take a hard look at the proffered evidence" under NEPA). This approach makes sense, as a court can only review these claims if it is able to evaluate the new, post-decisional evidence that a plaintiff contends triggered the requirement for supplemental NEPA analysis. BRWA's failure to prepare supplemental NEPA analysis claims, Counts 6 and 7, ECF No. 15 at ¶¶ 75–84, are covered by this broader scope of review.

LEGAL BACKGROUND: THE NATIONAL ENVIRONMENTAL POLICY ACT

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. Public participation and disclosure are key aspects of NEPA, meant to: (1) ensure agencies have carefully and fully contemplated the environmental effects of their actions before they make decisions and (2) ensure the public has sufficient information to review, comment on, and challenge (if necessary) these agency actions. *See* 42 U.S.C. §§ 4321, 4332; 40 C.F.R. §§ 1500.1(a), (b) (2019). NEPA "ensures

that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Marsh*, 490 U.S. at 371. NEPA *obligates* agencies to make high-quality information available to the public, 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). As the Supreme Court has explained, "the broad dissemination of information mandated by NEPA permits the public and other government agencies to react to the effects of a proposed action at a meaningful time." *Id. See also W. Watersheds Project v. U.S. Bureau of Land Mgmt.*, 76 F.4th 1286, 1296 (10th Cir. 2023) ("Recall that NEPA regulates an agency's collection and consideration of information. It 'ensure[s] that agencies carefully consider information about significant environmental impacts' and 'guarantee[s] relevant information is available to the public' to aid public input." (quoting *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1072 (9th Cir. 2011))). Further, NEPA 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), and to make documents underlying their NEPA analysis available without charge in response to FOIA requests. *Id.* § 1506.6(f). NEPA documents need to be written in plain language so that decisionmakers and the public can readily understand them. *See id.* §§ 1500.2(b), 1502.8.

NEPA requires all federal agencies to prepare a "detailed statement" called an EIS assessing the environmental impacts of all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). However, an agency can use an EA to aid the agency in determining whether a proposed activity may significantly affect the quality of the human environment. 40 C.F.R. §§ 1501.4(b), 1508.9 (2019). The role of the EA is to "provide sufficient evidence and analysis" to determine whether an EIS is needed or if a FONSI is appropriate. *Id.* § 1508.9(a)(1). NEPA requires all agencies to "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 … [EISs]." 40 C.F.R. § 1507.2(d) (2019).

An EA must include the evidence, data, and support that the agency relies upon so that that information is available to the public. 40 C.F.R. § 1508.9(a)(1) (2019) (an EA is "a concise public document" that "briefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS] or [FONSI]"). An agency may tier to other NEPA documents in its EA by "incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared[,]" however, tiering through incorporation by reference does not excuse an agency from including specific impacts about the particular project. 40 C.F.R. § 1508.28 (2019); *Klamath Siskyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 997–98 (9th Cir. 2004). It is not enough for an agency to support its decision based only on information included in an administrative record; the EA itself must contain "references to any material in support of or in opposition to its conclusions. That is where the Forest Service's defense of its position must be found." *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998). Further, the use of hyperlinks in an EA is unwise, as these links lead to websites that can be changed or removed. A hyperlink only identifies the current location of a website or document, but it is not the document itself and is certainly not necessarily any document an agency considered at some point in the past.

"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 (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); *cf. Del. Dep't of Nat. Res. & Env't Control v. U.S. Army Corps of Eng'rs*, 685 F.3d 259, 277 n.19 (3rd Cir. 2012) (distinguishing *Northern Plains Resource Council* because the agency in that case failed to collect baseline data, "put[ting] the cart before the horse[,]" whereas the agency in this case collected "considerable baseline data"). 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, 1101 (9th Cir. 2016) ("Establishing appropriate baseline conditions is critical to any NEPA analysis."); *Half Moon Bay Fishermans' Mktg. Ass'n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988) ("Without establishing the baseline conditions which exist … before [a project] begins, there is simply no way to determine what effect the [project] will have on the environmental, and consequently, no way to comply with NEPA."); *Izaak Walton League of Am., Inc. v. Tidwell*, No. 06–3357, 2015 WL 632140, at *12 (D. Minn. Feb. 13, 2015) (directing the Forest Service to use the "existing noise level as a baseline" to compare to the impacts of additional sound that would stem from the agency's decision). *See also Klamath-Siskiyou Wildlands*, 387 F.3d at 993 (applying NEPA's hard look requirement to EAs).

After completing an adequate EA, the agency must prepare either an EIS or a FONSI. For a federal agency to make a FONSI, it must present convincing 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); *see also Blackwood*, 161 F.3d at 1211 ("An agency's decision not to prepare an EIS will be considered unreasonable if the agency fails to supply a convincing statement of reasons why potential effects are insignificant." (quoting *Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988))); *Monroe Cnty. Bd. of Comm'rs v. U.S. Forest Serv.*, 595 F.Supp.3d 713, 724 (S.D. Ind. 2022) ("Given the number of

comments and concerns that were raised during the scoping process … [the Forest Service] should have at least provided a 'convincing statement of reasons' that explained why the impact to [the environment] would not be significant."); *Del. Audubon Soc'y v. Salazar*, 829 F.Supp.2d 273, 280 (D. Del. 2011). The FONSI must include the EA "or a summary of it and shall note any other environmental documents related to it[.]" 40 C.F.R. § 1508.13 (2019).

NEPA also 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." *Id.* § 1502.9(c)(1)(i)–(ii) (2019); *Marsh*, 490 U.S. at 373–74. 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[,]" even after a project has received "initial approval." *Marsh*, 490 U.S. at 373–74. 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. *Ark. Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 431 F.3d 1096, 1104 (8th Cir. 2005). 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.").

PROJECT HISTORY

The Robert's Gap project was developed by the Forest Service between February 2017 and October 2021. The Project began with an internal project initiation letter in February 2017. AR

1206. The public first heard about the Project a year later when the Forest Service conducted public scoping. AR 1210. The Forest Service published a draft EA in August of 2020, AR 1300, and BRWA submitted timely comments on that draft in early September of 2020. AR 1358. The Service completed its final EA in March of 2021, AR 1712,[6] and published the EA along with a draft DN/FONSI in April of 2021, AR 1776, which started the required objection period under Forest Service regulations. *See* 36 C.F.R. § 218.26(a). The final EA only included two appendices, Appendix A—Maps—and Appendix B—Public Involvement. AR 1772–1775. It did not include a bibliography or any similar list of cited sources. There were vague, cursory references to some sources throughout the document, *see, e.g.,* AR 1747 (citing "Patric, et al, 1984" and "Omernick 1987"), but none of those "citations" provided enough information to allow the public to locate and review the cited source. The EA referenced a "Water Resources for Cumulative Effects (WRACE)" model, but provided no information about how that model actually works, what specific data the Service inputted into that model, or where the public could access additional information about this model. AR 1748. The EA contained several hyperlinks, especially in the section addressing herbicide use, but almost none of those links are now functional. *See* AR 1762–1763. Overall, almost none of the supposedly supporting references in the final EA were properly incorporated by reference, 40 C.F.R. § 1502.19 (2019), properly included in an actual EA Appendix, 40 C.F.R. § 1502.18, or otherwise made reasonably accessible to the public for its review during the EA comment and objection periods.[7]

[6] Although the cover page of the final EA clearly indicates the document was finalized and published in March of 2021, AR 1712, the header on all subsequent pages in that 2021 document mistakenly states that it is the "Robert's Gap Environmental Assessment *2020*." AR 1713–1775 (emphasis added).

[7] The Defendants' administrative record also contains multiple, internal analysis documents and reports, *see, e.g.*, AR 2621, AR 2749, AR 6623, which are not cited by or incorporated into the EA and which the public was never given reasonable access to during the NEPA commenting process.

BRWA submitted its timely objection on May 20, 2021. AR 1797. A few weeks later, the Forest Service issued a press release announcing the discovery, during the first week of July 2021, of an endangered Indiana Bat maternity colony within the Project area. AR 6628. The objection resolution meeting occurred on July 27, 2021, the day after the press release. AR 1853–1859. The Forest Service overruled BRWA's objection on August 5, 2021. AR 1860–1870. In that objection response, the Service vaguely cited to several sources not cited by the EA, especially when discussing herbicides and water quality. *See* AR 1862–1863 (citing a "threatened and endangered species report," a 2018 USDA "position on Glyphosate," and prior "monitoring data" for herbicides). But that response, unlike the EA itself, did include a list of "references cited." AR 1871. The resolution letter also stated that water quality monitoring will be added to the Project in the final decision (but makes no mention of the need to obtain baseline water quality information) and acknowledges the recently discovered Indiana bat maternity colony in the Project area. AR 1869. However, the letter insists that the protective measures adopted by the Bat Plan Amendments will be sufficient to address this new circumstance and those plan amendment measure will be included in the final decision. AR 1869.

The Forest Service issued its DN/FONSI on October 27, 2021. AR 1897. It approved a huge project, including over 10,000 acres of various types of commercial logging, several thousand acres of herbicide use, over 11,000 of prescribed burning, and over 30 miles of new and temporary roads and over 21 miles of dozer lines to facilitate these management actions. *See* AR 1898–1903. As promised by the objection resolution letter, the DN/FONSI also included water quality monitoring for certain pollutants, not including herbicides. AR 1905. But the DN/FONSI also disclosed, for the first time, that the Forest Service had no current baseline water quality data for the Project area streams, and therefore, such data would need to be collected. AR 1905.

Nevertheless, the Forest Service approved the Project without baseline data, and instead delayed actual Project implementation while baseline water quality data was collected. AR 1905. The DN/FONSI also, contrary to the assertions in the objection resolution letter, did not rely solely on the existing protective measures for the endangered Indiana Bat from the Bat Plan Amendments, and instead added two additional measures, which were developed internally by the Forest Service without public comment. AR 1905. The DN/FONSI cited to no publicly available analysis to support or explain these measures. AR 1905.

In response to the publication of the final EA and discovery of the endangered Indiana bat maternity colony, BRWA submitted two Freedom of Information Act ("FOIA") requests: one on August 4, 2021 and one on August 13, 2021. Buchele Decl. Exs. 2 and 3.[8] The request submitted on August 4 sought non-public information the Forest Service used in its development of the EA, including records related to wildlife, aquatic resources, herbicide use, and threatened and endangered species (and specifically bats), among other records. Buchele Decl. Ex. 2 at 1–5. In particular, Plaintiff sought records regarding "[i]ssues analyzed but not included in [the] EA[.]" *Id.* at 2. The request submitted on August 13 sought non-public information the Forest Service had that evaluated, analyzed, or discussed the ecological importance and significance of the discovery of the endangered Indiana bat maternity colony in the Project area as the discovery related to the overall environmental impacts of the Project. Buchele Decl. Ex. 3 at 1. Many of the documents BRWA sought were internal Forest Service documents and scientific articles or other data the final EA cited using vague abbreviated forms, making the information difficult or impossible for BRWA

[8] BRWA's 2021 FOIA requests and the Forest Service's responses are not currently in the administrative record, but BRWA believes they should be. BRWA's 2021 requests were sent to the before it finalized its DN/FONSI. The Service's subsequent responses and BRWA's 2023 FOIA request are, at a minimum, appropriate for the Court to consider when addressing BRWA's failure to act claims.

to obtain independently. Buchele Decl. Ex. 3 at 1. None of these documents were provided to the public with the final EA. For both requests, BRWA's primary concern was the lack of public analysis included in the EA and the unavailability of most of the supporting information or documents referenced in the final EA, especially as it involved the endangered Indiana bat and the recently discovered maternity colony. The requests were initially answered by early October 2021, however, after beginning its review of the provided documents, BRWA realized its requests had not been answered fully, and counsel for Plaintiff contacted the FOIA officer requesting the missing information on November 18, 2021. *See* Buchele Decl. Ex. 4; Buchele Decl. Ex. 5 at 1. The FOIA officer responded November 29, 2021, indicating he had forwarded BRWA's request to other FOIA staff, however, BRWA received no subsequent response, and ultimately submitted administrative appeals of the responses to its two requests on December 10, 2021. Buchele Decl. Exs. 6 and 7. The appeals were not resolved until March 2022, months after the publication of the DN/FONSI, when the Forest Service provided thousands of pages of additional responsive records. Buchele Decl. Ex. 9. The untimely response frustrated BRWA's attempt to understand and evaluate the analysis supporting the Forest Service's decisionmaking with regard to the Project.

In February 2023, BRWA submitted a post-decisional FOIA request regarding the results of any water sampling, as the Forest Service had not begun collecting this data until after the final decision and publication of the DN/FONSI. Buchele Decl. Ex. 10. *See* AR 1905. The records the Forest Service produced in response to this request about one month later, *see* Buchele Decl. Ex. 11, indicated the Forest Service intended to also test the post-decisional water samples it collected for the herbicides it had earlier decided to use as part of the Project. AR 2588 ("To meet your concern, I have asked [the Forest Hydrologist] to request funding to conduct an additional herbicide detection test as part of the [water quality] baseline."). This was the first time BRWA

received information about the Forest Service potentially testing for herbicide metabolites as a part of its baseline water quality analysis. AR 2609. However, those records also indicated the Forest Service might not test for the metabolites that are often released into the environment when the complex chemical herbicides break down after being applied into other sometimes even more dangerous chemical metabolites. *See* AR 2607–2608.

ARGUMENT

The Forest Service's final EA violates NEPA and the APA, as it failed to discuss in any meaningful way potential impacts from the Project on the Buffalo National River and its headwaters, including baseline water data from rivers and streams in the Project area that flow into the River; failed to disclose information about the lack of herbicide use in the Project area for the 40 years preceding the approval of herbicide use by the Project; and did not include the necessary evidence, data, and analysis to support its assertions in the EA in a manner the public could reasonably review and evaluate. Because the EA was inadequate, so too was the DN/FONSI. The adequacy of the DN/FONSI is further undermined by the discovery of the endangered Indiana bat maternity colony in the Project area, which occurred after the final EA was published, but before the DN/FONSI was signed. The Forest Service's most recent and continuing errors are its continuing failure to conduct supplemental public NEPA analysis to address the newly discovered Indiana bat maternity colony, as well as its continuing failure to collect baseline water quality sampling and allow the public to comment on where and how that sampling occurs and what the obtained baseline data shows. The Forest Service's DN/FONSI also failed to consider at the Project's proximity to the Buffalo National River and failed to address the newly discovered endangered Indiana bat maternity colony within the Project area, instead relying on the Bat Plan Amendments, which could not and did not address this significant new circumstance. A proper

consideration of these significance factors and the other Project impacts would have determined that this very large logging Project, situated in the headwaters of a sensitive National River (but lacking baseline water quality data and including newly discovered key habitat for an endangered species) requires a much more thorough public analysis in a complete SEA or EIS.

I. The Forest Service Failed to Take a Hard Look at the Buffalo National River Specifically and Water Quality Generally. (Counts 1 and 2)

a. Background on the Buffalo National River and its local and national importance

The Project affects approximately 313 miles of streams across 40,000 acres. AR 1746. The Buffalo River, known for its scenic beauty, aesthetic and scientific value, broad recreational potential, and intangible social value, is one of the primary streams found in the Project area. AR 1746. The River flows north through the eastern portion of the Project area, where it is then designated the Buffalo National River as it exits the National Forest. AR 1746. To preserve its beauty, Congress designated 135 miles of the 150-mile-long Buffalo River as this country's first National River in 1972. Pub. L. No. 92-237, 86 Stat. 44 (March 1, 1972) (codified at 16 U.S.C. §§ 460m-8 to 460m-14); AR 702. Additionally, the upper 15.8 miles of the Buffalo River are part of the Nation's Wild and Scenic River System, protected under the Wild and Scenic Rivers Act.[9] *See* Pub. L. No. 102-275 § 2, 106 Stat. 123 (1992) (codified at 16 U.S.C. § 1274(a)(135)); AR 702.

Congress established the Buffalo National River as part of the National Park system in 1972 "(f)or the purposes of conserving and interpreting an area containing unique scenic and scientific features, and preserving [the Buffalo River] as a free-flowing stream…for the benefit

[9] The Wild and Scenic Rivers Act implements a congressional policy recognizing that certain rivers "possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values" and establishes a commitment to protect these rivers and their immediate environment. 16 U.S.C. § 1271.

and enjoyment of present and future generations" 16 U.S.C. § 460m-8 (1976); AR 702. The intangible social value of the Buffalo National River is evidenced by its expansive scope of recreational uses, such as boating, fishing, swimming, camping, photography, observing nature, and hunting. AR 1746; S. Rep. No. 92-130, *reprinted in* 1972 U.S.C.C.A.N. 1969, 1972 (May 19, 1971). Further, the River and its tributaries "are one of the richest waterways in the Nation in terms of the total number of fish species." S. Rep. No. 92-130. In support of establishing the River as part of the National Park system, former Secretary of the Interior Rogers Morton described the unique features of the Buffalo River to the Senate:

> The significance of the Buffalo River is not due to any single attribute of the river which, taken alone, ranks above that for any other river in the United States. Rather, its significance is due to a splendid combination of favorable qualities. Massive bluffs and deeply entrenched valleys give the Buffalo the most spectacular setting of any stream in the Ozark region, and enable it to be classed among the most outstanding scenic of the free-flowing streams in the Eastern United States.

S. Rep. No. 92-130. The area provides scenic and ecological value as "hillsides and bluffs with their varying elevations and exposures provide a variety of conditions for some 1,500 species of plants[.]" *Id.* The geological features of the Buffalo River add to its uniqueness, including the "massive beds of cavernous limestone; the folding and faulting of sedimentary rocks; and limestone, dolomite, sandstone, and shale formations." *Id.* The extensive karst geology that underlies the region adds to the River's unique features. AR 1359. Karst terrains, however, are more likely to have sinkholes, underground caverns, and greater porosity, "all of which enhances the potential for groundwater movement and contamination." *Four Cnty. (NW) Reg'l Solid Waste Mgmt. Dist. Bd. v. Sunray Servs., Inc.*, 971 S.W.2d 255, 259 (Ark. 1998); *see also* AR 1843 ("Karst sites provide rapid transport of groundwater with minimal filtration."). Thus, the unique geographic features of the Project area, including the steep slopes with erodible soils atop the highly permeable ground karst structure, makes both surface and groundwater susceptible to

contamination. *See* AR 377 (discussing the "steep side slopes and 1,000-foot local relief"); AR 378 ("The fractured and cavernous limestone geology of the region allows a direct linkage from surface waters to groundwater.").

The legislative history of Congress's first National River designation indicates that one of Congress's primary purposes in establishing the Buffalo National River was to preserve its "unspoiled" and pristine character; as Congress noted, the Buffalo River "provides a unique opportunity for preservation since its headwaters lie within the Ozark National Forest, and the remaining 132 miles of the river can be preserved and administered as a single unit." S. Rep. No. 92-130, 92d Cong., 2d Sess. 1, *reprinted in* 1972 U.S. Code Cong. & Ad. News 1969. The legislative history demonstrates Congress' expectation that the headwaters of the Buffalo National River would be adequately preserved through the protections afforded to the Ozark National Forest.

While the Buffalo National River is administered by the National Park Service, the Forest Service is responsible for the segment that lies within the Ozark National Forest. AR 1919, 3483. As a large portion of the Buffalo River watershed is in the Ozark National Forest, the Forest Service has a responsibility to protect the Buffalo River and its watershed. *See* AR 703 ("The USFS portion is essentially the headwaters of the Buffalo National River"). Because this region is not a part of the National River, one of the key protections the headwaters of the Buffalo River receive is from NEPA's pre-decisional analysis and disclosure obligations, further emphasizing the importance of upholding NEPA's requirements.

Even though additional potentially harmful activities are potentially allowed within the portions of the Buffalo River watershed within the National Forests, NEPA required the Forest Service to fully disclose and consider the potential impacts of any such proposed actions on the

watershed areas within the Project area and on the National River immediately downstream from that Project area. BRWA successfully invoked NEPA's requirements a decade ago to protect the Buffalo National River from a large hog CAFO located about six miles outside the National River's boundaries along a tributary of that River. In that case, the federal agencies facilitating the CAFO illegally failed to even mention the National River in their NEPA analysis. *Buffalo River Watershed All.*, 2014 WL 6837005 at *2; Buchele Decl. Ex. 1 at 4. A court must find that an agency's decision is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem[.]" *State Farm,* 463 U.S. at 43. In the Robert's Gap EA, the Forest Service does mention the Buffalo National River once, but it entirely fails to analyze or disclose the Project's potential impacts to that precious resource, nor its designation as a Wild and Scenic River. The Forest Service's at best cursory and in reality, non-existent analysis, regarding what is likely a much bigger threat to the Buffalo National River, also must be held to violate NEPA and the APA.

b. The Service violated NEPA by failing to take a "hard look" at the Buffalo National River.

The final EA does not reflect a "hard look" at the Project's effects on the Buffalo National River and does not provide sufficient information to permit opportunity for meaningful public scrutiny. A "hard look" is evidenced by a "reasonably thorough discussion" of the likely environmental effects. *Friends of the Boundary Waters v. Dombeck*, 164 F.3d 1115, 1130 (8th Cir. 1999). Although a meeting with "specialists from the Buffalo National River" apparently took place, the EA contained no discussion of the substance of that meeting or indication that any analysis or consideration of impacts to the National River took place as a result of that meeting. AR 1774, 1909. The lack of any substantive discussion in the EA about the Project's impact on the

Buffalo National River is essentially the same as completely ignoring the National River and shows that the Forest Service did not take a hard look at the environmental consequences of its actions.

The EA's silence as to the Project's potential impacts on the Buffalo National River undercuts Congress' clear intent in the Buffalo National River Enabling Act to protect and preserve the River. *See* 16 U.S.C. §§ 460m-8 to 460m-14. Furthermore, the Forest Service failed to identify and evaluate the impacts of the Project in violation of NEPA. An EA that "fails to address a significant environmental concern can hardly be deemed adequate for a reasoned determination that an EIS is not appropriate." *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 154 (D.C. Cir. 1985) (citing *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 553 (1978) ("NEPA places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action.")). While NEPA "does not prevent agencies from taking environmentally harmful action," it does require that the adverse environmental effects of the proposed action be "adequately identified and evaluated." *Sierra Club v. Kimbell,* 623 F.3d 594, 599 (8th Cir. 2019) (quoting *Methow Valley*, 490 U.S. at 350). The EA identifies the Buffalo National River only once with zero analysis as to how the Project will affect the protected segment of the River, AR 1746, and contains only a handful of additional references to the Buffalo River generally, AR 1745, 1747, 1750, 1752, but again with no actual analysis to potential impacts to that River. Further, the EA never specifically addressed the status of the Buffalo National River as a designated Wild and Scenic River. *See* AR 1746; 16 U.S.C. § 1274(a)(135).

The EA identified several "important" issues that it would "study in detail." AR 1718. The Buffalo National River was not one of those "important" issues; only "Water Quality" in general was listed. AR 1718. The Water Quality section of the EA correctly identified the Buffalo River within the Project area as an Extraordinary Resource Water and noted that it flows into the Buffalo

National River as it exits the Project area and National Forest. AR 1746. That, however, was the only time the National River is mentioned in the EA's Water Quality discussion.

Generally, the Water Quality section of the EA focused almost entirely on the impacts from sediment resulting from Project activities such as logging, road construction and reconstruction, and prescribed burning. AR 1748. The EA specifically acknowledged the risk of what it describes as "temporary increases in sediment" pollution that could last for up to three years. AR 1748, 1749. Significantly, although the EA claimed generally that the Project is not expected to contribute to the degradation of current water quality, AR 1749, it contained no information whatsoever about what the current water quality of the Buffalo River is, within the Project area or immediately downstream within the National River boundaries. The EA also did not explain why the acknowledged three years of increased sediment pollution would not degrade water quality in a water body like a National River that is likely highly sensitive to even small increases in pollution. Considering how important high-water quality is for the Buffalo National River, immediately downstream from the Project area, at a minimum the EA was required to have least discussed the impacts from the supposedly "short term" increases in sediment pollution on water quality for the Buffalo National River, but the EA arbitrarily failed to do so.

Further, the Project includes the use of herbicides within the Buffalo River headwaters, *see* AR 1730, 1746, 1793, 1898–1899, but the EA's water quality analysis was completely silent on the potential impacts of herbicide run-off on the Buffalo National River, particularly with the porous karst structure of the region. The EA's analysis of the impacts from herbicide use was in a separate section of the EA and focused almost exclusively on direct human health impacts, ignoring any potential impacts from herbicide use on the Buffalo River's water quality and on the fish and invertebrates that live in that River. The Forest Service's administrative record disclosed

for the first time that it has not used herbicides in the Buffalo River headwaters area for 40 years, AR 2588**,** which underscores the need to both disclose that fact to the public in the EA and for the EA to then fully disclose the impacts of now using herbicides in a watershed that likely currently contains little or no herbicide contamination.

The DN/FONSI approved the Project despite the readily apparent risks to the headwaters of a national river but then also publicly acknowledged, for the first time, that the Forest Service in fact had no baseline water quality information regarding any of the streams in the Project area, including those that flow into the Buffalo River, when it approved the Project. AR 1905. That made it impossible, in violation of NEPA, for the Forest Service to accurately analyze and predict impacts to current water quality, as BRWA discusses next.

c. The EA's consideration of water quality was fatally flawed because it lacked any information regarding baseline water quality in the Project area's streams that would be impacted.

The EA purportedly reached its conclusions about the Project's supposed lack of impacts on water quality using a WRACE model. AR 1748. The EA identified no specific data regarding current water quality in the Project area's 313 streams and rivers. *See* AR 1746. However, it is likely that most members of the public trusted the agency and believed the Forest Service had such data to input into its model. Indeed, it is entirely reasonable to assume that any reliable model tasked with predicting future impacts to a specific area would need at least some site-specific data regarding current conditions in that area. During the objection resolution process, the Forest Service agreed to include a requirement for water quality monitoring during Project implementation in its DN/FONSI, AR 1869, which was in fact a new addition to the Project. But the Service at this point did not disclose that the Forest Service's would need to first determine current baseline conditions before undertaking such monitoring. The key fact that the Forest

Service did not already have baseline water quality information was not disclosed to the public until the Forest Service admitted to such in its final DN/FONSI. AR 1905. In that document the Service did as it promised during the objection process and included a requirement for water quality monitoring regarding certain pollutants and water quality indicators. AR 1905. But it also acknowledged that, in order for such monitoring to be meaningful, it needed to first "collect sufficient baseline data." AR 1905. However, the Forest Service only proposed to collect baseline data after approving the Project. Instead of delaying its final approval, obtaining the required baseline water quality data, and then disclosing that information and analyzing it in a public supplemental NEPA analysis, the Forest Service decided to illegally approve the Project without such baseline data, and to simply delay Project implementation while it obtained that data. AR 1905 (delaying the majority of Project activities until September 1, 2022, in order to "collect sufficient baseline data"). This would mean that Forest Service decisions about when and how to obtain such baseline data and its analysis of that data would not be publicly disclosed and subject to public comment in a NEPA document. The administrative record underscores that the Service is in fact making internal, non-public decisions about such baseline data collection that demand public disclosure and participation. For example, the Forest Service decided to also obtain baseline data regarding herbicide pollution levels, pollutants that were not mentioned in the DN/FONSI. *Compare* AR 1905 (will obtain baseline data re "turbidity, pH, conductivity and temperature") *with* AR 2588, 2607–2612 (adding herbicide testing). Moreover, the Service has apparently debated internally whether it should test for herbicide metabolites, AR 2607–2612, a topic BRWA and all other interested members of the public should be able to comment on.[10]

[10] Several of the herbicides authorized by the DN/FONSI break down fairly quickly into metabolites that themselves have potentially adverse impacts. *See, e.g.,* Buchele Decl. Ex. 12 (2020 article re Glyphosate: Toxicity and Microbial Degradation, at 6–70; Ex. 13 (EPA R.E.D.

The Forest Service's EA was required to "describe the environment of the areas to be affected or created by the alternatives under consideration." 40 C.F.R. § 1502.15 (2019). "Without establishing the baseline conditions . . . there is simply no way to determine what effect the [action] will have on the environment, and consequently, no way to comply with NEPA." *Carlucci*, 857 F.2d at 510. "NEPA clearly requires that consideration of environmental impacts of proposed projects take place *before* [a final decision] is made." *LaFlamme v. Fed. Energy Regul. Comm'n,* 842 F.2d 1063, 1071 (9th Cir. 1988) (emphasis in original). Once a project begins, the "pre-project environment" becomes a thing of the past, thereby making evaluation of the project's effect on pre-project resources impossible. *Id.* at 1071. The lack of an adequate baseline analysis fatally flaws an agency's NEPA review. "[W]ithout [baseline] data, an agency cannot carefully consider information about significant environment impacts. Thus, the agency fail[s] to consider an important aspect of the problem, resulting in an arbitrary and capricious decision." *N. Plains Res. Council*, 668 F.3d at 1083, 1085.

Specific to water quality, several district courts have determined that an agency's EA must include information and analysis about baseline water quality and that the agency must obtain and analyze that data in a NEPA document before it approves the project. *See, e.g., Idaho Conservation League v. U.S. Forest Serv.*, No. 1:11-CV-00341-EJL, 2012 WL 3758161, at *17 (D. Idaho Aug. 29, 2012) (USFS violated NEPA by authorizing exploratory hard rock mineral drilling without having baseline groundwater information); *Shoshone-Bannock Tribes of Fort Hall Reservation v. U.S. Dep't of Interior*, No. 4:10-CV-004-BLW, 2011 WL 1743656, at *10 (D. Idaho May 3, 2011)

Facts-Triclopr, at 3). These sources are not meant to fully address the issue of sampling for herbicide metabolites. They simply illustrate that the issue needs to be fully considered in supplemental NEPA analysis that is subject to public and judicial scrutiny.

(the court found that the impacts of a project were "highly uncertain" where the agency's NEPA analysis lacked baseline water quality data and analysis).

Two recent opinions from the District Court in Oregon underscore illustrate why the baseline water quality data and analysis of that data belongs in a project's pre-approval NEPA analysis so that the data is subject to public scrutiny and judicial review. First, in 2014, the Oregon District Court found an EA and subsequent agency decision based on that EA violated NEPA because the agency did not obtain baseline water quality data before it made its decision. *Gifford Pinchot Task Force v. Perez*, No. 03:13-cv-00810-HZ, 2014 WL 3019165, at *33 (D. Or. July 3, 2014). After remand, the agency did some sampling, included analysis of that data in a revised EA, and approved the project again. But the district court then held that the agency's sampling and analysis were still insufficient. *Cascade Forest Conservancy v. Heppler*, No. 3:19-cv-00424-HZ, 2021 WL 641614, *19–21 (D. Or. Feb. 15, 2021).

These two decisions underscore why the Forest Service violated NEPA and Section 706(2) of the APA when it first approved the Project based on an EA that did not include or analyze baseline water quality data. "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." *N. Plains*, 668 F.3d at 1083 (emphasis added) ("plans to conduct surveys and studies as part of its post-approval mitigation measures," in the absence of baseline data, fails to take the requisite "hard look" at environmental impacts). Moreover, the Service is continuing to violate NEPA and APA Section 706(1) by refusing to prepare a public supplemental NEPA analysis disclosing the baseline data it has obtained and the analysis it has done based on that baseline data. That data and analysis is significant new information, and the decision to gather it is a substantial change to the Project, both of which must be subject to public scrutiny and judicial review by

including it in supplemental NEPA analysis. *See* 40 C.F.R. § 1502.9(c) (2019). Instead, any review and analysis are being conducted mostly internally, without the opportunity for public comment and outside of any agency action or analysis that would be subject to judicial review. Further, this baseline water quality information is not the only new significant issue that triggers the need for supplemental NEPA analysis. As BRWA discusses next, critical information regarding the endangered Indiana Bat, the discovery of an actual Indiana bat maternity colony within the Project area after the Forest Service finalized its EA but before it made its final decision to approve the Project, was a significant new circumstance and new information that also had to be addressed in a supplemental NEPA document.

II. The Forest Service is Continuing to Violate NEPA Under APA Section 706(1) and Must Produce a Supplemental Environmental Assessment or Environmental Impact Statement. (Counts 6 and 7)

Under NEPA, "a federal agency has a continuing duty to gather and evaluate new information relevant to the environmental impact of its actions" when planning and implementing a project. *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1023 (9th Cir. 1980). "An agency must continue to take a 'hard look' at the environmental effects of a planned action after preliminary approval and may need to prepare a supplemental assessment or impact statement if environmentally significant new circumstances or information develop, and if … major federal action is yet to occur." *Sierra Club*, 446 F.3d at 816 (8th Cir. 2006) (citing *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 72 (2004); *Marsh*, 490 U.S. at 372–74). CEQ NEPA regulations require agencies to produce a SEA or EIS whenever new "information relevant to environmental concerns and bearing on the proposed action or its impacts" comes to light. 40 C.F.R. § 1502.9(c)(1)(ii) (2019). An agency's failure to prepare a SEA or EIS is reviewed under § 706(1) of the APA, as a continuing failure to act. 5 U.S.C. § 706(1); *Dombeck*, 222 F.3d at 560.

When deciding whether an agency's failure to prepare a SEA or EIS is unlawful, courts first examine "the value of the new information to the decisionmaking process" to determine its significance. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 374 (1989). Specifically, courts ask whether "the new information is sufficient to show that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered." *Id.* at 374; 40 C.F.R. § 1502.9 (2019). The "significance" threshold in 40 C.F.R. § 1502.9(c)(1)(ii) presents "a low standard," and where new information raises "substantial questions" regarding the impacts of a proposed action, further analysis via a SEA or EIS is required. *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 760 (9th Cir. 2014); *Heartwood*, 380 F.3d at 431 ("We require that an agency, in reaching its conclusion to forego an EIS, take a 'hard look' at the project's potential impacts, identify the 'relevant areas of environmental concern,' make a 'convincing case that the impact was insignificant,' and, if the impact is determined to be significant, convincingly establish that changes in the project will sufficiently reduce that impact." (quoting *Audubon Soc'y of Cent. Ark. v. Dailey*, 977 F.2d 428, 434 (8th Cir. 1992))). *Cf. Ark. Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 431 F.3d 1096, 1099–1100, 1104 (8th Cir. 2005) (where court held no Supplemental EIS was required because agency completed a subsequent EA to consider proposed changes to its project and the effects of other reasonably foreseeable projects). "[T]o prevail on a claim that the Forest Service violated its statutory duty to prepare an EIS, a 'plaintiff need not show that significant effects will in fact occur.' It is enough for the plaintiff to raise 'substantial questions whether a project may have a significant effect' on the environment." *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998) (quoting *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149–50 (9th Cir. 1998)). *Cf. Nat'l Wildlife Fed'n v. Harvey*, 574 F.Supp.2d 934, 954–

55 (D. Ark. 2008) (holding the discovery of the Ivory-billed Woodpecker did not amount to significant new information—and therefore a Supplemental EIS was not required—because, even after substantial surveys, there was no evidence the Woodpecker resided in the project area). As the Ninth Circuit held:

> When new information comes to light the agency must consider it, evaluate it, and make a reasoned determination whether it is of such significance as to require implementation of formal NEPA filing procedures. Reasonableness depends on such factors as the environmental significance of the new information, the probable accuracy of the information, the degree of care with which the agency considered the information and evaluated its impact, the degree to which the agency supported its decision not to supplement with a statement of explanation or additional data.

Gribble, 621 F.2d at 1024.

Here, the Service must produce a SEA or EIS to satisfy its obligations under NEPA. There are significant new circumstances regarding the discovery of the first endangered Indiana bat maternity colony within the Ozark-St. Francis National Forests. This discovery alone warrants additional NEPA analysis. Additionally, the Forest Service failed to include baseline water sampling data in both the draft and final EA, as well as significant information about the use of herbicides within the Project area. Only after publishing its DN/FONSI has the Service begun to collect such pre-implementation baseline data and continues to make non-public decisions about where, how, and when to collect that data. AR 2593–2606.

Further, there is no indication in the administrative record that the Forest Service even considered whether it had a duty to supplement its EA after the discovery of the Indiana bat maternity colony. The Forest Service had "an ongoing duty to issue supplemental environmental analyses[,]" independent of any demand by the public to do so. *Cold Mountain*, 375 F.3d at 892; *Price Rd.*, 113 F.3d at 1509. Additionally, the Forest Service had a second chance to consider its duty to supplement in May 2022, when BRWA sent the Service a letter demanding additional,

public NEPA analysis. AR 8644. The Forest Service never responded to BRWA's demand, and there is no indication in the administrative record that the agency ever considered BRWA's request. The Forest Service's failure to even consider its duty to supplement its EA in light of the new information and circumstances regarding the Indiana bat maternity colony, and its failure to also do so regarding its changes to the Project regarding baseline water quality data collection, see below, at page 46, are both independent violations of NEPA. *See Friends of the Clearwater,* 222 F.3d at 558–59 ("We hold that the Forest Service's failure to evaluate in a timely manner the need to supplement the original EIS in light of new information violated NEPA."). Because this information has never been made available for public comment and critique, a SEA or EIS is still necessary to fulfill the purpose and goals of NEPA.

a. The discovery of an endangered Indiana bat maternity colony is a significant new circumstance or information, and the Forest Service's treatment of this new circumstance violates both Section 706(2) and Section 706(1) of the APA. (Counts 3, 6 and 7)

The discovery of an endangered Indiana bat maternity colony within the Project area is a significant new circumstance under NEPA, and, therefore, the Forest Service was required to either have existing NEPA analysis that addresses this new circumstance or the Service was required to conduct supplemental public analysis through a SEA or through an EIS. NEPA requires agencies to conduct supplemental analysis after the agency makes substantial changes to the project or the discovery of significant new information or circumstance relevant to the impact of the proposed project. 40 C.F.R. § 1502.9(d)(1) (2019). It is important that this supplemental analysis is available for public comment, as explained above, as this is one of the core components of NEPA. 36 C.F.R. §§ 218.22(a), (d).

The Indiana bat has been listed as an endangered species since 1967. AR 4256. Once thought to have a population numbering millions, the species' population sharply declined in the

early 1960s and continued to decline until 2001. AR 4258–4259. In 2019, FWS estimated that there were only 537,297 Indiana bats throughout their range. AR 4259. "The main threats to this species are availability of natural roost structures, loss of winter hibernacula, white-nose syndrome (WNS), and human disturbance[.]" AR 4212. Within Arkansas, Indiana bats prefer to roost in shortleaf pine, shagbark hickory, and other trees greater than 20 centimeters DBH, but "[the] bats roost[] in a wide range of species and sizes of trees." AR 4308. Disturbance to winter hibernacula and WNS are particularly threatening to the Indiana bat population in the Ozark-St. Francis National Forests, although the loss of forest cover and degradation of forested habitats has contributed to the decline of the species as well. AR 4212, 4260. "Additionally, individual bats are at risk of being killed, injured or harassed by falling occupied roost trees or activities that may disturb a roosting bat and cause it to fly during the day." AR 4266.

The endangered Indiana bat hibernates in caves and mines throughout the winter, then migrates to forested areas during the summer. AR 4256. Typically, in August and September, the bat "swarms" for several weeks, mating and storing fat reserves to prepare for hibernation. AR 4256. Most bats hibernate by the end of November. 4256. In late March and early April, most bats emerge, forage for a short period of time to restore some energy, and migrate to their summer forest habitats. AR 4257. Migration is incredibly stressful for the bat, and therefore, "adult mortality may be at the highest in late March and April." AR 4257. During the summer, female bats give birth, only birthing one young each year. AR 4258. The young are particularly vulnerable for a month, during which time they are unable to fly. *See* AR 4258. If a prescribed burn takes place near a maternity roost tree, "[n]on-volant Indian bats may be killed from heat and toxic gases given off during prescribed burns[.]" AR 4218.

In April of 2019, prior to the publication of the draft EA for the Robert's Gap Project, the Forest Service proposed amendments to the Ozark-St. Francis Forest Plan, the overarching plan and environmental analysis for the National Forests, aimed at updating the bat conservation practices in the area (the "Bat Plan Amendments"). AR 4295. In consultation with the U.S. Fish and Wildlife Service ("FWS"), the Forest Service published a Biological Assessment ("BA") on January 31, 2020, and FWS published a Biological Opinion ("BiOp") on May 7, 2020, describing and evaluating the potential effects of the Bat Plan Amendments on the endangered Indiana bat. *See* AR 4198, 4241. Both the BA and the BiOp predated the discovery of the Indiana bat maternity colony, and thus the agencies only addressed theoretical harm to Indiana bats and did not analyze potential harm to the actual Indiana bat maternity colony in the Project area. AR 4211 ("Females have been found to use temporary roost trees for one or more nights on their migration across the Ozark-St. Francis National Forests, but no maternity colonies have been found in the vicinity of the National Forest."), 4265 ("Females used temporary roost trees for one or more nights on their migration across the [Ozark-St. Francis National Forests ("OSFNF")], but no maternity colonies were found within the vicinity of the OSFNF."). FWS concluded that the Bat Plan Amendments would not "jeopardize the continued existence" of the Indiana bat. AR 4279. The Forest Service then published an EA for the Bat Plan Amendments in October 2020, which became official on March 17, 2021, upon the publication of a Decision Notice, which concluded the Bat Plan Amendments "may affect" and were "likely to adversely affect" the Indiana bat. AR 4291, 4343–4344. While the Forest Service conducted analysis from 2019 to early 2021 regarding the effects of the Bat Plan Amendments on unspecified, undiscovered, and theoretical endangered Indiana bat in the entire Ozark-St. Francis National Forests, this analysis entirely predated the discovery of an actual, rather than theoretical, Indiana bat maternity colony in the Project area itself.

Additionally, both the draft and final EAs for the Robert's Gap Project did not include analysis about the Indiana bat maternity colony, as the colony was not yet discovered. Thus, those existing NEPA documents could not satisfy the Service's NEPA obligations. The draft EA for the Project was published in August of 2020, and the final EA was published in March of 2021. AR 1300, 1712. The Forest Service published its draft DN/FONSI on April 13, 2021, and the objection period for public comment and dispute ended on May 28, 2021. AR 1794, 1795 Both the Forest Service's analysis and the public's opportunity to object occurred before the discovery of the Indiana bat maternity colony on July 7, 2021. *See* AR 6593–6597 (explaining that an adult male and an adult lactating female Indiana bat were captured on July 6, and "[t]he following day both bats were tracked to the same tree, located in the vicinity of the capture[,]" determined to be a "roost tree"). Despite this significant new information, the Forest Service moved forward and published the final DN/FONSI on October 27, 2021, without conducting any additional public analysis regarding the Project's impacts on this newly discovered maternity colony. This discovery was announced after the objection period for the Project but before those objections were resolved. In its response rejecting BRWA's objections, the Forest Service insisted that the existing forest-wide protective measures were sufficient to protect this newly discovered maternity colony. AR 1869. But when the final DN/FONSI was released it included for the first time additional "protective measures" that were not a part of its Bat Plan Amendments adopted in March of 2021. AR 1897, 1905. The public was not given the opportunity to review or comment on the Service's internal email "analysis" that developed these additional measures, and in fact these internal discussions were only disclosed many months later in the Service's tardy responses to BRWA's FOIA requests. *See* Buchele Decl. Exs. 2 and 3.

The DN/FONSI included two additional measures meant to protect the maternity colony. The first measure extended the maternity season during which no disturbance activities can occur within a quarter mile of the maternity roost from March 15–August 15 to March 15–October 15. AR 1905. The only reason the DN/FONSI gave for this extension was "due to emergence counts at this site." AR 1905. The second measure created "a protection zone encompassing the colony's known foraging and maternity roost tree" so that "snags over 9" DBH that have bat roost characteristics, such as peeling bark, cracks or cavities will only be removed during the hibernation season (Dec 1 – March 14) or after an emergence survey confirms bats are not roosting in the tree before removal between March 15th and November 30th." AR 1905. The DN/FONSI provided no further analysis or explanation for either measure.

i. The Forest Service only cursorily considered—entirely in internal correspondence—how the discovery of the Indiana bat maternity colony would affect the Project and if the Bat Plan Amendments were sufficiently protective.

The administrative record includes very little pre-decisional discussion of what protections the recently discovered maternity colony requires. The Forest Service conducted some of its own analysis in a series of internal emails following the discovery of the maternity colony. AR 6593–6627. However, this analysis is brief, fails to include adequate reasoning about why the additional protective measures will be sufficient, fails to include discussions with FWS, and most importantly was not available for public comment and critique. Indeed, the first time BRWA saw these internal discussions was when the Forest Service finally provided a complete response to its August 2021 FOIA request in 2022. Buchele Decl. Ex. 9. Therefore, additional public NEPA analysis in the form of a SEA or EIS that is subject to public review and comment is required.

Although claiming in the DN/FONSI that "[t]he potential for Indiana bat maternity trees was considered" in the Bat Plan Amendments, AR 1905, Forest Service employees were surprised

by the discovery of the colony within the Project area. AR 6593 (where a Forest Fish and Wildlife Biologist stated the discovery of an adult lactating female bat in the Project are was a "[p]retty big surprise" and "[c]razy news!"). After the discovery of the colony on July 6, 2021, the Forest Service began monitoring the colony tree and attempting to capture additional bats "to get foraging and alternate roost data[.]" AR 6597. On July 13, 2021, Timothy Jones, who signed the DN/FONSI, asked a Wildlife Biologist whether the Bat Plan Amendments "cover[ed] the Robert's Gap area in terms of implementation." AR 6599–6600. The Wildlife Biologist responded that the Bat Plan Amendments should be adequate, but provided very little information about why this was so. AR 6599 ("Biological it covers roost, roost maternity colony, swarming period, spring period and hibernacula. Other protections for foraging habitat is already covered by other forest plan measures. The tie to the amendment was taken care of in the supplemental BE. So this is why I think we are good."). However, neither Mr. Jones nor the Wildlife Biologist discussed the fact that the Bat Plan Amendments and FWS analysis only discussed the possibility of maternity colonies, rather than their actual existence.

The following day, July 14, 2021, was the first time Forest Service employees discussed the possibility of an "additional mitigation measure." AR 6601. In an email from a Forest Fish and Wildlife Biologist to Timothy Jones, the Biologist discussed

> the need to ensure that if [the Service] need[s] to remove any snags in [the area surrounding the maternity colony], [it] should either schedule those removals for outside the maternity roosting season. If snags must be cut during that period, [it] would need to have a biologist look at them to see if they had the potential to be a roost tree and if so, do an exit count the night before cutting the snag. If [it] could add an additional mitigation measure to the decision along those lines, [the Biologist] think[s] that would be substantially reduce any risk to the species from proposed activities in the area.

AR 6601.

On July 22, 2021, the Forest Service received an email from the Research Director of Copperhead Environmental Consulting, Inc., which included two maps and foraging data from three bats who used the maternity roost, outlining the distance each bat travelled within the Project area to forage. AR 6609, 6603–6604. The email stated that in total, the bats covered 4,123.52 acres to forage for food. AR 6609. There is no response from the Forest Service analyzing this data or discussing potential mitigation measures based on it.

In a series of emails dating from July 21, 2021, to July 23, 2021, several Forest Service employees were discussing a draft press release to inform the public about the discovery of the maternity colony. AR 6610–6614. A Wildlife Biologist stated the Service was "not providing protections to suitable trees because it can be a gray area as to what constitutes a suitable tree." AR 6612.

On August 10, 2021, a Service Wildlife Biologist discussed several articles that listed distances Indiana bats travel from and use surrounding their maternity colonies with a graduate student from Arkansas State University. AR 6616. The emails did not include any analysis using this information. Further, none of this data is included in the two additional mitigation measures listed in the DN/FONSI.

ii. The Forest Service illegally added additional measures to supposedly protect the Indiana Bat with no support for those changes in the EA or any supplemental NEPA document.

Substantive discussions about additional mitigation measures began in an email between Wildlife Biologists on September 28, 2021. AR 6621. The email stated that emergence counts showed Indiana bats using the maternity colony tree "even now at the end of September[,]" meaning "there is a need to ensure that the protections for that colony are in place as the bats linger later in the season and as they disperse from the tree[.]" AR 6621. Because of this extended use,

which was not protected under the Bat Plan Amendments, the Biologist wanted to establish a "Priority Roosting Zone" and "apply a tree-cutting restriction from August 15 to November 30" with an emphasis on retaining potential roost trees. AR 6621. The Biologist planned to use the acres mapped by Copperhead Environmental Consulting, Inc. as the basis of what acres would get "Priority Roosting Zone" protection. AR 6621. The Biologist next noted that "the bats could be using an alternative roost[,]" noting that many Indiana bats have multiple colony trees and that the bats would likely transition to a new tree as the quality of their current tree declined. AR 6621. Because of this, the Biologist proposed an additional protective measure to only remove snags over 9" diameter at breast height (DBH) with roost tree characteristics at particular times to ensure no bats are harmed. AR 6621.

There is also an undated, unsigned letter to Timothy Jones, presumably from one of the Service's Wildlife Biologists, that includes recommendations about additional protections Mr. Jones should include in the DN/FONSI regarding the Indiana bat maternity colony. AR 6623. The letter states that one of the Wildlife Biologists had some communication with FWS about the Bat Plan Amendments and how they relate to the recent, significant discovery, although none of that communication is included in the administrative record. AR 6623. The letter recommended:

> 1. Add a statement to clarify how [the Forest Service] will implement roost protections outlined in FW 163 [of the Bat Plan Amendments]. The statement is as follows: Snags that are 9" DBH or greater that have bat roost characteristics, such as peeling bark, crack or cavities, and will be removed during March 1 through November 30th will have an emergence survey conducted the night before removal.
> 2. Develop a Priority Roost Zone to protect bats that are present between August 15 to November 30th through FW66 [of the Bat Plan Amendments] and define an area that point 1 will apply.
>
> I also have a request
>
> 1. I would like to add WSI (manual) totaling 682 acres to Alternative 3 from the Proposed action (Project Areas 178, 182, & 188).

AR 6623. The letter also included a page and a half of rationalization for these recommendations. For Recommendation 1, the letter acknowledges while that FW 163 of the Bat Plan Amendments acknowledges roosts, but says some of the language from that measure is "a little vague[,]" as it does not clarify what other trees should be protected as potential roost trees. AR 6623. The letter specifically states the Forest Service does "not have enough data to say with any confidence that [it] ha[s] a good idea of where all their roosts are. It would be just speculation." AR 6623. For Recommendation 2, there was "concern[] that it is almost October and the bats are still present [in the maternity colony tree]" and therefore, the Service needed to address the lingering bats. AR 6624. The letter recommended the Priority Roost Zone should "encompass the foraging area identified this summer and expanded to the nearest identifiable boundary like drains, roads etc." The letter also stated the Wildlife Biologists had a discussion with FWS, who supported this Recommendation. AR 6624.

Additionally, the letter states Mr. Jones did not want to reiterate the Bat Plan Amendment protections "unless some clarification is needed or to meet some concerns identified by the public." AR 6623. However, the public did not have an opportunity to voice concerns—the objection period was already closed, and the public had no way to know what sort of measures the Forest Service would implement for the maternity colony until the DN/FONSI was published and the final decision was already made. The letter acknowledges some concerns that were raised at the objection meeting, but this is outside of the formal NEPA process. AR 6623 ("During the objection meeting one of the concerns that was expressed was how would we protect the maternity colony roost(s)."). This letter even acknowledges the importance of public input, stating Mr. Jones had altered portions of the Project in response to public concerns. AR 6624.

The next email exchange, dating from October 5, 2021, to October 7, 2021, includes further discussion about what additional protective measures should be added to the DN/FONSI. AR 6625–6626. While referencing the protective standards in the Bat Plan Amendments that mention maternity colonies, one of the Service's Wildlife Biologists noted that "neither one of these standards directly covers our issues[,]" and thus he suggested four additional measures to include in the DN/FONSI:

- A vicinity map encompassing the colony's known foraging area and maternity roost tree has been developed to establish a management area for this colony.
- Within this area, snags over 9" DBH that have bat roost characteristics, such as peeling bark, cracks or cavities will only be removed during the hibernation season (Dec 1 - March 14) or after an emergence survey conducted the night before removal confirms bats are not roosting in the tree.
- No disturbance activities such as timber harvest, use of heavy equipment, and prescribed burning will occur within a quarter of a mile of the maternity roost during the maternity season (March 15 – August 15); that period will be extended until emergence surveys indicate that bats have left the roost for the season.
- Woodland restoration areas 178, 182, and 188 analyzed in the Proposed Action (PA) will be included and implemented with this decision using manual methods only (no herbicides). This will increase the number of woodland restoration acres from 622 acres in the draft decision to 1,304 acres.

AR 6625. The email also noted that while the Biologists believed the WSI thinning would be beneficial to the bat, "[i]f that can't happen as part of this project and we need to do some follow up NEPA, then we can start working on that soon." AR 6626.

On October 12, 2021, the Wildlife Biologist emailed his final recommendations to Mr. Jones. AR 6627. Within this email, The Biologist mentions issues with the Bat Plan Amendments as they would be applied to the Project in light of the discovery of the maternity colony. He states that "Indiana bats have been identified using the roost tree past August 15[,]" which impacts standard 66 from the Bat Plan Amendments. AR 6627, 4330 ("Cutting of potential Indiana bat roost trees (trees three inches or greater diameter at breast height) is restricted from August 15 to

November 30[.]"). He next states that while the Bat Plan Amendments require the Service to "make an effort to locate alternate roost trees in the vicinity of the roost, [] vicinity is not defined." AR 6627. He next acknowledges the limited information gained from ongoing efforts to monitor the maternity colony tree: "We have made a good effort in locating alternate roost, but it was limited primarily to 3 bats out of 31 for a duration of less than 3 weeks." AR 6627. The Biologist noted that while he did not believe the Indiana bats at the maternity colony were using an alternate tree, "we can not rule out that individuals did not use an alternate roost." AR 6627. Last, the Biologist reiterated his desire to "do some management in the vicinity of the roost to provide quality foraging and roost habitat" by including additional WSI thinning. AR 6627.

This evidence demonstrates that significant new information was discovered, warranting additional analysis. The entire now-public email chain discussing the maternity colony and additional protective measures is 35 pages long, with the conversation beginning on July 7, 2021, and ending by October 12, 2021. *See* AR 6593–6627. There is no evidence of consultation with FWS beyond a passing mention that one of the Wildlife Biologists "has been talking" to FWS in regards to the Bat Plan Amendments and a promise that the Biologists "will be working" with FWS to determine what to do. AR 6623, 6615. The little data the Forest Service was able to collect before the DN/FONSI was published is incomplete, and the two additional protective measures for the bat adopted in the DN/FONSI were developed quickly without formal consultation with FWS. Further, the Biologists recommended more additional protective measures than were ultimately included in the DN/FONSI, yet there is nothing in the administrative record that explains why those measures were not included. *See* AR 6623–6625 (where a Forest Service Wildlife Biologist was requesting additional WSI thinning in proximity to the maternity colony to). Most importantly the public never saw any of these internal discussions until many months later when they were

disclosed in response to BRWA's FOIA requests, and the public had no opportunity to review or comment on these measures before the Service approved them.

The Forest Service's actual approval of the additional measures regarding the Indiana bat without any prior supporting NEPA analysis is a violation of NEPA's hard look requirement and Section 706(2) of the AP, which is BRWA's Count 3. Moreover because the Forest Service's NEPA obligations are continuing, the Service's continuing failure to prepare supplemental NEPA analysis for the endangered Indiana bat by preparing and publishing either a SEA or EIS violates Section 706(1) of the APA, which is covered by BRWA's Counts 6 and 7. *See* 40 C.F.R. §§ 1502.9(c)(1)(i)–(ii); *Alexander*, 222 F.3d at 566 ("[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)).

b. The Forest Service's decision to obtain baseline water quality information after it approved the Project is significant new information and a substantial change to the Project that requires supplemental NEPA analysis. (Counts 2, 6 and 7)

As BRWA already discussed above, the requirement added to the Project by the DN/FONSI to gather baseline water quality data, AR 1905, is a substantial change to the Project that triggers the obligation to prepare supplemental NEPA analysis. *See* 40 C.F.R. § 1502.9(c)(1)(i). The Service's subsequent and continuing decision-making regarding when, where, and how to obtain that data, *see* AR 1905, 2607–2612, 2593–2606, and any new analysis regarding what that new baseline water quality data shows is new information that triggers the Service's obligation to prepare supplemental NEPA analysis under 40 C.F.R. § 1502.9(c)(1)(ii). The Service's approval of the collection of baseline data in the DN/FONSI, but without any existing NEPA analysis regarding that change, is a violation of NEPA's hard look requirement and Section 706(2) of the APA. (Count 2) The Service's ongoing failure to prepare any supplemental NEPA analysis and

disclose it to the public for comments also violates NEPA and is a failure to act under the APA. 5 U.S.C. §§ 706(1). (Counts 6 and 7)

III. The Forest Service Failed to Provide the Public with an Adequate Opportunity for Meaningful Public Comment. (Count 4)

Because "the broad dissemination of information mandated by NEPA permits the public and other government agencies to react to the effects of a proposed action at a meaningful time[,]" *Marsh*, 490 U.S. at 371, the Forest Service violated NEPA by preventing the public from commenting and objecting to the substantial changes made to the Project, published only in the DN/FONSI, regarding the endangered Indiana bat and water quality, as well as information regarding herbicide use that was available for BRWA's review for the first time in the administrative record. The Forest Service must provide the opportunity to both comment and object to EAs, as well as SEAs and EISs. 36 C.F.R. §§ 218.22(a), (d). By failing to disclose all relevant information during the formal decisionmaking process, the Forest Service "insulate[d] its decision-making process from public scrutiny[,]" thereby "render[ing] NEPA's procedures meaningless." *State v. Block*, 690 F.2d 753, 771 (9th Cir. 1982).

NEPA is a statute centered around the dissemination of information. It requires decisionmakers to collect detailed information about the environmental impacts of their proposed actions, and, equally important, requires those decisionmakers to share that information with the public, thereby giving citizens an essential role in the decisionmaking process. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). "NEPA's public comment procedures are at the heart of the NEPA review process. …NEPA requires not merely public notice, but public participation in the evaluation of the environmental consequences" of federal actions and projects. *See Block*, 69 F.2d at 770–71. In order for an agency to comply with the spirit of NEPA, it must inform the public before a project begins. 40 C.F.R. § 1500.1(b) (2019) ("NEPA procedures must

insure that environmental information is available to public officials and citizens *before* decisions are made and before actions are taken." (emphasis added)). Additionally, it is important that agencies "[e]ncourage and facilitate public involvement" when making decisions "to the fullest extent possible[.]" 40 C.F.R. § 1500.2(d) (2019). *See also* 36 C.F.R. §§ 218.22(a), (d) (the Forest Service regulations that require the "legal notice and opportunity to comment procedures" to apply to "[p]roposed projects and activities implementing land management plans for which an environmental assessment (EA) is prepared" as well as "[a] proposed project or activity for which a supplemental or revised EA or EIS is prepared based on consideration of new information or changed circumstances"). This includes giving the public information on the "significant aspects" of proposed actions. *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1166 (9th Cir. 2003). It is important that all significant information is available to the public to "prevent[] stubborn problems or significant criticism from being shielded from internal and external scrutiny." *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir. 1980). It is not enough for an agency to acknowledge significant information through a response to a single comment from a member of the public; this sort of general statement of acknowledgement does not meet NEPA's public process requirements, as it forces the public to "connect the dots[,]" rather than the agency itself. *Gallatin Wildlife Ass'n v. U.S. Forest Serv.*, No. CV-15-27-BU-BMM, 2016 WL 3282047 at *8 (D. Mont. June 14, 2016). "NEPA expressly places the burden of compiling information on the agency so that the public and interested government departments can conveniently monitor and criticize the agency's action." *Grazing Fields Farm*, 626 F.2d at 1073. The agency must include all relevant information for public review; to require otherwise would "hamper the flow of information to the public by making more difficult the endeavors of watchdogs who could reasonably be expected to publicize the environmental issues present, and

would tend to mute those most likely to identify problems and criticize decisions." *Id.* This ensures both informed decisionmaking, as well as informed public participation. "The main policy reason for soliciting public comment is to use public input in assessing a decision's environmental impact." *Block*, 690 F.2d at 771.

a. The Forest Service did not give the public an opportunity to comment on the discovery of the endangered Indiana bat maternity colony and its additional protective measures.

Because the discovery of the endangered Indiana bat maternity colony constituted a significant new circumstance, the Forest Service was required to provide the public with an opportunity to comment on this discovery and object to the Service's additional protective measures published for the first time in the final DN/FONSI.

The Forest Service only gave the public an opportunity to comment and object to the draft and final EA for the Project, both of which did not include analysis about the endangered Indiana bat maternity colony. The comment period for the draft EA closed September 5, 2020. *See* AR 1297. The objection period for the final EA closed May 28, 2021. AR 1794, 1795. Neither the draft nor the final EA included the two additional protective measures for the colony that were included in the DN/FONSI, nor could they; the colony had not yet been discovered.

Further, after the discovery of the maternity colony, the Forest Service indicated it would only be relying on the Bat Plan Amendments when implementing the Project, rather than developing additional protective measures. In its press release disclosing the discovery to the public, the Forest Service stated it would only be "taking protective steps as identified in the recent Forest Plan Bat Amendment to protect this maternity colony and the surrounding area." AR 6628. In its objection letter response to BRWA, the Forest Service acknowledged the discovery of the maternity colony, but once again stated that because "[t]he potential for Indiana bat maternity trees

was considered and protective measure for maternity colonies were included in the recent Forest Plan Amendment for Bat Conservation dated March 2021[,]" only "these protective measures and a discussion of this finding will be included in the final decision for the project." AR 1869. The Forest Service then included two additional protective measures in the DN/FONSI with no explanation as to why (1) the Bat Plan Amendments themselves were inadequate or (2) how the Service came to the conclusion that the two additional measures would remedy the Bat Plan Amendments' inadequacies. AR 1905. The inclusion of these protective measures for the first time in the DN/FONSI—the Forest Service's final decision for the Project that did not include the opportunity for public comment and dispute—violates one of NEPA's core components: the call for public input in agency decisionmaking.

b. The public did not have an opportunity to comment on baseline water quality data because the Forest Service only began to collect such data post-decisionally.

"NEPA requires that the evaluation of a project's environmental consequences take place at an early stage in the project's planning process." *Block*, 690 F.2d at 761. Because the draft and final EAs for the Project did not include a baseline analysis of the water quality in the Project area, the public was deprived of the opportunity to meaningfully comment on and object to portions of the Project that have the potential to impact water quality in this sensitive area, including the headwaters of the Buffalo National River.

The DN/FONSI acknowledged the final EA did not include baseline turbidity, pH, conductivity, and temperature data for the water within the Project area. AR 1905. Thus, the DN/FONSI established for the first time a promise to collect that data quarterly, delaying most Project activities for nearly a year in order to "collect sufficient baseline data[.]" AR 1905. However, this data and analysis is being conducted entirely after the Forest service made its final

decision to approve the project, preventing the public from participating in the decisionmaking process that NEPA requires. The Forest Service, and therefore the public, had no way of knowing what the impact of Project activities would be on water quality, as there was no baseline to compare to.

IV. Because the Forest Service Failed to Properly Consider Important Significance Factors and Take a Hard Look at the Project, the Finding of No Significant Impact is Inadequate. (Count 8)

The Eighth Circuit has adopted four factors to consider when determining whether an agency's decision to forego an EIS is arbitrary and capricious:

(1) whether the agency took a hard look at the problem, as opposed to bald conclusions, unaided by preliminary investigation;
(2) whether the agency identified the relevant areas of environmental concern;
(3) whether, as to problems studied and identified, the agency made a convincing case that the impact is insignificant; and
(4) if there was impact of true "significance," whether the agency convincingly established that changes in the project sufficiently minimized it.

Audubon Soc'y of Cent. Ark. v. Dailey, 977 F.2d 428, 434 (8th Cir. 1992) (citing *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 681–82 (D.C. Cir. 1982)).

The first and second factors stem from the CEQ's regulations, which require agencies to consider both the context and the intensity of their proposed actions. 40 C.F.R. § 1508.27 (2019). First, an agency must analyze the significance of an action in different contexts, meaning "society as a whole (human, national), the affected region, the affected interests, and the locality." *Id.* § 1508.27(a) (2019). Second, an agency must analyze the significance of the intensity of its action, which means "the severity of impact." *Id.* § 1508.27(b) (2019). The CEQ has developed ten considerations an agency must consider when taking a hard look at the intensity of its action. *Id.* § 1508.27(b) (2019); *Heartwood*, 380 F.3d at 431 ("The CEQ's regulations list ten considerations that agencies should take into account when taking a 'hard look' and whether a project will have

'significant' environmental impacts[.]"). Of particular importance in this case, agencies must consider:

> (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the federal agency believes that on balance the effect will be beneficial.
> (2) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
> …
> (9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

40 C.F.R. § 1508.27(b)(1), (2), and (9) (2019). "If an agency takes a 'hard look' and determines that the proposed action has no 'significant' environmental impact [under these factors], an EIS is unnecessary." *Heartwood*, 380 F.3d at 431; *see also Newton County Wildlife Ass'n v. Rogers*, 141 F.3d 803 (8th Cir. 1998) (applying the "hard look" requirement to four EAs produced by the Forest Service).

The third and fourth factors in the Eight Circuit's test stem from the NEPA's requirements about the sufficiency of the public documents agencies must circulate in order to evaluate whether their projects are significant. 40 C.F.R. § 1500.1(b) (2019) ("Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.") Agencies must rely on high-quality and accurate scientific information in their analyses because it is essential to provide the best available information to the public and the decision-maker. *N. Plains*, 668 F.3d at 1085–86; 40 C.F.R. § 1500.1(b) (2019) ("NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken."). Collecting high-quality and accurate scientific information is not enough; it is crucial that an agency rely on this information when making its determination as to the effects of the project. *Dailey*, 977 F.2d at 436 (holding that

although the Army Corps of Engineers had indeed collected accurate information for its Environmental Assessment, "while taking a hard look, [the Corps] chose to ignore what it saw"). Further, if the agency finds that negative environmental results will occur as a consequence of its action and chooses to implement measures to mitigate that harm, "the result of the mitigating measures must be to render the net effect of the modified project on the quality of the environment less than 'significant.'" *Id.*

The Project fails under all four factors of the Eighth Circuit's test. First, the Forest Service failed to take a hard look at the proximity of the Project area to the Buffalo National River. The Forest Service also failed to analyze both the Buffalo River and the Buffalo National River under CEQ's considerations for the intensity of the significance of Project activities on a unique characteristic of the geographic area. Next, by failing to conduct baseline water sampling, the Forest Service failed to identify a relevant area of environmental concern, and thus make a convincing case that impact to water quality would not be significant. The Forest Service next failed to take a hard look at another intensity consideration: the discovery of the first endangered Indiana bat maternity colony in the Ozark-St. Francis National Forests. Finally, the Forest Service failed to both provide citations for and convincingly explain why the two additional mitigation measures it added in the DN/FONSI to protect the maternity colony sufficiently minimize the harmful impacts of the Project.

a. The DN/FONSI is improper because it does not address the Project's proximity to the Buffalo National River.

As explained above the Forest Service's EA violated NEPA when it failed to take a hard look at the Project's potential impacts to the Buffalo National River. Its DN/FONSI then violated NEPA again by completely failing to consider the significance of the proximity of the Project to the Buffalo National River. CEQ regulations require agencies to consider the "[u]nique

characteristics of the geographic area such as proximity to . . . park lands, . . . wild and scenic rivers, or ecologically critical areas." 40 C.F.R. § 1508.27(b) (2019). Because the Project encompasses rivers and streams that flow into the Buffalo National River, a National Park and designated Wild and Scenic River, the Buffalo National River is a unique geographic area that merits special consideration under NEPA and in any DN/FONSI.

Concluding that there will be no significant effects on the "unique characteristics of the geographic area," the Forest Service entirely fails to provide a convincing statement of reasons as to why the Project's impacts are insignificant. AR 1912. Of course, as is discussed above, at page 22, the EA itself has no analysis regrading impacts to the Buffalo National River, which is immediately downstream from the Project area. AR 1746. In addressing this factor, the DN/FONSI completely disregarded the Project's close proximity to the Buffalo National River and the karst geology in the basin, providing only the concurrence from the State Historic Preservation Officer ("SHPO") regarding historical properties for support. AR 1912 ("There will be no significant effects on unique characteristics of the area because concurrence on National Register eligibility and the avoidance of adverse effects by project implementation to historical properties was received from SHPO on July 08, 2019."). However, the SHPO concurrence made no mention of the impacts on Buffalo National River. AR 6840. By preparing the DN/FONSI in this way, the Forest Service implied that the National River will not be affected *at all* by the Project, despite being downstream from the segment of the Buffalo River that flows through the Project area. AR 1746. This brief and inadequate discussion on the potential significance of the Project does not fulfill the parameters of NEPA's hard look doctrine and is totally insufficient to support the Forest Service's FONSI.

The unique characteristics of the Buffalo National River warrant a full analysis by the Forest Service. However, the DN/FONSI is silent as to the potential impacts the Project may have on the Buffalo National River, despite being in a karst basin, characterized by underground drainage networks, in the watershed of a National Park unit, and state-designated ERW. AR 1746. By failing to consider even a single unique characteristic of the Buffalo River, the Forest Service "entirely failed to consider an important aspect of the problem," rendering the DN/FONSI arbitrary and capricious. *State Farm*, 463 U.S. at 43.

Further, the Forest Service's failure to identify and discuss potential impacts to the Buffalo National River is directly contrary to the Eighth Circuit's emphasis on the importance of considering impacts to congressionally protected areas. NEPA's policy is to "promote efforts which will prevent or eliminate damage to the environment" 42 U.S.C. § 4321. This policy "is surely implicated when the environment that may be damaged is one that Congress has specially designated for federal protection." *Kimbell,* 623 F.3d at 560 (quoting *Nat'l Audubon Soc'y v. Dep't of the Navy*, 422 F.3d 174, 186–87 (4th Cir. 2005)). Thus, the significance of the Buffalo National River as a National Park and designated Wild and Scenic River is improperly dismissed by the Forest Service in both its EA and DN/FONSI.

NEPA aims to make certain that "the agency . . . will have available, and will carefully consider, detailed information concerning significant environmental impacts," and "that the relevant information will be made available to the larger [public] audience." *Robertson*, 490 U.S. at 349. Here, the Forest Service's failure to articulate any analysis in its EA and DN/FONSI makes it impossible for the public to know that the agency considered the environmental consequences of its action. Further, by omitting any discussion about the Buffalo National River in its NEPA documents, the Forest Service deprived the public of the awareness of the potential impacts on the

National River and the opportunity for meaningful participation, one of the crucial aspects of NEPA. The Forest Service's failure to take a hard look at the Buffalo National River in its final EA and DN/FONSI therefore was arbitrary, capricious and not in accordance with NEPA and its implementing regulations.

b. The Forest Service failed to take a hard look at the significance of the new information and circumstances regarding the endangered Indiana bat.

The Forest Service failed to take a hard look at an endangered species and its habitat: the presence of a newly discovered Indiana bat maternity colony within the Project area. Because the Forest Service was required to take a hard look under NEPA and the CEQ's regulations at this discovery, its analysis is arbitrary and capricious.

Together, the timing of the analysis and release of the Bat Plan Amendments and Project EA show the Forest Service never had the opportunity to take a hard look at the discovery of the endangered Indiana bat maternity colony in any NEPA document prepared before it issued its DN/FONSI, making the Service's subsequent adoption of the DN/FONSI arbitrary and capricious under APA § 706(2).

Further, the Forest Service's consideration of "potential" maternity trees in the Bat Plan Amendments, as well as the subsequent analysis and supplementation of two "protective measures" in the DN/FONSI do not constitute a "hard look" under NEPA. First, the Bat Plan Amendments changed the Forest-Wide Standards for the Indiana bat under the assumption that no maternity colonies existed in the Ozark-St. Francis National Forests. AR 4211, 4265. Although the Bat Plan Amendments considered the possibility of maternity colonies, they did so using vague language that is not specific enough to provide real protection to the discovered maternity colony. For example, the Forest Service added a new standard, Forest-Wide Standard 163, which states if an Indiana bat maternity colony is discovered in the Ozark-St. Francis National Forests, "[e]fforts

would be made to determine the location of roost trees used by the colony prior to proceeding with forest management in the vicinity of the colony." AR 4331. However, the Forest Service did not define "vicinity," failing to include a distance, despite doing so for the protection zone around a potential colony mere sentences earlier. *See* AR 4331 ("No tree falling would occur within 150 feet of known maternity trees[.] …During the maternity period, April 1 to August 15), activities that may disturb the colonies, such as timber harvest, use of heavy equipment, and prescribed fire would be prohibited in an area approximately ¼ mile from known maternity roost trees."). The Bat Plan Amendments also failed to note that Indiana bats often use several maternity trees, making it crucial to know what the Forest Service considers to be the "vicinity" of a potential colony. Both of these issues were noted in internal emails between Forest Service staff after the discovery of the maternity colony on July 7, 2021. An employee noted that "[t]he plan states we need to make an effort to locate alternate roost trees in the vicinity of the roost, but vicinity is not defined." AR 6627. This is problematic because Indiana bats are not confined to a single maternity colony, as explained by a Forest Fish & Wildlife Biologist in an email discussing potential ways to add protections after the final EA was published and the maternity tree was discovered. AR 6621 ("the bats could be using alternate roost (most colonies do have multiple trees that they use as a network…)"). Further, an employee stated "[w]e just do not have enough data to say with confidence that we have a good idea where all their roosts are" when making recommendations for Timothy Jones, the District Ranger who signed the DN/FONSI. AR 6623.

The DN/FONSI then fails to consider the endangered Indiana bat maternity colony as part of its consideration of the intensity factors under CEQ's NEPA regulations. The Forest Service is required to consider "[t]he degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered

Species Act of 1973." 40 C.F.R. § 1508.27(b)(9) (2019). However, in its intensity discussion, the Forest Service only mentioned the BA and BiOp for the Bat Plan Amendments and the Amendments themselves, all three of which were produced pre-discovery. AR 1913. Further, this section completely fails to mention the maternity colony at all. There is no analysis, and the single paragraph in this section fails to adequately contextualize the potential harms to this fragile colony, making it arbitrary and capricious.

Additionally, the Forest Service does not have the technical expertise to make decisions about protections for endangered species, and thus could not have taken a hard look when developing post-EA "protective measures" for the endangered Indiana bat. Although courts typically "typically accord significant deference to an agency's decision that require 'a high level of technical expertise,' … such deference applies only when the agency is making predictions 'within its area of special expertise.'" *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 740 (9th Cir. 2020) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976) and *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc*., 462 U.S. 87, 103 (1983), respectively). In *Bernhardt*, the Ninth Circuit sustained NEPA challenges against the Bureau of Ocean Energy Management. 982 F.3d at 740. While recognizing the Bureau's technical proficiency with respect to conventional and renewable energy functions such as resource evaluation, development planning, and mineral leasing, the court held that an "economic analysis of greenhouse gas emissions" was beyond the scope of the agency's expertise. *Id.* at 740. Here, the Forest Service "manage[s] public lands in the form of national forests and grasslands, provide[s] technical and financial assistance to state, private, and tribal forestry agencies and make[s] up the largest forestry research organization in the world." *Meet the Forest Service*, FOREST SERV. U.S. DEP'T OF AGRIC., https://www.fs.usda.gov/about-agency/meet-forest-service (last visited Jan. 16, 2024).

In contrast, FWS is "the only agency in the federal government whose primary responsibility is the conservation and management of fish, wildlife, plants and their habitats[.]" About Us, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/about (last accessed Jan. 16, 2024). *See also* 16 U.S.C. § 1536 (requiring other federal agencies to consult with Secretary of the Interior—in this case the FWS—regarding any project where endangered species may be present). The Forest Service's "area of special expertise" does not include making its own, unilateral significance determination regarding the newly discovered Indiana bat maternity colony and its own "protective measures" for the Indiana bat. *See* AR 1905. As such, any non-significance determination by the Forest Service's regarding this new information and changes to the Project is not entitled to "significant deference."

REMEDY

BRWA believes that this Court should address remedy issues after it rules on the merits of BRWA's claims and with the assistance of additional briefing on remedy issues. *See, e.g, Elbert v. U.S. Dep't of Agric.*, No. 18-1574 (JRT/TNL), 2022 U.S. Dist. LEXIS 121433, at *3 (D. Minn. July 11, 2022) (district court ordered additional briefing on remedy after finding APA violation during summary judgment proceedings). However, if the Court wishes to address remedy issues now, BRWA will briefly address here the law that should apply after the Court finds for BRWA on its NEPA and APA claims, as BRWA believes it should.

When a court determines that an agency's decision was unlawful under the APA, under 5 U.S.C. § 706 (2), vacatur is the "ordinary practice" and "default" remedy. *Elbert,* 2022 U.S. Dist. LEXIS 121433, at *3, *10 (citing *Iowa League of Cities v. U.S. Env't Prot. Agency*, 711 F.3d 844, 875–76 (8th Cir. 2013). *See also United Food & Com. Workers Union, Loc. No. 663 v. United*

States Dep't of Agric., 532 F. Supp. 3d 741, 778 (D. Minn. 2021) ("Unsupported agency action normally warrants vacatur.")

Because vacatur "is the ordinary remedy," the defendant "bears the burden of demonstrating vacatur is inappropriate." *Nw. Env't Advoc. v. U.S. Env't Prot. Agency*, No. 3:12-cv-01751-AC, 2018 WL 6524161, at *3 (D. Or. Dec. 12, 2018). *See also Ctr. for Env't Health v. Vilsack*, No. 15-cv-01690-JSC, 2016 WL 3383954, at *13 (N.D. Cal. June 20, 2016) ("Given that vacatur is the presumptive remedy for a procedural violation […], it is Defendants' burden to show that vacatur is unwarranted."); *Coal. to Protect Puget Sound Habitat v. U.S. Army Corps of Eng'rs*, 466 F. Supp. 3d 1217, 1219 (W.D. Wash. 2020) ("Because the APA creates a 'presumption of vacatur' if an agency acts unlawfully, the presumption must be overcome by the party seeking remand without vacatur.").

BRWA does not believe Defendants could meet their burden of showing vacatur is not required here. *See, e.g., Elbert,* 2022 U.S. Dist. LEXIS 121433, *14 (finding vacatur appropriate for agency's procedural failures after applying test set out in *Allied-Signal v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993)). Thus, in this case, after ruling for BRWA on its NEPA/APA claims, APA, 5 U.S.C. § 706(2) directs that the Court should vacate the Forest Service's illegal DN/FONSI and legally flawed EA.

CONCLUSION

For all the reasons set forth above the Court should find that the Forest Service's DN/FONSI (AR1898–1914) and final EA (AR 1712–1775) violate NEPA and the APA in multiple respects and find for BRWA on Counts 1–4 and 6–8 of its Amended Complaint, ECF No. 15.

Dated: January 16, 2024

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