

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION**

Buffalo River Watershed Alliance,)	
)	Case No. 3:23-cv-03012-TLB
Plaintiff,)	
)	Parties' Rule 26(f) Report & Proposed
v.)	Schedule
)	
United States Forest Service &)	
Timothy E. Jones, District Ranger,)	
)	
Defendants.)	
)	

Pursuant to the Court's June 9, 2023 Order (Doc. 16), the Parties submit the following:

1. Plaintiff's Statement of the Case.

This is a civil action brought by Plaintiff Buffalo River Watershed Alliance ("BRWA") under the National Environmental Policy Act ("NEPA") (42 U.S.C. § 4321, *et seq.*) and the Administrative Procedure Act ("APA") (5 U.S.C. §§ 551 *et seq.*). BRWA challenges the defendants' October 27, 2021, Decision Notice ("DN"), including the Finding of No Significant Impact ("FONSI") and the related Environmental Assessment ("EA"), approving the Robert's Gap Project ("the Project"). The Project consists of a prescribed burn, logging, and chemical herbicide treatment in the Ozark-St. Francis National Forests within the Headwaters Buffalo River watershed. Because the Forest Service became aware of significant new circumstances and information regarding the Indiana bat, an endangered species, and admitted the need for baseline water quality information regarding numerous streams within the Project area after it finalized the EA but before it approved the Project, BRWA also challenges the Service's failure to prepare a supplemental EA or supplemental Environmental Impact Statement ("EIS") and its continuing failure to do so. The challenged decision approves the prescribed burning, logging, and woodland herbicide treatment of approximately 40,000 acres of forest. Project implementation

will result in the destruction of old growth forest as eighty-six percent of the Project contains forest stands 70 years old or more, wildlife habitat, and potential degradation of water quality.

BRWA's Amended Complaint, ECF No. 15, raises eight specific violations of NEPA and the APA, see ECF No. 15, ¶¶ 53-89 (Counts 1-8), and seeks declaratory relief, vacatur of the Decision Notice, and any necessary injunctive relief as remedies for these legal violations. As noted below, BRWA agrees these claims will be resolved by this Court based on the final administrative record underlying the challenged agency action and inaction, and potentially additional evidence offered by BRWA to supplement that record or establish the record regarding the Defendants' failure to act/prepare supplemental NEPA analysis.

2. Defendant's Statement of the Case.

Federal Defendants will respond to Plaintiff's claims in summary judgment briefing. Regarding Plaintiff's claim that new information about the Indiana bat required the Forest Service to prepare a supplemental analysis under NEPA, at this juncture, Federal Defendants note that the discovery of the bat maternity colony was not new information. The Forest Service fully recognized that the bat may be present in the Forest and the Project area. Indeed, to provide sufficient protection for the Indiana Bat in this and other projects on the Forest, the Service promulgated Forest Plan amendments, in consultation with the Department of Interior's Fish and Wildlife Service ("FWS"), pursuant to the Endangered Species Act ("ESA"), that provided additional standards to protect the bats should a maternity colony be present. And those protections, which the Service adopted in March 2021, were incorporated into the Service's October 2021 Decision Notice for the Project, and applied to the Project, just as the Service intended.

As to Plaintiff's other claims, as noted in the attached jurisdictional statement, which will be expanded upon in summary judgment briefing, Plaintiff waived arguments by not timely and properly raising them in its objections to the Project, as required by the agency's regulations. And the administrative record that will be lodged with the Court will demonstrate that the agency properly analyzed the potential environmental impact of the Project, including, among other things, its impact on water quality, in full compliance with NEPA and APA requirements.

3. Are there any Objections pursuant to Rule 26(a)(1)(C) to providing required

Initial Disclosures. The Parties agree that Plaintiff's action under the National Environmental Policy Act is a civil action for declaratory judgment and injunctive relief against Federal Defendants pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, that is exempt from initial disclosures under Federal Rule of Civil Procedure 26(a)(1)(B)(i).

4. Are there any Objections to the timing of Rule 26(a) Initial Disclosures. This action is exempt from initial disclosures under Federal Rule of Civil Procedure 26(a)(1)(B)(i).

5 & 6. Agreed Document Productions & Discovery. The Parties also agree to resolve this case based on cross-motions for summary judgment, without discovery and a trial.

7. State the parties' best estimate as to the number of days reasonably necessary to fully try the case. As noted above, the parties agree to resolve this case without a trial.

8. State whether 90 days—measured from the Case Management Hearing—is a sufficient amount of time to Add Parties and/or Amend Pleadings. Plaintiff has amended the Complaint. *See* ECF No. 15. Plaintiff does not anticipate the need to further amend its complaint but would like 90 days from the Case Management Hearing to seek leave to do so. Federal Defendants reserve the right to object to any further amendment of the Complaint.

9. Settlement Prospects. Based on the prior experience of Plaintiff's counsel regarding similar cases, Plaintiff believes settlement of this case is unlikely. Plaintiff however is willing to participate in good faith in any ADR process the Court believes is appropriate. Federal Defendants will consider any settlement offer Plaintiff wishes to present in this case.

10. Special Issues and Schedules.

The Parties agree that this case challenges agency action and will be reviewed on an administrative record under the standards of the APA on motions for summary judgment without need for a trial. Plaintiff however also challenges the Defendants' failure to act under Section 706(1) of the APA and may submit additional evidence to support that failure to act claim. Federal Defendants reserve the right to object to any evidence submitted by Plaintiff that is outside the administrative record. The parties have conferred and agree to the following schedule:

Certification of Administrative Record: Defendants propose providing Plaintiff and lodging with the Court a searchable copy of the administrative record on a USB-thumb drive by **August 18, 2023**. Defendants understand that Local Rule 5.1 generally requires the electronic filing of all documents except case initiating documents, but the record is likely to be voluminous and contain a large volume of documents that cannot be efficiently filed on the ECF system. The formatted indices for the Administrative Record also contain hyperlinks to the documents in the record that permits easy to access to each document. This functionality would not be available via the ECF system. To address these issues, Defendants request relief from the local rule to lodge the record by flash drive. Plaintiff agrees with this approach.

In the alternative, Defendants request that the CM/ECF filings of the administrative record be limited to just the parts of the record cited by the parties in their summary judgment briefs. This approach is followed by the U.S. District Court for the District of Columbia—which hears a high volume of cases seeking judicial review of federal administrative actions. The District of Columbia’s Local Civil Rule 7(n) requires the agency to file via CM/ECF a certified list of the contents of the administrative record and provide the entire record to the parties. After the conclusion of briefing on dispositive motions, the parties then jointly prepare and file via CM/ECF an appendix containing only those portions of the administrative record relied upon in the briefing. This joint appendix approach is consistent with the APA, which provides that in reviewing agency actions, courts “shall review the whole record *or those parts of it cited by a party.*” 5 U.S.C. § 706 (emphasis added). Defendants thus request this approach should the Court not grant relief from the filing requirements of Local Rule 5.1, discussed above.

Motions to Supplement or Complete the Administrative Record: The Parties may not agree on the proper scope of review and content of the administrative record. In the event of a dispute, the Parties agree to brief the scope of review issue in briefing on a motion to supplement or complete the record.

The Parties must confer no later than **October 3, 2023.**¹ to determine if there is a dispute over the contents of the Administrative Record.

¹ Plaintiff has agreed to this date based on Defendants’ responses to Plaintiff’s prior FOIA requests which indicate the administrative record will not be especially voluminous. If the record Defendants submit is significantly more voluminous than Plaintiff anticipates, Plaintiff reserves the right to seek additional time to review and raise objections to that record.

- a. If there is a dispute, any motion to supplement or complete the Administrative Record by either party shall be filed on or before **October 17, 2023**.
 - i. If a motion to complete and/or supplement is filed, the summary judgment briefing scheduled set forth below shall be stayed pending the Court's resolution of the motion. Within ten (10) days of an order of the Court resolving the motion to complete and/or supplement, the parties shall jointly submit a proposed revised summary judgment briefing schedule.
- b. Any response to a motion to supplement or complete the Administrative Record shall be filed on or before **October 31, 2023**.
- c. Any reply to a motion to supplement or complete the Administrative Record shall be filed on or before **November 14, 2023**.

Motions for Summary Judgment:

- a. If no motion to complete and/or supplement is filed, or no motion to complete and/or supplement remains unresolved by Court order, the parties propose the following schedule for resolution of this case on cross-motions for summary judgment:
- b. Plaintiff's Motion for Summary Judgment and brief in support will be filed on or before **October 17, 2023**.
- c. Federal Defendants' consolidated Cross-Motion for Summary Judgment, brief in support, and Response to Plaintiffs' Motion for Summary Judgment will be filed on or before **November 13, 2023**.

- d. Plaintiff's consolidated Response to Defendants' Cross-Motion for Summary Judgment and Reply in Support of Plaintiffs' Motion for Summary Judgment will be filed on or before **December 19, 2023**.
- e. Federal Defendants' Reply in Support of Their Cross Motion for Summary Judgment will be filed on or before **January 30, 2024**.

Additional Special Issues Identified in Court's Outline and Instructions for the Joint

Rule 26(f) Report: Pursuant to Schedule C of the Court's Joint Report, the parties state as follows:

Federal Defendants' Position: Plaintiff seeks to challenge the Forest Service's consideration of baseline water quality sampling or monitoring, herbicide metabolites, and the sufficiency of best available science that were not raised in its administrative objections to the Project. In summary judgment briefing, Federal Defendants will argue that such arguments are waived and the Court lacks jurisdiction to hear such claims. "Persons challenging an agency's compliance with NEPA must 'structure their participation so that it . . . alerts the agency to the [party's] position and contentions,' in order to allow the agency to give the issue meaningful consideration." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764 (2004) (quoting *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978)). By failing to raise the arguments above during the administrative process, Plaintiff "forfeited [any] objection" that was not raised in the agency's mandatory objection process. *Pub. Citizen*, 541 U.S. at 764; *see also Forest Guardians v. U.S. Forest Serv.*, 641 F.3d 423, 431-34 (10th Cir. 2011) (recognizing that Plaintiff must exhaust under 7 U.S.C. § 6912(e) before bringing claims in federal district court); *Ohio Env't. Council v. U.S. Forest Serv.*, No. 2:21-cv-04380, at *9-10, 2023 WL 2712454 (S.D. Ohio Mar. 30, 2023) (recognizing that party is barred from pursuing

claims not raised in administrative process); *Native Ecosystems Council v. Lannom*, Case No. 21-233-M-DWM, at *3-5, 2022 WL 1001493 (D. Mont. April 4, 2022) (same); *Native Ecosystems Council v. Kimbell*, Case No. CV 04-127-M-DWM at *10-11, 2006 WL 8430971 (D. Mont. Aug. 29, 2006) (same). Federal Defendants will respond to the various arguments Plaintiff proffers below for why it did not waive the above arguments in summary judgment briefing. The Court's one-page limit for jurisdictional statements does not permit full presentation of that response here.

Plaintiff's Response to Federal Defendants' Position regarding jurisdiction:

Defendants are only challenging this Court's jurisdiction regarding a few of the arguments Plaintiff is advancing in this case because Plaintiff allegedly did not sufficiently raise them during the administrative process. Defendants do not challenge the Court's overall jurisdiction over Plaintiff's amended complaint. Plaintiff will specifically respond to any argument Defendants make regarding waiver and the Court's alleged lack of jurisdiction regarding certain of Plaintiff's claims in its summary judgment briefing. Plaintiff however will now note that Defendants did not disclose that they had not undertaken baseline water quality sampling, for herbicide metabolites or otherwise, until the issuance of the Final Decision Notice and Finding of No Significant Impact ("Final DN/FONSI"), which was after the administrative process had concluded. Thus, Plaintiff could not have raised these arguments during that process because the underlying information was not publicly available at that time.² Plaintiff submitted comments on the Environmental Assessment and subsequently objecting to the Draft DN/FONSI. After learning that the Final DN/FONSI contained provisions to implement water quality sampling, Plaintiff submitted a letter to Defendants asking them to complete a Supplemental Environmental

² See *Native Ecosystems Council v. Marten*, 612 F. Supp. 3d 1146, 1163 (D. Mont. Mar. 26, 2020) ("Given the lack of transparency...Federal Defendants cannot now claim that Plaintiffs failed to raise their concerns...during the administrative process.").

Assessment due to the lack of baseline water quality data, thereby “alert[ing] the local agency officials...of their positions and contentions,”³ to which Federal Defendants did not respond. Plaintiff’s Amended Complaint includes Claims challenging Defendants’ failure to prepare supplemental NEPA analysis under both 5 U.S.C. § 706 (2)(A)(illegal final agency action) and 706(1)(failure to act).

11. Have all corporate parties filed the disclosure statement contemplated by Fed. R. Civ. P. 7.1? Yes, Plaintiff filed ECF No. 3 along with its initial complaint.

12. Magistrate Judge Jurisdiction. Yes, both Plaintiff and Federal Defendants counsel have discussed the option of consenting to Magistrate Judge jurisdiction with their respective clients and each other.

Respectfully submitted this 11th Day of July, 2023.

/s/Thomas Buchele
Thomas Buchele, Admitted *Pro Hac Vice*
Earthrise Law Center
Lewis & Clark Law School
10101 S. Terwilliger Blvd.
Portland OR 97219-7799
Tel: 503-768-6736
Email: tbuchele@lclark.edu

Hank Bates, ABN 98063
Carney Bates Pulliam PLLC
11311 Arcade Dr.
Little Rock, AR 72212
Telephone: (501) 312-8500
E-mail: hbates@cbplaw.com

Attorneys for Plaintiff Buffalo River Watershed Alliance

³ See 36 C.F.R. § 218.14(a); *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 764 (2004) (“Persons challenging an agency’s compliance with NEPA must ‘structure their participation so that it ... alerts the agency to the [parties]’ position and contentions,’ in order to allow the agency to give the issue meaningful consideration.”)

TODD KIM
Assistant Attorney General
Environment and Natural Resources Division
United States Department of Justice

/s/ Paul G. Freeborne
PAUL G. FREEBORNE
Trial Attorney
Natural Resources Section
P.O. Box 7611
Washington, D.C. 20044-7611
Tel.: (202) 532.5271
Fax: (202) 305-0275
paul.freeborne@usdoj.gov

Counsel for Federal Defendants

CERTIFICATE OF SERVICE

I, Thomas Buchele, counsel for Plaintiff, hereby certify that on July 11, 2023, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System which will send notification of such filing to CM/ECF participants.

/s/Thomas Buchele
Thomas Buchele
Counsel for Plaintiff