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

BUFFALO RIVER WATERSHED
ALLIANCE,

Plaintiff,

v.

U.S. FOREST SERVICE & TIMOTHY E.
JONES, District Ranger,

Defendants.

Case No. 3:23-cv-03012-TLB

District Judge Timothy L. Brooks

**FEDERAL DEFENDANTS' ANSWER TO
COMPLAINT**

Federal Defendants U.S. Forest Service and Timothy E. Jones, in his official capacity as District Ranger of the Big Piney Ranger District of the Ozark-St. Francis National Forests, submit the following Answer to Plaintiffs' Complaint, ECF No. 1.¹

¹ Plaintiff's claims are subject to judicial review, if at all, under the judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. § 706. Under the APA, the Court's task is not to find facts, but to review the agency's administrative record and determine whether, as a matter of law, the agency's decision is arbitrary, capricious or otherwise contrary to law. 5 U.S.C. § 706; *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729 (1985). Because the Court does not

The paragraph headings in this Answer correspond to the paragraph headings in Plaintiff's Complaint and are included solely for the purpose of organizational convenience in matching the answers provided with the allegations made in the Complaint. The "headings" are not part of Federal Defendants' answer to the allegations. Federal Defendants do not waive any defensive theory or agree to or admit that Plaintiffs' headings are accurate, appropriate, or substantiated. When a textual sentence is followed by a citation or citations, the textual sentence and its accompanying citation are referred to as one sentence.

INTRODUCTION

1. The allegations in the first, second and fifth sentences of Paragraph 1 consist of Plaintiff's characterization of its case and legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations and any violation of law. As to the third and fourth sentences of Paragraph 1, Federal Defendants admit the allegations.

2. Federal Defendants are unable to respond to the allegations in the first sentence of Paragraph 2 because the terms "approximately" and "logging" are vague and ambiguous. Federal Defendants admit only that the Final Decision Notice for the Robert's Gap Project approves 11,311 acres of prescribed burning and 622 acres of herbicide treatments, the Project will occur within the Headwaters Buffalo River watershed, and that the Project will occur within known Indiana bat habitat. The remainder of Paragraph 2 consists of Plaintiff's characterization of its case to which no response is required. To the extent a response is required, Federal Defendants

operate as a fact-finder during APA review, there is no role for an Answer, which is a civil litigation tool for determining areas of factual dispute. Nonetheless, to ensure compliance with Federal Rule of Civil Procedure 8, Defendants submit this Answer.

deny the allegations.

3. The allegations of Paragraph 3 consist of Plaintiff's characterization of its case and legal conclusions, to which no response is required. To the extent a response is required, Federal Defendants deny the allegations, any violation of law, and that Plaintiff is entitled to the requested relief or to any relief whatsoever.

JURISDICTION AND VENUE

4. The allegations in Paragraph 4 consist of legal conclusions of law to which no response is required.

5. The allegations in Paragraph 5 consist of legal conclusions of law to which no response is required. To the extent a response is required, Federal Defendants deny the allegations.

PARTIES

6. Federal Defendants lack the knowledge or information sufficient to form a belief as to the truth of the allegations Paragraph 6 and on that basis deny the allegations.

7. The allegations of paragraph 7 consist of Plaintiff's characterization of its case and legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations.

8. Federal Defendants are unable to respond to the allegations in the first and second sentence of Paragraph 8 because the terms "participated extensively" and "actively participated" are vague and ambiguous. Federal Defendants admit only that Plaintiff submitted comments on September 1, 2020. The third sentence of Paragraph 8 purports to characterize Plaintiff's May 24, 2021 letter, which in fact was sent on May 24, 2022. The letter speaks for itself and is the best evidence of its content. Any allegations contrary to its plain, language, meaning, or context

are denied. The fourth sentence of Paragraph 8 consists of legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations and any violation of law.

9. Federal Defendants admit that the Forest Service is an agency of the United States Department of Agriculture and that it administers the National Forests, including the Ozark-St. Francis National Forests. The remaining allegations in the first and second sentence of Paragraph 9 consist of conclusions of law to which no response is required. To the extent a response is required, Federal Defendants deny the allegations.

10. Federal Defendants admit the allegations in the first and second sentences of Paragraph 10. The allegations in the third sentence of Paragraph 10 consist of Plaintiff's characterization of its case and conclusions of law to which no response is required.

STATUTORY AND REGULATORY FRAMEWORK

National Environmental Policy Act (42 U.S.C. §§ 4321–4370(h))

11. The allegations in Paragraph 11 purport to characterize the National Environmental Policy Act (NEPA) and its implementing regulations, which speak for themselves and are the best evidence of their contents. Any allegations contrary to their plain language, meaning, or context are denied. The allegations in footnote 1 consist of legal conclusions of law to which no response is required.

12. The allegations in Paragraph 12 purport to characterize NEPA and its implementing regulations, which speak for themselves and are the best evidence of their contents. Any allegations contrary to their plain language, meaning, or context are denied.

13. The allegations in Paragraph 13 purport to characterize NEPA and its implementing regulations, which speak for themselves and are the best evidence of their contents. Any allegations contrary to their plain language, meaning, or context are denied.

14. The allegations in Paragraph 14 purport to characterize Council on Environmental Quality (“CEQ”) regulations, which speak for themselves and are the best evidence of their contents. Any allegations contrary to their plain language, meaning, or context are denied.

15. The allegations in Paragraph 15 purport to characterize NEPA and its implementing regulations, which speak for themselves and are the best evidence of their contents. Any allegations contrary to their plain language, meaning, or context are denied.

EA and EIS Requirements

16. The allegations in Paragraph 16 purport to characterize NEPA and its implementing regulations, which speak for themselves and are the best evidence of their contents. Any allegations contrary to their plain language, meaning, or context are denied.

17. The allegations in Paragraph 17 purport to characterize NEPA and its implementing regulations, which speak for themselves and are the best evidence of their contents. Any allegations contrary to their plain language, meaning, or context are denied.

18. The allegations in Paragraph 18 purport to characterize NEPA and its implementing regulations, and Ninth Circuit caselaw, which speak for themselves and are the best evidence of their contents. Any allegations contrary to their plain language, meaning, or context are denied.

19. The allegations in Paragraph 19 purport to characterize NEPA and its implementing regulations, which speak for themselves and are the best evidence of their contents. Any allegations contrary to their plain language, meaning, or context are denied.

20. The allegations in Paragraph 20 purport to characterize NEPA and its implementing regulations, and caselaw, which speak for themselves and are the best evidence of their contents. Any allegations contrary to their plain language, meaning, or context are denied.

21. The allegations in Paragraph 21 purport to characterize NEPA and caselaw, which speak for themselves and are the best evidence of their contents. Any allegations contrary to their plain language, meaning, or context are denied.

***United States Forest Service Project-Level
Pre-decisional Administrative Review Process Regulations (36 C.F.R. Pt. 218)***

22. The allegations in Paragraph 22 purport to characterize Forest Service regulations, found at 36 C.F.R. § 218.1 (2019), which speaks for themselves and are best evidence of their contents. Any allegations contrary to its plain language, meaning, or context are denied.

23. The allegations in Paragraph 23 purport to characterize Forest Service regulations, found at 36 C.F.R. § 218.2 (2019), which speaks for themselves and are the best evidence of their content. Any allegations contrary to its plain language, meaning, or context are denied.

24. The allegations in Paragraph 24 purport to characterize Forest Service regulations, found at 36 C.F.R. § 218.22(d) and 218.5 (2019), which speaks for themselves and are the best evidence of its contents. Any allegations contrary to their plain language, meaning, or context are denied.

Administrative Procedure Act (5 U.S.C. §§ 701-706)

25. The allegations in Paragraph 25 purport to characterize the Administrative Procedure Act (APA) at 5 U.S.C. § 702, which speaks for itself and is the best evidence of its content. Any allegations contrary to its plain language, meaning, or context are denied.

26. The allegations in Paragraph 26 purport to characterize the APA at 5 U.S.C. §704, which speaks for itself and is the best evidence of their contents. Any allegations contrary to its plain language, meaning, or context are denied.

27. The allegations in Paragraph 27 purport to characterize the APA at 5 U.S.C. §706, which speaks for itself and is the best evidence of their contents. Any allegations contrary to its plain language, meaning, or context are denied.

28. The allegations in Paragraph 28 consist of Plaintiff's conclusions of law to which no response is required. To the extent a response is required, Federal Defendants deny the allegations.

ADDITIONAL FACTS GIVING RISE TO THE PLAINTIFFS CAUSE OF ACTION

29. Federal Defendants are unable to respond to the allegations in the first sentence of Paragraph 29 because the term "spans" is vague and ambiguous. Federal Defendants admit only that the Final Decision Notice for the Robert's Gap Project covers a project area of 39,697 acres, which includes Forest Service land within the Headwaters Buffalo River watershed in Arkansas. Federal Defendants are also unable to respond to the allegations in the second sentence of Paragraph 2 because the term "affects approximately" is vague and ambiguous. Federal Defendants admit only that the Final Decision Notice of the Project approves prescribed burning on 11,311 acres, commercial thinning on 7,873 acres, timber standing improvement ("TSI") on 296 acres, manual release thinning on 139 acres, and herbicide treatments on 622 acres. Federal Defendants further admit only that the Final Decision Notice for the Project approves 21.25 miles of fireline for prescribed burning, 0.5 miles of new road construction, and 3.5 miles of reconstructed roads in the project area. Federal Defendants deny any allegation in Paragraph 29

to the contrary.

30. As to Paragraph 30, Federal Defendants admit the allegations in the first sentence. Federal Defendants are unable to respond to all of the allegations in the second sentence of because the words “importance”, “surrounding”, and “underscored” are vague and ambiguous. Federal Defendants admit only that the Buffalo River is a Wild and Scenic River and an Extraordinary Resource Water. The allegations in the third and fourth sentences of Paragraph 30 purport to characterize the EA, which speaks for itself and is the best evidence of its content. Any allegations contrary to its plain language, meaning or context is denied. Federal Defendants are unable to respond to all of the allegations in the fifth and sixth sentences of Paragraph 30 because the words “important” and “surrounding” are vague and ambiguous. Federal Defendants admit only that the Robert’s Gap Project is within Indiana bat habitat and that karst limestone formations exist within the project area.

31. Federal Defendants are unable to respond to the allegations in the first sentence of Paragraph 31 because the words “popular” and “cherished site” are vague and ambiguous. Federal Defendants are without knowledge to form a belief regarding the truth of the allegations in Paragraph 31 regarding why visitors come to the Ozark-St. Francis National Forests or what type of recreation or other activities each visitor engage in while on the Forest. Federal Defendants admit only that the Ozark-St. Francis National Forests are used for a number of activities, including driving for pleasure, sightseeing, picnicking, trail use, camping at developed sites, hunting/fishing, gathering forest products such as firewood, visiting areas that provide solitude such as wilderness areas, mountain biking, rock-climbing, and water activities.

32. Federal Defendants deny the allegations in Paragraph 32. The Final EA and Draft Decision Notice/Finding of No Significant Impact for the Robert's Gap project was released for public review on April 9, 2021.

33. Federal Defendants admit the allegations in Paragraph 33.

34. Federal Defendants admit the allegations in Paragraph 34.

35. Federal Defendants admit the allegations in the first sentence of Paragraph 35. The allegations in the second sentence of Paragraph 35 purport to characterize the Forest Service's response to Plaintiff's objections, which speaks for itself and is the best evidence of its contents. Any allegations contrary to its plain language, meaning, or context are denied.

Endangered Indiana Bat

36. Federal Defendants admit only the allegation in the first sentence of Paragraph 36 that the Forest Service discovered an Indiana bat maternity colony within the area of the Robert's Gap Project in the Headwaters Buffalo River watershed in July 2021. The remaining allegations in the first sentence of Paragraph 36 purport to characterize the Forest Service's response to Plaintiff's objections, which speaks for itself and is the best evidence of its contents. Any allegations contrary to its plain language, meaning, or context are denied. Federal Defendants admit the allegation in the second sentence of Paragraph 36 that the Forest Service was not aware of this colony when it proposed amendments to the Ozark-St. Francis Forest Plan in 2019; when it conducted a Biological Assessment ("BA") pursuant to the Endangered Species Act ("ESA"); when it prepared the EA pursuant to NEPA evaluating the potential effects of the amendments on the Indiana bat in early 2020; and when it adopted the amendments in March of 2021. Federal Defendants aver that the BA and EA for the amendment to the Ozark-St. Francis Forest Plan

evaluated the potential effects of the amendments on the Indiana bat, including potential maternity colonies in the Ozark-St. Francis National Forest.

37. The allegations in the first sentence of Paragraph 37 purport to characterize the BA, which speaks for itself and is the best evidence of its contents. Any allegations contrary to its plain language, meaning, or context are denied. The allegations in the second sentence of Paragraph 37 purport to characterize the Fish and Wildlife Service's Biological Opinion ("BiOp"), which speaks for itself and is the best evidence of its contents. Any allegations contrary to its plain language, meaning, or context are denied. Federal Defendants admit the allegations in the third sentence of Paragraph 37.

38. Federal Defendants are unable to respond to the allegations in the first sentence of Paragraph 38 because the "approximately" is vague and ambiguous. Federal Defendants admit only that an Indiana bat maternity colony was discovered Robert's Gap Project area in July 2021, the Service adopted the Bat Amendments on March 17, 2021, and circulated the Robert's Gap Final EA to the public on April 9, 2021. Federal Defendants are similarly unable to respond to the allegations in the second sentence of Paragraph 38 because the phrase "[t]hree months later" is vague and ambiguous. Federal Defendants admit only that, in October of 2021, the Service issued its DN/FONSI authorizing the Robert's Gap Project.

39. Federal Defendants admit that the first sentence of Paragraph 39 correctly quotes Plaintiff's Freedom of Information Act ("FOIA") request. The second and third sentences of Paragraph 39 purport to characterize the Forest Service's response to Plaintiff's FOIA request, which speaks for itself and is the best evidence of its contents. Any allegations contrary to its plain language, meaning, or context are denied.

40. Federal Defendants admit the allegation in the first sentence of Paragraph 40 that the Forest Service's Final Decision Notice and Finding of No Significant Impact ("DN/FONSI") included additional measures to protect the Indiana bat maternity colony. The second and third sentences of Paragraph 40 purport to characterize the DN/FONSI, which speaks for itself and is the best evidence of its contents. Any allegations contrary to its plain language, meaning, or context is denied. Federal Defendants also deny that the DN/FONSI included any additional "mitigation measures," as that term is used in the NEPA context. The DN/FONSI instead included "design criteria." The fourth sentence of Paragraph 40 consists of Plaintiff's characterization of its case and legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations in this sentence and deny any violation of law.

41. The first sentence of Paragraph 41 purports to characterize the DN/FONSI, which speaks for itself and is the best evidence of its contents. Any allegations contrary to its plain language, meaning, or context are denied. The second sentence of Paragraph 41 provides Plaintiff's characterization of its case and legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations in this sentence and any violation of law. The third sentence of Paragraph 41 purports to characterize the DN/FONSI, which speaks for itself and is the best evidence of its contents. Any allegations contrary to its plain language, meaning, or denied are denied. Further, the third sentence of Paragraph 41 consists of Plaintiff's characterization of its case and legal conclusions to which no response is required. Federal Defendants deny the allegations in the sentence and any violation of law.

42. The first sentence of Paragraph 42 is too vague and ambiguous as to permit a response. To the extent a response is required, Federal Defendants deny the allegations. The remainder of allegations in Paragraph 42 purport to characterize the Forest Plan Amendment for Bat Conservation Environmental Assessment, which speaks for themselves and are the best evidence of their content. Further, the remainder of the allegations in Paragraph 42 include Plaintiff's characterization of its case to which no response is required. To the extent a response is required, these allegations are denied.

43. The allegations in the first, third and fourth sentences of Paragraph 43 purport to characterize NEPA and caselaw, which speak for themselves and are the best evidence of their contents. Any allegations contrary to their plain language, meaning, or context are denied. The remainder of the allegations in Paragraph 43 consist of Plaintiff's characterization of its case and legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations and any violation of law.

44. The allegations in Paragraph 44 consist of Plaintiff's characterization of its case and legal conclusions to which no response is required. To the extent a response is required, these allegations are denied. Federal Defendants admit only that, in the Final DN/FONSI, the Forest Service added additional protective measures to protect the Indiana bat maternity colony.

45. The allegations in Paragraph 45 consist of Plaintiff's characterization of its case and legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations and any violation of law.

Water Quality

46. The allegations in the first sentence of Paragraph 46 purport to characterize the DN/FONSI, which speaks for itself and is the best evidence of its contents. Any allegations contrary to its plain language, meaning, or context are denied. The second through seventh sentences of Paragraph 46 consist of Plaintiff's characterization of its case and legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations and any violation of law. The allegations in the eighth sentence of Paragraph 46 purport to characterize the Project's EA, which speaks for itself and is the best evidence of its contents. Any allegations contrary to its plain language, meaning, or context are denied. The allegations in the eighth sentence also consist of Plaintiff's characterization of its case and legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations and any violation of law.

47. The allegations in the first sentence of Paragraph 47 purport to characterize the Project's EA, which speaks for itself and is the best evidence of its contents. Any allegations contrary to its plain language, meaning, or context are denied. The second sentence consist of Plaintiff's characterization of its case and legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations and any violation of law.

48. The first and third sentences of Paragraph 48 purport to characterize Plaintiff's comments and objections, and a Ninth Circuit ruling, which speak for themselves and are the best evidence of their contents. Any allegations contrary to their plain language, meaning, or context are denied. The second sentence of Paragraph 48 purports to characterize "class action

settlements” which likewise speak for themselves and are the best evidence of their contents. Any allegations contrary to its plain language, meaning, or context are denied. The fourth and fifth sentences of Paragraph 48 purport to characterize an EPA rulemaking, which speaks for itself and is the best evidence of its content. Any allegations contrary to the plain language, meaning, or context of that rulemaking are denied.

Herbicide Use

49. The allegations in the first sentence of Paragraph 49 purports to characterize the DN/FONSI which speaks for itself and is the best evidence of its contents. Any allegations contrary to its plain language, meaning, or context are denied. As to the second sentence in Paragraph 49, Federal Defendants admit that, in the Final DN/FONSI, the Forest Service modified the area that herbicides such as Glyphosate will be used on, specifically reducing the application in MA2D Upper Buffalo Dispersed Recreation Area to zero. The third sentence of Paragraph 49 consists of Plaintiff’s characterization of its case and legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations and any violation of law.

Request for Supplemental Environmental Assessment

50. Federal Defendants admit that on May 24, 2022, Plaintiff sent a letter to Tom Vilsack, Mike Mulford and Timothy Jones. The remainder of the allegations in the first and second sentences of Paragraph 50 purport to characterize Plaintiff’s May 24, 2022 letter, which speaks for itself and is the best evidence of its contents. Any allegations contrary to its plain language, meaning, or context are denied. As to the third sentence in Paragraph 50, Federal Defendants admit that they did not respond to Plaintiff’s May 24, 2022 letter

PLAINTIFF’S CLAIMS FOR RELIEF

(Violations of APA and NEPA)

51. The allegations in Paragraph 51 consist of Plaintiff’s characterization of its case and legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations and any violation of law.

52. Federal Defendants incorporate by reference all preceding paragraphs as if set forth fully herein.

Count 1

(Failure to Take a Hard Look at the Buffalo National River in violation of APA and NEPA)

53. The allegations in Paragraph 52 consist of Plaintiff’s characterization of its case and legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations and any violation of law.

54. Federal Defendants admit the allegations in the first and second sentences of Paragraph 54. Federal Defendants are unable to respond to the allegations in the third sentence of Paragraph 54 because it refers to “a meeting with three specialists” that is not otherwise defined and is thus vague and ambiguous. To the extent the third sentence of Paragraph 54 purports to characterize the DN/FONSI, moreover, that document speaks for itself and is the best evidence of its contents. Any allegations contrary to its plain language, meaning, or context are denied.

55. The allegations contained in Paragraph 55 consist of Plaintiff’s characterization of its case and conclusions of law to which no response is required. To the extent a response is required, Federal Defendants deny the allegations and any violation of law.

Count 2

(Failure to Take a Hard Look at Water Quality in violation of APA and NEPA)

56. The allegations contained in Paragraph 56 consist of Plaintiff's characterization of its case and conclusions of law to which no response is required. To the extent a response is required, Federal Defendants deny the allegations and any violation of law.

57. The allegations contained in Paragraph 57 consist of Plaintiff's characterization of its case and conclusions of law to which no response is required. To the extent a response is required, Federal Defendants deny the allegations and any violation of law.

58. The allegations contained in Paragraph 58 consist of Plaintiff's characterization of its case and conclusions of law to which no response is required. To the extent a response is required, Federal Defendants deny the allegations and any violation of law.

59. The allegations in Paragraph 59 consist of Plaintiff's characterization of its case and conclusions of law to which no response is required. To the extent a response is required, Federal Defendants deny the allegations and any violation of law.

Count 3

(Failure to Take a Hard Look at the Impacts to the Indiana bat in violation of APA and NEPA)

60. The allegations in Paragraph 60 consist of Plaintiff's characterization of its case and conclusions of law to which no response is required. To the extent a response is required, Federal Defendants deny the allegations and any violation of law.

61. The allegations in Paragraph 61 consist of Plaintiff's characterization of its case to which no response is required. To the extent a response is required, Federal Defendants deny the allegations.

62. The allegations in Paragraph 62 consist of Plaintiff's characterization of its case and legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations and any violation of law.

63. The allegations in Paragraph 63 consist of Plaintiff's characterization of its case and legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations and any violation of law.

Count 4

(Failure to Provide an Opportunity for Public Comment in violation of APA and NEPA)

64. The allegations in Paragraph 64 purport to characterize and quote NEPA and its implementing regulations, which speak for themselves and are the best evidence of their contents. Any allegations contrary to their plain language, meaning, or context are denied.

65. The allegations in Paragraph 65 consist of Plaintiff's characterization of its case and legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations and any violation of law.

66. The allegations in Paragraph 66 consist of Plaintiff's characterization of its case and legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations and any violation of law.

67. The allegations in Paragraph 67 consist of Plaintiff's characterization of its case and legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations and any violation of law.

Count 5

(Improper Reliance on Outdated Science in violation of APA and NEPA)

68. The allegations in Paragraph 68 consist of Plaintiff's characterization of its case and legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations and any violation of law.

69. The allegations in Paragraph 69 purport to characterize Plaintiff's comments on the Project, which speak for themselves and are the best evidence of their contents. Any allegations contrary to their plain language, meaning, or context are denied.

70. Paragraph 70 purports to characterize the EA and the DN-FONSI, which speak for themselves and are the best evidence of their contents. Any allegations contrary to their plain language, meaning, or context are denied.

71. The allegations in Paragraph 71 consist of Plaintiff's characterization of its case and legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations and any violation of law.

Count 6

(Failure to Produce a Supplemental Environmental Assessment or Environmental Impact Statement in violation of APA and NEPA)

72. The allegations in Paragraph 72 consist of Plaintiff's characterization of its case and legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations and any violation of law.

73. The allegations in Paragraph 73 consist of Plaintiff's characterization of its case and legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations and any violation of law.

74. The allegations in the second sentence of Paragraph 74 purport to characterize the EA and the DN-FONSI, which speak for themselves and are the best evidence of their contents. Any allegations contrary to their plain language, meaning, or context are denied. The remaining allegations in Paragraph 74 consist of Plaintiff's characterization of its case and legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations and any violation of law.

75. The allegations in Paragraph 75 consist of legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations and any violation of law.

76. The allegations in Paragraph 76 consist of Plaintiff's characterization of its case and legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations and any violation of law.

Count 7

(Continuing Failure to Act in not preparing an SEIS in violation of APA and NEPA)

77. The allegations in Paragraph 77 purport to characterize NEPA and its implementing regulations, which speak for themselves and are the best evidence of their contents. Any allegations contrary to their plain language, meaning, or context are denied.

78. The allegations in Paragraph 78 consist of Plaintiff's characterization of its case and legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations and any violation of law.

79. The allegations in Paragraph 79 consist of Plaintiff's characterization of its case and legal conclusions to which no response is required. To the extent a response is required, Federal

Defendants deny the allegations and any violation of law.

80. The allegations in Paragraph 80 consist of Plaintiff's characterization of its case and legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations and any violation of law.

81. The allegations in Paragraph 81 consist of Plaintiff's characterization of its case and legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations and any violation of law.

Count 8

(Improper Assessment of a Finding of No Significant Impact in violation of APA and NEPA)

82. The allegations in Paragraph 82 purport to characterize NEPA and its implementing regulations, which speak for themselves and are the best evidence of their contents. Any allegations contrary to their plain language, meaning, or context are denied.

83. The allegations in Paragraph 83 consist of Plaintiff's characterization of its case and legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations and any violation of law. Federal Defendants are also unable to respond to the allegations in the third sentence because the term "closely related chemicals" is vague and ambiguous.

84. The allegations in the first, fourth, and fifth sentences of Paragraph 84 consist of Plaintiff's characterization of its case and legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations and any violation of law. Federal Defendants are unable to respond to the allegations in in the second sentence of Paragraph 84 because the term "fragile" is vague and ambiguous. The allegations in the second

and third sentence of Paragraph 84, moreover, purport to characterizing the EA, which speaks for itself and is the best evidence of its contents. Any allegations contrary to its plain language, meaning, or context are denied.

85. Paragraph 85 purports to characterize the content of Plaintiff’s comments and objection, which speak for themselves and are the best evidence of their contents. Any allegations contrary to their plain language, meaning, or context are denied. Further, Federal Defendants are unable to respond to the allegations in this paragraph because the term “substantial questions” is vague and ambiguous.

86. The allegations in Paragraph 86 consist of Plaintiff’s characterization of its case and legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations and any violation of law.

REQUEST FOR RELIEF

The remainder of the Complaint constitutes Plaintiff’s request for relief, to which no response is required. To the extent a response is required, Federal Defendants deny any violation of law including under the APA or NEPA, and deny that Plaintiff is entitled to the requested relief or any relief whatsoever.

Wherefore, Federal Defendants request the Court deny in all respects Plaintiff’s requests for relief, dismiss the Complaint, enter judgment for Federal Defendants, and grant Federal Defendants such other relief as may be appropriate.

GENERAL DENIAL

Federal Defendants deny any allegations of the Complaint, whether express or implied, not specifically admitted, denied, or qualified herein.

AFFIRMATIVE DEFENSES

1. Plaintiff failed to exhaust all administrative remedies for some or all of its claims.
2. Plaintiff's claims are additionally barred by estoppel, laches, and/or waiver.
3. The Court lacks subject-matter jurisdiction to hear this action.
4. Some or all of Plaintiff's claims are not ripe for review.

Federal Defendants reserve their right to assert additional affirmative defenses during the course of this litigation.

WHEREFORE, Federal Defendants deny that Plaintiff is entitled to the relief requested or to any relief whatsoever, and request that the Complaint be dismissed with prejudice, that judgment be entered in favor of Federal Defendants, and that the Court order such other and further relief as it may allow.

Respectfully submitted on this 17th day of May, 2023.

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CERTIFICATE OF SERVICE

I certify that on May 17, 2023, I filed the foregoing Federal Defendants' Answer to Plaintiff's Complaint using the Court's ECF system, which will provide service to all counsel of record.

/s/ Paul G. Freeborne
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