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

PAUL G. FREEBORNE
Trial Attorney
Natural Resources Section
P.O. Box 7611
Washington, D.C. 20044-76
Phone: (202) 532-5271
Fax: (202) 305-0275
Email: paul.freeborne@usdoj.gov

Counsel for Federal Defendants

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

BUFFALO RIVER WATERSHED ALLIANCE, Plaintiff, v. U.S. FOREST SERVICE & TIMOTHY E. JONES, District Ranger, Defendants.	Case No. 3:23-cv-03012-TLB **FEDERAL DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** **ORAL ARGUMENT REQUESTED**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

INTRODUCTION

This case involves the Robert's Gap Project ("Project") on the Ozark-St. Francis National Forests ("Ozark-St. Francis" or "Forest"). The Project area is in the northwest corner of the Big Piney Ranger District of the Forest, in Newton and Madison Counties, Arkansas. The area was once a fire-dominated ecosystem, where periodic low intensity fire cleared underbrush and created stands of shade-intolerant tree species such as shortleaf pine and various oaks. But the history of Forest Service ("Forest Service" or "Service") fire suppression, the lack of forest management in the last 25 years, and recent insect and disease outbreaks have left the area out of balance—dominated by over-mature tree stands at risk to dying from additional insects and pathogens and subject to uncharacteristically dangerous wildfire. The Project seeks to reintroduce fire into the area in a controlled manner through prescribed burning. Moreover, to reintroduce the shade intolerant species that once occupied the area, the Project also includes various silvicultural treatments, including the manual application of EPA-approved herbicides.

The Forest Service engaged in an extensive process to evaluate the Project's potential environmental effects under the National Environmental Protection Act ("NEPA"), including evaluating the Project's potential impact on water quality and wildlife in the area. That process resulted in an Environmental Assessment ("EA") that is supported by various specialist reports. The Forest Service's Decision Notice approving the Project and Finding of No Significant Impact ("DN/FONSI") are supported by the EA, the Final Environmental Impact Statement ("FEIS") that supports the Forest Plan standards applied to the Project, and Forest Plan amendments that were implemented before the DN/FONSI to protect the endangered Indiana bat.

The Forest Service's DN/FONSI is fully supported by the record and falls well within the Forest Service's discretion to make under the Administrative Procedure Act's ("APA's") deferential standard of review. Buffalo River Watershed Alliance's ("BRWA's") claims to the

contrary are unavailing. In its summary judgment briefing, BRWA argues that the Forest Service failed to take the requisite "hard look" at [1] the Project's potential effect on the Buffalo National River and its status as a Wild and Scenic River because the agency's environmental analysis of the river was not extensively discussed in the EA; [2] the potential effect of herbicides authorized by the Project's decision because the agency did not disclose in the EA that the agency had not used herbicides in the area in the past 40 years; and [3] water quality in the watershed because the agency did not conduct water sampling before undertaking the Project. Because BRWA failed to make these arguments in its objections to the Project, as the agency's regulations require, they are waived.

And even if BRWA could raise these arguments for the first time in litigation, they fail on the merits. NEPA does not require that an agency identify specific areas included in its water quality analysis. An EA is a short and concise document; it cannot discuss every issue. The Forest Service conducted an expansive and thorough analysis of the Project's potential effect on the watershed, including downstream, in the Buffalo National River, when it evaluated the Project—and when it evaluated Forest Plan standards in the Forest Plan's FEIS that apply to these areas.

Nor does NEPA require that the Forest Service specifically identify in the EA when it last used herbicides. The Project's scoping notice made clear from the outset that the Project's treatments were long overdue because such treatments had not occurred in the area in 25 years. And in any event, the Forest Service need only analyze the effect of such herbicides on the Project area, which the agency did in the record. It is telling that BRWA has now abandoned in briefing Count Five of the Amended Complaint, where it had claimed that the Forest Service failed to use the best available science in its environmental analysis of Project herbicides.

Finally, for years, the Forest Service conducted project-specific water quality monitoring for herbicides. Because the results of that monitoring consistently revealed no contamination from the chemical application of herbicides above EPA-concern levels, the Forest Service originally decided not to undertake further water sampling for this Project. That decision was made pursuant to its policy and was not arbitrary and capricious because the agency's previous sampling reasonably led it to conserve its scarce resources and test only when necessary. Based on the request made by another party, however, the Forest Service later agreed to gather background water sampling data prior to the Project and to further monitor water quality during Project implementation. The Forest Service has now completed that sampling in the area and the testing did not detect any trace of chemical herbicides. BRWA's claim is thus, at best, harmless error because the requested sampling has now been done and revealed no trace of chemical herbicide in the watershed. BRWA's requested injunctive relief is also now moot for the same reason.

BRWA next suggests that the Forest Service was required to supplement the EA to assess the Project's impact on an Indiana bat maternity colony that was discovered after the EA was prepared. But the Forest Plan amendments that were incorporated into the decision were specifically designed to protect the roosting habitat of the bat and a maternity colony. And those amendments complied with NEPA and the Endangered Species Act ("ESA"). The existence of the colony was thus not substantial new information that the agency had never considered that triggered a supplemental EA.

BRWA also contends that the Forest Service must delay the Project while it conducts baseline water quality sampling and seeks public comment on such sampling. But the Forest Service has now completed the requested sampling and detected no herbicide chemicals. The

sampling and testing thus reveal no substantially new information that would trigger a supplemental EA.

Next, BRWA argues the Forest Service erred in not involving the public in its determination that a supplemental NEPA analysis was not required to address the discovery of the Indiana bat and water sampling. But there is no such requirement in NEPA. Granting repeated public comment every time a new piece of information arises, would lead to intractable delays.

Last, BRWA seeks to argue that the Forest Service was required to prepare an EIS in evaluating the Project, rather than an EA. But neither the Project's context nor the "intensity" factors under the NEPA regulations triggered an obligation to prepare an EIS for the Project. For that reason, BRWA repeats its "hard look" arguments to show that the FONSI was clear error. As explained above and below, the Forest Service took the requisite "hard look" at the Project.

The Court should thus grant Federal Defendants summary judgment and deny BRWA's motion based on the record—and allow this important forest management project to proceed.

BACKGROUND

I. Statutory Background

A. National Environmental Policy Act

Congress enacted NEPA, 42 U.S.C. §§ 4321-4370m-12, to establish a process for federal agencies to consider the environmental impacts of their actions. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978). Unlike some statutes that mandate that an agency come to a substantive outcome, NEPA is a process-oriented statute. *Sierra Club v. Kimbell*, 623 F.3d 549, 559 (8th Cir. 2010). The statute's purpose is to "insure a fully informed and well-considered decision, not necessarily a decision [that a court] would have reached had

they been members of the [decision-making] unit of the agency." *Vt. Yankee Nuclear Power Corp*., 435 U.S. at 558. NEPA also does not prevent agencies from taking environmentally harmful action. If "the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350, (1989). The statute requires "only that the agency take a 'hard look' at the environmental consequences before taking a major action." *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc*., 462 U.S. 87, 97 (1983).

In enacting NEPA, Congress directed that all federal agencies, "to the fullest extent possible," 42 U.S.C. § 4332, include a detailed statement of environmental impacts "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." *Id.* § 4332(2)(C). NEPA also established the Council on Environmental Quality ("CEQ"), *id.* § 4321, which issues mandatory regulations for implementing the procedural provisions of NEPA. *Andrus v. Sierra Club*, 442 U.S. 347, 357 (1979).[1] Recognizing that full-scale environmental impact statements are "'very costly and time-consuming to prepare and [have] been the kiss of death to many a federal project,'" *Friends of Fiery Gizzard v. Farmers Home Admin.*, 61 F.3d 501, 504 (6th Cir. 1995) (alteration in original) (quoting *Cronin v. U.S. Dept. of Agric*., 919 F.2d 439, 443 (7th Cir. 1990)), CEQ's implementing regulations provide that an EIS "need not be prepared for every

[1] Updated CEQ regulations became effective on September 14, 2020. Because projects that were initiated before September 14, 2020, could be completed using the previous version of the regulations, which is the case for the Robert's Gap Project, the prior version of the regulations is cited. *See* Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43304 (July 16, 2020). The parties appear to agree on this point. *See* Pls.' Mem. in Supp. of Mot. for Summ. J. ("Pls.' Mem.") 4-5 n.2.

major Federal action that might conceivably have a significant effect on the quality of the human environment." *Id.*

NEPA regulations instead "specify what kinds of federal actions clearly require an EIS and which [federal actions] clearly do not." *Neighborhood Transp. Network v. Pena*, 42 F.3d 1169, 1171 (8th Cir. 1994) (citing 40 C.F.R. § 1500 *et seq.*). If an activity is contemplated that does not automatically require an EIS, an EA may instead be prepared to determine whether a project level EIS is necessary. *Sierra Club v. U.S. Forest Serv.*, 46 F.3d 835, 837 (8th Cir. 1995); 40 C.F.R. § 1501.3–1501.4.

An EA is a "concise" document that includes "brief discussions" of the need for the action, its impacts, and alternative courses of action, including doing nothing, the "No Action" alternative. 40 C.F.R. § 1508.9(a), (b). The document helps the agency determine whether any of the proposed actions will significantly affect the environment and so require that the agency prepare an EIS for the proposed action. *Id.* § 1508.9(a)(1).

If an agency prepares an EA and determines that a proposed action, like a project or a Forest Plan amendment, as here, will not have a "significant impact" on the environment, then the agency prepares a FONSI and need not then prepare an EIS. *Id*. §§1508.9(a), 1501.4(c). A FONSI "briefly" presents the reasons why an agency action will not create a significant environmental impact and why an EIS will not be issued. *Id*. § 1508.13. The deciding official issues a Decision Notice when an EA and FONSI have been prepared. 36 C.F.R. §§ 220.3, 220.7(c). A Decision Notice is to be a "concise written record of the responsible official's decision." *Id.* § 220.3.

B. Administrative Procedure Act

NEPA does not, by itself, authorize a private right of action. Judicial review under NEPA thus proceeds under the APA. *Kimbell*, 623 F.3d at 558-59. The Court's review is limited to whether the agency's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Court considers whether the agency considered the relevant factors and whether they made a '"clear error of judgment.'" *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto Ins. Co*., 463 U.S. 29, 43 (1983) (quoting *Bowman Transp. Inc. v. Arkansas-Best Freight System,* 419 U.S.,281, 285 (1974)). The APA's narrow standard of review gives the agency a high degree of judicial deference upon review. *Sierra Club v. Envtl. Prot. Agency*, 252 F.3d 943, 947 (8th Cir. 2001). An agency's decision is arbitrary and capricious only if it (1) relied on factors Congress did not intend it to consider; (2) "entirely failed to consider an important aspect of the problem"; (3) offered an explanation that conflicts with the evidence before the agency; or (4) "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle*, 463 U.S. at 43.

II. Factual Background

A. Management of the Ozark-St. Francis

The Ozark-St. Francis includes around 1.2 million acres of public land managed by the Forest Service. AR_0017 (Forest Plan). The Ozark National Forest was established by presidential proclamation in 1908 and is located mainly in Northwest Arkansas. The St. Francis was established in 1960 and is in eastern Arkansas. AR_0018.[2] Although two separate national

[2] The Forest Service filed the original and a revised Administrative Record index with the Court, *see* ECF Nos. 21-2 & 29-2. Like BRWA, Federal Defendants cite the documents listed in the index by referencing the bates numbering in the lower right-hand corner of each page. Pursuant to the Court's Scheduling Order, ECF No. 22, the parties will provide the Court with a Joint Appendix after briefing closes that contains all record documents cited by the parties in briefing.

forests, the Ozark and St. Francis are managed by one Supervisor's Office in Russellville, Arkansas. *Id*.

The Ozark-St. Francis is administered under a Forest Plan, prepared pursuant to the National Forest Management Act ("NFMA"), NEPA, and other applicable laws and regulations. AR_0015. The Forest Plan describes the strategic direction and broad program-level direction for managing the Forest's land and resources. *Id*. The Forest Service does not make project-level decisions in a Forest Plan, but site-specific project decisions must be consistent with the Forest Plan's forest-wide standards absent a project-specific amendment for the Plan. *Id*.

The Ozark-St. Francis's current Forest Plan was revised in 2005. *Id*. Amendments to the Plan are made pursuant to NFMA. 16 U.S.C. § 1604(f)(4). Pursuant to the Forest Service's Planning Rule, Forest Plan amendments must also be evaluated under NEPA. 36 C.F.R § 219.13.

ESA Section 7(a)(2) requires that agencies ensure that any action they authorize or carry out "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of designated critical habitat. 16 U.S.C. § 1536(a)(2). If a proposed action, like a Forest Plan amendment, may affect a listed species or critical habitat, the action agency (here, the Forest Service) must engage in formal consultation with the consulting agency (here, the United States Department of Interior's Fish and Wildlife Service ("FWS")). *Id.* § 1536(b); 50 C.F.R. § 402.14(a).

ESA Section 7 consultations are designed to help agencies meet the requirement that their actions do not jeopardize the continued existence of species, or destroy or adversely modify designated critical habitat. The outcome of these consultations is a biological opinion, or "BiOP." If the consulting agency determines that a Forest Plan amendment (or other proposed action) is not likely to jeopardize the continued existence of a listed species, the consulting agency

provides the action agency with an Incidental Take Statement in the BiOp for the proposed action. The Incidental Take Statement specifies the "amount or extent" of incidental take authorized under the proposed action, "reasonable and prudent measures" to minimize such take, and the "terms and conditions" with which the action agency must comply. 50 CFR § 402.14(i).

B. The Robert's Gap Project

1. Purpose and Need for the Project

The Robert's Gap Project area encompasses 39,697 acres of the National Forest System lands close to the communities of Boston, Fallsville, and Red Star, Arkansas. AR_1715 (Final EA). Because little forest management has occurred in the Project area in the last 25 years, the area has experienced adverse insect and disease outbreaks. AR_1210 (Scoping Letter). Areas of over-mature hardwood stands showing mortality with little to no advanced regeneration of non-woody plants, such as ferns or grasses, are common in the area. *Id*. The remaining over mature tree stands are also at risk to dying from additional insects and pathogens, resulting in dangerous fuel loading that can lead to dangerous wildfire and resulting harm to the surrounding community. *Id*.

To address the forest conditions in the area and to protect the surrounding communities from the risk of uncharacteristic wildfire, the Project includes various treatments, including reintroducing fire into the area in a controlled manner through prescribed burning on 13,468 acres. AR_1716, 1721-1722 (Final EA). The Project would also include regeneration timber harvesting on 965 acres of the Forest, which would remove the mature, over-mature or diseased trees and establish new hardwood stands. *Id*. Doing so improves overall forest health and creates vegetation types that are more adapted to the area's physical and biotic conditions. AR_1722.

The Project would also include commercial thinning, timber stand improvement thinning, and shelterwood preparation harvests to reintroduce shade intolerant tree species that once occupied the area but which have been crowded out as past fire suppression has led to dense stands of shade-tolerant species. AR_1723-25. The treatments would also seek to restore woodlands by manually applying EPA-approved herbicides. AR_1726, 1763; *see also* 1730 (identifying type of treatment and chemical). And to carry-out these activities, the Project would include connecting activities—the construction or reconstruction of new roads. AR_1729.

2. Project Scoping and Environmental Analysis

The Forest Service sought public input on the Project for two years, taking comments on the initial scoping notice, the draft EA, and objections to the draft decision notice (which was published with the Final EA). Public comment on the scope of the Project was sought in January 2018. AR_1210-13 (Scoping Letter), AR_1214-96 (Scoping Period Responses). Public comment on the Draft EA was sought in August 2020. *See* AR_1297-1299 (Notice of Availability of Draft EA); AR_1300-1357 (Draft EA); AR_1358-1364 (BRWA Comment); AR_1365-1711 (Other Comments).

Both the Draft and Final EA for the Project considered three alternatives: [1] a "No Action" Alternative (Alternative 1); [2] a "No Herbicide" Use Alternative (Alternative 2); and [3] a "Other Resources" Alternative (Alternative 3), which was developed because the location of another 24 miles of mountain bike trails that was also proposed under the Project conflicted with the proposed silviculture treatments. *See* AR_1305 (Draft EA); AR-1717 (Final EA). The Draft and Final EA were supported by a host of specialist reports, including, as relevant to BRWA's claims here, analyses of the Project's potential effect on water quality and wildlife.

a. Water Quality Analysis

The Forest Service evaluated each of the alternatives' potential effect on water quality in the analysis area. AR_1745-1753 (EA Water Quality Analysis); AR_1918-1927 (Draft EA Water Quality Analysis). To assess potential increases in sediment that may result from the Project's management activities, the Forest Service used the Water Resource Analysis for Cumulative Effects ("WRACE") model. *See* AR_1928-1974. (WRACE Model Information). The WRACE model is described in the EA and the results are in the record. AR_1750-1752 (EA), 1928-1974 (model results). Based on the analysis in the model, the direct and indirect impacts from the Project are not likely to contribute to degradation of the current water quality. AR_1750.

Current watershed conditions are also disclosed in Table 21 of the EA. AR_1752. The resulting analysis compares current sediment levels to the expected sediment level after the Project is implemented, not by a particular stream or waterway. But the Forest Service's analysis included potential effects on water quality for all the waterways in or downstream of the Project area, including, as relevant here, the "Buffalo National River, [that] flows north through the Upper Buffalo Wilderness in the eastern part of the project area and becomes the Buffalo National River as it exits the National Forest" *See* AR_1746 (Robert's Gap Watershed Map).

The Buffalo National River is managed by the United States Department of Interior's National Park Service ("Park Service"). 16 U.S.C. § 460m-8. The Park Service reviewed the water quality analysis in the draft EA and "determined that none of the proposed actions [under the Project] have the potential to significantly impact resources of [the Buffalo National River]. AR_1392.

The Forest Service also considered the Buffalo National River, and its unique qualities as a wild and scenic river, in the FEIS that supports the Ozark-St. Francis's Forest Plan, which, as

noted, guides this and other management activities on the Forest. The Forest plan specifically incorporates Management Activity Standards to maintain that area. *See* AR_0099-100 (noting desired conditions for area), AR_0175 (setting forth management activity standards for scenic areas such as Buffalo National River), and AR_0702-0703 (noting that Buffalo National River is among wild and scenic rivers affected by Forest Plan management activities). The Project includes no management activities that are inconsistent with the Forest Plan standards for the Buffalo National River or which were not previously evaluated in the Forest Plan's FEIS.

For years, the Forest Service also conducted project-specific water quality monitoring for herbicides. AR_1975-1987 (Herbicide Monitoring Policy and Supporting Historical Results). Because the results of that monitoring consistently revealed no contamination from the chemical application of herbicides above EPA-concern levels, the Forest Service originally decided not to undertake further water sampling for this Project. That decision was made pursuant to the agency's policy to only undertake further project-specific monitoring "where determined to be necessary." AR_1975. The Forest has determined that routinely conducting project-specific water quality monitoring is unnecessary because previous monitoring shows that the Forest Plan's protection measures and application methods are effective in protecting water quality. AR_1975-1987. The Forest Plan's protective measures and application methods are included in the Project EA and the Forest Plan that is included in the record. *See* AR_0154-0155 (Forest Plan Forest Wide Standards for herbicides and herbicide application methods), AR_0157 (Forest Wide Standards for management activities undertaken around Karst features), AR_0170 (Forest Wide Standards for Fire Management activities, including use of prescribed fire), and AR_1762-1770 (Final EA discussion of Project herbicides).

b.) Wildlife Analysis, including the Bat Plan Amendments

The Forest Service also assessed potential impacts to wildlife, by alternative, including potential impacts to threatened, endangered species, such as the Indiana bat. *See* AR_2760-2762 (Wildlife Report). While planning the Project, the Forest Service also assessed and implemented Forest Plan amendments ("Bat Plan Amendments") containing standards to protect the Indiana bat. The Forest Service considered the analysis prepared for the Bat Plan Amendments when it evaluated the potential effect of the Project on the Indiana bat. *See* AR_6633-6634 (Supplemental Threatened and Endangered Species Analysis).

Because Indiana bat maternity sites were found to the south, east, and west of the Forest, the Forest Service recognized that maternity sites may also exist on the Forest. *See* AR_4211 (BA, noting "[f]emale bats have been tracked migrating north into Missouri, south, with the longest distance migrant last located south of the Arkansas River, and [east] to bottomland hardwood forests in the Black River area, where a maternity colony has been documented"), AR_4265-4266 (BiOP, noting "[f]emale bats migrated north into Missouri, south with the longest distance migrant last located south of the Arkansas River, and east to maternity colony in bottomland hardwood forests in the Black River area"), and 4301 (Bat Plan EA, noting that "[a]lthough no maternity sites have been found on the Forest, they have been found to occur in Arkansas and evidence suggests that sites occur to the south, east, and west of the" Forest).

The Forest Service's Biological Assessment ("BA") for the Bat Plan Amendments also recognized that the agency would need to undertake resource management activities like those in the Robert's Gap Project in the coming years to fulfill the Forest Plan goals, and to restore forest health by increasing resiliency to insect, disease, and wildfire. *See* AR_4205 (BA recognizing

that the Forest Service would be undertaking timber harvesting, prescribed fire, road, and trail construction and reconstruction, and other activities on the Forest in the coming years).

The Forest Service recognized that such activities may impact the endangered Indiana bat, both positively and adversely, including Indiana bat cover, roosting, and forage. AR_4212-4219. Thus, one of the core purposes for the amendments was to ensure that "the proper protective measures [for a maternity bat] are in place and will not delay project implementation if one is found." AR_4301-4302. The amendments include a new Forest-Wide Standard, FW-163, that provides "[i]f Indiana bat maternity trees are discovered within the Forests, those trees and other trees used by the colony would be protected." AR_4331. FW-163 also provides that "[n]o tree falling [may] occur [under a project] within 150 feet of known maternity trees unless their cutting or modification is needed to protect public or employee safety." *Id*. And during the maternity period for the Indiana bat, which runs from April 1 to August 15, the amendments generally prohibit the use of heavy equipment and prescribed fire within a quarter of a mile from known maternity roost trees although this buffer may be adjusted in specific cases in consultation with FWS. *Id*.

In addition to the new Bat Plan Amendments, existing Forest Plan standard FW-69, protects from cutting and intentional modification live trees, snags (standing dead trees), buildings, and other structures known to have been used as roosts by Indiana bats unless such cutting or modification is necessary to protect public or employee safety. AR_4330. And while the Forest Plan generally allows prescribed burns to proceed with special protection for Indiana bat roost trees, it prohibits prescribed burns when active Indiana bat maternity trees are present in the area. *Id*.

Pursuant to the ESA Section 7(a)(2) consultation process discussed above, the FWS issued a BiOp for the Bat Plan Amendments. AR 4241-4290. Pursuant to Section 7 of the ESA, the Bat Plan Amendments BiOp includes the required ESA incidental take statement—and provides for the amount and extent of any take. AR_4279-80. The Forest Service also evaluated the Bat Plan Amendments under NEPA through an EA ("Bat Plan Amendments EA)"), which is in the record. AR_4291-4328. After receiving and considering objections to the amendments, the Forest Service issued a March 17, 2021, DN/FONSI adopting the amendments. AR-4329-4348.

C. BRWA's Project Objections and the Agency's Response

Returning to the Robert's Gap Project, the Forest Service published the Final EA and Draft Decision authorizing the Project in April 2021. *See* AR_1712-1775 (Final EA); AR_1776-1793 (Draft Decision). Pursuant to the mandatory administrative process, 36 C.F.R. § 218.8, a party must file written objections to the decision that set out "how the objector believes the environmental analysis or draft decision specifically violates law, regulation, or policy." *Id*. §218.8(d)(5); AR_1794 (Objection Period Notice setting forth mandatory objection process).

BRWA submitted its objection to the Draft Decision on May 20, 2021. AR_1795-1800 (BRWA Objection). First, BRWA requested that no herbicides be used in the Project. AR_1798. Second, BRWA expressed concern that the Project may pose a danger to endangered and threatened species, including bat species, and requested that the Forest Service engaged in further consultation with the FWS before proceeding with the Project. AR_1798-1799. Last, BRWA expressed concern that the Project may adversely impact recreation in the area. AR_1799.

The Forest Service also held an objection resolution meeting on July 27, 2021, so that the agency could listen to and receive clarification of objector concerns—and determine whether any objection could be resolved. AR_1853-54. BRWA also attended that meeting. AR_1855-1859.

As relevant here, BRWA expressed concern during the objection resolution meeting that the Project would adversely impact the Buffalo River watershed from herbicides and increased runoff and sediment. AR_1855-1856. BRWA also expressed concern that increased sediment resulting from the Project and the Project's herbicides would adversely impact threatened or endangered bat species in the area by reducing the macroinvertebrates that bats forage upon and by disturbing foraging and roosting in the area. AR_1856-1857. Finally, BRWA questioned the Project's cumulative effect on water quality, from "runoff and channeling from roads"—and to air quality, from "[a]irborne particulates" associated with prescribed burning. AR_1857.

The Forest Service responded to BRWA's objections in a written response. AR_1860-1870. As for the Project's potential effect on water quality, the Forest Service noted, among other things, that the Forest Plan's Forest-Wide and Management Area standards, and Project designs would adequately protect water quality. AR_1860 (referencing Chapter II, Parts D-G of Final EA, AR_1739-1740).

As discussed, the Forest Plan includes standards that are designed to protect the Forest's watershed, including, among other things, designated wild and scenic rivers such as the Buffalo National River. *See* AR_0161-0163 (Forest-Wide Standards) and AR_0175 (Management Area Standards). The Project's specific designs, moreover, protect areas such as karst landscapes which feature caves, underground streams, and sinkholes that provide for rapid transport of groundwater with minimal filtration. AR_1862. To protect these sites, the Project's design criteria include buffers around the sites where herbicides cannot be used and require that herbicides containing concentrated chemicals be handled and mixed outside of karst sites. *Id*.

The Forest Service also responded to BRWA's concerns about the Project's potential effect on bat species, explaining that "the project record discloses the potential effects to species,

including macroinvertebrates, which provides the foundation for determining the potential effects to bats foraging on aquatic insects." AR_1865. Any direct risks to dwelling bats from prescribed fire or other Project activity, the Service also explained, were expected to be largely beneficial to the foraging habitat of bat species. AR_1866. The Forest Service added that the Project creates habitat diversity across the area that would provide benefit to bat roosting and foraging. *Id*. And the Forest Service explained that the Bat Plan Amendments—which the Project must adhere to—adequately protect Indiana bat roosting habitat, such as snags (standing dead trees) that provide cover. AR_1867.

D. Project Water Quality Monitoring and Indiana Bat Maternity Colony

During the July 27, 2021 objection resolution meeting, another party (Joseph Morgan), requested that the Forest Service include water quality monitoring during Project implementation to assure tourists and residents. AR_1855. Based on that request, the Forest Service informed BRWA in the agency's August 5, 2021 objection response that the agency would be including in the final decision water quality monitoring during Project implementation. *Id*.

In addition, an Indiana bat maternity colony was discovered in the Project area in July 2021, after the Final EA was issued. AR_1905. The Forest Service informed BRWA in its August 5, 2021 objection response letter that the Bat Plan Amendment's "protective measures" finalized in March 2021 would also be part of the final decision. AR_1869.

BRWA responded in an August 23, 2021 email, acknowledging the additions that the agency intended to make to address the concerns expressed by Mr. Morgan, and that it (BRWA) was "pleased to see" that the agency agreed "to include water quality monitoring as well as protective measures to preserve the Indiana bat maternal colony" in the decision approving the Project. AR_1896.

E. Project's Final Decision Notice/FONSI

On October 27, 2021, the Forest Service issued the Project's DN/FONSI adopting Alternative 3 with certain modifications. AR_1897-1914. As to the water quality monitoring, the Forest Service agreed to establish quarterly water quality monitoring that would include baseline sampling and measuring of any change in turbidity (which is related to the amount of sediment moving in the water), pH (to measure acidity/alkalinity of the water), conductivity (which is related to the amount of impurities in the water), and temperature, beginning in the Fall of 2021. AR_1905. Such monitoring would continue until one year after the Project's ground disturbing activities are complete, AR_1905, thus addressing Mr. Morgan's request. The Forest Service also delayed ground disturbing vegetation management until September 1, 2022, so that it could collect baseline data. *Id*. Though Mr. Morgan did not specifically request the collection of baseline (or pre-implementation) data as part of his request for water monitoring, that was included in the decision to respond to additional input from another member of the public (Mr. Larson) after the close of the objection process. AR-2585-2587 (Mr. Larson's letter and District Ranger's email to staff directing incorporation of Mr. Larson's suggestions).

The DN/FONSI for the Project also incorporated the Bat Plan Amendments into the site-specific design criteria for the Project to protect the Indiana bat maternity colony that was found in the Project area. AR_1903-1904 (incorporating FW 163 standards, and two protective measures permitted by the BiOp and standards, as applicable site-specific design criteria).

III. AMENDED COMPLAINT

In Counts One, Two, and Three of the Amended Complaint, BRWA asserts that the Forest Service's DN/FONSI was "arbitrary and capricious" under Section 706(2)(A) of the APA and NEPA. 5 U.S.C. 706(2)(A). Am. Compl. ¶¶ 55-65, ECF No. 15. BRWA asserts that the Service

failed to take a "hard look" at the Project's effect on the Buffalo National River, water quality in the area, and Indiana bat. *Id*. BRWA does not assert in its summary judgment brief that the Forest Service failed to take a "hard look" at the Project's impact on the Indiana bat. *See* Pls.' Mem. at 22-32. BRWA has thus abandoned in briefing this aspect of the Amended Complaint.

Count Four of the Amended Complaint asserts that the agency failed to provide an opportunity for public participation in the DN/FONSI. Am. Compl. ¶¶ 66-69, ECF No. 15.

Count Five of the Amended Complaint asserts the Forest Service relied on outdated science in evaluating the potential health risks of herbicide chemicals. *Id*. ¶¶ 70-74. BRWA has now abandoned Count Five of the Amended Complaint. *See* Pls.' Mem. 10 n.3.

In Counts Six and Seven, BRWA asserts that the Forest Service violated NEPA and acted arbitrarily and capriciously under Section 706(2)(A) of the APA in not preparing a Supplemental EA or EIS regarding the Indiana bat maternity colony and to consider the Project's impact on baseline water quality. Am. Compl. ¶¶ 75-84, ECF No. 15. BRWA also asserts that these alleged violations constitute a so-called failure to act that it asserts is reviewable under Section 706(1) of the APA, 5 U.S.C. § 706(1). *Id*.

Last, in Count Eight, BRWA asserts that the Service acted arbitrarily and capriciously under Section 706(2)(A) of the APA in preparing an EA, rather than an EIS. *Id*. ¶¶ 85-89.

ARGUMENT

I. BRWA Waived and Forfeited the Arguments in Counts One-Three

In seeking summary judgment regarding the "hard look claims" presented in Counts One, Two and Three of the Amended Complaint, BRWA argues that that the Forest Service [1] ignored the Project's potential effect on the Buffalo National River and its status as a Wild and Scenic River because the river was not specifically discussed in the EA; [2] ignored the potential effect

of Project herbicides because it failed to disclose in the EA that the agency had not used herbicides in 40 years in the area; and [3] failed to determine current water quality in the watershed because it did not conduct project-specific baseline water quality sampling prior to approving the Project. *See* Pls.' Mem. 21-32. However, because BRWA included none of these concerns in its public comments, Project objections, *see* AR_1795-1800 (BRWA Objection), or during the objection resolution meeting, *see* AR_1855-58 (Meeting Notes), they have been both waived and forfeited for failure to exhaust administrative remedies. The Court should thus not consider them.

While related, exhaustion and waiver are two separate doctrines. *See Alliance for the Wild Rockies v. Petrick*, 68 F. 4th 475, 488 (9th Cir. 2023). "[A]bsent exceptional circumstances, failure to raise arguments before an agency" waives a litigant's "rights to make those arguments in court." *Id*. at 487-88. In addition, a litigant must raise the same issues during the administrative objection process. Failure to do so constitutes a failure to exhaust administrative remedies and bars a party from raising the issue in litigation. *Degnan v. Burwell*, 765 F.3d 805, 808 (8th Cir. 2014).

Regarding waiver, the Supreme Court has made clear that 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) (alterations in original) (quoting *Vt. Yankee Nuclear Power Corp.*, 435 U.S. at 553.). Failure to do so results in waiver. *Id*. (recognizing plaintiff "forfeited" objection not raised before agency).

Regarding exhaustion, Congress has specifically mandated exhaustion of administrative remedies for decisions of the Department of Agriculture. 7 U.S.C. § 6912(e) (requiring that "a

person shall exhaust all administrative appeal procedures. . . before the person may bring an action in a court…"). The exhaustion provision of 7 U.S.C. § 6912(e) is a statutory requirement that must be met except in cases raising collateral constitutional concerns, which are not present here. *McBride Cotton & Cattle Corp. v. Veneman*, 290 F.3d 973, 980 (Ninth Cir. 2002) ("Exhaustion is, however, a requirement of § 6912(e) which the plaintiffs failed to meet.").

The Forest Service's administrative appeal procedures, which take the form of a predecisional objection process, are set forth in 36 C.F.R. Part 218. Statute and Forest Service regulation thus both insist on administrative exhaustion before a claim can be brought in district court. *See* 7 U.S.C. § 6912(e) ("a person shall exhaust all administrative appeal procedures established by the Secretary"); 36 C.F.R. § 218.14 (reiterating Section 6912(e) statutory exhaustion requirement). *See also Forest Guardians v. U.S. Forest Serv*., 641 F.3d 423, 431 (10th Cir. 2011) (recognizing that Plaintiff must exhaust under 7 U.S.C. § 6912(e) before bringing claims in federal district court); *Earth Island Inst. v. U.S. Forest Serv*., 87 F.4th 1054, 1062-64 (9th Cir. 2023) (organization waived argument that that agency did not consider by failing to raise that in its objection to project).[3]

BRWA concedes that it was required to exhaust its administrative remedies under the Forest Service's regulations to invoke the Court's jurisdiction but claims that it did so by

[3] *See also Native Ecosystems Council v. Kimbell*, No. CV 04-127-M-DWM, 2006 WL 8430971, at *10-11 (D. Mont. Aug. 29, 2006) (recognizing that party may not pursue claims that were not timely and properly raised during agency's mandatory administrative process); *Ohio Envtl. Council v. U.S. Forest Serv*. No. 2-21-cv-04380, 2023 WL 2712454, at *9-11 (S.D. Ohio March 30, 2023) ("A failure to raise properly an issue during the Forest Service's mandatory [administrative] process deprives the Forest Service of the opportunity to consider the concern during the administrative process and, therefore, waives judicial review of that issue"), *Native Ecosystems Council v. Lannom*, 598 F.Supp.3d 957, 965-68 (D. Mont. 2022) (similarly finding waiver of arguments that were not in project objections).

submitting "a valid comment and valid objection." *See* Pls.' Mem. 6-7. But BRWA cannot satisfy the exhaustion obligation by simply filing an objection (or comments); its objection must describe with particularity "how the objector believes the environmental analysis or draft decision specifically violates law, regulation, or policy." 36 C.F.R § 218.8(d)(5). *See also Kleissler v. U.S. Forest Serv.*, 183 F.3d 196, 202 (3d Cir. 1999) ("[C]laims raised at the administrative appeal and in the federal complaint must be so similar that the district court can ascertain that the agency was on notice of, and had an opportunity to consider and decide, the *same* claims now raised in federal court."). Here BRWA's objections fall well short of the mark, failing to raise its concerns that the EA was deficient because it failed to specifically discuss the Project's effect on the Buffalo National River, failed to express any concern that the agency had not used herbicides in the area in 40 years, or that the Project EA was deficient because the agency had not conducted baseline water quality sampling. Those claims must thus be dismissed.

Indeed, BRWA's failure to properly raise its concerns with the Project's EA in its objections also interferes with the Court's review because it prevents the agency from compiling an administrative record for review that could respond to BRWA's newly minted arguments. *See Weinberger v. Salfi*, 422 U.S. 749, 765 (1975) (noting that administrative exhaustion is "generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review."). In short, BRWA should not be permitted to now make arguments that the agency was unable to respond to during its objection process. This is particularly so here, where the Forest Service held an objection resolution meeting to seek clarification of objections and to resolve objections raised, if possible.

Nor can BRWA rely on its Freedom of Information Act requests to excuse its failure to make a timely and proper objection under the Forest Service's mandatory administrative process. *See* Pls.' Mem. 19-20. The Forest Service provided BRWA and the public the Final EA and Draft Decision in advance of the agency's mandatory objection process. *See* AR_1712-1775 (Final EA); AR_1776-1793 (Draft Decision), and AR_1794 (Objection Period Legal Notice). The alleged gaps in the EA that BRWA now challenges were clear at that time, and BRWA was obligated, in turn, to include its concerns in its written objections so that the agency could address them in its written response and the administrative record for the Court to evaluate.

Furthermore, it is BRWA that asserts that the Court's review of the "hard look" claims is limited to the four corners of the EA. *See* Pls.' Mem. 14 (arguing, incorrectly, that judicial review is limited to the four corners of the EA). That position is contrary to this Circuit's decision in *Sierra Club*, which expressly held that review is not limited to the four corners of the EA. See *Sierra Club*, 46 F.3d at 840 (recognizing that, because "an EA cannot be both concise and brief and provide detailed answers for every question," review proceeds on the entire record). But BRWA cannot have it both ways in its briefing. To the extent BRWA believed the EA had gaps on the questions it now seeks to raise, it was obligated to timely raise them in its objections.

II. Even if Not Waived and Forfeited, Counts One-Three Fail on the Merits

Even if BRWA's "hard look" claims could proceed to the merits, its challenge to the DN/FONSI in Counts One-Three still fail on the merits under the APA's standard of review. As discussed, the APA's arbitrary and capricious standard of review is narrow and gives the agency a high degree of deference. *Sierra Club v. E.P.A.*, 252 F.3d at 947. The Court must "affirm" the DN/FONSI under that deferential standard if it determines that the Forest Service took the

requisite "'hard look' at the [P]roject, identified the relevant areas of environmental concern, and made a convincing case for its FONSI." *Sierra Club*, 46 F.3d at 838-39.

A. The Forest Service Took the Requisite "Hard Look" at the Project's Potential Effects on the Entire Watershed, Including the Buffalo National River

The Forest Service took the requisite "hard look" at the Project's potential effect on water quality on the Buffalo National River, and determined after modeling, review of the Forest Plan standards, and developing the Project's specific design criteria, that the river was sufficiently protected. BRWA ignores the record that supports the agency's analysis and determination.

The record shows that the Project's EA evaluated each of the alternatives' potential effect on water quality in the analysis area. AR_1745-1753 (EA Water Quality Analysis); AR_1918-1927 (Draft EA Water Quality Analysis). That analysis included potential effects on water quality for all the waterways in or downstream of the Project area, including the "Buffalo National River, [that] flows north through the Upper Buffalo Wilderness in the eastern part of the project area and becomes the Buffalo National River as it exits the National Forest" *See* AR_1746 (Robert's Gap Watershed Map).

To assess the Project's effect on sediment in the watershed, the Forest Service used the WRACE model. *See* AR_1928-1974. (WRACE Model Information). The model is described in the EA and included in the record. AR-1749-1752 (EA), 1928-1974 (model results). Watershed current conditions are also disclosed in Table 21 of the EA. AR-1752. While the resulting analysis shown there discloses the expected change in sediment at the watershed level, and not by a particular stream or waterway, the downstream impact of sediment on the Buffalo River was considered. Based on the analysis in the model, the Service concluded that the direct and indirect impacts of the Project are not likely to contribute to degradation of the current water quality. AR_1750.

The Park Service, which manages the Buffalo National River, reviewed the Forest Service's draft EA, and likewise "determined that none of the proposed actions [under the Project] have the potential to significantly impact resources of [the Buffalo National River]. AR_1392.

BRWA's critique of the Forest Service's analysis of water quality impacts also ignores the protective water quality standards for the Buffalo National River contained in the Forest Plan and evaluated in the Forest Plan EIS. As noted above, the Forest Plan for the Ozark-St. Francis contains standards designed to protect the Forest's watershed, including designated wild and scenic rivers such as the Buffalo National River. *See* AR_0099-100 (noting desired conditions for area), AR_0175 (setting forth management activity standards for scenic areas such as Buffalo National River), and AR_0702-0703 (noting that Buffalo National River is among wild and scenic rivers affected by Forest Plan management activities). The Forest Service developed these standards in its EIS for the Forest Plan. AR_0702-0703 (FEIS discussing Buffalo River)

The Robert's Gap Project follows these Forest Plan standards, and rather than re-evaluating the impacts of those standards anew from whole cloth for each project, the Robert's Gap EA tiers to analysis contained in the Forest Plan EIS. AR_1860 (referencing Chapter II, Parts D-G of Final EA, AR_1739-1740). This is perfectly consistent with NEPA, which "encourages agencies to tier a subsequent [EA] to an EIS to save money and time by avoiding repetitive inquiries, 40 C.F.R. § 1502.20, and to help the agency 'focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe.'" *Ark. Wildlife Fed. v. U.S. Army Corp. of Eng'rs*, 431 F.3d 1096, 1101 (8th Cir. 2005) (quoting 40 C.F.R. § 1508.28.).

Tellingly, BRWA challenges neither the Forest Plan standards for protecting the Buffalo National River nor the EIS prepared for the Forest Plan. BRWA thus concedes that the agency's implementation of those standards fully complies with NEPA.

BRWA seems to suggest that the Forest Service acted arbitrarily and capriciously in tiering to the Forest Plan EIS, claiming that the Ninth Circuit's *Klamath* decision supports the proposition that an agency cannot tier to a programmatic EIS. Pls.' Mem. 14. But *Klamath* is inapposite. There the agency was attempting to tier to a non-NEPA document. *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt*., 387 F.3d 989, 998 (9th Cir. 2004). Here, the Forest Service tiered to an EIS, as NEPA encourages. Indeed, the Ninth Circuit there noted that the CEQ's implementing regulations permit an agency to "'incorporat[e]'" "broader environmental impact statements" in narrower NEPA documents, like an EA. *Id*. at 997 (citing 40 C.F.R. § 1508.28).

Finally, the Project includes specific design features that protect areas such as karst landscapes found in the Buffalo National River. AR_1862. In particular, the Project's design features include buffers around karst sites where herbicides cannot be used and concentrated chemicals cannot be handled or mixed. *Id*. Also, prescribed burning is the only vegetation treatment proposed in the Wild and Scenic River corridor of the watershed that includes the Buffalo National River. AR_1730 (identifying type of treatment and chemical). Herbicides will not be used in the Wild and Scenic River corridor of the watershed that includes the Buffalo National River. Therefore, the proposed activities under the Project will not include the use of herbicides adjacent to the portion of the Buffalo River on National Forest ownership.

The administrative record thus shows that the Forest Service fully assessed the Project's potential effect on the Buffalo National River. BRWA ignores the record above, claiming that the

Court's review is limited to the four corners of the EA. *See* Pls.' Mem. at 25-27 (limiting its critique to the water quality analysis to just the EA). BRWA argues that the Project's EA only "mention[s] the Buffalo National River once" and otherwise fails to specifically mention the river in its "analy[sis] or disclose the Project's potential impacts to that precious resource, nor its designation as a Wild and Scenic River." *Id*. at 25. But an EA is a "concise public document" that serves to "[b]riefly provide sufficient evidence and analysis for determining whether to prepare" an EIS or FONSI. 40 C.F.R. § 1508.9(a). The Eighth Circuit has thus recognized that "[a]n EA cannot be both concise and brief and provide detailed answers for every question" that is presented in a proposed action. *Sierra Club*, 46 F.3d at 840. The Eighth Circuit has further recognized that an agency need not set forth its conclusions regarding a potential environmental impact "in a single explicit sentence" in the administrative record. *Mid States Coal. For Progress v. Surface Transp. Bd*., 345 F.3d 520, 535 (8th Cir. 2003). The record instead includes the entire administrative record before the Court, not the EA—or any other particular document in the record.

BRWA relies on the Ninth Circuit's decision in *Blue Mountains Biodiversity Project* in seeking to cabin the Court's review to the EA. Pls.' Mem. 14. But there the Ninth Circuit ruled that the agency did not support its decision in the "administrative record." *Blue Mountain Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998). That non-binding decision is thus distinguishable from the case and record here that contains that support.

The Ninth Circuit also held there that "[t]he EA [contained] virtually no references to any material in support of or in opposition to its conclusions. That is where the [agency's] defense of its position must be found." *Id*. *Blue Mountains Biodiversity Project* thus echoes *Sierra Club* in recognizing that it is the record that includes the "material" supporting a decision and FONSI,

not just the EA. And like this Circuit's *Sierra Club* decision, *Blue Mountains Biodiversity Project* recognized that an EA is designed to be a "concise public document" and to "briefly" set forth the agency's environmental analysis. *Id*. (citing 40 C.F.R. § 1508.9(a)). An EA thus cannot and need not address every issue or area in detail. Here, the record plainly documents that the Forest Service took the needed "hard look" at the Project's impacts on the Buffalo National River.

B. The Forest Service Also Took a "Hard Look" at the Project Herbicides

BRWA also complains that that the "EA did not disclose that the Forest Service had not applied herbicides within the Project area for the past 40 years." Pls.' Mem. 3. It is unclear from BRWA's briefing whether it intends to argue that the Forest Service failed to properly assess the environmental impacts of Project herbicides. If that is BRWA's argument, it lacks merit.

As an initial matter, the Forest Service's January 29, 2018 scoping letter made clear from the onset of the Project that "little forest management [had] occurred in the project area" in the "last 25 years." AR_1210. BRWA thus knew that herbicides, which would be used only in those management activities, had not taken place for a long time. And in any event, NEPA does not require that the agency specifically identify when an agency last used a particular treatment.

If BRWA intends to argue that the Forest Service failed to take a "hard look" at the potential environmental impact of herbicides, that, too, is unavailing. The EA lists the EPA-approved herbicides that would be applied, by treatment and chemical, and contains a risk assessment. AR_ 1730 (identifying type of treatment and chemical); AR_1762-1770 (herbicide risk assessment). The Project also includes specific design features to protect unique sensitive areas such as karst landscapes, by restricting the handling and mixing of chemicals contained in herbicides around such sites. AR_1862. And again, herbicides would also be applied in accordance with the Forest Plan's standards that were fully evaluated in the FEIS supporting the

Plan. *See* AR_0154-0155 (Forest Plan Forest Wide Standards for herbicides and herbicide application methods), AR_0157 (Forest Wide Standards for activities undertaken around Karst features, including the use of herbicides). The Forest Service thus fully assessed the potential environmental impact of herbicide use and implemented measures to minimize any potential adverse impact that chemical herbicides may have on the Project area. That is all that NEPA requires. It is puzzling why BRWA would even continue to press this point in its summary judgment briefing, given that it decided in briefing to abandon Count Five, where it had thought to argue that the Forest Service failed to properly consider the effect of Project herbicides.

C. Baseline Water Quality Sampling Was Unnecessary, And Has Now Been Done, Rendering BRWA's Claim Both Harmless Error and Moot

Last, BRWA asserts that the Forest Service was required to undertake baseline water quality sampling in evaluating the Project's effects on the watershed. *See* Pls.' Mem. 28-32. This argument, which is also made as part of the failure to supplement claims in Counts Six and Seven, similarly fails. The cases BRWA relies on in its briefing undercut its position that the agency was required to collect baseline sampling before the Project. *See* Pls.' Mem. 14-15, 30-31.

Great Basin Resource Watch recognizes that "[a]n agency need not conduct measurements of actual baseline conditions in every situation." *Great Basin Res. Watch v. Bureau of Land Mgmt*., 844 F.3d 1095, 1101 (9th Cir. 2016). An agency can instead rely upon reasonable alternative monitoring methods, so long as they are explained in the record. *Id*. Here, the record shows that, for years, the Forest Service conducted project-specific water quality monitoring for herbicides. AR_1975-1987 (Herbicide Monitoring Policy and Supporting Historical Results). Because the results of that monitoring consistently revealed no contamination from the chemical application of herbicides above EPA-concern levels, the Forest

Service originally decided not to undertake water quality sampling monitoring for this Project because such monitoring would likely lead to the same results. There was nothing arbitrary and capricious about the Forest Service's original determination, which was both reasonable and supported by the record.

Indeed, "NEPA regulations require agencies to expend the bulk of their efforts on the most pressing environmental issues" and to direct the "expenditure of agency resources" to those areas. *Mid States Coal. For Progress*, 345 F.3d at 541. The Forest Service thus acted according to that directive in NEPA in not expending further resources and in reaching a conclusion that would reveal nothing of environmental concern. The agency also reasonably concluded that the Forest Plan standards and management practices that were reviewed in the Forest Plan's FEIS were adequate to protect water quality in the area. AR_1975-1987 (Herbicide Monitoring Policy).

BRWA's cases also recognize that there must be some evidence of contamination for further monitoring and baseline sampling to even be at issue. *See Gifford Pinchot Task Force v. Perez*, No. 03:13-cv-00810-HZ, 2014 WL 3019165, at *33 (D. Or. July 3, 2014) (baseline sampling is necessary to mitigate harm). The Forest Service's historical data revealed no contamination above EPA-concern levels, rendering such cases inapposite to the situation here.

Notwithstanding the reasonableness of its approach, moreover, the Forest Service, in response to public comment, agreed in the DN/FONSI to conduct baseline sampling and establish quarterly water monitoring. AR_1905. The Forest Service also delayed ground disturbing vegetation management until September 1, 2022, so that it could collect background data before the Project begins. *Id*. Even if the Court were to find that the Forest Service's initial determination not to conduct further baseline water quality monitoring to be arbitrary and

capricious, therefore, any such error is now, at best, harmless error. The APA makes clear that this Court must "review the whole record . . . and due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706. Thus, the "prejudicial error" language in Section 706, which provides for review, generally, requires the reviewing court in an APA to apply the "harmless-error rule that courts ordinarily apply in civil cases." *Shineski v. Sanders*, 556 U.S. 396, 406 (2009). Applying that rule here provides yet another reason to reject BRWA's argument.

The Forest Service has also now completed the testing of the samples. *See* Declaration of Richard Monk ("Monk Decl."), ¶¶ 3-5. The Forest Service submitted these results to a certified laboratory and received the results in a report dated May 30, 2023. *Id*. ¶ 4. No herbicide contamination was detected at the locations of the testing. *Id*. BRWA's claim is thus now moot, as the baseline testing is now complete and reaffirms the agency's initial determination that the sampling was not likely to identify anything of environmental concern in the watershed.

Federal Defendants are therefore entitled to summary judgment on Counts One-Three because of BRWA's waiver or on the merits.

III. The Failure to Supplement Claims in Counts Six and Seven Fail

Federal Defendants are similarly entitled to summary judgment on the failure to supplement claims presented in Counts Six and Seven. Neither the discovery of the Indiana bat maternity colony, nor the baseline water quality sampling that the Forest Service has now completed in the area, triggered a duty under NEPA to supplement the EA. Pls.' Mem. 32-47.

A. The Bat Plan Amendments Considered the Indiana Bat Maternity Colony

The obligation to supplement a NEPA analysis is not triggered "every time new information comes to light." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 373 (1989). "To require otherwise would render agency decisionmaking intractable, always awaiting updated

information only to find the new information outdated by the time a decision is made." *Id*. The duty to supplement is instead only triggered when new information arises that is "substantial" and presents a "seriously different picture of the environmental impact" of the action at issue. *Ark. Wildlife Fed*., 431 F.3d at 1102 (internal quote and citation omitted). "To determine whether a change is substantial [courts] look at the possible environmental consequences not previously considered." *Id*. (citng *Marsh*, 490 U.S. at 374). BRWA's claims fail under that standard.

To address the discovery of the Indiana bat maternity colony after the EA, the Forest Service incorporated the Bat Plan Amendment's conservation measures in the DN/FONSI. AR_1903-1904. There was nothing arbitrary and capricious about its decision not to supplement the EA. The BA that initiated the amendments recognized that the Forest Service would need to undertake resource management activities like those in the Project in the coming years to fulfill Forest Plan goals, and to restore forest health by increasing resiliency to insect, disease, and wildfire. *See* AR_4205; AR_4212-4219. Thus, projects like Robert's Gap were front of mind when the agency's interdisciplinary team, partner groups, and the public developed and implemented the Plan amendments to address the potential adverse impact that those management activities may have on the Indiana bat, including a bat maternity colony, should one be found. AR_4202.

True, at the time the Forest Service completed the EA for the Bat Plan Amendment, Forest Service monitoring had not found any maternity sites. But such sites were found to the south, east, and west of the Forest. *See* AR_4211; AR_4265-4266; and AR_4301. The Forest Service thus recognized that those maternity sites may also be found on the Forest. The Forest Service adopted the amendments to ensure that "the proper protective measures [for a maternity

site] are in place and will not delay project implementation if one is found," as here. AR_4301-4302.

Indeed, the Court need look no further than the amendments themselves to understand that the amendments were specifically adopted to protect a maternity colony. This is evidenced by the language of FW-163, which states that "[i]f Indiana bat *maternity trees* are discovered within the Forests, those trees and other trees used by the colony would be protected." AR_4331 (emphasis added). To protect such colonies, FW-163 also provides that "[n]o tree falling [may] occur [under a project] within 150 feet of known *maternity trees* unless their cutting or modification is needed to protect public or employee safety." *Id* (emphasis added). And during the maternity period for the Indiana bat, which runs from April 1 to August 15, the amendments also require that the agency protect potential maternity colonies from management activities. *Id*.

Nowhere in BRWA's briefing does it even acknowledge Bat Plan Amendments or that the amendments were adopted precisely to address the situation here—where a maternity colony is found in a project area. BRWA instead claims that the mere fact that the maternity colony was discovered after the Bat Plan Amendments were adopted means that the agency was obligated to prepare a supplemental NEPA analysis. *See e.g.* Pls.' Mem. 34 ("This discovery *alone* warrants additional NEPA analysis.") (emphasis added). But BRWA's position is contrary to the law, which recognizes that an agency need only supplement when new information arises that is "substantial" and presents a "seriously different picture of the environmental impact" of the action at issue. *Ark. Wildlife Fed*., 431 F.3d at 1102 (internal quote and citation omitted). "To determine whether a change is substantial [courts] look at the possible environmental consequences not previously considered." *Id*. (citng *Marsh*, 490 U.S. at 374). In this case, both the Forest Service and the FWS considered the impact that the management activities conducted

here would have on a maternity colony and the Forest Service adopted plan standards to be employed in the event of such a discovery. Thus, the mere discovery of the maternity colony in the Project area, alone, was not a "substantial" change triggering a duty to supplement, as BRWA repeatedly contends.

There is also nothing arbitrary and capricious about the Forest Service's decision to tier to the Bat Plan Amendments EA in the DN/FONSI, rather than supplement the Robert's Gap Project EA. Such tiering is an appropriate use of agency resources and one that NEPA encourages in the CEQ implementing regulations. *See Id.* at 1104 (recognizing that agency did not act arbitrarily or capriciously in not supplementing an EA that was "properly tiered" to agency's earlier environmental analysis). As noted above, the amendments were fully analyzed under NEPA through an EA. AR_4291-4328. The Forest Service need not redo that analysis every time a new maternity colony is found. Again, the agency amendments were put in place to ensure that "the proper protective measures [for a maternity site] are in place and will not delay project implementation if one is found." AR_4301-4302. If the Court were to accept BRWA's theory, the efficiencies intended by the amendments and the tiering NEPA encourages would be nullified.

BRWA argues that "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." Pls.' Mem. 34. But elsewhere in its brief, BRWA criticizes the agency for the internal discussions in the record that led to the decision to incorporate the Bat Plan Amendments EA, rather than supplement the Robert's Gap EA. *Id*. at 39-41. These arguments are internally inconsistent—BRWA cannot claim there is no evidence in the record while simultaneously critiquing the evidence in the record. In any event, even if BRWA intends

to suggest that the Forest Service's decision not to supplement the Project EA was somehow unclear in the record, that is refuted by the record and BRWA's contemporaneous understandings.

During the July 27, 2021 objection resolution meeting, the Forest Service specifically addressed the discovery of the Indiana bat maternity colony, and advised BRWA and other attendees that the presence of a colony was not "new information" that triggered a supplemental environmental analysis "because the scenario was anticipated and protective measures for maternity colonies were included in the recent" Bat Plan Amendments EA. AR_1867. That announcement was followed by the Forest Service's August 5, 2021 objection response letter, where the Forest Service again informed BRWA that the agency would be tiering to the Bat Plan Amendments EA in the DN/FONSI to address the discovery of the maternity colony, rather than supplementing the EA. AR_1869. Indeed, at that time, BRWA indicated it was "pleased to see" that the Service agreed to include those measures "to preserve the Indiana bat maternal colony." AR_1896. True, BRWA later reversed course in its May 24, 2022 letter, demanding that the agency supplement the Robert's Gap EA. But even then BRWA acknowledged that the agency's decision not to supplement was made because the discovery of the maternity colony was "not a significant change" that triggered supplementation under NEPA's requirements. AR_8647.

Lastly, BRWA contends that the two other protective measures the Forest Service adopted in the DN/FONSI to protect the maternity colony from the Project's management activities went beyond the BiOp and Plan standard implemented in the amendments and thus triggered a duty to supplement. Pls.' Mem. 40-41. This, too, is incorrect and flatly contradicted by the record.

The first protective measure, which provided for a two-month extension of the protections afforded maternity roost trees in FW-163, from August 15 to October 15, was a discretionary measure undertaken pursuant to the FWS's BiOp for the amendments. AR_1905.

The extension was included because site-specific monitoring revealed "emergence counts at the site" after August 15. AR_6627. The FWS's BiOp contemplated that "discretionary activities" may be necessary "to avoid or minimize the adverse effects of a proposed action." AR_4282. The measures "allow overlap between seasonal use designations to account for variable bat use," such as the post-August 15 emergence of the maternity colony that the agency's monitoring detected. AR_4283. Thus, the measure stemmed directly from the BiOp and ESA consultation.

"To protect other potential roost trees," the second protective measure included in the DN/FONSI, created "a protection zone encompassing the colony's known foraging and maternity roost tree[.]" AR_1905. "Within this area, snags over 9" [diameter at breast height] that have bat roost characteristics, such as peeling bark, cracks, or cavities will [be removed only] during the hibernation season (Dec. 1 – March 14) or after an emergency survey confirms bats are not roosting in the tree before removal between March 15th and November 30th." *Id*. This was a clarification of FW-163, which states that, "[i]f Indiana bat maternity trees are discovered within the Forests, those trees, *and other* trees *used by the colony* would be protected." AR_4331(emphasis added). The measure thus interprets and defines the colony's known foraging and maternity roost trees so that they would be protected under the Bat Plan Amendments. AR_1905.

Neither protective measure was undertaken separate from the FWS's BiOp or the Bat Amendments. But even if either measure were separate, both further reduced the effect of the Project's management activities on the colony. And such "'a reduction in the environmental impact is less likely to be considered a substantial change relevant to environmental concerns than would be an increase in the environmental impact.'" *Ark. Wildlife Fed.,* 431 F.3d at 1104 (quoting *Friends of the Bow v. Thompson*, 124 F.3d 1210, 1218-19 (10th Cir. 1997). If anything,

therefore, the agency's inclusion of the two additional protective measures further diminish any need to prepare a supplemental EA in response to the discovery of the maternity colony.

B. The Forest Service Is Under No Obligation to Supplement the EA to Account for the Water Sampling It Has Now Done

The Forest Service is similarly not required to supplement the Robert's Gap EA to address the baseline water quality data that the Forest Service agreed to collect in the DN/FONSI. Pls.' Mem. 46-47. The Forest Service has now conducted the sampling and found no herbicide contamination at the locations tested. Monk Decl. ¶¶ 4-5, Ex. A to Monk Decl. (testing results). The testing thus reveals no new, "substantial" information that would require a supplemental EA. Federal Defendants are thus entitled to summary judgment on Counts Six and Seven.

C. Section 706(1) Does Not Apply to Any of BRWA's Claims

Finally, Section 706(1) of the APA, 5 U.S.C. § 706(1), does not change that result. It does not even apply to BRWA's failure to supplement claims, as BRWA asserts in briefing. Pls.' Mem. 32. A failure to act claim under Section 706(1) is like a request for a mandamus remedy and can only proceed where there is a "specific, unequivocal command" and when "ordering . . . a precise, definite act . . . about which [an official] has no discretion whatever." *Norton v. S. Utah Wilderness All.* ("SUWA"), 542 U.S. 55, 62-63 (2004) (alternations in original) (internal quotes and citations omitted). Section 706(1) applies to agency action that is "compelled by law to [occur] within a certain period." *Id.* at 65. Courts are not empowered under Section 706(1) of the APA to order that agencies comply with broad "statutory mandates" such as NEPA. *Id.* at 66-67. "The principal purpose of the APA limitations" in Section 706(1) "is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." *Id.*

The Court in *SUWA* thus held that a failure to supplement claim is governed by Section 706(2)(A)'s arbitrary or capricious standard, not Section 706(1)'s mandamus-like standard. *Id.*

And the Eighth Circuit has followed *SUWA* in also recognizing that a NEPA failure to supplement claim is properly reviewed under Section 706(2)(A). *See Ark. Wildlife Fed.,* 431 F.3d at 1104 (evaluating failure to supplement claim under Section 706(2)(A) and concluding that agency "did not act arbitrarily or capriciously in refusing to prepare" supplemental EIS based on new information). The Court should not be misled by BRWA's argument to the contrary.

For the reasons set forth above Federal Defendants are entitled to summary judgment on Counts Six and Seven.

IV. Count Four Fails Because BRWA Was Given Ample Opportunity to Comment

BRWA next asserts in support of Claim Four, that "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." Pls.' Mem. 47. All these arguments fail.

As for the bat, BRWA asserts that 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." *Id*. at 49. But this is no more than a reframing of BRWA's argument that the discovery constituted significant new information requiring a supplemental EA. "'The public comment process . . . is not essential every time new information comes to light after [a NEPA document] is prepared.'" *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000) (first alteration in original) (quoting *California v. Watt*, 683 F.2d 1253, 1269 (9th Cir. 1982)). Just as an obligation to prepare a

supplemental NEPA document every time any new information came to light would render the ENPA process "intractable," *Marsh*, 490 U.S. at 373, so too would an obligation to re-open the public comment process every time changes were made between a draft and final Decision Notice. Outside of supplementation, moreover, an agency can make modifications to a project without further public the comment where such modifications are "'within the spectrum'" of the alternatives already considered. *Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836, 854 (9th Cir. 2013) (quoting *Dubois v. U.S. Dep't of Agric*., 102 F.3d 1273, 1291-93 (1st Cir. 1996)). The Bat Plan Amendments changed none of the alternatives considered in the Project's EA. Lastly, the Forest Service's DN/FONSI simply incorporated the Bat Plan Amendments to protect the site, and two additional protective measures that protected the site. BRWA had ample opportunity to comment on the Bat Plan Amendment EA when it was published for public comment.

As for the baseline water quality data, BRWA complains that it was not permitted to participate in determining the agency's "baseline data collection" and testing. Pls.' Mem. 29, 50. But even if this claim were not now moot because the Forest Service has now completed the baseline sampling and testing, the Court would not proceed, as BRWA seem to urge, "by dictating to the agency the methods, procedures, and time dimension of the needed inquiry and ordering the results to be reported to the court." *Fed. Power Comm'n v. Transcon Gas Pipe Line Corp*., 423 U.S. 326, 333 (1976). Doing so, would run the risk of "propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency." *SEC v. Chenery Corp*., 332 U.S. 194, 196 (1947). The Court would instead defer to the agency's scientific expertise in developing the appropriate baseline water quality sampling and testing now done.

Dictating agency methods and procedures, as BRWA urges, would run afoul of *Chenery* principles.

BRWA further contends in the Amended Complaint and in briefing that the Forest Service's background sampling is deficient because it tests for chemicals contained in the herbicides, rather than the compound or substance formed during the chemical reactions (metabolism) through enzymes in an organism or cell. Am. Compl., ¶ 48. The Forest Service's Pesticide Manager concluded otherwise, however, determining that, in her scientific judgment, testing for the chemicals used in herbicides is sufficient because many metabolites are not detectable once they break down in water and carbon. AR_2607. The Forest Service has thus fully considered BRWA's methodological approach. The Court should defer to the agency's scientific expertise under the APA's standard of review. *See Baltimore Gas & Electric Co*., 462 U.S. at 103 ("[A] reviewing court must generally be at its most deferential" when examining an agency's "scientific determination" that is "within its area of special expertise").

Federal Defendants are accordingly entitled to summary judgment on Count Four.

V. Count Eight, Which Repeats BRWA's "Hard Look" Arguments, Also Fails

Finally, BRWA asserts in Count Eight of the Amended Complaint and in briefing that the Forest Service was required to prepare an EIS, rather than an EA, in evaluating the Project under NEPA. Pls.' Mem. 53-59. In determining whether an EIS is required, NEPA implementing regulations require the agency to consider the "context" of the proposed action and whether it "significantly" affects the quality of the human environment. 40 C.F.R. § 1508.27. The regulations define "significantly" by reference to ten intensity factors. 40 C.F.R. § 1508.27(b).

A federal agency has considerable discretion in determining whether an EA should lead to an EIS. *Sierra Club*, 46 F.3d at 838. Judicial review of an agency's determination under the

intensity factors is governed by the APA's deferential arbitrary and capricious standard of review, which requires that BRWA show that the FONSI rests on "clear error of judgment." *Sierra Club*, 46 F.3d at 838. The Forest Service's DN/FONSI properly evaluated the "context" and "intensity of the Project, 40 C.F.R. § 1508.27 and reasonably determined that the Project did not significantly impact the environment to warrant an EIS. *See* AR_1911-1913 (FONSI).

In briefing, BRWA does not even attempt to argue that the Project's "context" requires an EIS. Nor does it seek to argue that the Forest Service's determination on any intensity factor was arbitrary and capricious. Rather, it reasserts its claims that the Forest Service failed to take a "hard look" at the proximity of the Project area to the Buffalo River, failed to conduct baseline water sampling, and failed to take a "hard look" at the Indiana bat maternity site that was discovered after the EA. *See* Pls.' Mem. 53-59. And BRWA similarly repeats its argument that the Forest Service failed to 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." *Id*. at 53.

BRWA's "hard look" arguments fail regardless of whether they are framed as in Counts One-Three, or as a basis to argue that the Forest Service was required to prepare an EIS, rather than an EA. The Forest Service fully evaluated the watershed in the area, including the Buffalo National River. The Forest Service also fully evaluated water quality through modeling, historic project-specific monitoring and now Project-specific sampling and testing that detected no contamination from herbicide chemicals in the watershed.

As for the Indiana bat maternity colony, the Forest Service followed the protections required by the Bat Plan Amendments. The Bat Plan Amendments, which were developed in consultation with the FWS, were sufficient to support the EA and FONSI. And lastly, the two

additional protective measures that the Forest Service adopted in the decision flowed from the FWS's BiOp and Forest Plan standards. As explained, they were included to account for seasonal emergence detected during monitoring and to interpret the standards to ensure Indiana bat roost trees are protected.

Thus, for these reasons and the other reasons provided above, the Court should enter summary judgment for the Federal Defendants on Count Eight, which makes no new argument.

CONCLUSION

For all these reasons, the Court should deny BRWA's motion for summary judgment in its entirety and grant judgment for Federal Defendants on all claims.

Respectfully submitted this 20th day of February 2024.

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. 20044-76
Phone: (202) 532-5271
Fax: (202) 305-0275
Email: paul.freeborne@usdoj.gov

Counsel for Federal Defendants