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

BUFFALO RIVER WATERSHED ALLIANCE; ARKANSAS CANOE CLUB; NATIONAL PARKS CONSERVATION ASSOCIATION; and OZARK SOCIETY, Plaintiffs, v. UNITED STATES DEPARTMENT OF AGRICULTURE; UNITED STATES SMALL BUSINESS ADMINISTRATION; TOM VILSACK, in his official capacity as Secretary, United States Department of Agriculture; MARIA CONTRERAS-SWEET, in her official capacity as Administrator, Small Business Administration; VAL DOLCINI, in his official capacity as Administrator, Farm Service Agency; LINDA NEWKIRK, in her official capacity as Arkansas State Executive Director, Farm Service Agency; and LINDA NELSON, in her official capacity as Arkansas District Director, Small Business Administration, Defendants.	)	Civil No. 4:13-cv-0450 DPM

DEFENDANTS' MOTION TO DISSOLVE INJUNCTION

Defendants, the Small Business Administration ("SBA") and the Farm Service Agency ("FSA"), respectfully move this Court to dissolve its injunction prohibiting the Agencies from making any payment on their loan guaranties to Farm Credit Services of Western Arkansas for that bank's loans to C&H Hog Farms, Inc., pending the Agencies' compliance with the National Environmental Policy Act ("NEPA") and the Endangered Species Act ("ESA"). ECF No. 59. The Agencies have now completed new NEPA analysis and consultation under the ESA and submit that continued prospective enforcement of the injunction would not be equitable.

Counsel for Federal Defendants have conferred with counsel for Plaintiffs, who advise that Plaintiffs take no position on this motion. The parties agree that Plaintiffs do not waive any

claim regarding the sufficiency of the NEPA analysis or ESA consultation conducted by the Agencies and reserve the right to bring a new suit challenging those actions.

I. FACTUAL BACKGROUND

In 2012, the SBA and the FSA issued loan guaranties to Farm Credit Services of Western Arkansas to back loans that the bank made to C&H Hog Farms. *See* ECF No. 58 at 3. Plaintiffs brought suit alleging that in issuing the guaranties the Agencies violated NEPA, the ESA, and the Buffalo National River Enabling Act. *See* ECF No. 1.

After considering the parties' cross-motions for summary judgment this Court concluded that the Agencies had violated NEPA and the ESA but not the Buffalo National River Enabling Act. ECF No. 58. The Court entered a permanent injunction enjoining the Agencies "from making any payment on their loan guaranties to Farm Credit Services for that bank's loans to C&H Hog Farms, Inc., pending the Agencies' compliance with the National Environmental Policy Act and the Endangered Species Act." ECF No. 59 at 1-2. The Court set a December 2, 2015 deadline for compliance with both acts, ECF No. 59, which the Court later extended to March 1, 2016, based on an unopposed motion by Defendants, ECF No. 80.

Under NEPA, the Agencies prepared a new Environmental Assessment ("EA"). On the basis of the EA, the Agencies concluded that the continuation of the loan guaranties and operation of the C&H Farm would not have a significant effect on the human environment and therefore preparation of an Environmental Impact Statement was not required. Exhibit 1 (Final EA). On February 18, 2016, the Agencies issued a final Finding of No Significant Impact ("FONSI"). Exhibit 2. Issuance of an FONSI represents completion of the NEPA process. 40 C.F.R. §1501.4(e).

Under the ESA, the Agencies prepared a Biological Assessment ("BA") to address the potential environmental effects of the C&H Hog Farm on federally listed endangered or threatened species and consulted with the United States Fish and Wildlife Service ("FWS"). Exhibit 3. On November 10, 2015, the FWS concurred in the BA's finding that the Agencies'

actions would have no effect, or may affect but are not likely to adversely affect, listed species. Exhibit 4. This concurrence concluded the inter-agency consultation requirements of the ESA. *Id.*

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 60(b) provides that relief from a final judgment is appropriate when "the judgment has been satisfied, released, or discharged," when "applying it prospectively is no longer equitable," Fed. R. Civ. P. 60(b)(5), or for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). The party seeking dissolution of the injunction bears the burden of establishing that dissolution is warranted. *See Horne v. Flores*, 557 U.S. 433, 447 (2009).

III. ARGUMENT

By completing a new NEPA analysis and new ESA consultation within the deadline established by the Court, the Agencies have satisfied the Court's injunction, which prohibited payment on the guaranties pending completion of new analyses under the statutes. ECF No. 59 at 2. Now that new decisions have been made, prospective application of an injunction that was issued on the basis of prior decisions is inequitable. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 160 (2010) (holding it improper for a district court to maintain an injunction against an agency decision as a "prophylactic measure" to guard against a new agency action).

Dissolving the current injunction will not harm Plaintiffs or other parties. Any future challenge to the adequacy of the Agencies' NEPA analysis or ESA consultation with regard to the loan guaranties can, and should, proceed through a new case and will be based on judicial review of a new administrative record. *See, e.g., Minn. Pub. Interest Research Group v. Butz*, 498 F.2d 1314, 1325 n.32 (8th Cir. 1974) ("Any challenge to the adequacy of the [subsequent] EIS will require institution of a separate proceeding."); *Alliance for Wild Rockies v. Kruger*, 15 F. Supp. 3d 1052, 1055-56 (D. Mont. 2014) ("Plaintiffs' claims regarding Defendant's post-remand actions allege separate and distinct causes of action compelling a new complaint."); *NC*

Alliance for Transp. Reform v. U.S. Dep't of Transp., 713 F. Supp. 2d 491, 504 (M.D.N.C. 2010) ("plaintiffs must institute separate proceedings to challenge the adequacy of the environmental documents filed in response to an injunction.").

IV. CONCLUSION

Defendants respectfully submit that this Court's injunction has been satisfied and should now be dissolved.

Respectfully submitted this 2nd day of March, 2015.

/s/ Barclay T. Samford
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