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; JUAN GARCIA, 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

FEDERAL DEFENDANTS' SUPPLEMENTAL BRIEFING ON THE SCOPE OF INJUNCTIVE RELIEF

I. INTRODUCTION

At oral argument on October 16, 2014, the Court indicated that it had concluded that the Small Business Administration ("SBA") and the Farm Service Agency ("FSA") failed to comply with the National Environmental Policy Act ("NEPA") and the Endangered Species Act ("ESA") when the Agencies issued loan guaranties to Farm Credit Services of Western Arkansas to back loans that Farm Credit Services made to C&H Hog Farms.[1] The Court further stated that it had determined some injunctive relief was warranted and asked the parties to submit additional briefing regarding the appropriate scope of such relief. Accordingly, Federal Defendants propose language for properly tailored injunctive relief and briefly outline those principles which should underlay and limit the award of injunctive relief.

Defendants respectfully submit that, upon the Court's finding that the Agencies violated NEPA and the ESA and that injunctive relief is warranted, the appropriate remedy is to remand the matter to the Agencies and enjoin payment on the challenged guaranties until the Agencies have met their obligations under both statutes. A more prescriptive injunction, dictating the form, content or timing of the NEPA and ESA analyses, would unduly restrict the administrative prerogatives of the Agencies and is unnecessary to remedy the legal violations found by the Court and the harm allegedly suffered by Plaintiffs.[2]

II. DEFENDANTS' PROPOSED INJUNCTION

Federal Defendants propose that the Court include in its final order the following language related to injunctive relief:

> The FSA and the SBA are enjoined 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, pending the Agencies' compliance with NEPA and the ESA. Upon issuance of a new decision under NEPA and compliance with the ESA through a no effect determination or completion of consultation, the Agencies

[1] The Court also indicated that it had concluded the Agencies had not violated the Buffalo National River Enabling Act and that it would issue a written opinion in due course.

[2] Defendants do not intend this submission as a concession that injunctive relief is appropriate in the first instance, and preserve their right to appeal from any aspect of the Court's final opinion and judgment.

> shall modify, amend, or void, the loan guaranties as they may deem appropriate in light of the completed NEPA and ESA analyses.

As set forth below, this language affords Plaintiffs tailored relief with regard to the claims on which this Court has indicated Plaintiffs will prevail while respecting the Agencies' discretion to determine how best to comply with the law on remand.

III. DEFENDANTS' PROPOSED INJUNCTION PROVIDES AN APPROPRIATE REMEDY

By enjoining payment on the federal loan guaranties pending the Agencies' compliance with NEPA through completion of a new analysis, and with the ESA through any needed consultation, and by making clear that the Agencies may then modify, amend or void the guaranties if needed as a result of the NEPA and ESA processes, Defendants' proposed remedy provides Plaintiffs with all the relief to which they are entitled.

A. Enjoining the Federal Loan Guaranties Provides Plaintiffs With All the Injunctive Relief They Seek

In their amended complaint, Plaintiffs ask that the Court "enjoin implementation of Defendants' loan guarantees." Pls' Am. Compl. at Request for Relief No. 5 (ECF No. 18). Because the loan guaranties have already been issued, the only "implementation" of the guaranties to be enjoined is payment on the guaranties by the federal agencies to Farm Credit Services in the event of a default by C&H Hog Farm. Defendants' proposed injunction, which enjoins the Agencies from paying on the loan guaranties pending compliance with NEPA and the ESA, thus gives Plaintiffs all the relief they sought in their complaint with regard to injunctive relief against the loan guaranties. Further equitable relief, such as vacatur of the loan guaranties or an injunction against operations at the C&H Hog Farm has not been sought by Plaintiffs, and would not be appropriate.

B. The Court Should Not Dictate How the Agencies are to Comply with NEPA and the Endangered Species Act

To address the Court's finding that the Agencies have violated NEPA and the ESA, Defendants' proposed language enjoins payment on the guaranties until the Agencies have complied with both statutes. This language is consistent with the well-established principle that upon finding a violation of the NEPA or the ESA, the proper course is to remand the matter to the agency to comply with the law without attempting to dictate how the agency is to do so.

It is a bedrock principle of judicial review under the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 *et seq*., that upon finding that an agency's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2), the appropriate remedy is to remand the matter back to the agency for "'further consideration.'" *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549 (1978) (quoting *Camp v. Pitts*, 411 U.S. 138, 143 (1973) and citing *SEC v. Chenery Corp*., 318 U.S. 80 (1943)). "[T]he function of the reviewing court ends when an error of law is laid bare." *Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952). A court is not to "substitute its judgment for that of the agency" by dictating how that agency should comply with the law in the future. *Citizens to Pres. Overton Park, Inc. v. Volp*e, 401 U.S. 402, 416 (1971). *See also INS v. Orlando Ventura*, 537 U.S. 12, 16 (2002) ("the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation") (quoting *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)); *Fed. Power Comm'n v. Transcontinental Gas Pipe Line Corp*., 423 U.S. 326, 333 (1976) (upon remand, a reviewing court may not "proceed by dictating to the agency, the methods, procedures, and time dimension of the needed inquiry").[3]

[3] With regard to NEPA, Plaintiffs appear to acknowledge these principles, and have requested only that the matter be remanded "for an environmental review in compliance with the

In the context of NEPA, these principles dictate that when a reviewing court finds that an agency failed to comply with NEPA, the court should remand the matter for the agency to determine how best to comply with the law and should not direct preparation of a particular analysis (an Environmental Impact Statement ("EIS") instead of an Environmental Assessment ("EA") or Categorical Exclusion ("CE") for example) or dictate the content of that analysis. *See, e.g.,* C*tr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1178–80 (9th Cir. 2008) (finding that the court should defer to Agency's decision on remand whether to prepare an EA or full EIS); *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 18 (2d Cir. 1997) ("[t]he district court overstepped the narrow confines of judicial review of an agency's decision when it . . . ordered the agency to prepare an EIS. Because the question of whether the project may have significant adverse impacts is one that the Forest Service must decide, the appropriate remedy is to remand the case to the agency to correct the deficiencies in the record and in its analysis"); *Jones v. Gordon*, 792 F.2d 821, 829 (9th Cir. 1986) ("We emphasize, however, that we disagree with the district court's conclusion that the Service must prepare [an EIS] . . . . Rather, the Service must consider the requirements of NEPA and regulations thereunder, and must provide a reasoned explanation of whatever course it elects to pursue."); *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 154 (D.C. Cir. 1985) (concluding that until the agency produced an EA addressing the court's concerns, "the question whether the [activity] requires an EIS remains open"); *Fritiofson v. Alexander*, 772 F.2d 1225, 1248 (5th Cir. 1985), *overruled on unrelated grounds by Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669, 677 (5th Cir.

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law." Pls' Am. Compl. at Request for Relief No. 6 (ECF No. 18). With regard to the ESA, however, Plaintiffs' request is inappropriately prescriptive, asking the Court to "order" the agencies "to consult with FWS." *Id.* at Request for Relief No. 8. As noted herein, an agency need not consult if it determines that a proposed action will have "no effect" on a listed species, and thus the proper formulation of relief under the ESA is to direct compliance with the law, not to direct an agency to "consult."

1992) (holding the district court erred when it "jumped from the finding that the EA is inadequate to the ultimate conclusion that the Corps must prepare an EIS."). In sum, while the Agencies here may determine to prepare an EIS rather than another NEPA document for their loan guaranties, that decision is one which should be made in the first instance by the Agencies themselves.

For the same reasons, under the ESA, the Court's order should enjoin payment on the guaranties pending compliance with the ESA, without taking the additional affirmative step of specifying that the Agencies must "consult" with the United States Fish and Wildlife Service ("FWS") under the Act. As the prior briefing before the Court makes clear,[4] under the ESA, the action agency (here the FSA and SBA) is charged with making the initial determination of whether its action may affect listed species or critical habitat. If it determines that the proposed action will have "no effect," the consultation requirements are not triggered. *Newton Cnty Wildlife Ass'n v. Rogers*, 141 F.3d 803, 810-11 (8th Cir. 1998). If the action agency determines that the proposed action "may affect" listed species or critical habitat, it is then required to engage in consultation with the FWS. 50 C.F.R. § 402.14(a). Thus, while the SBA and FSA may ultimately determine that consultation with the FWS is appropriate, that decision is one for the Agencies to make in the first instance, and should not be pre-determined now through this Court's order on remedy.

C. The Court Should Not Dictate to the Agencies a Timeframe for Completing the NEPA and ESA Processes

The Court should not include in any injunctive order a deadline for completion of the required NEPA and ESA analyses. As explained below, a judicially imposed deadline is contrary to the general principle in APA cases that upon finding a legal error, a court's role

[4] *See, e.g.*, Fed. Defs' Mem. in Supp. of Summ. J. at 48 (ECF No. 38).

should end, and the agency should be afforded the discretion to determine how best to comply with the law on remand. Moreover, because the timing of NEPA and ESA review is not fully within the control of the Defendant Agencies, a judicially imposed deadline may work considerable hardship on the Defendant Agencies by rendering them legally liable for delays that are not within their control.

First, judicial imposition of a schedule on remand following APA review is generally contrary to the well-established principle that the function of a reviewing court ends when an error of law is found. *Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. at 20. Indeed, the Supreme Court has emphasized that absent "substantial justification," courts should not dictate to an agency "the methods, procedures, and *time dimension* of the needed inquiry" on remand, because "such [] procedure[s] clearly run[] the risk of 'propelling the court into the domain which Congress has set aside exclusively for the administrative agency.'" *Fed. Power Comm'n v. Transcontinental Gas Pipe Line Corp*., 423 U.S. at 333 (emphasis added) (quoting *SEC v. Chenery Corp*, 332 U.S. at 196).

Here there is no "substantial justification" for imposing a judicial schedule on remand. Both Agencies are entitled to the presumption that on remand they will act expeditiously and in good faith to abide by the Court's decision, and comply with NEPA and the ESA. *See Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 415 (federal agencies are entitled to a "presumption of regularity"); *Sierra Club v. Penfold*, 857 F.2d 1307, 1319 (9th Cir. 1988) (noting courts cannot assume that because an agency has failed to comply with NEPA in the past it will fail to do so in the future). Moreover, there is no evidence before the Court that there is an appreciable risk of harm to the Plaintiffs' interests in the Buffalo National River during the time it will take the Agencies to comply with NEPA and the ESA. As the parties have previously noted, the

C&H facility is subject to ongoing monitoring and regulatory supervision to ensure that water quality in Big Creek and the Buffalo National River is maintained. *See* Pls' Am Compl. at ¶ 90 (noting the State of Arkansas has established a monitoring program to assess the potential impacts of the C&H facility on water quality); Fed. Defs' Mem. in Supp. of Summ. J. at 8, 10 (noting ADEQ exercises ongoing authority to inspect C&H facility and modify its permit). Indeed, an inspection of the facility conducted by the United States Environmental Protection Agency ("EPA") in April, 2014, which included water and soil sampling, found no areas of concern with regard to the facility.[5] If, however, during the remand, negative water quality impacts are detected, ADEQ retains authority to modify C&H's operating permit to prevent harm to the Buffalo National River.

In addition to interfering with the administrative discretion of the Defendant Agencies, the imposition of judicial deadlines for compliance with NEPA and the ESA would pose a very practical hardship on the Agencies because the timing of completion of NEPA and ESA procedures is not fully within their control. Under NEPA, for example, the timing of analysis is determined not only by the scientific complexity of the issues before the agency, but also by the volume and substance of the public comment to which the agency must respond. *See, e.g.*, 40 C.F.R. § 1503.4 (noting agency may need to "supplement, improve or modify its analyses" in response to public comment); 40 C.F.R. § 1502.9(c)(1) (noting duty to circulate for additional

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[5] The EPA study and related news coverage is available on Plaintiffs' website. *See* http://buffaloriverwatershedalliance.wildapricot.org/page-1558368 (follow hyperlink, then scroll down to "EPA Compliance Inspection"); http://buffaloriverwatershedalliance.wildapricot.org/page-1545631/3019642 (link to June 22, 2014 Arkansas-Democrat Gazette Article "EPA Finds No Issues at C&H Hog Farms") (last visited Nov. 3, 2014). The EPA's study post-dates the challenged loan guaranties and therefore cannot be considered in reviewing the merits of those guaranties, but it may be considered by the Court in evaluating appropriate remedies. *See Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000) (noting extra-record evidence may be relevant to the question of whether relief should be granted).

public comment a supplemental EIS if substantial changes are made). Moreover, NEPA imposes an obligation on agencies to address significant new information that arises at any point during the NEPA process. 40 C.F.R. § 1502.9(c)(1)(ii). As a result, significant new information that comes to light close to the end of the NEPA process could require the agency to develop a supplemental analysis and seek additional public comment, delaying a final decision.[6] Similarly, under the ESA, the timing of the process of consultation is not solely within the control of the action agency, but rather is to be conducted within a timeframe that is "mutually agreeable to the [FWS] and the Federal agency." 16 U.S.C. § 1536(b)(1)(A). Thus, under the ESA, the schedule for completing any required consultation is controlled in part by the FWS, a party not before the Court and outside the control of the Defendant Agencies.

Finally, as a policy matter, the interests of the public and of the environment are better served by allowing the Defendant Agencies to take the time needed to properly comply with both Acts, rather than creating a situation where the need to conduct a thorough analysis is overshadowed by the specter of failing to meet a judicially imposed deadline. *See, e.g., San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 606, 605 (9th Cir. 2014) (*petition for cert. pending*, No. 14-377 (filed Sept. 30, 2014) (observing that "[d]eadlines become a substantive constraint on what an agency can reasonably do" and that the district court's imposition of a tight deadline—one year—for FWS's production of a Biological Opinion under the ESA resulted in that document being "a jumble of disjointed facts and analyses"); *id.* at 606

[6] As a consequence of such uncertainties, the timing of NEPA analyses varies considerably. In a 2003 Report, the Council on Environmental Quality ("CEQ") found that the time to prepare an EA ranged from 2 weeks to 18 months, and the time to prepare an EIS ranged from 1 to more than 6 years. CEQ, *Modernizing NEPA Implementation* (2003), at 65-66. https://ceq.doe.gov/publications/modernizing_nepa_implementation.html (choose "The Report in HTML Format" or "The Report in PDF Format") (last visited Nov. 3, 2014).

("We wonder whether anyone was ultimately well-served by the imposition of tight deadlines in a matter of such consequence.").

For these reasons, Defendants respectfully request that the Court not impose a deadline on the completion of NEPA and ESA analyses on remand.

III. CONCLUSION

In sum, Defendants submit that the Court should limit its injunctive relief to the language proposed by Defendants, which properly remedies the legal violations found by the Court while respecting the Agencies' discretion to determine how to proceed on remand.

Respectfully submitted this 6th day of November, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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