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

BUFFALO RIVER WATERSHED ALLIANCE, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF AGRICULTURE, et al., Defendants,	Civil Action No. 4:13-CV-450 DPM

PLAINTIFFS' MEMORANDUM OF LAW
REGARDING SCOPE OF INJUNCTIVE RELIEF

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Plaintiffs respectfully submit this memorandum of law pursuant to this Court's October 16, 2014 Minute Entry, ECF No. 51, and request from the bench at the October 16, 2014 motions hearing for further briefing on the scope of the injunctive relief to be granted. Plaintiffs seek, as part of their Request for Relief, that this Court "[e]njoin implementation of Defendants' loan guarantees," order Defendants "to consult with [Fish and Wildlife Service ("FWS")] to ensure no jeopardy to species listed under the Endangered Species Act ("ESA")," and to "[r]emand the matter to Defendants for an environmental review in compliance with the law." Amended Compl. for Declaratory and Injunctive Relief, Request for Relief ¶¶ 5-8, ECF No. 18. This memorandum of law provides further support for and clarification of this requested injunctive relief.[1]

ENJOINING IMPLEMENTATION OF THE LOAN GUARANTEES

Because the loan guarantees at issue have already been approved by Defendants, a court order enjoining implementation of these guarantees enjoins Defendants' payment and commitment to pay on the guarantees. In effect, the loan guarantees become "inoperative" as a result of this Court's injunction.

This Court and the Eighth Circuit have previously exercised their authority to enjoin the operation of agency actions found to be made in violation of NEPA. In *Save Greers Ferry Lake, Inc. v. U.S. Army Corps of Eng'rs*, for instance, this Court found that the U.S. Army Corps of Engineers ("Corps") had violated the National Environmental Policy Act ("NEPA") when it adopted a Shoreline Management Plan without properly reviewing the Plan's environmental impacts. 111 F. Supp. 2d 1135, 1138 (E.D. Ark. 2000). Pursuant to the Shoreline Management

[1] This memorandum of law does not address Plaintiffs' other requested relief, including declaratory relief and the award of Plaintiffs' reasonable fees, costs, and expenses. In accordance with the Court's ruling from the bench, this memorandum of law also does not address whether injunctive relief is appropriate.

Plan, the Corps had issued permits to private individuals to install boat docks. This Court concluded that because the dock permits had been issued pursuant to a Plan that violated NEPA, "[i]t is impossible for this Court to allow the use of the . . . dock permits without creating a continuing violation of NEPA." *Id.* at 1140. Accordingly, the Court ordered that:

> No other boat docks may be placed on the lake and all dock permits issued under the 2000 [Shoreline Management Plan] will remain inoperative until the Corps completes its environmental studies and complies with NEPA, or the Eighth Circuit reverses this Court's decision of May 30, 2000. The four boat docks that have already been situated on the lake may remain in place pending the Eighth Circuit's decision or the completion of the Corps' environmental study, but they *must* not be used. If the Corps is not able to comply with NEPA and the Eighth Circuit does not reverse, those four docks will have to be removed from the lake.

Id. The Eighth Circuit affirmed the injunctive relief:

> The boat docks that have already been constructed on the Lake under permits issued pursuant to the 2000 [Shoreline Management Plan] may remain on the Lake, and they may be maintained to prevent movement or deterioration but *may not be used* for any recreational purposes, unless and until the Corps implements a new shoreline management plan in full accordance with NEPA and lawfully issues new permits for those docks or unless the docks can be authorized and permitted under the pre-existing . . . shoreline plan . . . . If they may not be so authorized and permitted and if the Corps does not take such action within one year after the date of this order, then the subject boat docks shall be removed by whoever owns them as of that one-year anniversary date . . . .

Save Greers Ferry Lake, Inc. v. Dep't of Def., 255 F.3d 498, 501 (8th Cir. 2001) (emphasis added). This case is instructive in demonstrating a reasonable scope of injunctive relief. Agency actions—permits in the case of *Save Greers Ferry Lake* and loan guarantees in the present case—should "remain inoperative" and "not be used" or relied upon during the pendency of the agencies' attempts to comply with the law on remand.

REMAND FOR COMPLIANCE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT AND ENDANGERED SPECIES ACT

In remanding the matter to Defendants, this Court may specify procedural restrictions or directions but may not "usurp decisionmaking authority that properly belongs" to the Defendant

agencies. *Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 207 (4th Cir. 2005); *see also Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 937-38 (9th Cir. 2008). Permissible procedural directions include setting deadlines by which the agencies' decision-making must be completed on remand and requiring status reports of the agencies' progress.

With respect to compliance with NEPA, this Court may specifically direct the agencies to prepare a revised Environmental Assessment ("EA") or an Environmental Impact Statement ("EIS"), depending on the Court's findings. If this Court finds that the evidence in the record demonstrates that, contrary to the FONSI, Defendants' loan guarantees "may have a significant impact" on the environment, the Court "should order the agenc[ies] to prepare an EIS." *Fritiofson v. Alexander*, 772 F.2d 1225, 1238 (5th Cir. 1985), *abrogated on other grounds by Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669 (5th Cir. 1992); *see also Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244, 1251 (10th Cir. 1973) ("[T]he cause is remanded with instructions that an order be entered requiring that [EISs] be prepared in connection with the timber cutting contracts in issue and that no performance of such cutting contracts shall be permitted until the [EISs] be issued in accordance with the National Environmental Policy Act."), *overruled on other grounds by Vill. of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992); *Audubon Soc'y of Cent. Ark. v. Dailey*, 761 F. Supp. 640, 650 (E.D. Ark. 1991) ("The [Army Corps of Engineers] is permanently enjoined to suspend Permit No. W–D–050–03–5830 . . . and the defendants are permanently enjoined from proceeding any further with the construction of a bridge over Jimerson Creek pursuant to that permit until such time as an EIS in conformity with the requirements of NEPA has been completed."), *aff'd*, 977 F.2d 428 (8th Cir. 1992); *Arkansas Nature Alliance, Inc. v.*

U.S. Army Corps of Eng'rs, 266 F. Supp. 2d 895, 897 (E.D. Ark. 2003) (ordering that "[t]he permitting process used by the Corps . . . include an EIS").

If, on the other hand, the Court finds "that the EA is inadequate in a manner that precludes making the determination whether the project may have a significant impact, the court should remand the case to the agency to correct the deficiencies in its analysis." *Fritiofson*, 772 F.2d at 1238; *see, e.g.*, *Oregon Natural Res. Council v. U.S. Bureau of Land Mgmt.*, 470 F.3d 818, 823 (9th Cir. 2006) ("On remand, the district court is instructed to enjoin the remainder of the Mr. Wilson project until the [Bureau of Land Management] provides a revised Environmental Assessment, including the required hard look at cumulative impacts of the logging already completed on contiguous habitat areas or neighboring habitat areas to be impacted by contemplated future sales.").

With respect to a remand for compliance with Section 7(a) of the Endangered Species Act, courts typically simply direct the action agency to comply with the consultation requirement. *See, e.g.*, *Washington Toxics Coal. v. Envtl. Prot. Agency*, 413 F.3d 1024, 1036 (9th Cir. 2005) (affirming district court's order enjoining the Environmental Protection Agency from authorizing any use of certain pesticides within certain distances of waters supporting endangered fish pending the agency's compliance with the ESA section 7(a)(2) consultation requirements for registering the pesticides); *Nat'l Wildlife Fed'n v. Fed. Emergency Mgmt. Agency*, 345 F. Supp. 2d 1151, 1177 (W.D. Wash. 2004) ("[The Federal Emergency Management Agency] must initiate consultation with [the National Marine Fisheries Service] on the impacts of its implementation of the [National Flood Insurance Program] . . . within 60 days of the entry of this Order."); *Florida Key Deer v. Stickney*, 864 F. Supp. 1222, 1242 (S.D. Fla. 1994) (finding that "the proper scope of an injunction against [the Federal Emergency

Management Agency] is an Order directing [the agency] to consult with the [FWS] within thirty (30) days of the date of this Order"); *Idaho Dep't of Fish & Game v. Nat'l Marine Fisheries Serv.*, 850 F. Supp. 886, 900-01 (D. Or. 1994) ("Defendants shall re-initiate consultation consistent with my findings and should complete any re-initiation within 60 days, unless extended by leave of court."), *vacated as moot*, 56 F.3d 1071 (9th Cir. 1995).

In fashioning equitable relief, this Court has "discretionary authority to impose a deadline for the remand proceedings." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d at 937 (citing *Nat'l Org. of Veterans' Advocates v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1381 (Fed. Cir. 2001)). Courts have, for instance, given agencies 30 days or 60 days to initiate and/or complete consultation under Section 7(a) of the ESA. *See Nat'l Wildlife Fed'n v. Fed. Emergency Mgmt. Agency*, 345 F. Supp. 2d at 1177; *Florida Key Deer*, 864 F. Supp. at 1242; *Idaho Dep't of Fish & Game*, 850 F. Supp. at 900-01. Courts have similarly set deadlines for agencies to comply with the requirements of NEPA on remand. *See, e.g., High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 641-44 (9th Cir. 2004) (upholding district court's order requiring the Forest Service to assess cumulative impacts pursuant to NEPA by December 2005). Indeed both this Court and the Eighth Circuit have required federal agencies to comply with NEPA by a specific time on remand. In *Arkansas Nature Alliance, Inc. v. U.S. Army Corps of Eng'rs*, for instance, this Court required the Corps to conduct its permitting process to authorize modification to a bridge in compliance with NEPA, "which require[s] the preparation of the proper environmental documents, public notice, and hearing," 266 F. Supp. 2d 876, 894 (E.D. Ark. 2003), within nine months "from the entry of this Order," 266 F. Supp. 2d at 897 (modifying order). In *Save Greers Ferry Lake*, the Eighth Circuit affirmed this Court's order of

injunctive relief and further required that the Army Corps of Engineers comply with NEPA "within one year after the date of this order." 255 F.3d at 501.

In addition to setting deadlines for compliance with the law on remand, this Court has the authority and discretion to require status reports of Defendants' progress in achieving compliance. *See, e.g., Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d at 937 (noting in an ESA suit that the district court's requirement that the federal agency defendant submit status reports every 90 days during remand is "clearly permissible") (citing *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 81 (D.C. Cir. 1984)); *Nat'l Wildlife Fed'n v. Fed. Emergency Mgmt. Agency*, 345 F. Supp. 2d at 1177 ("Within 60 days of the entry of this Order, [the Federal Emergency Management Agency] shall file a status report advising the Court and the parties to this litigation as to the schedule for completion of its formal consultation."); *Arkansas Nature Alliance, Inc.*, 266 F. Supp. 2d at 895 ("The Corps is ordered to file quarterly reports of the actions taken to comply with this Order.").

The Court also is authorized to retain jurisdiction of the matter on remand. *See, e.g., Res. Ltd. v. Robertson*, 35 F.3d 1300, 1308 (9th Cir. 1993) ("The district court will retain jurisdiction over this case to ensure that this process [of complying with the Endangered Species Act] is completed within six months of our mandate."), *as amended on denial of reh'g* (July 5, 1994); *Envtl. Def. Fund v. Marsh*, 651 F.2d 983, 1006 (5th Cir. 1981) ("The district court shall retain jurisdiction pending the submission of a final supplemental EIS."); *Nat'l Wildlife Fed'n v. Fed. Emergency Mgmt. Agency*, 345 F. Supp. 2d at 1177 ("The Court retains jurisdiction to ensure that [the Federal Emergency Management Agency] complies with its obligation to consult with [the National Marine Fisheries Service]."); *Florida Key Deer*, 864 F. Supp. at 1242 ("The Court will retain jurisdiction over this action to enforce the consultation requirement imposed upon the

Federal Emergency Management Agency by Section 7 of the Endangered Species Act with regard to its implementation and administration of the National Flood Insurance Program in Monroe County, Florida, and its effect on the continued existence of the endangered Florida Key deer.").

In short, this Court has "broad latitude in fashioning equitable relief when necessary to remedy an established wrong." *Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 986 (9th Cir. 1994). The Supreme Court has made clear that, indeed, "[c]ourts of equity have much greater latitude in granting injunctive relief 'in furtherance of the public interest . . . than when only private interests are involved.'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 136 (1983) (quoting *Virginian Ry. Co. v. System Fed'n No. 40*, 300 U.S. 515, 552 (1937)). In this case, where Defendants have flouted the mandates of the law and the resulting harm already is occurring and has occurred for more than a year, the timeliness of Defendants' compliance with the law and the imposition of any conditions that may mitigate the harm from Defendants' loan guarantees is paramount. Plaintiffs therefore urge this Court to exercise its discretion to establish deadlines for Defendants' compliance with NEPA, the ESA and their own regulations;[2] to require status

[2] Plaintiffs' Eleventh Cause of Action alleges FSA's failure to undertake the required consultation with the National Park Service for a river on the Nationwide Rivers Inventory, 7 C.F.R. § 1940.305(f). *See* Pls.' Am. Compl. ¶¶ 170-73, ECF No. 18. To the extent this Court rules in Plaintiffs' favor on this claim, it should order FSA to comply with this regulation and to consult with the National Park Service. Even if the Court does not rule in Plaintiffs' favor on this claim, Plaintiffs urge the Court to direct Defendants to consider whether any other federal agency, such as the National Park Service, should be a cooperating agency in the NEPA process. *See* 40 C.F.R. § 1501.6 ("[A]ny other Federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement may be a cooperating agency upon request of the lead agency.").

Plaintiffs' Twelfth Cause of Action alleges FSA's failure to review its financial assistance for compliance with antidegradation requirements for Extraordinary Resource Waters, 7 C.F.R. § 1940.305(k). *See* Pls.' Amended Compl. ¶¶ 174-77, ECF No. 18. To the extent this Court rules in Plaintiffs' favor on this claim, it should order FSA to comply with this regulation as well.

reports of Defendants' progress in complying with the law; and to retain jurisdiction of the matter until such compliance has been demonstrated.

CONCLUSION

For all the reasons set forth above, Plaintiffs respectfully request that this Court enjoin Defendants' payment, and commitment to pay, on the guaranteed loans they issued to assist C&H Hog Farms, Inc.; remand the matter to Defendants for compliance with the requirements of NEPA, the ESA, and their own regulations, including requirements for proper public notice; order Defendants to initiate consultation with FWS pursuant to the Endangered Species Act within 30 days and to complete consultation within 90 days from initiation;[3] order Defendants to prepare an EIS and complete the NEPA review within twelve months; order Defendants to submit quarterly status reports of their progress in complying with the law; and retain jurisdiction until Defendants demonstrate full compliance with the law.

Respectfully submitted this 6th day of November, 2014,

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[3] The ESA provides that "[c]onsultation under subsection (a) (2) of [Section 7] with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated . . . ." 16 U.S.C. § 1536(b)(1)(A).

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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2014, I electronically filed the foregoing Plaintiffs' Memorandum of Law Regarding Scope of Injunctive Relief with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all listed counsel of record.

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