

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

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| BUFFALO RIVER WATERSHED ALLIANCE, | |) | |
| et al., | |) | |
| | |) | |
| Plaintiffs, | |) | |
| | |) | Civil Action No. 4:13-CV-450 DPM |
| v. | |) | |
| | |) | |
| UNITED STATES DEPARTMENT OF | |) | |
| AGRICULTURE, et al., | |) | |
| | |) | |
| Defendants, | |) | |
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**PLAINTIFFS' PROPOSED RESPONSE TO DEFENDANTS' SUPPLEMENTAL
BRIEFING ON THE SCOPE OF INJUNCTIVE RELIEF**

In their Supplemental Briefing on the Scope of Injunctive Relief, ECF No. 52, Defendants claim that “substantial justification” is necessary for a deadline to be imposed on remand and suggest that new evidence supports their argument that a deadline is unwarranted because the Buffalo National River will suffer no “appreciable risk of harm” during remand. *See id.* at 6-7. Plaintiffs submit this response to address the narrow issue made relevant by Defendants’ introduction of extra-record evidence. As is explained below, Defendants’ argument is unavailing and a deadline on remand is warranted in this case.

Defendants cite no case law that supports their argument that “substantial justification” is necessary for a Court to impose a mere deadline on remand. In *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, the case relied on by Defendants, the lower court had ordered the agency to

complete and report to the court an investigation “of Transco's claims of reduced reserves by immediate subpoena of Transco's books and records . . . and by field investigation” The court further directed that its decision reviewing the [agency’s] order would be deferred pending the investigation and report, and that the investigation and report should be made by the Commission within 30 days.

423 U.S. 326, 329-30 (1976). It was in this context that the Supreme Court found that “in the absence of substantial justification for doing otherwise, a reviewing court may not . . . dictat[e] to the agency the methods, procedures, *and* time dimension of the needed inquiry.” *Id.* at 333 (emphasis added). Notably, where courts do not provide detailed instructions on methods and procedures *in addition to* timelines, and instead merely specify a deadline on remand, there is no indication in the case law that “substantial justification” is necessary. *See, e.g., Save Greers Ferry Lake, Inc. v. Dep’t of Def.*, 255 F.3d 498, 501 (8th Cir. 2001) (identifying further injunctive relief if agency fails to comply with the National Environmental Policy Act (“NEPA”) “within one year after the date of this order,” without addressing a “substantial justification”

standard); *Arkansas Nature Alliance, Inc. v. U.S. Army Corps of Eng'rs*, 266 F. Supp. 2d 895, 897 (E.D. Ark. 2003) (requiring agency to conduct permitting process to authorize modification to a bridge in compliance with NEPA within nine months, without addressing a “substantial justification” standard); *see also In re Consol. Delta Smelt Cases*, No. 1:09-CV-00407 LJO BAM, 2013 WL 1455592, at *3 (E.D. Cal. Apr. 9, 2013) (noting that “recent Ninth Circuit precedent clearly permits imposition of deadlines upon the remand process” and that such precedent “is not in conflict with *Transcontinental*”).

Even if “substantial justification” were required to impose a deadline on remand, Defendants are wrong to suggest that such justification is absent because “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 [Endangered Species Act (“ESA”)].” ECF No. 52 at 6.¹ Defendants’ claim that no harm will come to the Buffalo National River during a remand is fundamentally problematic because it demonstrates the same callous disregard for the law and for the environment that led to the present proceeding; Defendants once again exhibit a proclivity for arriving at a conclusion without the benefit of the required and necessary analysis. Having failed to properly identify and evaluate the environmental impacts of their actions in the first instance, Defendants cannot now credibly claim that “there is no evidence” of risk of harm to the Buffalo.

The “evidence” Defendants rely on for this supposition, in any event, fails to demonstrate that there is no “appreciable risk of harm” from the operation of a 6,500-swine factory farm situated on karst terrain, next to a school, and on a tributary to the Buffalo National River.

¹ There is no evidence before the Court of harm during the pendency of a remand because, of course, this Court has not held a hearing on this issue. This Court *has* determined, however, in its standing inquiry and in deciding to order an injunction, that Plaintiffs have demonstrated concrete and particularized harm, and indeed irreparable harm, to their interests.

Ongoing monitoring, supervision, and a dated inspection report simply do not show, as Defendants would have it, that the C&H facility will not have detrimental impacts *during the pendency of a remand* unrestricted by deadlines. After all, as Defendants acknowledge, there may well be “scientific complexity” and “significant new information that comes to light” during a proper consideration of environmental impacts. ECF No. 52 at 7-8.² The ongoing monitoring, regulatory supervision, and inspection report identified by Defendants, moreover, all relate solely to C&H’s water quality impacts³ and fail to address any of the other impacts of the facility on the natural resources of the Buffalo River watershed, local communities, and protected species.

For all of these reasons, this Court should disregard Defendants’ attempt to evade a deadline for complying with the law. The egregious circumstances of this case, in which Defendants failed to properly notify the public and thereby made possible a significant source of pollution in the Buffalo River watershed, present a substantial justification, if any is needed, for a schedule on remand.

Respectfully submitted this 12th day of November, 2014,

/s/ Hannah Chang
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² This briefing does not purport to comprehensively present all evidence of the risk of harm to the Buffalo River. One key scientific complexity worth noting, however, which Defendants ignored in the first instance and continue to ignore in claiming that there will be no harm to the Buffalo National River, is the presence of karst terrain. *See* Public Comment of Robert Cross, President, Ozark Society (with major contributions from John Van Brahana, Ph.D, Professor Emeritus, Geosciences, University of Arkansas, Fayetteville, AR) (summarizing results from dye-tracing studies in the Mount Judea area and concluding that, due to the predominant karstified limestone in the Buffalo River Watershed, “the chances are essentially nil that a medium to large [Concentrated Animal Feeding Operation], constructed with present techniques, can be operated without extreme danger to the environment”), http://www.adeq.state.ar.us/regs/drafts/3rdParty/reg05_3rdParty_docket_14-002-R/reg05_3rdParty_docket_14-002-R.htm (follow hyperlink, scroll down to “07/01/2014 – Comments of Robert Cross and Ozark Society – 2”).

³ The referenced U.S. Environmental Protection Agency report is self-described as an inspection report to determine C&H’s compliance with its water permit. *See* U.S. Env’tl. Prot. Agency, Region 6 Compliance Assurance and Enforcement Division Inspection Report 2, http://buffaloriverwatershedalliance.wildapricot.org/Resources/Documents/InspRptWtrC_HHogFarmC_HHogFarm20140417.pdf.

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