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

BUFFALO RIVER WATERSHED ALLIANCE, a non-profit corporation — **PLAINTIFF**

VS. **CASE NO. 3:23-cv-03012-TLB**

UNITED STATES FOREST SERVICE, an agency of the United States Government; TIMOTHY E. JONES, District Ranger, — **DEFENDANTS**

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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TABLE OF ACRONYMS

APA ..... Administrative Procedure Act

BRWA ..... Buffalo River Watershed Alliance

CEQ ..... Council on Environmental Quality

DN ..... Decision Notice

EA ..... Environmental Assessment

EIS ..... Environmental Impact Statement

ERW ..... Extraordinary Resource Water

ESA ..... Endangered Species Act

FEIS ..... Final Environmental Impact Statement

FOIA ..... Freedom of Information Act

FONSI ..... Finding of No Significant Impact

FWS ..... Fish & Wildlife Service

NEPA ..... National Environmental Policy Act

SEA ..... Supplemental Environmental Assessment

INTRODUCTION

Plaintiff, Buffalo River Watershed Alliance ("BRWA"), begins this Reply in Support of its Motion For Summary Judgment and Response in Opposition to Defendants' (collectively the "Forest Service or the "Service") Cross Motion for Summary Judgment ("Reply/Response") by focusing first on the same specific omission in the Service's decisionmaking—the agency's complete failure to specifically consider and disclose the impacts of the Robert's Gap Project ("the Project") on the Buffalo National River—that also served as the focus of its Opening Summary Judgment Brief ("Opening Brief"). *See* ECF No. 43 at 1.[1] The Forest Service does not deny that its final Environmental Assessment ("EA") for the Project only specifically mentions the Buffalo National River once; never identifies it as a congressionally-designated Wild & Scenic River; and never directly or separately addresses the impacts of the Project, which includes the headwaters of the Buffalo National River, on that River's unique characteristics or especially pristine waters. *See id.* at 26–27. Instead, the Service argues that the final EA's general discussion of water quality and overall impacts to all of the Project area's watersheds was sufficient and "NEPA does not require that an agency identify specific areas included in its water quality analysis." *See* ECF No. 46 at 2. To the contrary, the Council on Environmental Quality's ("CEQ") applicable regulations interpreting the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321, *et seq.*, identify ten intensity factors that an agency's NEPA analysis should consider, and one of those factors is the "[u]nique characteristics of the geographic area such as proximity to…wild and scenic

[1] When referencing both its Opening Summary Judgment Brief, ECF No. 43, as well as Defendants' Summary Judgment Brief, ECF No. 46, BRWA cites to the page numbers on the bottom of each respective document. When referencing its Amended Complaint, ECF No. 15, BRWA cites to the specific paragraph numbers.

rivers….” 40 C.F.R. § 1508.27(b)(3) (2019).[2] Thus, NEPA did in fact require the Service to specifically address the Project’s impacts on the unique characteristics of the Buffalo National River, which include its especially pristine water quality. The EA completely failed to do that.

One of the key functions of an EA is to “provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.” 40 C.F.R. § 1508.9(a)(1) (2019). The Forest Service’s final Decision Notice and Finding of No Significant Impact (“DN/FONSI”) specifically used the CEQ’s intensity factors, including factor 3, unique characteristics, when drafting its FONSI. AR 1912. But just as the EA failed to do, the DN/FONSI completely fails to even acknowledge that the Project area is in fact in very close proximity to a wild and scenic river that is also a national river. *See* AR 1912. To borrow a phrase from the Forest Service’s Summary Judgment Brief (“the Service’s Brief”), it is telling that the Service’s initial defense of these omissions in its NEPA documents for the Project is to argue incorrectly that BRWA somehow waived its right to raise this issue before this Court, *see* ECF No. 46 at 19–20, even though Plaintiff’s administrative objection expressly noted that this Project required a “harder look” because of the Project’s impacts on downstream water quality in the Buffalo National River. AR 1797. BRWA did not waive these issues, and the omission of the Buffalo National River from specific consideration in both the EA and DN/FONSI is not a harmless error. These are very serious omissions that undercut the twin functions of NEPA: To ensure that both federal agencies and the public are aware of the potential environmental impacts of their proposed actions before agencies make decisions. 40 C.F.R. § 1500.1(b)(2019).

[2] The Parties agree the CEQ regulations that were in effect when the Forest Service began its NEPA analysis of the Project control this case. *See* ECF No. 46, at 5 n.1 and ECF No. 43 at 4–5 n.2.

Further, this specific error is likely attributable to another more general and overarching error in the Forest Service's compliance with NEPA and its defense of that compliance in its Brief. The Service describes NEPA as having only one purpose: To "insure a fully informed and well-considered decision[.]" ECF No. 46 at 4 (quoting *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978)). However, as BRWA emphasized in its Opening Brief, *see* ECF No. 43 at 12–13, NEPA in fact has a second, equally important purpose. "Informed public participation in reviewing environmental impacts is essential to the proper functioning of NEPA." *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton,* 752 F.3d 755, 761 (9th Cir. 2014). As the Supreme Court has explained, one of the purposes of NEPA is ensuring "that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Dep't of Transp. v. Pub. Citizen,* 541 U.S. 752, 768 (2004) (quoting *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 349 (1989)). The Service's NEPA documents and its defense of those documents repeatedly fail to facilitate and acknowledge the necessity of informed public participation during the Robert's Gap decisionmaking process.

For example, although BRWA specifically raised the need to consider the Project area's karst hydrogeology when addressing impacts to water quality and asked that those karst features be mapped in a more-detailed environmental impact statement ("EIS"), AR 1800, the EA does not mention that karst hydrogeology even once. *See* AR 1712–1775. Nevertheless, the Service argues that because the EA generally—but improperly—tiers to the entire Final Environmental Impact Statement ("FEIS") for its Revised Land and Resource Management Plan for the Ozark-St. Francis National Forests ("the Management Plan" or "the Forest Plan"), the Plan that governs "broad program level direction" for the entirety of both National Forests, *see* AR 0015, 1717, as well as

all Forest Plan standards, AR 1739, BRWA should have known that the Plan includes forest-wide standards regarding the karst landscapes that the agency never mentions in the EA and standards to protect the Wild and Scenic River that it never identified as such in the EA. *See* ECF No. 46 at 25. As BRWA discusses below, while tiering to a more general Management Plan and its FEIS can be appropriate, NEPA regulations require that the EA at least summarize and specifically reference the material from the broader or more general analysis. 40 C.F.R. § 1502.20 (2019). Moreover, such tiering did not excuse the Forest Service from including site-specific analysis regarding how those general standards would be applied to the Robert's Gap Project area and how they would supposedly protect the Buffalo National River from any adverse impacts. In fact, the karst standards cited by the Service for the first time in its Brief, *see* ECF No. 46 at 12 (citing AR 0157), required that karst features be "recognized" and "documented" and that "karst management zones" be "delineated," which is essentially the mapping of such features that BRWA requested in its objection. *See* AR 1800. The EA and DN/FONSI cite to no such site-specific actions regarding karst features, and the Service's Brief also cites to none in those NEPA documents or in its administrative record generally. Apparently, the Forest Service expected BRWA to connect the dots and discover these forest-wide standards on its own and to assume that they were being implemented as a part of the Project. NEPA public participation requirements, however, do not allow for an agency to put such burdens on the public; it is the agency that both possesses and is most familiar with this information, and thus has an obligation to facilitate public participation. *See Gallatin Wildlife Ass'n v. U.S. Forest Serv.*, No. CV-15-27-BU-BMM, 2016 WL 3282047 at *8 (D. Mont. June 14, 2016).

BRWA discusses below numerous other examples where the Service has failed to fully inform the public or failed to foster public participation. This includes, most egregiously, its

decisionmaking regarding how to protect the newly discovered Indiana bat maternity colony in the Project area and, to obtain for the first time, baseline water quality information for the Project area's rivers and streams. The Forest Service simply announced these actions in its final DN/FONSI, after reaching its conclusions based on entirely internal analysis and discussions. *See* AR 1905, 2607–2612, 6593–6627. Then, the Service failed to prepare supplemental NEPA analysis that would have allowed the public to see and comment on the information and analysis underlying these changed circumstances and significant new information. Although the Service's Brief suggests that it determined such supplemental NEPA analysis was not required, *see* ECF No. 46 at 35, it never actually cites to such a specific finding in the record, and there is no indication in the record that the Service ever acknowledged, much less considered, BRWA's specific written demand for such supplemental NEPA analysis. AR 8644–8649. BRWA cannot find in the record, and the Forest Service has not cited, any express, pre-litigation determination by the Service that supplemental NEPA analysis was not required under the mandatory standard set forth by the CEQ regulations, and the agency's post-hoc arguments in its Brief for why such supplementation was not required deserve no deference and are legally and factually incorrect in any case.

Finally, the Service cannot defeat BRWA's NEPA supplementation claims by suddenly and inexplicably offering water quality sampling results for herbicides in the Project area's streams that it has had since May of 2023, *see* ECF No. 46-1 at ¶ 4, and arguing that these testing results showing no herbicide pollution somehow moot BRWA's claims for supplemental NEPA analysis. ECF No. 46 at 37. The Service makes no motion for the Court to allow these extra-record materials, which the Service could and should have included in its administrative record or submitted them when the Parties negotiated the scope of that record and reached a stipulation in that regard. *See* ECF No. 27, 28. Nevertheless, BRWA will not object to this extra-record submission because

rather than mooting its NEPA supplementation claims, this evidence strengthens them.[3] The Forest Service seems to believe that obtaining baseline, pre-decisional water quality information was an end unto itself and, once it does so and that sampling shows no herbicide contamination, its NEPA obligations come to an end. *See* ECF No. 46 at 37. There are numerous problems with this specious argument that BRWA addresses more completely below. Most fundamentally, however, this argument ignores the clear explanations from case law cited in BRWA's Opening Brief: Baseline water quality information is needed so that the agency can disclose and fully consider the impacts of the Project in light of those baseline conditions. *See* ECF No. 43 at 30–32. In other words, obtaining such information is the *starting point* for the analysis and public disclosures required by NEPA, rather than the end point. Moreover, when that baseline sampling shows that the current water quality is essentially pristine in terms of herbicide pollution, such information makes it even more critical that the Service analyze and disclose publicly the impacts of endangering that pristine water quality in the Buffalo National River by authorizing herbicide use for the first time in forty years in the headwaters of that River. AR 2588.

BRWA's claims are not moot, nor did BRWA waive those claims during the administrative process. These are arguments designed to distract this Court from the Forest Service's legally flawed and incomplete EA and DN/FONSI and its improper refusal to conduct supplemental NEPA analysis that allows for public comment and participation in its up-until-now entirely internal analysis and decisionmaking regarding how to best protect the newly-discovered Indiana bat

[3] BRWA submitted multiple extra-record documents in support of its Summary Judgment Motion. *See* ECF No. 39; 39-1–39-16. Although the Service could have objected to those documents pursuant to the Parties' stipulation, ECF No. 28 at ¶ 4, it did not do so in its Brief, *see* ECF No. 46, and it has therefore waived its right to object to them. BRWA does not object to the disputed documents, *see* ECF No. 28, that the Service uses in its Brief, except where specifically noted in this Response/Reply. BRWA reserves the right to object if the Service uses a new document covered by the stipulation or uses a document in a different way in its Reply.

maternity colony and its belated decision to obtain baseline water quality information for the Project area's streams. This Court should grant BRWA's Motion for Summary Judgment on all its claims covered by that Motion: Counts 1, 2, 3, 4, 6, 7, and 8. *See* ECF No. 15 at ¶¶ 53–69, 75–89; ECF No. 38.

ARGUMENT

I. Preliminary Issues[4]

Before addressing the Service's arguments regarding BRWA's specific claims, BRWA will respond to several arguments that relate to more than one of those claims: 1) whether the decision in *Norton v. Southern Utah Wilderness Alliance,* 542 U.S. 55 (2004) ("*SUWA*"), somehow bars BRWA from seeking relief from the Service's ongoing failure to supplement its NEPA analysis under 5 U.S.C. § 706(1); and 2) whether the Service can defend its challenged NEPA analysis by citing to any document in its administrative record, even if there is no evidence that such a document was expressly cited or referenced by that NEPA analysis or that the public was ever given access to that document during the NEPA process.

a. The Forest Service cites to inapplicable portions of *SUWA* while simultaneously failing to cite to portions that support BRWA's NEPA failure to supplement claims, Counts 6 and 7.

The Service's argument regarding *SUWA* is almost frivolous. *See* ECF No. 46 at 37–38. That case, in a part of the opinion not cited by Defendants, directly addressed a NEPA failure to supplement claim brought under APA § 706(1) and dismissed that claim only because the facts in *SUWA* showed the claim was not cognizable under NEPA. 542 U.S. at 72–73. Here, the very different facts establish BRWA has such a claim.

[4] The Service does not challenge BRWA's standing. *See* ECF No. 43 at 6–7 and ECF Nos. 40, 41, and 42.

In *SUWA* the plaintiffs brought three separate and distinct failure to act claims under § 706(1), 542 U.S. at 61, and the Supreme Court rejected each of them for quite different and distinct reasons. The first claim sought to enforce the "non-impairment" mandate in 43 U.S.C. § 1782(c), a provision that is not at issue in this case. It was regarding this claim, which has nothing to do with NEPA, where the Supreme Court held that a plaintiff cannot use APA § 706(1) to enforce "broad statutory mandates." 542 U.S. at 65–67. Here, the Service's argument, which seems to claim that this holding includes *all* of NEPA's requirements, *see* ECF No. 46 at 37, 38, is not supported by the actual language or reasoning of the *SUWA* opinion.[5] The Service cites no case that has applied this holding from *SUWA* to an agency's failure to comply with its mandatory duty to supplement its NEPA analysis under certain, specified circumstances. *See* 40 C.F.R. §1502.9(c) (2019).

To the extent the Service is arguing that *SUWA* should be extended to cover such claims, and that very clearly is not how its argument is framed, such an extension is severely undercut by the absence of any other case law doing that and by the *SUWA* opinion's treatment of the actual NEPA supplementation claim at issue in that case, and should therefore be rejected by this Court. The *SUWA* plaintiffs' third § 706(1) failure to act claim was a claim for supplemental NEPA analysis under 40 C.F.R. § 1502.9(c). 542 U.S. at 72. The Supreme Court specifically declined to address whether "a NEPA required duty is actionable under the APA," and instead decided that under the facts of that case, NEPA did not create a duty to supplement. *Id.* at 72–73. Citing to *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989), *SUWA* explained that a

[5] Although the Service argues that *SUWA* "held that a failure to supplement claim is governed by Section 706(2)(A)'s arbitrary and capricious standard, not Section 706(1)'s mandamus-like standard[,]" ECF No. 46 at 38 (citing 542 U.S. at 66–67), no such holding can be found in those pages of the opinion or anywhere else in the opinion. In fact, those pages of the opinion do not cite or mention § 706(2) at all.

duty to supplement under NEPA only exists if "there remains a major federal action to occur." 542 U.S. at 73 (internal quotation marks omitted). In *Marsh,* the federal action at issue was the construction of a dam that was not yet completed, and this NEPA condition was therefore satisfied. 490 U.S. 367. In *SUWA*, however, the major federal action at issue was the approval of a land management plan, and that action was complete when the plan was approved; therefore, the NEPA condition for NEPA supplementation, an ongoing major federal action, was missing. 452 U.S. at 73. In this case, the major federal action at issue is the Robert's Gap Project, and that action is ongoing, just as was the construction of the dam in *Marsh.* Thus, the reasoning in *SUWA* for rejecting the NEPA supplementation failure to act claim under APA § 706(1) does not in any way apply to this case.

The Service then goes on to argue that the Eighth Circuit decision in *Arkansas Wildlife Federation v. U.S. Army Corps of Engineers*, 431 F.3d 1096, 1104 (8th Cir. 2005), "followed *SUWA*" and held that NEPA failure to supplement claims must be reviewed under APA § 706(2), which controls judicial review of final agency actions. ECF No. 46 at 38. But *Arkansas Wildlife Federation* does not cite to *SUWA* or to APA § 706(1) at all, *see* 431 F.3d at 1098–1104, and for good reasons. While that case did involve a challenge to the defendant agency's refusal to supplement its NEPA analysis, the agency there made an actual determination in its DN/FONSI that NEPA supplemental analysis was not necessary, and the court, therefore, was reviewing that final agency decision under APA § 706(2)'s arbitrary and capricious standard. 431 F.3d at 1100. In this case however, although the Service repeatedly claims in its Brief that it "decided" or "determined" that supplemental NEPA analysis was not required, *see* ECF No. 46 at 32, 34, 35, in each instance the Service fails to cite to any such specific decision or determination. The Service has in fact never made a specific decision that it did not need to supplement its NEPA analysis,

even when BRWA expressly asked for such a supplemental analysis. *See* AR 8644–8649. Although BRWA pled its NEPA supplementation claims in the alternative as both Section 706(2) and 706(1) claims, *see* ECF No. 15 at ¶¶ 79 and 84, now that it has reviewed the Service's administrative record, it is clear that there is no actual agency decision regarding the Service's duty to conduct supplemental NEPA for this Court to defer to and review under APA § 706(2)'s deferential standards. Instead, the Service's failure to supplement in this case is a failure to act subject to review under APA § 706(1).

b. The Service's defense of its NEPA analysis must be based on its actual NEPA analysis documents and any supporting record documents that the Service Properly cited to in those NEPA analysis documents that were made available to the public during the NEPA process.

As a general matter, judicial review under the APA is based on "the whole record." 5 U.S.C. § 706(2); *see also Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). However, because of NEPA's twin aims of providing relevant environmental information to both agencies and the interested public, courts have made their review of an agency's NEPA analysis somewhat more limited. As the Ninth Circuit explained in *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998):

> We do not find adequate support for the Forest Service's decision in its argument that the 3,000 page administrative record contains supporting data. The EA contains virtually no references to any material in support of or in opposition to its conclusions. That is where the Forest Service's defense of its position must be found. *See* 40 C.F.R. § 1508.9(a) (an environmental assessment is "a concise public document" that "briefly provide[s] sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact").

That decision thus refused to allow the agency when defending its NEPA analysis to rely upon administrative record documents that the EA at issue did not expressly reference. This makes sense in light of NEPA's requirement for analysis that is available to both the public and the agency. If

an agency can defend its analysis with record evidence that the public never saw or had the opportunity to see because it was not clearly cited within the public NEPA analysis, NEPA's public disclosure and public involvement requirements would be severely undermined.

The Service's Brief attempts to twist this holding and reasoning from *Blackwood* into something unrecognizable. It actually argues that *Blackwood* stands for the proposition that an agency can defend its NEPA analysis with anything in the record because an EA is a "concise document." ECF No. 46 at 27–28. And then the Service insists that two Eighth Circuit cases have held as much. *Id.* But neither case contains such a holding, and neither case in fact allows an agency to cite to record materials that are not at least referenced by the NEPA analysis at issue. *Sierra Club v. United States Forest Service*, 46 F.3d 835, 840 (8th Cir. 1995), does recognize that, because an EA is supposed to be a concise document, it cannot be expected to "provide detailed answers to every question." But when evaluating the EA at issue the court appeared to confine its review to statements and analysis in the EA itself. *Id.* at 840. Similarly, *Mid States Coalition for Progress v. Surface Transportation Board,* 345 F.3d 520, 540 (8th Cir. 2003), does say that a NEPA analysis need not set forth conclusions "in a single explicit conclusion." But again, the case appears to confine its review of the NEPA analysis at issue to evidence actually set forth in that analysis. *Id.* at 540. Neither case holds or seems to even suggest that an agency can defend its NEPA analysis by citing to record evidence that is not at least referenced within that analysis.

The CEQ's NEPA regulations contain specific provisions that allow agencies to keep their NEPA analysis concise while also maintaining public access to the actual information underlying that analysis. An agency can "tier" to broader NEPA analysis to eliminate repetitive discussions, so long as the tiering NEPA analysis "summarizes the issues discussed" and "incorporates those discussions by reference." 40 C.F.R. § 1502.20 (2019). Similarly, an agency can incorporate non-

NEPA documents into its NEPA analysis when that incorporated material is cited in the NEPA document, its content briefly described, and that incorporated material is reasonably available to the public. 40 C.F.R. § 1502.21 (2019). In this case, the Forest Service in multiple places within its Brief attempts to cite record evidence that it did not properly tier to or incorporate by reference in the EA or DN/FONSI. For example, it cites to a "Wildlife Report" that is in the record, but which the EA itself never cited. ECF No. 46 at 13; *see* AR 1712–1775. It cites to WRACE modeling information and results that were not specifically cited in the EA or made available to the public during the NEPA process. ECF No. 46 at 24; *see* AR 1748, 1749–1750. *See also* ECF 43 at 17 (objecting to final EA's failure to reference such information). It cites to its Forest Water Quality Monitoring Policy and Historic Water Quality Testing Results, which the EA itself never cited or even included the Policy's reasoning. ECF No. 46 at 12; *see* AR 1712–1775. It cites to the Bat Plan Amendments, which were not mentioned until the final DN/FONSI. ECF No. 46 at 13; *see* AR 1712–1775; 1904–1905. *See also* ECF 43 at 17–18 (discussing the final EA's improper tiering and incorporation by reference).

The Service also misrepresents BRWA's position regarding tiering. It argues, ECF No. 46 at 26, that BRWA believes that NEPA prohibits tiering to a programmatic EIS, citing to ECF No. 43 at 14. But BRWA's Opening Brief argues no such thing. Instead, it correctly argues that the decision in *Klamath-Siskiyou Wildlands Center v. Bureau of Land Management,* 387 F.3d 989, 997–98 (9th Cir. 2004), allows such tiering, but only if done properly (with specific citations and summaries), and such tiering to a programmatic EIS does not excuse the agency from also discussing the site-specific impacts of a proposed action. In this case, the Service's tiering to the Forests' Management Plan suffers from multiple infirmities. First the Service's EA simply cites generally to that Plan, AR 1717, and all of its forest-wide and management area standards, AR

1739, leaving it up to the public to figure out which standards actually apply to the site-specific Robert's Gap Project, and which standards address specific impact issues. More significantly, the EA makes no attempt to address how any standard actually addresses the site-specific impacts from the Project. For example, although the Service is now, in its Brief, citing for the first time the specific forest-wide standards that apply to wild and scenic rivers, *see* ECF No. 46 at 16, it cannot cite to any place in the EA where the Service explains why and how those standards would be sufficiently protect the Buffalo National River from the specific actions it has authorized as part of the Project.[6] This is the specific NEPA violation found by the decision in *Klamath-Siskiyou*. 387 F.3d at 997–98.

II. The Forest Service Failed to Take a Hard Look at Water Quality in its Pre-Decisional NEPA Analysis, and was Therefore Required to Conduct Supplemental NEPA Analysis with Public Review. (Counts 1, 2, 6, 7)

a. BRWA properly raised issues in its objection, and therefore satisfied both exhaustion and waiver requirements.

The APA requires plaintiffs to exhaust available administrative remedies before bringing issues to federal court. 5 U.S.C. § 704. This includes the appeal procedures established by the Secretary of Agriculture pursuant to 7 U.S.C. § 6912(e). Administrative appeal procedures for the Forest Service are carried out through the objection process. 36 C.F.R. § 218.1. The regulations specify that "[i]ndividuals and groups must structure their participation so as to alert the. . . agency officials. . . of their positions and contentions." 36 C.F.R. § 218.14. This language mirrors the sentiment set forth by the Supreme Court that parties challenging an agency's compliance with NEPA generally must "'structure their participation so that it alerts the agency to the parties'

[6] Although the Service asserts herbicides will not be used in the Wild & Scenic River corridor, it cites nothing to support that assertion. ECF No. 46 at 26.

position and contentions' in order to allow the agency to give the issue meaningful consideration." *Pub. Citizen*, 541 U.S. at 764 (quoting *Vt. Yankee,* 435 U.S. at 553).

However, courts have determined *Public Citizen* does not require comments to explain the precise legal challenge. *Protect Our Cmtys. Found. v. LaCounte* 939 F.3d 1029, 1037 (9th Cir. 2019); *see also All. for Wild Rockies v. Kruger*, 950 F. Supp 2d 1172, 1189 (D. Mont. 2013) (explaining that claimants may meet the exhaustion requirement "using general terms rather than specific legal arguments").[7] Further, there is no bright-line test to determine whether a party has properly exhausted a claim to the Forest Service. *Buckingham v. Sec'y of the U.S. Dep't of Agric.*, 603 F.3d 1073, 1080 (9th Cir. 2010); *Karst Env't Educ. & Prot., Inc. v. Fed. Highway Admin.*, 559 F. App'x 421, 425 (6th Cir. 2014). The Eighth Circuit has embraced the Supreme Court's approach that cautions against applying the exhaustion doctrine "blindly" or inflexibly. *Madsen v. Dep't of Agric.,* 866 F.2d 1035, 1039 (8th Cir. 1989) (quoting *McKart v. United States*, 395 U.S. 185, 193 (1969)). Outside the context of 7 U.S.C. § 6912 (e), the 8th Circuit Court of Appeals has taken a balanced approach as to the level of specificity required to exhaust administrative remedies, stating that it will "liberally construe an administrative charge for exhaustion of remedies purposes," but noting that "there is a difference between liberally reading a claim which lacks specificity, and inventing, *ex nihilo,* a claim which simply was not made." *Cottrill v. MFA, Inc.,* 443 F.3d 629, 635 (8th Cir. 2006) (internal citations omitted).

Similarly, courts in other jurisdictions have interpreted the exhaustion requirement broadly, and generally will not invoke the waiver rule "if an agency has had the opportunity to consider the issue. . . even if the issue was considered *sua sponte* by the agency or was raised by someone other

[7] Claims not raised before an agency are waived, unless the problems underlying the claim are "obvious" or otherwise brought to the agency's attention. *Forest Guardians v. U.S. Forest Serv.* 495 F.3d 1162, 1170 (10th Cir. 2007) (quoting *Pub. Citizen*, 541 U.S. at 764–65).

than the petitioning party." *LaCounte,* 939 F.3d at 1037 (internal citations emitted)*; see also Wyo. Lodging & Rest. Ass'n v. U.S. Dep't of the Interior*, 398 F.Supp.2d 1197, 1211 (D. Wyo. 2005) (holding that third party comments addressing an issue sufficiently put the agency on notice).

While agencies may prefer comments to be more detailed, claimants need not "incant [certain] magic words . . . in order to leave the courtroom door open to a challenge" and may "alert[] the decision maker to the problem in general terms." *Idaho Sporting Cong., Inc. v. Rittenhouse* 305 F.3d 957, 965–66 (9th Cir. 2002). As long as "the appeal, taken as a whole, provides sufficient notice to the agency to afford it the opportunity to rectify the violations that the plaintiff's alleged, the exhaustion requirement has been satisfied." *Great Basin Mine Watch v. Hankins,* 456 F.3d 955, 965 (9th Cir. 2006) (quoting *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 899 (9th Cir. 2002)). The court in *Native Ecosystems Council* explained that this standard conformed with the purposes of the exhaustion requirement, and that "[r]equiring more might unduly burden those who pursue administrative appeals unrepresented by counsel, who may frame their claims in non-legal terms rather than precise legal formulations." 304 F.3d at 900.

Defendants argue that BRWA's challenge to the EA's deficient analysis of the impacts to the Buffalo National River was waived through a failure to raise the issue in its comment and objection. ECF No. 46 at 19–23. However, this argument implies that the Forest Service was somehow unaware of the need to meaningfully consider the Buffalo National River, which misrepresents the law and facts. As already noted above, NEPA and its implementing regulations clarify that each agency must take a "hard look" at the environmental impacts of an action, including significant impacts to "geographically unique" areas.

Moreover, Defendants cannot sincerely contend that BRWA's concern regarding the Project's effect on the Buffalo National River was not clearly expressed during the objection

process, *see* ECF No. 46 at 19–23, as BRWA raised this issue multiple times throughout its comment and objection. To start, BRWA raised the concern that the Project's EA failed to recognize the significance of the resources within the Project area, including wild and scenic rivers, in the opening paragraphs of its comment. AR 1358 (BRWA comment stating that the Project area "encompasses what is arguably one of the most ecologically sensitive areas of Arkansas. It includes the headwaters of the nearby Buffalo National River, designated…as a Wild and Scenic River"). In its subsequent objection, BRWA reiterated the significance of the Buffalo National River's proximity to the Project area and how that could impact such pristine water. AR 1799 ("This plan affects the highest quality, most popular recreational river[] in Arkansas and the Ozarks, the Buffalo National River[.]").

Importantly, BRWA unequivocally urged the Forest Service to take a "harder look" and a "deeper look" at the Project's impacts on water quality due to the unique geography within the Project area and the potential for negative impacts on the Buffalo National River. AR 1797 ("This project deserves a harder look [because of risks to the Buffalo River]"); AR 1800 (BRWA objection asserting that a "deeper look with a site specific Environmental Impact Statement (EIS) taking into account and mapping its many karst hydrogeological features is required"); *see also* AR 1358 (BRWA comment stating "[t]he [Project] area is characterized as having steep slopes and erodible soils atop karst topography"); AR 1358 (BRWA comment stating concern that the Buffalo National River will "be impacted, particularly in terms of *reduced water quality*, to the extent that an Environmental Impact Statement is warranted" (emphasis added)). Because claimants need not use "precise legal formulations," the request that the Forest Service take a "harder" and "deeper" look at the Project's impacts on the Buffalo National River, including impacts to water quality, is stated with enough clarity "to allow the decision maker to understand and rule on the issue raised."

Rittenhouse, 305 F.3d at 965. Indeed, BRWA actually uses the "hard look" language from NEPA case law.[8] AR 1798.

Defendants argue that BRWA waived its concern regarding herbicide use and the fact that the Forest Service has not used such treatments in the Project area in over forty years. ECF No. 46 at 19–20. However, BRWA could not expressly raise this in the objection process because "[t]he agency had independent knowledge of the issues." *Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1092 (9th Cir. 2006). As BRWA explained, knowledge that herbicides had not been used in four decades came only *after* the Forest Service issued its final decision, and only after receiving responses to its Freedom of Information Act ("FOIA") requests. *See* ECF No. 43 at 19–21. *See Native Ecosystems Council v. Lannon,* 598 F.Supp.3d 957, 967 (D. Mont. 2022) (plaintiff did not waive claim regarding missing information not provided by agency in decision documents). Arguing that BRWA should have raised this issue in its objections, Defendants attempt to rely on the 2018 scoping letter, which stated that "little forest management [had] occurred in the project area" in the "last 25 years[.]" AR 1210; ECF No. 46 at 28. However, this information is not provided in the EA, and this general statement does not notify the public of the significance of the fact that *no* herbicides have been used in *nearly four decades.* NEPA does not require the public to parse agency disclosures in order to understand them. *Connaughton*, 752 F.3d at 761.

In any event, BRWA alerted the Forest Service of its contentions regarding the risks of herbicide treatments within the Project area in its comment, stating that "Robert's Gap in particular is characterized as having karst geology, making both surface and groundwater subject to contamination from toxins applied on the surface[.]" AR 1359. This concern is repeated in BRWA's

[8] The Service does not argue that BRWA waived its claims regarding the Service's failure to take a hard look at the impacts of sediment pollution on the Buffalo River, which it raised in its comment and objection. AR 1360, 1797, and raised in its Opening Brief. ECF No. 43 at 27.

subsequent objection regarding herbicides "and their impacts not only within the project area but downstream on the water quality of the *Buffalo National River.*" AR 1797 (emphasis added); *see also* AR 1798 (BRWA objection stating that "manual alternatives to herbicides fits better with the Forest Plan goals of all MAs and herbicide usage should be eliminated altogether from this project").

As for the absence of baseline water quality information, this also was not disclosed by the Service until it issued it final DN/FONSI. AR 1905. Although the Service argues this "gap" in the EA was obvious, ECF No. 46 at 23, BRWA has already explained why that is not true, *See* ECF No. 43 at 28. Just as was the case with the absence of information about no herbicide use in the Project area for forty years, BRWA could not raise the specific issue of the missing baseline water quality information in its objection because the fact that the Service did not have this information was not disclosed by the Service until many months later in its DN/FONSI. *See* cases cited above, at 17.

Defendant's assertion of waiver is also based on a narrow reading of non-binding case law regarding the level of specificity required for objections. Although the Eighth Circuit has not aligned itself with any approach within the context of 7 U.S.C. § 6912(e), the Forest Service would have this court adopt the stricter approach taken by the Third Circuit in *Kleissler v. U.S. Forest Service,* 183 F.3d 196 (3d Cir. 1999). ECF No. 46 at 22. However, the holding in *Kleissler* was influenced by the plaintiff's tactic to game the system through "Paper Monkeywrenching," which is not a genuine concern regarding the Service's projects, but rather a method used to increase the workload of the Forest Service and to slow down implementation of projects. 183 F.3d at 200 n.6. Further, due to concerns of "unjustified obstructionism[,]" the court rejected using a more relaxed standard for plaintiff's unrepresented by counsel during the administrative process proceedings.

Id. Finally, because the plaintiffs had not presented certain arguments in writing and instead only raised those arguments informally at public meetings, the court held that the plaintiffs had failed to exhaust their administrative remedies. *Id.* at 200–02. More fundamentally, adopting this much stricter approach to exhaustion is inconsistent with NEPA's requirement to facilitate public involvement. 40 C.F.R. § 1506.6 (2019). If the public knows the Service can ignore comments that are not prepared with the assistance of someone with specific knowledge regarding legal matters, far fewer members of the public may submit comments.

Defendants' reliance on *Kleissler* is inapposite, as BRWA sufficiently raised its legitimate concerns in writing throughout the objection process. *See* AR 1358–1364 (BRWA comment); AR1795–1800 (BRWA objection). Moreover, the apprehension of ingenuine gaming tactics underling the strict holding in *Kleissler* is not at issue here, nor has the Forest Service raised any argument which would suggest otherwise. Therefore, because this approach negatively impacts the rights of parties who were unrepresented during the administrative appeal proceedings to have their claims heard, this Court should apply a more lenient standard already embraced by the Eighth Circuit, which would adhere to the Supreme Court's caution against inflexible applications of the exhaustion requirement. *See Madsen,* 866 F.2d at 1039; *McKart*, 395 U.S. at 193 (cautioning against "blindly" applying the doctrine).

Defendants cannot earnestly contend that BRWA's timely appeals failed to provide sufficient notice about BRWA's concerns regarding the deficiency of the EA to specifically discuss the Project's impacts on the Buffalo National River and water quality in general, including due to the use of herbicides. Because the record reveals that BRWA structured its comment and objection sufficiently so as to alert the Forest Service of their "positions and contentions," 36 C.F.R. §

218.14, Plaintiffs satisfied the exhaustion requirement and therefore did not waive its claim in Counts One and 2.

b. Forest Service violated NEPA by failing to take a "hard look" at the Buffalo National River. (Count 1)

For an agency to meet the "hard look" requirement, NEPA requires an EA to "explain fully its course of inquiry, analysis and reasoning." *Mid States Coal. for Progress*, 345 F.3d at 536 (quoting *Minn. Pub. Interest Rsch. Grp. v. Butz*, 541 F.2d 1292, 1299 (8th Cir. 1976)). Conclusory assurances in an EA, without adequate support, do not substitute for the analysis provided by an EIS. *Sierra Club v. Bosworth*, 352 F.Supp.2d 909, 927 (D. Minn. 2005). Further, general statements that "merely catalog environmental facts" are insufficient; rather, some "detailed information is required." *Friends of the Boundary Waters Wilderness v. Dombeck,* 164 F.3d 1115, 1128 (8th Cir. 1999); *see also Neighbors of Cuddy Mt. v. U.S. Forest Serv.,* 137 F.3d 1372, 1379 (9th Cir. 1998) (finding that because the Forest Service provided only "perfunctory" statements, neither the court nor the public could be assured that it took requisite "hard look").[9]

i. The final EA includes no real analysis or discussion regarding the Project's impacts to the Buffalo National River and cannot be considered a "hard look" at this pristine resource.

The final EA does not adequately assess the Roberts Gap Project's effects on the Buffalo National River and does not provide sufficient information to permit opportunity for meaningful public scrutiny. Congress has twice passed legislation on its recognition that the Buffalo River is a unique geographic resource that merits special protection and consideration. *See* ECF No. 43 at

[9] The Service cites a five-sentence letter from the U.S. National Park Service supporting the conclusions in the draft EA. ECF No. 46 at 25 (citing AR 1392). But this short letter also offers only conclusions that do not merit deference. Moreover, the Park Service likely was unaware that the Forest Service had no baseline water quality data and was authorizing herbicide use in the Buffalo National River headwaters area where herbicides had not been used for forty years, which is most of the time period since the River was designated as a "National River" in 1972.

36. Congress specifically recognized the need to protect and conserve "an area containing unique scenic and scientific features" and to "preserv[e]" the Buffalo River "for the benefit and enjoyment of present and future generations." 16 U.S.C. § 460m-8 (1976); AR 0702; ECF No. 43 at 22–23.

Despite these congressional findings, the Forest Service engaged in an impermissibly selective analysis of the River in its EA. The most fundamental omission from this "analysis" is the total failure to even mention impacts to the Buffalo National River, even though preservation of its "unspoiled" and pristine character was the primary reason the River received its designation. *See* ECF No. 43 at 24. Even in the limited instances where the Buffalo National River was mentioned in the EA, the Forest Service offered no analysis as to what impacts may occur, in direct violation of NEPA.

Defendants attempt to defend the Forest Service's incomplete analysis by stating that it considered the Buffalo National River when it evaluated water quality for the waterways in the Project area in general. ECF No. 46 at 24. However, Defendants admit that the EA does not separately discuss impacts of the Project on the Buffalo National River. *See* ECF No. 46 at 24. ("While the resulting analysis shown there discloses the expected change in sediment at the watershed level, and not by particular stream or waterway, the downstream impact of sediment on the Buffalo River was [implicitly] considered."). Defendants cannot seriously contend that simply arguing in a *post hoc* legal brief that the Buffalo National River was considered satisfies the Forest Service's NEPA obligation to specifically analyze and share with the public in a comprehensive manner the impacts of the Project on the Buffalo National River. The district court in *Sierra Club Northstar Chapter v. Kimbell*, No. 07-3160, 2008 U.S. Dist. LEXIS 107239, at *2 (D. Minn. Sept. 15, 2008), specifically rejected such an argument regarding impacts from a Forest Service project adjacent to the Boundary Waters Wilderness. The court found that the Service needed to

specifically address and analyze impacts on the Boundary Waters and that tiering to Forest Plan requirements regarding protection of the Boundary Waters was insufficient absent site-specific analysis of a project's impacts on that protected area. *Id.* at *15.

Further, the EA's water quality "analysis" that Defendants rely on to support the Forest Service's assertion that it considered the impacts to downstream waterways is centered on sediment increase and does not even mention effects from herbicide use. But even that discussion of sediment pollution is inadequate as it relates to the Buffalo National River, as BRWA explained in its Opening Brief. ECF No. 43 at 27.[10]

While it is true that the EA contains a section—wholly independent of the water quality section—discussing risks associated with herbicides, this analysis was focused entirely on risks to human health and contained zero analysis regarding the risks to water quality. AR 1762–1770. Outside of the EA, the Forest Service itself admits that herbicides "may pose a hazard," AR 1862, and acknowledges that there is a risk for spills to occur in or near water. AR 1976. The lack of analysis as to the potential impacts of this "hazard" on water quality is especially concerning given that the Project area is in the Buffalo River watershed, upstream to the National River, and on a highly permeable karst structure that makes both surface and groundwater susceptible to contamination. *See* AR 0378 ("The fractured cavernous limestone geology of the region allows a direct linkage from surface waters to groundwater."); ECF No. 43 at 23.

These concerns are compounded by the fact, not included in the EA, that "herbicides have not been used in this area in more than 40 years." AR 2588; *see* ECF No. 43 at 21. And now the

[10] The Forest Service Brief, ECF No. 46, does not respond in any way to BRWA's argument that the final EA's analysis of the impacts of sediment pollution on the Buffalo National River was inadequate and not a hard look. ECF 43 at 27. The Service has therefore conceded this issue. *See Bosch v. Thurman*, No. 4:22-cv-00677-LPR, 2024 U.S. Dist. LEXIS 34235, *2 n.4 (E.D. Ark. Feb. 28, 2024).

Service's baseline water sampling has shown that the Buffalo River headwaters in fact contain no herbicide pollution at all. *See* ECF No. 46-1. Rather than mooting BRWA's claims, *see* discussion above at 5-6, this new information confirms just how pristine those waters are and how concerning it is that the Service has decided to put such high quality waters at risk by authorizing herbicide use in the Project area, which includes the Buffalo National River's headwaters.

Instead of fully analyzing all direct and indirect impacts, the Forest Service impermissibly limited its water quality analysis to a small number of topics, predominantly focusing on impacts from sediment increases. AR 1749–1751. It simply states that the chosen Alternative 3 "should not result in sizeable effects to the water resources." AR 1750. But an agency cannot make conclusions about the likelihood or magnitude of a particular impact without first taking a hard look at the expected impacts.

As discussed above, it is reasonably foreseeable, and almost certainly true, that the proposed Project will affect the water quality of the Buffalo National River. *See* AR 1748 (admitting increased sediment pollution for at least three years); *see also* AR 1863 (Forest Service stating that there are "detections of herbicides when monitoring the streams that run through or adjacent to treated areas"). As the Eighth Circuit has held, "[w]hen the *nature* of the effect is reasonably foreseeable but its *extent* is not, the agency may not simply ignore the effect." *Mid States Coal. for Progress*, 345 F.3d at 549 (emphasis in original). Because the Forest Service decided not to disclose impacts to a unique geographic and congressionally-recognized resource, and did so knowing that its decision to utilize treatments that have not been used in the area in forty years would have consequences to the water quality, its failure to take a "hard look" at the Buffalo National River was arbitrary and capricious.

ii. The EA does not properly tier to the Forest Plan, its standards, or its associated FEIS, and thus, any attempted tiering the Forest Service cites to does not cure the EA's deficiencies.

The Forest Service prepares a programmatic EIS for each national forest as part of the Forest Plan required by the National Forest Management Act. *Sharps v. U.S. Forest Serv*., 823 F.Supp. 668, 675 (D. S.D. 1993), *aff'd* 28 F.3d 851 (8th Cir. 1994). Before the Forest Service can permit a specific logging project, the agency must, among other things, ensure that the project conforms with the Forest Plan, *see* 36 C.F.R. § 219.10(e), and conduct site-specific environmental analysis pursuant to NEPA. *Sierra Club v. Kimbell,* 623 F.3d 539, 554 (8th Cir. 2010). At the programmatic planning stage of a forest plan, an EIS "must provide sufficient detail to foster informed decision-making," but "site-specific impacts need not be fully evaluated" until the decision to undertake a site-specific project has been made. *Id.* at 560 (quoting *Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 800 (9th Cir. 2003)).

As is discussed above, at 11-3 when evaluating site-specific impacts, NEPA allows agencies to "tier" to a previous EIS. 40 C.F.R. § 1508.28 (2019). However, complete reliance on an earlier NEPA analysis is permissible only when the previous document actually analyzes the impacts of the project at issue. *See Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 810 (9th Cir. 1999) (holding that reliance on an earlier EIS was improper because it did not discuss the subsequent specific project in detail). Moreover, "tiering" to an earlier EIS is allowed only to the extent that the subsequent EA summarizes and specifically references issues discussed in greater depth in the earlier EIS. 40 C.F.R. § 1502.20 (2019).

Defendants disingenuously point the Court to the Forest Plan and its corresponding FEIS to cure NEPA defects in the Robert's Gap Project's approval.[11] ECF No. 46 at 25. However, because neither the Forest Plan nor its FEIS include any analysis that pertains to the issues arising from the Project, the Court should not allow the Forest Service to evade NEPA's clear requirement to examine impacts to geographically unique areas at both the project and programmatic level. While the Forest Plan does include standards designed to protect wild and scenic rivers such as the Buffalo River, these standards do not contain any analysis, nor does the final EA discuss how they apply and would impact the specific management activities at issue here. AR 0175 (Forest Plan management activity standards).[12] Defendants claim that because the Robert's Gap Project follows these standards, the Forest Service was relieved of its duty to evaluate the impacts of this specific Project. ECF No. 46 at 25. "[A] focus on *plan* compliance, however, fails to account for whether members of the public have fair notice of when they should challenge the *NEPA* compliance of a particular action." *N. Alaska Envtl. Ctr. v. U.S. DOI, Bureau of Land Mgmt.*, 983 F.3d 1077, 1092 (9th Cir. 2020) (emphasis added).

[11] As Defendants point out in their Brief, ECF No. 46 at 26, Plaintiffs are not challenging the Forest Plan standards nor the EIS prepared for the Forest Plan. To begin, the statute of limitations to challenge NEPA documents is six years, so Plaintiffs cannot bring such a challenge in this case. *See United States v. Est. of Hage*, 810 F.3d 712, 720 (9th Cir. 2016) ("The six-year statute of limitations found in 28 U.S.C § 2401(a) applies to APA claims."); 28 U.S.C. § 2401(a) ("every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."). The Forest Service is still required to conduct site-specific analysis pursuant to NEPA regarding how those Plan standards apply to a specific project, and BRWA can challenge that site-specific analysis, as it does here. Further, the Forest Plan FEIS itself stresses the importance of detailed, project-level analysis. AR 0017 ("Project level decision requires compliance with NEPA procedures").

[12] BRWA has already discussed above, at 3-4 and 11-13, how the final EA fails to properly tier to the Plan's Karst and Wild and Scenic River standards by only citing to all Plan standards generally and not summarizing how they apply to this Project.

Further, tiering to the Forest Plan in the EA does not cure the deficiencies in the agency's analysis, as the Plan does not analyze impacts to the Buffalo National River as a discrete area or resource. While the Forest Plan recognizes the Buffalo River as a wild and scenic river, NEPA requires more than just an acknowledgement of the River's presence in the area. *See Friends of the Boundary Waters Wilderness,* 164 F.3d at 1128. In fact, the only mention of the Forest Plan regarding impacts to water quality in the EA is a perfunctory, unsupported statement that does not even properly cite to the Forest Plan. AR 1751 ("With the application of . . . current Forest Plan standards. . . the activities of the PA and Alternatives 2 and 3 should not result in sizeable effects to the water resources."); *see* 40 C.F.R. § 1502.21 (2019) (stating that the "incorporated material shall be cited in the statement and its content briefly described"). While "[t]he subsequent EIS or EA need only summarize the issues discussed in the broader statement and concentrate on the issues specific to the subsequent action," 40 C.F.R. § 1502.20 (2019), here, the Forest Service did not mention any potential impacts to the Buffalo National River in general, or the effects of herbicide use on water quality, much less summarize such issues. NEPA requires that *every* major federal action must be examined to determine the potential significant impacts on the environment, and while "tiering" is allowed, the Forest Service is still required to provide the public with all the information necessary to allow for meaningful participation. *See Marsh,* 490 U.S. at 371. By failing to adequately analyze the Project's impacts on the Buffalo National River, the Forest Service's attempt to tier to the Forest Plan is insufficient.

The Forest Service further suggests that the FEIS prepared in conjunction with the Forest Plan somehow alters the legal landscape of its NEPA obligations during its analysis of environmental impacts from this site-specific Project. ECF No. 46 at 25. However, the FEIS falls short of fulfilling this purpose. The analysis contained in the Forest Plan FEIS is programmatic;

therefore, it does not analyze the impacts that this site-specific logging Project will have on the Buffalo National River and its headwaters. In fact, the only time the Buffalo National River is even mentioned in the Forest Plan's FEIS is not in reference to herbicides, or even water quality in general. AR 0406 ("The Upper Buffalo Wilderness contains…the headwaters of the Buffalo National River."). Similarly, the Buffalo River, outside of National River designation, is discussed only four times, each merely identifying it as a "Wild and Scenic River." AR 0323–0324; AR 0337–0338. Defendants claim that the FEIS analyzed the management activity standards to "protect" the wild and scenic rivers in the forest, ECF No. 46 at 25. However, Defendants cannot point to anywhere in the FEIS that can actually be considered "analysis," as all it contains are general statements regarding wild and scenic rivers. *See, e.g.,* AR 0326 ("Any restoration needs would be made compatible with wild and scenic river classification and its outstandingly remarkable values"). General statements contained throughout a FEIS cannot substitute for an actual analysis that considers impacts to a particular resource.

Similarly, nowhere do Defendants discuss where or how impacts from herbicides on the Buffalo National River were considered, likely because there is nowhere to point to. The only mention of herbicides in the FEIS is confined in a single paragraph that states that "direct application methods minimize off-site movement," and then briefly discusses monitoring results from nearly two decades ago to support this conclusion. AR 0388. However, such general statements are not sufficient analysis for a site-specific Project to tier to. *Sierra Club v. Kimbell*, 595 F.Supp.2d 1021, 1030 (D. Mont. 2009); *see also Sierra Club Northstar Chapter,* 2008 U.S. Dist. LEXIS 107239, at *15 (discussed above at 21).

Defendants cannot point to any place in the EA, Forest Plan, FEIS, or any other NEPA documents where it actually acknowledges and sufficiently analyzes the environmental impacts

from herbicides, on water quality in general, or to impacts on the Buffalo National River. Although Defendants attempt to downplay the significance, the use of herbicides in this area is a substantial matter. As the Forest Service concedes, it has not used herbicides in the past forty years. *See* ECF No. 43 at 3; AR 1762–1770, 2588. The fact that there has been little forest management in the area in the past twenty-five years, ECF No. 46 at 28, along with no herbicide application in the past forty years, AR 2588, evidences the pristine quality of the water and emphasizes the importance of the Forest Service making efforts to preserve it.

The EA illegally does not assess the Project's impacts on the Buffalo National River. The fact that the EA attempts to tier to the Forest Plan cannot not cure this deficiency. Although the Forest Plan does include a discussion regarding the goals and standards for managing the wild and scenic rivers within the Forests' boundaries, it does not inform the public of possible impacts to water quality caused by the Robert's Gap Project. Further, neither the Forest Plan nor its corresponding FEIS, address the impacts of herbicides on water quality or potential impacts to the Buffalo National River.

c. BRWA's claims (Counts 2, 6 and 7) regarding missing baseline water quality data and analysis are not moot, and now that the Service has baseline data it must reanalyze its water quality analysis in light of that data in a supplemental NEPA document.

BRWA's Opening Brief explained how and why the EA's water quality analysis violates NEPA. The EA required supplemental NEPA analysis because the Service admitted for the first time in its DN/FONSI that it lacked baseline water quality data for the Project area before it approved the Project. *See* ECF No. 43 at 28–35, 46–47; AR 1905 (DN/FONSI admitting need to obtain baseline water quality information). The Forest Service's Brief first argues that it did not

need baseline water quality data when it prepared its EA and that, because it now has such data, BRWA's claims are moot. *See* ECF No. 46 at 29–31, 37. Both arguments lack merit.[13]

The Service first insists that the holding in *Great Basin Resource Watch v. Bureau of Land Management,* 844 F.3d 1095, 1101 (9th Cir. 2016), excuses it from needing actual baseline water quality data. ECF No. 46 at 29. That case does hold that an agency can use methods to analyze environmental impacts that do not rely on actual baseline data, "but whatever method the agency uses, its assessment of baseline conditions must be based on accurate information and defensible reasoning." 844 F.3d at 1101 (internal citations and quotations omitted).[14] The Service's problem however is that its EA does not even admit it lacks actual baseline data, much less offer "defensible reasoning" for using other methods. The Service attempts to get around this problem by citing to a 2017 document about changes in the Service's herbicide monitoring policy. ECF No. 46 at 12, 29–30. That document explains that the Ozark-St. Francis National Forests are no longer mandating monitoring for herbicides, but it also cautions that "[d]istricts are to continue to assess whether monitoring should be included in Project planning." AR 1975.[15]

There are multiple reasons for why this 2017 policy change document does not provide the

[13] Before addressing the Service's specific arguments, BRWA must emphasize that the Service's arguments often appear to be conflating having or obtaining pre-decisional water quality baseline data to use in a proposed action's NEPA analysis and subsequent monitoring to detect changes to that initial water quality caused by a Project's implementation. The Service's DN/FONSI appears to recognize this distinction and requires both. *See* AR 1905. BRWA's claims are based on the Service's admitted lack of pre-decisional baseline water quality data and the legal fact that such missing data completely undercuts the water quality analysis in its EA, which therefore must be supplemented. *See* ECF No. 15, ¶ 58–61, 75–84; ECF No. 46 at 29–30.

[14] Although the Service's Brief claims this "defensible reasoning" can be anywhere in the record, ECF No. 46 at 29, the *Great Basin* opinion does not actually say that and instead focuses on the explanations in or cited by the NEPA documents at issue, 844 F.3d at 1101–04, and expressly refuses to consider non-NEPA documents. *Id.* at 1104.

[15] This document, not cited by the final EA, is the only "defensible reasoning" offered by the Service's Brief, and thus, it has waived it ability to offer alternative explanations in its Reply.

"defensible reasoning" required by *Great Basin.* First, this document is not cited in the EA or the DN/FONSI, and BRWA had never seen it until it received the administrative record in December of 2023. Second, the policy addressed by the document concerns "monitoring." It says nothing about the need, under NEPA, to have pre-decisional baseline water quality information. Third, even if it were addressing the need for baseline data, it is not a blanket "get out of jail free card" for an agency's lack of such data. In fact, it specifically says the need for monitoring must be assessed for each project, and there is no evidence whatsoever that the Service did that when it was preparing the NEPA analysis for the Robert's Gap Project. Finally, this policy only addresses herbicide pollution and says nothing about other water pollutants such as sediment, which are put at issue by BRWA's claims. The Service, in fact, never offered "defensible reasoning" for not obtaining and using actual baseline water quality data, which is why its DN/FONSI belatedly decided to obtain that data for multiple pollutants.

The Service also argues that there must be evidence that a proposal will cause contamination before baseline data is needed. ECF No. 46 at 30. The case it cites, *Gifford Pinchot Task Force v. Perez*, No. 03:13-cv-00810-HZ, 2014 WL 3019165, *33 (D. Or. July 3, 2014), contains no such holding or requirement. But even if it did, the final EA expressly admits increased sediment pollution, AR 1748, and the policy change document admits past detections of herbicide pollution. AR 1975. The fact that those levels were "below concern levels" generally, does not mean they are below concern levels when the water body at risk is a National River known for its high water quality.

With regard to BRWA's claims for supplemental NEPA analysis based on the missing baseline water quality data and related analysis, the Service does not address most of the case law or applicable regulations cited in BRWA's Opening Brief. *See* ECF No. 43 at 32–35, 46–47. In

fact, the Service's Brief never cites or discusses 40 C.F.R. § 1502.9(c)(1)(i) and (ii) (2019), which sets out the mandatory NEPA requirement and standard for supplemental NEPA analysis. Because the Service now has the baseline data, but has not prepared any public NEPA analysis using it, this binding regulation requires that the Service prepare a supplemental NEPA document regarding this "substantial change" to the Project, the DN/FONSI's new requirement to obtain the baseline data, *see* 40 C.F.R. § 1502.9(c)(1)(i) (2019), and the "significant new … information," the baseline water quality data the Service has actually obtained. *See* 40 C.F.R. § 1502.9(c)(1)(ii) (2019).

Finally, as was already explained above, at 5-6, rather than mooting BRWA's water quality claims, the Service's newly obtained water sampling results showing no current herbicide pollution underscore just how clean the Buffalo National River's waters currently are. *See* ECF No. 46-1. This significant new information bolsters BRWA's demand for a specific and detailed supplemental analysis of the risks that the Service is now creating to the National River's pristine waters by authorizing herbicide use in an area that has not seen such use for forty years.

III. Because the Forest Service Drafted and Published the EA and Bat Plan Amendments Before the Discovery of the Endangered Indiana Bat Maternity Colony, Those Documents Failed to Take a Hard Look at the Indiana Bat, and Supplemental Public NEPA Analysis is Required. (Counts 3, 6, and 7)

a. BRWA preserved all claims involving the Indiana bat and BRWA should prevail on each of those claims. (Counts 3, 4, 6, and 7)

The record facts regarding BRWA's Indiana bat claims are fairly straightforward and not seriously disputed by the Forest Service. First, the Forest Service has never publicly analyzed in a NEPA document the impacts of the Project on the recently discovered Indiana bat maternity colony or the impacts of the additional measures intended to protect that maternity colony that it adopted in its final DN/FONSI. The Forest Service finalized the EA that the DN/FONSI expressly relies upon to comply with NEPA in March 2021, AR 1712, several months before the maternity colony

was discovered in July 2021, AR 6595, and before the Service decided to impose the additional measures in October 2021. *See* AR 1897, 1905.[16] So, not surprisingly, that EA does not address the impacts of the Project on the maternity colony or the impacts of the new protective measures. Second, although NEPA expressly imposes a continuing obligation on federal agencies to consider whether any changed circumstances or new information should be addressed in a public, supplemental NEPA analysis, there is no evidence in the record indicating that the Forest Service actually considered whether such supplemental NEPA analysis was or was not required by the discovery of the maternity colony and the agency's adoption of additional measures designed to protect that maternity colony. Indeed, there is no evidence in the record that the Service ever even acknowledged BRWA's express written demand for such supplemental NEPA analysis, let alone considered its demand. *See* AR 8644–8649. Finally, it is beyond dispute that, because of this absence of public NEPA analysis, the public has never had the opportunity to comment on the additional protective measures adopted by the DN/FONSI or on any internal analysis that the Forest Service may have conducted regarding impacts on the Indiana bat.

These undisputed record facts prove the four Indiana bat related claims in BRWA's Amended Complaint, ECF No. 15. First, Count 3 alleges that the DN/FONSI violated NEPA by approving the Project without analyzing and disclosing in a NEPA document—here, the EA—the impacts of that Project on the recently discovered Indiana bat maternity colony, including the impacts of the new, additional measures intended to protect that colony. ECF No. 15 at ¶ 62. It also

[16] The Service's Brief, ECF No. 46 at 13, also references a Supplemental Threatened and Endangered Species Analysis, citing AR 6633–6634 (Supplemental TES Report). This record document is undated. *See* ECF No. 21-2, AR 0005. However, as part of the Parties' record stipulation, ECF No. 28, the Forest Service provided an April 2021 date for this document, referenced as Tab FS0058. *See* ECF No. 28 at ¶ 6. This means that this "analysis" also could not have considered Project impacts to the maternity colony, which was discovered in July 2021.

alleges, correctly, that the non-NEPA Endangered Species Act ("ESA") documents that the DN/FONSI references, *see* AR 1904, 1905, 1913, also do not address these changed circumstances, nor do the general references to the Bat Plan Amendments EA or DN, as all of these documents pre-date the discovery of the colony. ECF No. 15 at ¶ 62. Second, Count 6 alleges that the Forest Service violated its obligation under NEPA to determine whether supplemental NEPA analysis was required because of the Indiana bat maternity colony discovery and to prepare such supplemental analysis. ECF No. 15 at ¶ 75. Counts 3 and 6 are really two sides to the same NEPA violations claim: The Service needed a complete public NEPA analysis *before* it approved the Project. The March 2021 EA was not such a complete analysis and, in fact, could not have been, as the significant new discovery had not yet occurred. This is the NEPA violation set forth in Count 3. The Service could nevertheless have complied with NEPA by preparing supplemental NEPA analysis prior to the publication of the final DN/FONSI to support its decision. Its failure to do so is the NEPA violation set forth in Count 6. ECF No. 15 at ¶ 75. Count 7 adds a NEPA violation based on the Service's continuing failure to supplement its NEPA analysis, including its failure to even acknowledge, much less evaluate and respond to, BRWA's letter demanding such supplemental NEPA analysis. ECF No. 15 at ¶ 80–82; AR 8644–8649. Finally, Count 4 adds a NEPA claim based on the Service's failure to allow the public to comment on the changed circumstances caused by the maternity colony discovery and the Service's adoption of the Bat Plan Amendments and additional measures intended to protect that colony for the first time in the DN/FONSI. ECF No. 15 at ¶ 67–68.

b. The discovery of the endangered Indiana bat maternity colony postdated the publication of the EA, and thus the EA did not—and could not—take a hard look at the Indiana bat. (Count 3)

BRWA did not abandon Count 3 in its Opening Brief, as the Forest Service claims in its Brief. ECF No. 46 at 18–19 ("BRWA does not assert in its summary judgment brief that the Forest Service failed to take a 'hard look' at the Project's impacts on the Indiana bat. BRWA has thus abandoned in briefing this aspect of the Amended Complaint." (internal citations omitted)). In its Amended Complaint, BRWA pled Count 3 as the Forest Service's failure to take a hard look at the Indiana bat because "neither the impact to the actual maternity colony nor the adequacy of the additional protections [included in the DN/FONSI] were considered in the Final EA or any of the associated documents issued to comply with the ESA." ECF No. 15 at ¶ 62. BRWA then made the same argument in its Opening Brief, despite labelling the argument somewhat differently in its headings than it had in the Amended Complaint. *See* ECF No. 43 at 35 (where subheading a. specifically states it encompasses Count 3); 38 ("Additionally, both the draft and final EAs for the Robert's Gap Project did not include analysis about the Indiana bat maternity colony, as the colony was not yet discovered."). Thus, BRWA preserved Count 3 in its Opening Brief.

The existing NEPA documentation for the Project does not analyze the Project's impacts on the endangered Indiana bat maternity colony, meaning the Forest Service could not rely on the March 2021 EA or the March 2021 Bat Plan Amendments EA to satisfy its NEPA obligation to take a hard look at this significant new discovery before it made its final decision. The Forest Service thus failed to take a hard look at the Indiana bat in its EA for three reasons.

First, and most significantly, the endangered Indiana bat maternity colony was discovered *after* the final EA and draft DN/FONSI were published and objection period had occurred. *See* AR 6595. Therefore, the Forest Service did not—and *could not*—include any environmental analysis

regarding these issues pursuant to NEPA in its final EA for the public to object to through the pre-decisional administrative appeals process.

Second, the final EA hardly mentions the Indiana bat, and thus cannot be considered a "hard look," even under the CEQ regulations' lessened EA requirements. *See* 40 C.F.R. §1508.9 (2019). The EA only discusses the Indiana bat in limited circumstances, primarily when describing the different kinds of logging that will occur in different parcels of the Project area, where the Forest Service notes in its tables if the parcel is "within, or partially within, a secondary conservation zone" for the bat, and what timing restrictions apply for timber harvesting. AR 1723, 1724, 1726, 1732, 1733.

Third, although the Forest Service generally and improperly tiered to its own Forest Plan FEIS in the final EA, *see* AR 1717, it did not cite or attempt to tier to the Bat Plan Amendments or any of its associated NEPA documents. The final EA states that part of the Project area includes two overlapping "secondary conservation zones" for the Indiana bat, then states the "[f]orest-wide standards from the Forest Plan related to conservation zones are listed below." AR 1741. However, the final EA fails to actually include these standards, or even reference a page number that the public could use to easily find the standards for themselves, despite the fact that the forest-wide standards for the Indiana bat were recently updated to "ensure that 'the proper protective measures [for a maternity site] are in place and will not delay project implementation if one is found.'" *See* ECF No. 46 at 32–33; AR 4301–4302 (October 2020 EA for Bat Plan Amendments), 1741. Instead, the remaining analysis for the Indiana bat in the EA was a mere two sentences:

> Indiana Bat Forest-Wide Standards:
> The Reeves Mountain Rx burn is partially within the secondary conservation zone for Indiana bats; therefore, the Forest Plan standards will apply.
> *See Design Criteria in project record at District office for Forest Wide Standards which apply to Indiana bat*

AR 1741. And that is the entirety of the Forest Service's endangered Indiana bat analysis in the EA. The Forest Service did not tier to the October 2020 EA for the Bat Plan Amendments that had been published less than a year prior, *see* AR 4291, nor to the DN for the Bat Plan Amendments that had been finalized that same month. AR 4344. It is irrelevant that the DN/FONSI finally cites to the Bat Plan Amendments EA and DN, *see* AR 1904–1905; the DN/FONSI contains no analysis explaining why the Bat Plan Amendments are sufficient to protect the colony, does not cite to or attempt to tier to any other NEPA document that might do so, and further adds additional protective measures for the first time, completely outside of the public NEPA process. AR 1904–1905.

Additionally, the Bat Plan Amendments themselves, as well as their associated NEPA and ESA documents, do not constitute a hard look at the effects of the Robert's Gap Project for two reasons. First, just as the development and publication of the EA and draft DN/FONSI predated the discovery of the Indiana bat maternity colony, so too did the development and publication of all of the Bat Plan Amendment documents, and therefore, the Bat Plan Amendments did not analyze Project impacts on the actual maternity colony.[17] Further, as is noted continuously both in this Reply/Response and in BRWA's Opening Brief, the Forest Service is not merely following the Bat Plan Amendments, as it has repeatedly suggested. *See, e.g.,* AR 1869 (BRWA Objection Resolution Letter). Instead, it has included two additional measures that were not analyzed through

[17] The Forest Service argues in its Brief that the Bat Plan Amendments were meant to make subsequent site-specific projects more efficient and ensure that if a maternity colony is found, its discovery "will not delay project implementation[.]" ECF No. 46 at 34, citing AR 4301–4302. However, this statement appears out of context, and more likely is in reference to delays caused by the need to reinitiate ESA consultation, not supplemental NEPA analysis. Further, even if this statement were in regards to supplemental NEPA, the Forest Service could not pre-determine the need for supplemental NEPA analysis regarding future projects. In contrast, if this is referencing the need for further ESA consultation, the U.S. Fish & Wildlife Service, a consulting agency for the cited EA, *see* AR 4295, and the agency responsible for administering the ESA, might be able to pre-determine such a need.

NEPA (or ESA) analysis in the DN/FONSI. AR 1905. These two measures are part of a federal action that is subject to NEPA and must therefore be properly considered in supplemental public NEPA analysis.

Second, the Bat Plan Amendments EA is a programmatic document and cannot replace site-specific analysis for the Robert's Gap Project. The Forest Service conflates two distinct types of NEPA documents: programmatic documents and site-specific documents. The Service states that the Bat Plan Amendments Biological Assessment ("BA"), a non-NEPA document, "recognized that the Forest Service would need to undertake resource management activities like those in the Project in the coming years[,]" and thus, "projects like Robert's Gap were front of mind when" the agency developed the Bat Plan Amendments. ECF No. 46 at 32. However, this argument fails to recognize that the Bat Plan Amendment EA is a programmatic document, meant to update the Management Plan forest-wide standards for the Indiana bat across the entire Ozark-St. Francis National Forests. *See* discussion above, at 24-25.

Therefore, none of the NEPA documents specifically cited by or relied upon by the DN/FONSI actually address the Project's impacts on the Indiana Bat maternity colony or the additional measures that the Service adopted to provide additional protections to that colony and the Service therefore violated its NEPA obligation to take a hard look at the Project's impacts on the Indiana bat before it approved the Project.

c. Because the EA failed to take a hard look at the Project's impacts on the endangered Indiana bat maternity colony, the Forest Service has a continuing obligation to complete supplemental NEPA analysis addressing this issue. (Counts 6 and 7)

The discovery of the first endangered Indiana bat maternity colony within the Ozark-St. Francis National Forests, spanning over 1,200,000 acres, and decision to add measures intended to provide additional site-specific protections for that maternity colony constitute significant

changed circumstances and new information that the Forest Service must evaluate publicly through additional NEPA analysis, either in the form of an SEA or EIS. While the Forest Service argues that additional public analysis is not necessary because it 1) evaluated the Indiana bat in its Bat Plan Amendments and associated ESA consultation and 2) "tiered" to the Bat Plan Amendments and added two additional "protective" measures in its final DN/FONSI, neither supposed protection measure has been adequately analyzed or exposed to public review and critique, and are thus illegal under NEPA.

As previously explained, Counts 3 and 6 of BRWA's Amended Complaint are connected NEPA violations: the Project final EA did not adequately take a hard look at Project effects on the Indiana bat maternity colony, and as such, the Service's decision to move forward with the Project and publish the final DN/FONSI, rather than undertaking supplemental public NEPA analysis, is arbitrary and capricious, in violation of NEPA's "hard look requirement, Count 3, and 40 C.F.R. § 1502.9(c)(1) (2019), Count 6. The discovery of the colony is " significant new …information" under § 1502.9(c)(1)(ii) and the additional of two additional measures intended to protect that maternity colony is a "substantial change" to the Project under § 1502.9(c)(1)(i). The "significance" threshold in 40 C.F.R. § 1502.9(c)(1)(ii) (2019) presents "a low standard," and where new information raises "substantial questions" regarding the impacts of a proposed action, further analysis via a SEA or EIS is required. *Connaughton*, 752 F.3d at 760. Further, BRWA sent a letter in May 2022 demanding the Forest Service undertake such supplemental NEPA analysis, a letter that was fully ignored by the agency. *See* AR 8644–8649. By ignoring BRWA's demand letter, and failing to consider the need for supplemental analysis even after the decision had been made, the Forest Service has continued to violate NEPA, 40 C. F.R. § 1502.9(c)(1) (2019), and APA § 706(1), which is BRWA's claim under Count 7. Therefore, the Forest Service must conduct

additional NEPA analysis, with the opportunity for public comment, to fully understand the Project's potential effect and harm on the endangered Indiana bat colony located within the Project area.

i. The Forest Service failed to pre-decisionally determine whether supplemental NEPA analysis for the Indiana bat maternity colony was necessary. (Count 6)

There is no evidence in the record that the Forest Service pre-decisionally determined whether or not it had to complete supplemental NEPA analysis before making a final decision for the Project.

The endangered Indiana bat maternity colony was discovered on July 7, 2021. AR 6595. On July 13, Defendant Jones inquired whether the Bat Plan Amendments "cover[ed] the Robert's Gap area in terms of implementation[,]" but did not mention NEPA or any additional analysis pursuant to it. AR 6600. The first response to Jones indicated that the Bat Plan Amendments alone seemed to cover the Project but again did not discuss NEPA. AR 6599. Another response to Jones discussed the Project and Bat Plan Amendments in terms of ESA consultation, but once again, did not mention NEPA, confirming internal discussions were only considering the discovery of the colony in terms of ESA consultation, rather than supplemental NEPA analysis. AR 6601. It was not until late September when the Forest Service began discussing what additional protective measures would be necessary to safely implement the Project without harm to the colony. *See* AR 6621. These conversations only framed the additional protections as what needed to be included in the final DN/FONSI, rather than what additional NEPA analysis needed to be completed. *See* AR 6623 ("I have been working… to review the Indiana Bat Forest Wide Standards and the New amendment to determine what language needs to be included in [the] decision."). The only time NEPA is acknowledged in this meager internal analysis indicates that the Forest Service was aware

of its continuing obligations under NEPA, but even then, was not itself a decision as to whether the agency would conduct such analysis for the Project. AR 6626 (an October 5, 2021 email from a Service Wildlife Biologist, which states the desire for additional thinning as a protective measure for the colony, but then states "[i]f that can't happen as part of this project and we need to do some follow up NEPA, then we can start working on that soon[,]" indicating the Service was well aware that it needed to comply with NEPA regarding any additional measures).

Further, the Forest Service did not address whether "the presence of a [maternity] colony was [] 'new information' that triggered supplemental environmental analysis" during the objection resolution process as it suggests in its Brief. ECF No. 46 at 35. To begin, the Forest Service did not expressly address whether additional NEPA analysis was necessary; it only said the maternity colony was "[n]ot considered new information because this scenario was anticipated and protective measures for maternity colonies were included in" the Bat Plan Amendments. AR 1857. Similarly, the Forest Service's objection response to BRWA stated "An Indiana bat maternity colony was recently discovered in the project area. The potential for Indiana bat maternity trees was considered and protective measures for maternity colonies were included in the recent Forest Plan Amendment for Bat Conservation dated March 2021." AR 1869. This is neither a decision about whether supplemental NEPA analysis is necessary, nor is it that analysis. Most importantly, it is also does not reflect what ultimately appeared in the DN/FONSI, the inclusion of two additional measures that go beyond the recent Bat Plan Amendments. *See* AR 1905.

The Forest Service fails to mention this deviation when it states that "BRWA indicated it was 'pleased to see' that the Service agreed to include" the Bat Plan Amendments, when in reality, BRWA was told—and unfortunately, believed—that the maternity colony would be adequately protected under a different scheme than that which emerged in the DN/FONSI. ECF No. 46 at 35.

See also AR 1896 (email from BRWA to Forest Service where BRWA asks both for the specific details about what protective measures from the Bat Plan Amendments will be added to the Project and if there will be an opportunity for public comment). Additionally, the two protective measures that appeared in the final DN/FONSI were not the only additional measures considered internally by the Forest Service. Several times, one of the Forest Service's Wildlife Biologists voiced his desire to add thinning "in proximity of the maternity site." AR 6624 ("I would love to add the [thinning] back in to the secondary conservation zone, but I think it is more critical to add it in the proximity to the maternity site… to establish roosting habitat… and improve some foraging habitat directly associated with the maternity colony."), 6625 (discussing proposed language to add additional protective measures, including "woodland restoration," a type of thinning, because the Wildlife Biologist wanted to "add back WSI in this area."), 6627 ("Lastly, it is important that we do some management in the vicinity of the roost to provide quality foraging and roost habitat as the Bat conservation amendment outlines is critical for the survival of the species. 682 acres of WSI was dropped from the decision that falls within the proximity of the roost."). The DN/FONSI does not include this final measure, nor is there any explanation in the record as to why the two measures ultimately included in the decision were alone adequate to protect the colony. BRWA was not and is not pleased that it has had no opportunity to see a complete analysis regarding the efficacy of the additional measures—including the measure that was entirely dropped with no explanation without the public even being aware of its consideration—or had the opportunity to comment on that analysis.

Finally, the Forest Service's description in its Brief of the two additional measures meant to protect the maternity colony is inconsistent with how the measures are framed in the DN/FONSI itself, as "additional protection measures." AR 1905. The Forest Service claims that the first

measure, which extended the period during which no "disturbance activities" could occur within a quarter mile of the roost by two months, AR 1905, is merely a "discretionary measure undertaken pursuant to the FWS's BiOp for the [Bat Plan Amendments]." ECF No. 46 at 35. The Forest Service conflates the purpose of analysis undertaken pursuant to the ESA versus analysis undertaken for the purpose of NEPA. The Conservation Recommendations in FWS's BiOp that the Service is referencing in its Brief specifically involves agencies' obligations under § 7(a)(1) of the ESA, which generally "directs Federal agencies to use their authorities to further the purposes of the ESA by conducting conservation programs for the benefit of endangered and threatened species." AR 4282; ECF No. 46 at 36. However, this has nothing to do with agencies' independent duty to conduct site-specific analysis for major federal actions under NEPA when they take action pursuant to that general ESA conservation duty. Further, as is frequently repeated both in this Reply/Response and in BRWA's Opening Brief, the formal ESA consultation the Service completed with FWS occurred entirely before the discovery of the Indiana bat maternity colony, making this non-NEPA analysis irrelevant to the additional measures the Service illegally adopted in its DN/FONSI. This new measure was included expressly because the bats using the maternity colony were using the tree outside of the timeframe that the Forest Service and FWS had anticipated when developing the Bat Plan Amendments. AR 6621 ("The one issue that has come up is that we have been doing emergence counts at the tree and there are bats still utilizing the known roost tree even now at the end of September."), 6624 ("I am concerned that it is almost October and the bats are still present.").

The Forest Service next claims the second additional protective measure, which created "a protection zone encompassing the colony's known foraging and maternity tree[,]" AR 1905, is merely a "clarification" of forest-wide standard 163. ECF No. 46 at 36. That standard states Indiana

bat maternity trees "and other trees used by the colony" would be protected *if* discovered in the Ozark-St. Francis National Forests, and that "[e]fforts would be made to determine the location of roost trees used by the colony prior to proceedings with forest management in the vicinity of the colony." AR 4331. However, the measure added to the DN/FONSI is more than a mere "clarification;" FW 163 is too vague to provide adequate protection to the maternity colony, which the internal email analysis specifically noted. AR 6623. Service employees were concerned about the amount of data they had been able to collect about the colony, and therefore recommended adding the specific protections in the DN/FONSI to describe what size of trees would be protected and for how long, which is more than FW 163 demanded. *Compare* AR 4331 (where FW 163 does not specify what size of trees should be retained as potential additional roosts, and only restricts disturbing activities from April 1 to August 15) *to* AR 1905 ("Within this area, snags over 9" DBH that have bat roost characteristics, such as peeling bark, cracks or cavities will only be removed during the hibernation season (Dec 1 - March 14) or after an emergence survey confirms bats are not roosting in the tree before removal between March 15th and November 30th"). Thus, this second additional protective measure requires supplemental NEPA analysis with public input to ensure adequate protection for the maternity colony.

ii. The Forest Service is violating its continuing obligation to undertake supplemental public NEPA analysis to analyze the Project's impacts on the Indiana bat maternity colony. (Count 7)

Further, there is no evidence in the record that the Forest Service post-decisionally considered whether to complete additional public NEPA analysis to determine the Project's impacts on the Indiana bat, either before or after BRWA send its demand letter in May 2022, despite delaying the majority of Project activities by an entire year to complete post-decisional water

quality monitoring. AR 8644, 1905. *See* ECF No. 43 at 32–33 (case law explaining agency's continuing obligation to supplement under 40 C.F.R. § 1502.9(c)(1) (2019).

BRWA provided the Forest Service with a second, concrete opportunity to consider undertaking supplemental public NEPA analysis in its demand letter to the agency sent in May 2022, before Project activities began. AR 8644; *see* AR 1905. In its demand letter, BRWA clearly stated the deficiencies with the Project's NEPA analysis regarding both the significant new discovery of the endangered Indiana bat maternity colony[18] and failure to conduct pre-decisional baseline water quality sampling, AR 8646–8649, despite the fact that it was not BRWA's responsibility to analyze the Project's impacts on endangered species and water quality. *Dombeck*, 222 F.3d at 559 ("It is the agency, not the environmental plaintiff, that has a 'continuing duty to gather and evaluate new information relevant to the environmental impact of its actions.'"). However, the Forest Service never responded to BRWA's letter. Further, there is no evidence in the record of any discussion regarding BRWA's letter at all, or even acknowledgment of its receipt.

[18] In response to the Forest Service's discussion regarding BRWA's May 2022 demand letter, the Service states "[b]ut even BRWA acknowledged that the agency 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." ECF No. 46 at 35; *see* AR 8647. BRWA acknowledges that its demand letter assumed the Service had in fact made a determination about whether the maternity colony and baseline water analysis were significant new circumstances or information. *See* AR 8649 ("These two deficiencies make the Forest Service's *determination* that no significant impacts will occur from the Project an arbitrary and capricious decision." (emphasis added)). However, at the time BRWA sent this letter, it had neither a complete response to each of its FOIA requests, nor the administrative record, meaning Plaintiff was working off of incomplete information when asking for supplemental analysis. *See* ECF 43 at 19–20 (discussing FOIA requests and responses). Because of this, BRWA reasonably assumed that the Forest Service had in fact made such a decision, through a Supplemental Information Report ("SIR") or otherwise. *See Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 555 (9th Cir. 2000) ("[SIRs] are the Forest Service's formal instruments for documenting whether new information is sufficiently significant to trigger the need for [additional NEPA documentation]."). It was only when it received the complete administrative record late last year that BRWA learned the Service had in fact never documented any decision by it not to conduct supplemental NEPA analysis. *See* ECF No. 21-1, 21-2.

The Forest Service had ample time to consider undertaking supplemental NEPA analysis, and even to conduct that NEPA analysis. The Service delayed nearly all Project activities until September 1, 2022, to "collect sufficient baseline [water] data[.]" AR 1905. The Service could have easily conducted—or at the very least, started—analysis about the sufficiency of the Bat Plan Amendments themselves, as well as the two additional protective measures in the DN/FONSI, during this time between the final decision and when the agency said it would begin Project implementation. Or, more properly, and consistent with its obligation to complete NEPA before it made a final decision, the Service could have postponed that decision until after it collected the water samples and completed the necessary supplemental NEPA analysis, with public comment, regarding the Indiana bat maternity colony and its new baseline water quality data. Moreover, it appears the Service has even today not yet begun to implement most environmentally harmful aspects of the Project. Thus, the failure to conduct supplemental NEPA analysis cannot be attributed to any desire by the Service to immediately implement the Project or to implement it pursuant to some pre-existing, mandatory schedule.

IV. The Public Did Not Have an Opportunity to Comment and Object to the Project as it will be Implemented Because the Forest Service Modified Aspects of the Project in the Final DN/FONSI, After the Full Administrative Process was Done, and Collected Post-Decisional Data That the Public Was Not Able to Review. (Count 4)

Public participation is "at the heart of the NEPA review process." *State v. Block*, 690 F.2d 753, 770 (9th Cir. 1982). Indeed, "NEPA procedures must insure that environmental information is available to public officials *and citizens* before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b) (2019) (emphasis added); s*ee also Robertson*, 490 U.S. at 349 (1989) (proper environmental analysis under NEPA "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and

the implementation of that decision"). The Forest Service failed this most basic NEPA duty when it did not provide the public and BRWA with additional opportunity to comment on the Robert's Gap Project upon discovery and inclusion of new significant information and changes to the Project.

In its Brief, ECF No. 46 at 38, the Forest Service argues that the "'public comment process . . . is not essential every time new information comes to light after [a NEPA document] is prepared.'" *Dombeck*, 222 F.3d at 560 (first alteration in original) (quoting *California v. Watt*, 683 F.2d 1253, 1268 (9th Cir.1982)). Although this can certainly be true, "an agency that has prepared [a NEPA document] cannot simply rest on the original document." *Dombeck*, 222 F.3d at 557. BRWA does not seek an "intractable" NEPA process; it merely asks the Forest Service to adhere to NEPA regulations. When new information is discovered or collected "that may alter the results of its original environmental analysis[,]" it is "incumbent on the Forest Service to evaluate the existing [NEPA document] to determine whether it required supplementation." *Id.* at 557, 558. Though evidence of the Forest Service's internal reevaluation of the Project in light of the discovery of the Indiana bat maternity roost and post-decisionally collected water quality samples is cursory at best,[19] it apparently considered that new information significant because it subsequently altered the final DN/FONSI to reflect this information. *Compare* AR 1776–1793 *to* AR 1905.

The Forest Service failed in its duty to keep the public informed when it approved the Robert's Gap Project without reengaging the public after it made meaningful changes to the

[19] *See* AR 2607–2612 (internal discussion about testing water for herbicide metabolites; 6593–6627 (internal discussion about discovery of Indiana bat maternity colony).

Project's DN/FONSI based on significant new discoveries within the Project area and an added requirement to collect baseline water data. *See* AR 1905.

a. The Forest Service did not provide adequate opportunity for the public to meaningful participate after the significant discovery of an endangered Indiana bat maternity tree within the Project area.

The Forest Service claims it did not alter the DN/FONSI—significantly or otherwise—when it added the two additional Indiana bat protection measures, it instead "simply incorporated the Bat Plan Amendments . . . and two additional protective measures." ECF No. 46 at 39. The Service then attempts to evade its obligation to reengage the public for its changes to the final DN/FONSI by claiming that the public and "BRWA had ample opportunity to comment on the Bat Plan Amendment EA[,]" *id.*, the public comment period of which was in April 2019, AR 4335, more than two years before the Robert's Gap public objection period closed on May 28, 2021, AR 1838, or the Indiana bat maternity roost was even discovered on July 6, 2021. AR 6597. In doing so, the Forest Service essentially insists that it gave the public and BRWA notice for the changes it made to the endangered Indiana bat's protections in the Robert's Gap Project when it promulgated of the Bat Plan Amendments. But "NEPA requires not merely public *notice*, but public *participation* in the evaluation of environmental consequences." *Block*, 69 F.2d at 771 (emphasis added). Considering the Forest Service finalized the Bat Plan Amendments long before the actual discovery of the endangered Indiana bat maternity tree, any "notice" the public and BRWA received was purely hypothetical and not reasonably foreseeable.

Courts have determined that "an agency cannot minimize an activity's environmental impact by adopting a broad scale analysis and marginalizing the activity's site-specific impact." *Cascadia Wildlands v. Bureau of Land Mgmt.*, 410 F.Supp.3d 1146, 1157 (D. Or. 2019); *see Or. Nat. Res. Council v. Brong,* 492 F.3d 1120, 1130 (9th Cir. 2007); *Pac. Coast Fed'n of Fishermen's*

Ass'n v. Nat'l Marine Fisheries Serv., 265 F.3d 1028, 1035–37 (9th Cir. 2001). When the Forest Service adopted the Bat Plan Amendment, "no maternity colonies ha[d] been found in the vicinity of the [Ozark-St. Francis National Forests]." AR 4309. The analysis supporting the Bat Plan Amendments was thus inherently broad and could not have included analysis about the effects on an actual colony within the Robert's Gap Project area and the behavior of the bats who use the colony. Prior to the discovery of the maternity roost, the Bat Plan Amendments were completely absent from the Robert's Gap NEPA analysis, with no mention in the final EA or draft DN/FONSI—the last time the public was able to meaningfully participate the planning process in a manner the Forest Service was legally obligated to consider. AR 1838. Indeed, in the final EA, the Forest Service confirmed that it chose not to conduct an additional public comment period because "no new information was added" and "none of the findings of the analysis have changed." AR 1720. In the Objection Resolution Letter sent out after the discovery of the maternity colony, the Service claimed the final decision would simply incorporate the 2021 Bat Plan Amendment provisions. AR 1869.

The Forest Service then did reference the Bat Plan Amendments in the final DN/FONSI, AR 1904, 1905. It now argues it only "considered the analysis prepared for the Bat Plan Amendments when it evaluated the potential effect of the Project on the Indiana bat." ECF No. 46 at 13. However, based on its internal, non-public evaluation, the Forest Service in fact made several changes to the Project—two additions to the protections provided by the earlier Bat Plan Amendments. See discussion above, at 39-43; AR 1904–1905. These changes directly conflict with the conclusion in the final EA. To use the Forest Service's own test, 1) new information was added and 2) the findings of its analysis changed (new protections were added). So, by its own math the Forest Service should have conducted an additional public comment period, as required

by its own regulation, 36 C.F.R. § 218.22(d), which is another applicable and binding regulation that the Service's Brief does not cite, much less address. *See* ECF No. 43 at 35, 47, 48 (BRWA's Opening Brief citing this regulation).

b. The Forest Service misconstrues the purpose of collecting baseline water quality data and, as a result, did not provide the public opportunity with the information necessary to fully consider the potential harms to the pristine Buffalo River.

The Forest Service seems to misunderstand what baseline data is and why it must collect that data before a final decision is made. Because it collected water samples from the Project area to understand what the baseline quality of the water in the Project area was only after it made its decision, the Forest Service argues incorrectly that BRWA's claims regarding baseline water quality testing is moot. ECF No. 46 at 29–31, However, "the very purpose of NEPA [analysis] is to obviate the need for . . . speculation by insuring that available data is gathered and analyzed *prior* to the implementation of the proposed action." *Found. for N. Am. Wild Sheep v. U.S. Dep't of Agric.*, 681 F.2d 1172, 1179 (9th Cir. 1982) (emphasis added).

Merely collecting "baseline" data after the decision has been made, after the public comment period has ended, and without further analysis or explanation for how this data affects the scope of Project activities and their impacts, did not allow the public to meaningfully engage with this information before the decision was made. Literal proof that the Buffalo River is as pristine as hoped is highly significant. *See* ECF No. 46-1 at ¶ 4. Given BRWA's clear love of the Buffalo River (Plaintiff's name is the *Buffalo River* Watershed Alliance, after all) and its comments and objections concerned with the use of herbicides in the Project area due to water quality,[20]

[20] *See, e.g.,* AR 1358–1359 (BRWA commenting that "[t]he Robert's Gap plan encompasses what is arguably one of the most ecologically sensitive areas of Arkansas[,]" which will "be impacted, particularly in terms of reduced water quality" by the proposed actions, including "the introduction of toxins such as herbicides [that] pose[] a risk to human health"); AR 1366 (one of

baseline data that indicated the Project area was completely unsullied would have surely impacted what BRWA included in its comment and objection and likely would have impacted the comments of other interested parties as well.

The Forest Service defends its post-decisional collection of baseline data by arguing that BRWA is "not permitted to participate in determining the agency's 'baseline data collection' and testing" ECF No. 46 at 39. It proceeds to direct this Court to *Federal Power Commission v. Transcontinental Gas Pipe Line Corporation,* 423 U.S. 326, 333 (1976), to accuse BRWA of "'[ ] dictating to the agency the methods, procedures, and time dimension needed and ordering the results to be reported to the court.'" ECF No. 46 at 39. But that case has nothing to do with a request for an additional public commenting opportunity under NEPA. Instead it involved a request by the petitioners and an order from the lower court requiring the agency to conduct additional factual investigations. *See* 423 U.S at 330–34. Indeed, the Supreme Court held that "*a reviewing court* may not, after determining that additional evidence is requisite for adequate review[,]" dictate the means and methods of an agency's review upon remand. *Id.* at 333 (emphasis added). Here, the Service itself has already decided to conduct baseline water sampling, albeit only after making its final decision. *See* AR 2585–2588. BRWA only seeks the right to comment on—not dictate—how those samples were collected, and how they were analyzed. Such public participation in NEPA analysis is a valid and legally protected part of the NEPA process. *See generally* 40 C.F.R. § 1506.6 (2019).

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many IMBA members commenting that "Using highly suspect chemicals in this pristine environment will do nothing but degrade the . . . water[,]" which threatens "Clean water[, which] is the most important natural resource of the area."); AR 1797 (BRWA objecting to the draft DN/FONSI and noting its concern of negative impacts "not only within the project area but downstream on the water quality of the Buffalo National River").

Finally, the Forest Service contends that emailed conversations that took place in July 2022, regarding its baseline water sampling, show the Service "fully considered BPWA's methodological approach," and any "decisions" in those emails require substantial deference, ECF No. 46 at 40. But the actual email from the Service's Pesticide Manger reflects a recommendation regarding a complex issue, not an actual or final decision, and offers the local Forest Service personnel information to allow them to conduct their own research and make their own decision. *See* AR 2607. The Service chose not to include any document in the administrative record reflecting an actual decision regarding whether it would also sample for herbicide metabolites. Thus, there is currently no decision before the Court in this regard that merits deference. Moreover it is impossible for the Service to have "fully considered" BRWA's views on this issue since it has never been given the opportunity to comment on the Service's post-decisional actions regarding water sampling, the results of that sampling, or any analysis based on that information obtained only after the Service made its final decision to approve the Project. That inability to comment is precisely why BRWA seeks the opportunity to comment on a public analysis by the Service regarding its water sampling and how those samples could or should affect its analysis of impacts from the Project.

V. Because of the Forest Service's Failure to Take a Hard Look at Multiple Aspects of the Project, and Because Supplemental Public NEPA Analysis is Necessary in Order for the Forest Service to Take a Hard Look, the DN/FONSI is Inadequate.

Although the Forest Service equates BRWA's arguments regarding its challenge to the FONSI with its hard look claims, *see* ECF No. 46 at 40–41, that is not correct. Hard look claims focus on the agency's analysis of impacts in the EA, while a FONSI challenge scrutinizes the agency's statement of reasons in its FONSI, where the agency must offer "a convincing case" that the impact was insignificant. *Audubon Soc'y of Cent. Ark. v. Dailey*, 977 F.2d 428, 434 (8th Cir.

1992). When the question of whether an action will result in a significant impact is a "close call," an EIS should be prepared. *Sierra Club*, 352 F.Supp.2d at 924 (citing *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 13 (2d Cir. 1997); 40 C.F.R. § 1508.13 (2019)). An EA alone is sufficient for the requisite environmental review under NEPA "only in those obvious circumstances where no effect on the environment is possible." *Sierra Club*, 352 F. Supp.2d at 923 (internal citation omitted). Such circumstances exist only if "the conclusion reached [is] close to self-evident and would not require an extended document incorporating other studies." *Id*. Further, a court may only defer to agency conclusions that are "fully informed and well-considered," and need not rubber stamp a "clear error of judgment." *Id.* (citing *Anderson v. Evans*, 371 F.3d 475, 486–87 (9th Cir. 2004)). Thus, an EA may only be upheld if the Forest Service "took a 'hard look' at the project, identified the relevant areas of environmental concern, and made a convincing statement for its FONSI." *Sierra Club*, 352 F.Supp.2d at 922 (quoting *Newton Cnty. Wildlife Ass'n v. Rogers*, 141 F.3d 803, 809 (8th Cir. 1998).

BRWA's FONSI claim, Count 8, focuses on two of the CEQ's "intensity factors," impacts on unique characteristics, 40 C.F.R. § 1508.27(b)(3) (2019), and impacts on an endangered species. 40 C.F.R. § 1508.27(b)(9) (2019). The presence of just "one of these factors may be sufficient to require preparation of an EIS in appropriate circumstances." *Ocean Advocs. v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 865 (9th Cir. 2005).

The Eighth Circuit has held that "the guiding policy of NEPA" requires that an EIS consider how an agency's proposals impact areas that Congress has designated for special protection, *Sierra Club,* 623 F.3d at 560, which certainly would include the Buffalo National River. And it follows that when determining whether an EIS is necessary, the unique characteristics intensity factor similarly requires specific consideration of impacts to that National River. As noted above, at 20-

28, the EA itself completely fails to explicitly consider the Project's potential to impact the Buffalo National River. The FONSI's consideration is even more lacking. Instead of addressing "unique characteristics" like those listed in the regulation, 40 C.F.R. § 1508.27(b)(3) (2019), such as parks, wetlands, wild and scenic rivers and "ecologically critical areas," the FONSI only discusses impacts to "historical properties." AR 1912. But consideration of impacts to places listed on the National Register of Historic Places is the focus of an entirely different and separate intensity factor. *See* 40 C.F.R. § 1508.27(b)(8) (2019). The FONSI essentially repeats the same statement of reasons for both intensity factors 3 and 8. AR 1912–1913. It therefore double-counts an absence of impacts to historic places and simultaneously completely ignores impacts to the ecologically critical area, the Buffalo National River, that is immediately downstream from the Project area. This is not a convincing statement of reasons under even the most deferential review.

As for impacts to endangered species, the FONSI relies almost entirely on ESA documents that pre-date the discovery of the Indiana Bat maternity colony. These documents did not and could not consider the Projects' impacts on that newly discovered maternity colony or the efficacy of the additional measures adopted by the DN to supposedly further protect that maternity colony, issues that the FONSI does not even acknowledge, much less address. The Service, ECF No. 46 at 34–35, completely fails to respond to BRWA's argument that the Service's own internal, non-public evaluation of the Project's impacts on the maternity colony and the efficacy of its additional measures are entitled to no deference from this Court, ECF No. 43 at 39–46, 58–59, and has therefore waived any response to that argument.

CONCLUSION

For all the reasons set forth above, as well as the reasons set forth in its Opening Brief, ECF No. 43, the Court should find that the Forest Service's DN/FONSI (AR 1898–1914) and EA

(AR 1712–1775) violate NEPA and the APA in multiple respects. BRWA therefore respectfully requests that the Court find for BRWA and grant summary judgment in its favor on Counts 1–4 and 6–8 of its Amended Complaint, ECF No. 15.

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/s/ Thomas Buchele
Thomas Buchele, Admitted *Pro Hac Vice*
Lydia Dexter, Admitted *Pro Hac Vice*
Earthrise Law Center
Lewis & Clark Law School
10101 S. Terwilliger Blvd.
Portland, OR 97219-7799
Tel: 503-768-6736 (Buchele)
Tel: 503-768-6830 (Dexter)
Email: tbuchele@lclark.edu
Email: lydiadexter@lclark.edu

Hank Bates, ABN 98063
CARNEY BATES & PULLIAM, PLLC
519 W. 7th Street
Little Rock, AR 72201
Tel: 501-312-8500
Email: hbates@cbplaw.com

Attorneys for Plaintiff
Buffalo River Watershed Alliance