NATHAN G. JOHNSON (OH State Bar No.0082838)
Ohio Environmental Council
1145 Chesapeake Avenue, Suite I
Columbus, OH 43212
Tel: 614-487-5841
njohnson@theoec.org

Counsel for Plaintiff OEC

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

OHIO ENVIRONMENTAL COUNCIL, Plaintiff, vs. U.S. FOREST SERVICE, et al., Defendants.	Case No. 2:21-cv-4380 Chief Judge Algenon L. Marbley Magistrate Judge Kimberly A. Jolson **REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

INTRODUCTION

Defendants' response to Plaintiff's motion for leave to amend is nothing more than an attempt to muddy clear legal and factual waters. Defendants were given ample notice of the GFW-VEG-11 issue and claim; Defendants briefed the issue in their summary judgment motion. And this is an administrative record case in which no discovery process is implicated. Defendants cannot avoid the fact that they will suffer no prejudice from the Court granting Plaintiff leave to amend, let alone substantial prejudice. No undue delay or repeated failure to amend is present in this matter. Plaintiff did not waive or otherwise fail to exhaust the GFW-VEG-11 issue. And there is no futility in the amendment Plaintiff seeks.

I. Defendants Will Suffer No Prejudice if Leave Is Granted.

Defendants' empty averments of prejudice lack any specificity. That Plaintiff filed its motion for leave to amend approximately 40 days after Defendants filed their reply briefing is of no material consequence. Plaintiff provided Defendants with adequate notice of the GFW-VEG-11 issue in its brief, Defendants had ample time to argue the issue in their own brief, and Defendants did just that.

Defendants attempt to invent a broad legal principle that only a complaint can provide a defendant with notice of a claim. ECF 41 at DocID 2136 (citing *Wade v. Knoxville Utilities Bd.*, 259 F.3d 452, 459 (6th Cir. 2001). But Defendants are trying to twist the *Wade* decision into something it simply does not stand for. In *Wade*, the plaintiff waited a year and a half before filing its motion to amend the complaint to add a claim it was clearly aware of prior to filing the initial complaint. *Id*. Furthermore, the *Wade* plaintiff provided no explanation or justification for the delay, significant discovery had been conducted in the interim, and the plaintiff did not dispute that the defendant would be prejudiced if the new claims were added at that stage of the litigation. *Id*. None of these factors are present in the instant matter. With their "only a complaint can provide notice" argument, Defendants also ignore the fact that the Sixth Circuit has repeatedly found that claims raised in response to a summary judgment motion provide sufficient notice to the opposing party. Plaintiff cited this fact extensively in its initial motion requesting leave. ECF 40 at DocID 2042-43.

Defendants attempt to manufacture the appearance of prejudice by arguing that amendment of the complaint would "require Federal Defendants to defend a new claim after summary judgment has been briefed[.]"ECF 41 at DocID 2136. But this is false. Because, again, ***Defendants have already briefed this claim in their summary judgment motion***. Defendants

cite three cases in which a district court in the Sixth Circuit denied leave when parties have fully briefed summary judgment. But these cases are readily distinguishable. In *Prater v. Ohio Educ. Ass'n*, the amendment deadline in the pretrial order had already passed, substantial discovery had already occurred, the amendment was likely futile, and the party opposing amendment had not already briefed the issue. 505 F.3d 437, 445-46 (6th Cir. 2007). In *Siegner v. Twp. of Salem*, the plaintiff sought leave to include new claims and a new defendant after discovery had closed and summary judgment had been fully briefed (sans the new claims and defendant). 654 F. App'x 223, 228-29 (6th Cir. 2016). And, the district court below had determined that the plaintiff's proposed new claims were futile. *Id*. In *Duggins v. Steak 'n Shake, Inc.*, the plaintiff was aware of the operative facts prior to filing the initial complaint and significant prejudice would result because the proposed amendment was sought after the close of discovery. 195 F.3d 828, 834 (6th Cir. 1999). None of these cases are remotely similar to the matter at hand.

Defendants further state that amendment of the complaint "threatens to significantly delay resolution of the litigation[.]" ECF 41 at DocID 2136. But Defendants offer no reason why this might be true. Nor does the requested amendment seem in any way likely to cause any delay in the resolution of this case, let alone significant delay. Defendants have offered no genuine reasons why they would be prejudiced by this amendment, let alone significantly prejudiced.

II. There Is No Undue Delay or Repeated Failure to Cure Deficiencies.

Defendants fail to demonstrate that Plaintiff's motion for leave involves any undue delay. Plaintiff was unaware of Defendants' unlawful and arbitrary and capricious departure from GFW-VEG-11 until after Defendants corrected the administrative record to include the applicable Forest Plan. Plaintiff raised the GFW-VEG-11 issue in its response and reply

summary judgment brief, which was the first scheduled opportunity available for Plaintiff to do so once it became aware of the violation.

Defendants mischaracterize the facts by arguing that Plaintiff's *only* offered justification for not including GFW-VEG-11 in the original complaint or the first amended complaint is that the administrative record was not corrected to include the Forest Plan until after Plaintiff's complaints were filed. ECF 41 at DocID 2134-35. Certainly, Defendants' correction of the record is an important factor in the timing of the instant request for leave to amend. But Defendants very conveniently ignore the fact that ***they never documented or disclosed their departure*** in the NEPA process. And Defendants further ignore the fact that ***they never even mentioned let alone discussed GFW-VEG-11 in connection with their 15 square foot basal area maximum retention approach*** in either the public-facing NEPA process or anywhere in the administrative record. In other words, Defendants failed to provide the public or Plaintiff with any notice that they were departing from this Forest Plan Guideline. It ultimately fell to Plaintiff to independently identify GWF-VEG-11 and then compare it to Defendants' basal area retention approach – something Defendants never did in the project record, public facing or otherwise. Defendants bear the duty to comply with the terms and requirements of their own Forest Plan, NEPA, NFMA, and the implementing regulations of the same. That burden, including the burden to document and disclose Guideline departures and to take a "hard look" at the proposed action, does not and should not rest on Plaintiff's shoulders. *See DOT v. Public Citizen*, 541 U.S. 752, 765 (2004).

In addition, Plaintiff did not "sit on" a motion for leave for approximately 40 days, as Defendants contend at ECF 41, DocID 2136.[1] Before expending the time to research and draft the motion, Plaintiff first sought Defendants' consent to seek leave, which Defendants refused to

[1] Nor do Defendants in any way enumerate how this 40-day period has resulted or would result in any prejudice.

give. Furthermore, Plaintiff's motion for leave does not run afoul of any amendment deadline in the scheduling order. Lastly, Plaintiff filed its motion for leave the day immediately after oral argument was scheduled, which was the earliest time Plaintiff was able to do so. As of the filing of the instant reply motion, oral argument is still well over a month and a half away.

Defendants further attempt to muddy the water by falsely stating that Plaintiff "abused" what Defendants allude to as "prior accommodations" by attempting to "recast" claims. ECF 41 at DocID 2138. As purported evidence for this "argument," Defendants falsely state that Plaintiff first raised its failure to consider a reasonable range of alternatives NEPA claim and its Forest Plan Standard violation NFMA claim in its reply summary judgment brief. *Id*. Defendants' characterizations are plainly false. In addition to arguing that the FONSI was arbitrary and capricious, Plaintiff's opening brief also raised and argued the following: that Defendants failed to take the required NEPA hard look at Project impacts, failed to adequately disclose Project information, failed to consider a reasonable range of alternatives, and that Defendants violated NFMA and the Wayne's Forest Plan. *E.g.*, ECF 18 at DocID 314 ("Forest Service's approval of the Sunny Oaks timber project in the Wayne National Forest violated the National Environmental Policy Act, […] [and] the National Forest Management Act"); *Id*. at DocID 323 (Forest Service "failed to prepare an EIS where one is required; failed to take the required hard look at many of the Project's environmental effects; failed to adequately disclose critical Project information to the public; failed to consider a reasonable and meaningfully broad range of feasible project alternatives; and, violated mandatory terms of the applicable Forest Plan, as well as federal law and regulation."); *Id*. at DocID 336 ("**Failure to Prepare an EIS for the Sunny Oaks Project *and Otherwise Take the Requisite Hard Look at the Project's Impacts***") (italics added); *Id*. at DocID 334 ("All site-specific decisions must be consistent with the broader Forest

Plan. […] Project-level departures from Forest Plan Standards require a Forest Plan Amendment."); *Id.* at DocID 350 ("Wishing away the Plan's bat tree retention Standard violates the Wayne's 2006 Forest Plan, as well as NFMA 16 U.S.C. § 1604(i)."); *Id*. at DocID 351 ("Forest Service only briefly considered the OEC's proposed alternatives and then eliminated them from detailed analysis."); *Id*. at DocID 352 ("As detailed above, the ill-conceived Sunny Oaks Project violates NEPA and NFMA."). Defendants are simply trying to recast reality.

Defendants' citation to *Leary v. Daeschner*, 349 F.3d 888, 909 (6th Cir. 2003), provides them no harbor. ECF 41 at DocID 2138. In *Leary*, leave was sought after the pleading amendment deadline in the scheduling order had passed and years after discovery was closed. 349 F.3d at 909. The plaintiff in *Leary* sought to recast a due process claim as a breach of contract claim and provided no justification for the significant delay in seeking leave. *Id*. at 905. The district court also noted that plaintiff's proposed amendment would have been futile. *Id*. Defendants' citation to *Leary* is wholly inapposite.

III. The Amendments Sought Are Not Futile.

A. Plaintiff Was Not Required to Explicitly Reference GFW-VEG-11 in its Comments or Objection to the Sunny Oaks Project.

Defendants conveniently ignore the fact that they never even mentioned or discussed the VEG-11 Guideline in relation to their 15 square foot maximum policy in the administrative record. Courts have ruled against waiver and exhaustion defenses in similar situations. *All. for the Wild Rockies v. Savage*, 897 F.3d 1025, 1034 (9th Cir. 2018) (finding objection not waived where plaintiff's failure to object at an earlier time "resulted from the Forest Service's failure to disclose this aspect of the Project" prior to that time); *Native Ecosystems Council v. Lannom*, 2022 U.S. Dist. LEXIS 62442, at *12-14 (D. Mont. Apr. 4, 2022) (finding claim exhausted administratively where Forest Service never disclosed the issue complained of in decision

documents, and where plaintiffs' comments raised general concerns about the issue). Defendants cite *Native Ecosystems Council v. Kimbell*, but that case is readily distinguishable. 2006 U.S. Dist. LEXIS 116659, *28-29 (D. Mont. Aug. 29, 2006) (species issues waived where plaintiff apparently failed to raise them in administrative appeal or its motions, and was unprepared to address them in oral argument). Defendants also fail to respond to Plaintiff's case-cited argument that their undocumented departure from GFV-VEG-11 would have been so obvious a flaw (to Forest Service) that the public was not required to comment on or object to the violation in order to challenge it in court. *See* ECF 40 at DocID 2041.

Furthermore, it is well established that claimants may provide the agency sufficient clarity of notice by "alerting the decision maker to the problem in general terms, rather than using precise legal formulations." *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 965-66 (9th Cir. 2002) (holding plaintiffs need not incant "magic words"). In comments and objection Plaintiff repeatedly took issue with Defendants' insistence on limiting tree retention to no more than 15 square feet. *See* ECF 41 at DocID 2141. Yet for some reason, Defendants still did not bother to mention GFW-VEG-11 in tandem with their 15 square foot maximum policy.

B. Plaintiff Did Not Waive Any Argument Related to GFW-VEG-11 By Not Raising It in its Opening Summary Judgment Brief.

Defendants argue that Plaintiff waived any arguments relating to GFW-VEG-11 by not raising them in its opening summary judgment brief. But Defendants, again, are merely trying to muddy the water. First, Defendants erroneously cite *Novosteel SA v. U.S. Bethlehem Steel Corp.* as a Sixth Circuit case. But *Novosteel* is a *Federal Circuit* case. 284 F.3d 1261 (Fed. Cir. 2002). Furthermore, *Novosteel* stressed that a non-moving party "ordinarily has no right to respond to the reply brief, at least not until oral argument." *Id*. at 1274. But, as repeated throughout this

motion and Plaintiff's opening motion for leave, Defendants were afforded the right to respond to Plaintiff's reply brief.

Furthermore, summary judgment was briefed on cross motions in this case. Plaintiff's second summary judgment brief was ***both a response and a reply***. Defendants' refusal to acknowledge this very basic and obvious fact is nothing more than a desperate sleight of hand on their part. The Sixth Circuit has repeatedly found that a claim raised in a response to a summary judgment motion provides sufficient notice to the opposing party. Defendants fail to meaningfully address the Sixth Circuit cases and the in-circuit district case Plaintiff cites on this matter in its opening motion for leave. ECF 40 at DocID 2042-43.

C. Defendants' Fifteen Foot Square Foot Maximum Policy Is Not Compatible with the Forest Plan's VEG-11 Guideline.

Plaintiff has treated this issue at length in its opening motion for leave. ECF 40 at DocID 2044-48. And Defendants' motion in opposition fails to counter Plaintiff's arguments. *See* ECF 41 at DocID 2142-2145. That said, Defendants' motion does contain a few passages that merit a reply.

First, Defendants admit that the Forest Service "is not acting under the express terms of the Forest Plan" with respect to its "implementation" of Guideline VEG-11. ECF 41 at DocID 2143. This admission speaks for itself.

Second, Defendants try to argue that the Court should not engage in an *Auer/Kisor* inquiry with respect to VEG-11, but that the court should instead apply what Defendants call the "*Forest Guardians* standard." *Id*. at 2143-44. Defendants' argument is nonsensical. The deference standard recited in the *Forest Guardians* case is simply the classic *Auer* standard. The operative "plainly erroneous or inconsistent" inquiry is identical. And the Ninth Circuit, which decided *Forest Guardians*, has made it very clear that it applies *Auer* deference to Forest

Service's interpretation of forest plans. *Native Ecosystems Council v. Marten*, 883 F.3d 783, 793 (9th Cir. 2018) ("We apply *Auer* deference to USFS's interpretation […] of parts of the Plan that are susceptible to more than one meaning unless the interpretation is plainly erroneous or inconsistent with the [Plan].") (internal quotations omitted). It appears that Defendants simply wish to avoid addressing Plaintiff's citations to *Kisor v. Wilkie, 139 S.Ct. 2400 (2019)*, and *United States v. Riccardi*, 989 F.3d 476 (6th Cir. 2021). See ECF 40 at DocID 2045-48.

Third, Defendants did not need to explicitly state in the record that they would be retaining "as little as zero" feet of basal area in two-age harvests in order for it to hold true (whether as to zero, one, two, three, etc. square feet of retention). *See* Defendants arguments at ECF 41, DocID 2144. Defendants insist on a maximum of 15 square feet of basal area retention. And they never articulate a minimum. With no minimum retention amount specified, there is nothing in the Project's decision documents that would restrict Defendants from implementing retention *well below* 15 square feet, including retention as low as zero square feet. *See* AR 13466-67 (Final Decision Notice) (stating that Forest Service would retain discretion to implement the Project's shelterwood harvests as "clearcut with reserves, resulting in a two-aged stand" that "would retain *up to* 15 square feet of basal area[.]" (emphasis added).

D. Defendants' Tree Retention Maximum Policy Is a *De Facto* Rulemaking.

Lastly, Defendants may wish to argue now, in litigation, that their basal area retention maximum policy is not a *de facto* Forest Plan directive or rulemaking. But the administrative record plainly contradicts Defendants' litigation position. Defendants cite *Klein v. U.S. Dep't of Energy* as though it stands for a general principle that Forest Service projects either do not or cannot set precedent for future action. 753 F.3d 576, 585 (6th Cir. 2014). ECF 41 at DocID 2145. But *Klein* stands for no such proposition. Indeed, the *Klein* court held that the EA before it did

not set precedent for future actions because it was "tied […] to the *unique* facts of this [biorefinery] plant[.]" *Id.* at 585 (emphasis added).

Furthermore, Defendants' suggested interpretation of *Klein* is in clear conflict with Forest Service regulation, which *Klein* cites in reaching its decision. 40 C.F.R. § 1508.27(b)(6) (directing the preparation of an EIS when "[t]he degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration"). *See also Anglers of the Au Sable v. U.S. Forest Service*, 565 F. Supp. 2d 812 (S.D. Mich. 2008) (holding Forest Service "failed to take a 'hard look' at the precedential effect of its decision").

Moreover, Defendants clearly intend the Sunny Oaks Project to serve as precedent for future agency implementation of the Forest Plan and agency timber projects on the Wayne National Forest. The administrative record makes this abundantly clear. Plaintiff will reproduce agency record quotations here for the Court's convenience:

> The Forest Service has identified a need to document the current and ***future approach*** to implementation of a specific forest-wide standard, SFW-TES-12, pertaining to the retention of future Indiana bat roost trees in conjunction with hardwood timber harvest and other required bat-related standards and guidelines found in the 2006 Forest Plan."

AR 5615 (emphasis added).

> ***In this document, the Wayne establishes a working approach to applying SFW-TES-12 in concert with other 2006 Forest Plan forest-wide standards and guidelines*** pertaining to Indiana bat conservation and timber harvest. This approach takes into account standard silvicultural science, current bat biology, needed efficiencies for implementation, existing on-the-ground conditions in the Wayne, overarching 2006 Forest Plan goals, objectives, and desired future conditions, and the Wayne's current priority of accelerated early successional forest habitat creation and oak-dominated forest management.

Id. (document Forest Service submitted to U.S. Fish and Wildlife Service entitled "2006 Land and Resource Management Plan APPROACH TO PROVIDING SUMMER ROOSTING

HABITAT FOR INDIANA BATS IN CONJUNCTION WITH HARDWOOD HARVESTS")

(emphasis added).

> Therefore, ***the Forest Service will implement SFW-TES-12 on the basis of the example provided in the proposed Sunny Oaks project***.

AR 5627 (emphasis added).

> Is it [sustaining oak forests] up to public lands? Yes. The Wayne National Forest holds a large acreage in southeast Ohio to be managed for the benefit of the American public. These lands will be managed by the U.S. Forest Service in perpetuity. This means that we can take the long –term approach. Growing trees and forests is a long-term activity, one needs to be thinking decades into the future. Also, then **the National Forest becomes the example of sustainable forest management**.

AR 9764 (EA PowerPoint presentation) (emphasis added).

CONCLUSION

For the foregoing reasons, and for those provided in Plaintiff's opening motion for leave, Plaintiff respectfully requests that the Court grant Plaintiff leave to file its (proposed) Second Amended Complaint.

DATED: January 12, 2023

Respectfully submitted,

/s/ Nathan G. Johnson
Nathan G. Johnson
(OH State Bar No.0082838)
Trial Attorney for Ohio Environmental Council
OHIO ENVIRONMENTAL COUNCIL
1145 Chesapeake Ave., Suite I
Columbus, OH 43212
Tel: (614) 487-5841
NJohnson@theOEC.org

CERTIFICATE OF SERVICE

I certify that on January 12th, 2023 I filed the foregoing Reply in Support of Motion for Leave to File Second Amended Complaint on behalf of Plaintiff Ohio Environmental Council via the CM/ECF system which will provide electronic service to all counsel of record.

DATED: January 12, 2023

/s/ Nathan G. Johnson
Nathan G. Johnson
(OH State Bar No.0082838)
Trial Attorney for Ohio Environmental Council
OHIO ENVIRONMENTAL COUNCIL
1145 Chesapeake Ave., Suite I
Columbus, OH 43212
Tel: (614) 487-5841
NJohnson@theOEC.org