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-ALM-KAJ Chief Judge Algenon L. Marbley Magistrate Judge Kimberly A. Jolson **PLAINTIFF OEC'S SUPPLEMENTAL BRIEF IN RESPONSE TO OHIO FORESTRY ASSOCIATION, INC.'S *AMICUS CURIAE* BRIEF**

Plaintiff Ohio Environmental Council ("OEC") hereby files its supplemental brief in response to the *amicus curiae* brief of Ohio Forestry Association, Inc. ("OFA") (ECF No. 25-1). The Court should grant in full Plaintiff's Motion for Summary Judgment (ECF 18) and deny in full the federal Defendants' Motion for Summary Judgment (ECF 24).

FACTUAL BACKGROUND

Ohio Forestry Association's brief highlights the vital importance of white oak. *E.g.* ECF 25-1 at DocID 1943 ("The white oak is of critical importance to both the forest product industry and the natural environment."); *Id*. ("While the white oak is economically important, it also is

ecologically significant. White oak acorns are a preferred food for many animals such as turkeys and deer, while warblers *and some bats prefer to nest in white oak trees*.") (emphasis added); *Id*. at DocID 1944 ("The White Oak Initiative was formed because the oak forests in the eastern United States, especially white oak forests, are in trouble."). In highlighting white oak's vital importance, OFA's brief underscores the significance of the Sunny Oaks Project and the corresponding need for Defendants to prepare an EIS. OFA's brief states that "**White Oak Forests Are In A Decline That Is Reversible Only With Well-Planned Conservation Management.**" *Id*. at 1943 (emphasis in original). That may be true, but the Sunny Oaks Project is not well-planned conservation management.

It bears mentioning that the White Oak Initiative (WOI) membership consists of entities from the logging and wood products industries, as well as government agencies (including state universities) and NGOs that are closely associated with those industries. That said, the White Oak Initiative's Assessment and Conservation Plan, which OFA cites to repeatedly, provides helpful context. ECF 25-1 DocID 1943-45. For example, the report acknowledges that harvesting is driving white oak decline in Ohio.

> A USDA report that's published every five years reported that, from 2011 to 2016, Ohio's white oak supply decreased almost 10% in net volume, with nearly a 15% decrease in the number of white oak trees measuring five inches or greater in diameter. Stated another way, Ohio's white oaks are being removed faster than they're regenerating.

WOI Report at page 47.

Both Defendants and OFA describe prescribed fire as though it were a cure-all for oak ecosystems and oak regeneration. Fire can be beneficial for oak regeneration in some situations. But the effectiveness of fire in promoting oak regeneration is often quite limited and uncertain. In fact, the use of fire can make the oak regeneration process more difficult. Forest Service didn't

disclose any of this nuance on the face of its EA or DN-FONSI. But the WOI report touches on some of this uncertainty:

> Researchers are also investigating the use of repeated prescribed fires to encourage oak advance regeneration to develop and reduce competing species over a long period of time. This can be helpful in developing forests with good oak regeneration potential, but widespread use of this practice will require more research.

WOI Report at page 44.

> It should be noted that the use of prescribed fire to encourage oak regeneration, as a stand-alone practice or in combination with other practices, is currently being investigated for use on both small private holdings and large public-ownership properties. Results have been mixed and further investigation to fine-tune prescribed fire prescriptions is underway.

WOI Report at page 46. *See also* 40 C.F.R. §1508.27(b)(5) (significance intensity factor regarding the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks).

Notably, neither OFA nor the WOI (nor Defendants) mention let alone discuss the importance of ectomycorrhizal fungal networks and soils for oak ecosystem health, functioning, and regeneration.

ARGUMENT

I. OFA and Defendants Fail to Account for Sunny Oaks' Cumulative Effects.

Another shortcoming in the analysis of OFA, the WOI, and Defendants is the failure of all three to acknowledge or consider the fact that white oak was once dominant on the landscape and that clearcutting and similar forms of industrial logging were and are the primary driver of this species' decline. OFA accuses Plaintiff OEC of seemingly giving the decline of oak ecosystems a "free pass," but OFA is incorrect. ECF 25-1 at AR 1945. *See* AR 14829 – 14845

(Plaintiff's in-depth literature review of white oak, its historical status, and the cumulative loss of the species due to heavy commercial timbering).

Defendants never acknowledged let alone analyzed the historical dominance and cumulative loss of white oak as part of the Project. "Just as is required for an EIS, 'the EA must take a 'hard look' at the environmental consequences of the proposed action . . . including its direct, indirect, and cumulative effects.'" *Ctr. for Biological Diversity v. United States Forest Serv.*, 444 F. Supp. 3d 832, 858 (S.D. Ohio 2020) (quoting *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 53 (D.D.C. 2019)); 40 CFR § 1508.27(b)(7) (significance intensity factor regarding relation to other actions with individually insignificant but cumulatively significant impacts.). Data in the administrative record paints a stark picture of the cumulative loss. See, in particular, these passages from the 2005 Biological Opinion for the Wayne's Forest Plan:

> Other private lands in and around the WNF are managed for a wide variety of purposes. Some timber harvesting is occurring on private lands, and these primarily involve high grading. In Ohio, timber harvest on private land is not regulated. Some landowners in the action area may be performing logging operations at any time of the year. Based on knowledge gained by WNF staff, about 50% of the private lands in the Ironton District have been logged over the past 20 years. About 95 percent of the treatments were considered high-grading or diameter-limit cutting.

AR 20546 (so much for a lack of early successional habitat; *see also* Kellett, et al. (2023));

> Emphasis on clearcutting was substantially curtailed after 1990 and no clearcutting at all has occurred on the Wayne since 1994.

AR 20549. Compare these 2005 BiOp passages with the comparative white oak data contained in Appendix A of Defendants' unlawful "approach" to SFW-TES-12. AR 5631 (Appendix A, showing white oaks per acre on the Wayne National Forest and private land in the surrounding 17 counties of southeastern Ohio). There are more than twice as many white oaks per acre on the Wayne than on surrounding private lands. *Id*.

II. Concealing a Primary Project Purpose from the Public Violates NEPA.

OFA argues that commercial timber harvesting and even-aged logging are part of Forest Service's overall management portfolio under federal law. ECF 25-1 at DocID 1947-1952. The OEC does not disagree, at least not with this very general formulation. OEC has never questioned the basic authority of U.S. Forest Service to authorize even-aged commercial timber cuts, so long as those authorizations are reasonably made and comply with applicable law. In fact, the OEC even proposed that Defendants analyze a project alternative in which *all* trees in the Projects stands *except* white oaks be authorized for sale and cutting.

OFA goes on to argue that "OEC's brief dismisses timber harvesting as a valid purpose for the Project, arguing that a few USFS documents developing timbering targets for the Project 'were, in fact, driving the Sunny Oaks bus.'" ECF 25-1 at DocID 1951. But, again, Plaintiff OEC has never suggested that timber harvesting is not a valid purpose for the Project. Nor did Plaintiff state that "a few USFS documents" were "driving the bus." The OEC did, however, state that *timber volume targets* were "driving the Sunny Oaks bus." ECF 18 at DocID 347-48. Satisfying timber targets is not a valid purpose of the Sunny Oaks Project *because Defendants never disclosed this purpose to the public*. NEPA "has twin aims." *Balt. Gas & Elec. Co.*, 462 U.S. 87, 97 (1983). It obliges an agency "to consider every significant aspect of the environmental impact of a proposed action" and to "inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Id*. "By focusing both agency and public attention on the environmental effects of proposed actions, NEPA facilitates informed decision-making by agencies" and "public involvement" in those decisions. *N.M. ex rel. Richardson v. BLM*, 565 F.3d 683, 703 (10th Cir. 2009). The fact that Forest Service concealed the fact that the primary, or at least *a* primary, Sunny Oaks purpose is to satisfy timber volume targets means that Forest

Service has thwarted meaningful public involvement in the Sunny Oaks process. Not to mention the influence of this undisclosed project purpose on Defendants' elimination of oak retention alternatives, Defendants' flagrant violation of the forest plan, and their refusal to consider relevant factors like fungal networks.

Generating revenue for local communities was a stated Sunny Oaks project purpose. AR 13499. But, satisfying volume targets is not the same as generating revenue for local communities. Nor have Defendants ever stated that satisfying timber volume quotas and generating local market revenues are the same project purpose. Defendants have never addressed the issue of timber volume targets as part of this project or litigation, whether in their NEPA documentation or in briefing. *See Ctr. for Biological Diversity v. United States Forest Serv.*, 444 F. Supp. 3d 832, 854 (S.D. Ohio 2020) (NEPA "requires a reasoned evaluation of the relevant factors.").

III. The Unprecedented Size of the Project Demonstrates Significance Requiring an EIS.

OFA attempts to downplay the substantial size of the Sunny Oaks Project. ECF 25-1 at DocID 1951. OFA cites *WildEarth Guardians v. Conner*, 920 F.3d 1245, 1262 (10th Cir. 2019) for the unremarkable proposition that the large size of a project, in and of itself, does not *always* establish significance. *Id*. This project is also far larger than the project in *WildEarth Guardians*, which authorized up to 6,040 acres of prescribed burning. *Id*. at 1255. The Sunny Oaks Project, by contrast, authorizes between 40,000 and 80,000 acres of prescribed burning. AR 13468. That represents very nearly a full third of the entire Wayne National Forest. *See* Defendants' opening cross motion for summary judgment. ECF 24 at DocID 1897 ("over 244,000 acres are now federally owned and managed by the Forest Service."). In addition, Sunny Oaks 23 miles of bulldozer line per year, for a total of 460 miles of bulldozed fireline through the Forest. AR

13468. The Project also authorizes an unspecified amount and geographic scope of herbicide application throughout the project area. *Id.*; *see also Heartwood, Inc. v. Agpaoa*, 628 F.3d 261, 268 (6th Cir. 2010) (finding, in context of standing inquiry, that 5,000 acres "constitute an 'immense' area of land"). And, of course, *WildEarth Guardians* is further distinguishable from the present matter based on the fact that this Project's size is one of only many context and intensity factors demonstrating that Sunny Oaks will have significant effects and must therefore be analyzed in an EIS. *See* Plaintiff's opening brief at ECF 18.

Preparation of an EIS is required where a plaintiff raises substantial questions about whether a project may have a significant effect. *Ctr. for Biological Diversity v. United States Forest Serv.*, 444 F. Supp. 3d 832, 854 (S.D. Ohio 2020) ("[i]f the EA establishe[s] that the agency's action '*may* have a significant effect upon the . . . environment, an EIS must be prepared.'") (emphasis in original) (quoting *Mont. Wilderness Ass'n v. Fry*, 310 F. Supp. 2d 1127, 1144 (D. Mont. 2004)); *Anglers of the Au Sable v. U.S. Forest Serv.*, 565 F. Supp. 2d 812, 825 (E.D. Mich. 2008) ("raising substantial questions whether a project may have a significant effect is sufficient."). The EIS threshold is readily satisfied in this case.

IV. Defendants' Optimality and Appropriateness Determinations, Elimination of Oak Retention Alternatives, and Adoption of Updated Alternative 2 Violate NFMA and NEPA.

In its amicus brief, OFA states that in *Sierra Club v. Espy*, 38 F.3d 792, 795-96 (5th Cir. 1994), "the Fifth Circuit rejected the very argument that OEC is advocating, upholding environmental assessments against challenges under NEPA and the NFMA that disputed USFS' decisions to employ even-aged harvesting to rejuvenate the forest[.]" ECF 25-1 at DocID 1954-55. But the facts of *Sierra Club v. Espy* are readily distinguishable from the present matter. In that case Forest Service considered multiple alternatives, including both even-aged and uneven-

aged alternatives, and discussed the effects of all alternatives in the applicable EAs. *Sierra Club*, 38 F.3d at 803. There was no indication in the case that the agency had eliminated reasonable alternatives or failed to consider relevant factors. And the EAs in *Sierra Club* incorporated the requirements of the applicable forest plan. *Id.* Here, by contrast, USFS eliminated reasonable project alternatives, failed to consider relevant factors, and unlawfully and arbitrarily and capriciously violated forest plan requirements.

OFA's argument that NEPA "does not require an agency to provide a 'detailed analysis' of alternatives in an environmental assessment" is likewise unavailing. ECF 25-1 at DocID 1953. The fact of the matter is that Defendants did not meaningfully evaluate Plaintiff's proposed oak retention alternatives on the face of the EA. Instead, Defendants eliminated Plaintiff's white oak retention alternative from, in Defendants' words, "detailed analysis" based on Defendants' (unlawful) insistence on retaining no more than 15 square feet of basal area per acre. AR19328 (FONSI). "Whether the agency employed a reasoned-decisionmaking process is key. 'NEPA does not require that an agency discuss every impact in great detail; it simply requires a reasoned evaluation of the relevant factors.'" *Ctr. for Biological Diversity*, 444 F. Supp. at 854 (quoting *Forest Guardians v. United States Forest Serv.*, 495 F.3d 1162, 1172 (10th Cir. 2007)).

OFA further contends that the OEC's concern about Defendants' authorization of clearcutting and shelterwood cuts is a "mere disagreement with USFS' policy decision" and "is not an indicator of significant environmental impact." ECF 25-1 at DocID 1955. The present matter is no "mere disagreement with USFS' policy decision," as OFA contends.

As Ohio Forestry Association notes, "USFS has concluded that clearcuts, clearcuts with reserves, and shelterwood harvests are the optimum methods to reach the project objectives of creating young, brushy forest that is largely composed of oaks, because they immediately

stimulate a pulse of new growth of flowering plants, shrubs, and trees. FONSI, p. 7 (AR19326)." ECF 25-1 at DocID 1946. Defendants' conclusion, however, is arbitrary and capricious.

The Sunny Oaks Project's authorized hardwood timber cuts are inconsistent with the requirements of the Wayne's forest plan because they all unlawfully deviate from SFW-TES-12 and GFW-VEG-11. These cuts therefore violate NFMA's constraints on clearcutting and other even-aged cuts. 16 U.S.C. § 1604(g)(3)(F)(i). To comply with NFMA, the Forest Service must analyze proposed projects "and the analysis must show that each project is consistent with the" governing forest plan. *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1061-62 (9th Cir. 2002). Defendants' EA and DN-FONSI fail to demonstrate that the project's authorized cuts are consistent with the Wayne's forest plan.

In determining whether the Forest Service complied with NFMA, courts ask if its actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Sierra Club v. Espy*, 38 F.3d 792, 798 (5th Cir. 1994). Defendants' determination that the Project's clearcuts are the optimum method and the Project's shelterwoods an appropriate method to meet the objectives and requirements of the Wayne's forest plan is arbitrary and capricious, an abuse of discretion, and not in accordance with law.

As Plaintiff stated in its opening brief:

> NFMA constrains the Forest Service's use of clearcutting to circumstances in which it is determined to be the "optimum" method of achieving applicable forest plan requirements and goals. 16 U.S.C. § 1604(g)(3)(F)(i). And, NFMA constrains the agency's use of other even-aged harvest methods (e.g., shelterwood cuts) to circumstances in which they are determined to be "appropriate" methods of achieving applicable forest plan requirements and goals. *Id*. NFMA proscribes any and all timber harvests in the National Forest System where soil will be irreversibly damaged; and, limits the use of clearcuts, shelterwood cutting, and other forms of even-aged cutting to situations where such cuts are consistent with the protection of soil and the regeneration of the timber resource. 16 U.S.C. § 1604(g)(3)(E)(i); (F)(v).

ECF 18 at DocID 334-35. The Fifth Circuit has reiterated this NFMA requirement, in a case OFA cites throughout its *amicus* brief:

> Before choosing to clearcut a portion of the forest, the Forest Service must find that clearcutting is the "optimum method" for achieving the objectives and requirements of the LRMP. 16 U.S.C. § 1604(g)(3)(F)(i). Similarly, before choosing to seed tree cut or shelterwood cut, the Forest Service must find that those methods are "appropriate" for achieving the objectives and requirements of the LRMP.

Sierra Club v. Espy, 38 F.3d 792, 795-96 (5th Cir. 1994).

SFW-TES-12 is a forest plan requirement that requires Defendants to retain a minimum of 12 live loose-barked trees per acre in all hardwood timber harvests. GFW-VEG-11 is a forest plan requirement that requires Defendants to retain approximately 15 to 30 square feet of tree basal area per acre in all two-age cuts. The record reflects that Defendants chose not to comply (or even attempt to comply) with SFW-TES-12's loose-barked tree retention requirement because doing so would likely necessitate retaining, according to their estimates, somewhere between 22-30 square feet of basal area. AR 5636-39. In other words, compliance with this forest plan requirement would mean the Sunny Oaks hardwood cuts would need to be authorized as "two-aged" cuts. Two-aged cuts that would likely primarily retain, per the evidence in the record, white oak trees. ECF 37 at DocID 2010. However, retaining approximately 22-30 square feet of basal area in all hardwood cuts would conflict with Defendants' unlawful, *de facto* forest plan guideline that limits all two-aged retention to a maximum of 15 square feet of tree basal area per acre. AR 5636-39. But NFMA does not demand that Forest Service projects comply with unlawful *de facto* forest plan requirements. Rather, NFMA mandates that Forest Service projects comply with lawfully adopted forest plan requirements. Defendants' determination that the Project's hardwood clearcuts and shelterwoods were the optimum and appropriate methods, respectively, to meet the forest plan's requirements therefore violates NFMA. 16 U.S.C. §

1604(g)(3)(F)(i); *Curry v. United States Forest Serv.*, 988 F. Supp. 541, 556 (W.D. PA 1997) (holding even-aged optimality and appropriateness determinations were arbitrary and capricious under NFMA and NEPA where determinations failed to examine adequate range of alternatives).

Furthermore, Defendants' NFMA optimal/appropriate determination was arbitrary and capricious because it failed to meaningfully acknowledge or address the Project's substantially incomplete understory oak reproduction (seedling/sapling) data. This data is necessary for determining the optimality and appropriateness of clearcuts and shelterwood cuts. AR 14844-45. Information that forms the basis of agency NEPA analysis must be of high quality. 40 C.F.R. § 1500.1(b). Scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. *Id.* Where the agency "lacks certainty on one or more issues, it is the responsibility of the agency to provide a 'justification regarding why more definitive information could not be provided.'" *Anglers*, 565 F. Supp. 2d at 829 (citing *Blue Mtn. Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1213 (9th Cir. 1998)). "Lack of knowledge does not excuse the preparation of an EIS; rather it requires the agency to do the necessary work to obtain it." *Id.* (citation omitted). Defendants have never provided any justification whatsoever for why more understory plot data could not be provided for the Project's stands. Nor did Defendants ever mention these data gaps in its public-facing NEPA documentation. Nor did Defendants ever provide the Project's underlying stand data or even a summary of that data in the EA or DN-FONSI for the general public's consumption.

> Conclusions drawn in an EA must be supported by some quantified or detailed information, and the underlying environmental data relied upon to support the expert conclusions must be made available to the public to allow for informed public comment on the project.

Ctr. for Biological Diversity v. United States Forest Serv., 444 F. Supp. 3d 832, 858-59 (S.D. Ohio 2020) (internal quotations omitted).

In addition, Defendants' NFMA shelterwood determination is arbitrary and capricious because Defendants fail to address the contrary scientific information and analysis before them regarding the efficacy of shelterwood cutting as an oak forest regeneration method when advance oak reproduction is absent or scarce. *Cf.* AR 10426 (Plaintiff citing literature substantiation for proposition that shelterwood treatments generally cannot correct for an initial lack of oak seedling numbers and spatial distribution) with AR 16120 (in response to OEC's objection letter, Defendants stating without any substantiation that: "[i]t is not required that advance regeneration be present before the establishment cut to successfully regenerate oak in a shelterwood system."). Defendants never even discussed this important issue in the EA, let alone attempt to rebut Plaintiff's concern with any references. *Ctr. for Biological Diversity v. United States Forest Serv.*, 444 F. Supp. 3d 832, 858-59 (S.D. Ohio 2020) ("An EA's analysis is insufficient if it includes virtually no references to any material in support of or in opposition to its conclusions.") (internal quotations omitted). Furthermore, Defendants did not even respond to this shelterwood issue in their briefing. *See* ECF 18 at DocID 346.

In addition, Defendants failed to consider the Project effects with respect to oak's mycorrhizal soils. Defendants' NFMA determination that the Project's clearcuts and shelterwood cuts are, respectively, optimal and appropriate to meet the forest plan's oak ecosystem "objectives" under 16 U.S.C. § 1604(g)(3)(F)(i) is therefore also arbitrary and capricious.

The Wayne's 2006 Forest Plan includes, *inter alia*, Goal 6.1 and Objective 6.1a, which directs the Wayne's managers to promote the maintenance and restoration of the oak-hickory *ecosystem*: "Use all available silvicultural treatments, including precommercial and commercial thinning, regeneration harvesting, prescribed fire, shelterwood harvests, site preparation, and improvement cutting to promote the maintenance and restoration of the oak-hickory ecosystem."

AR 19446. In addition, the EA explained and emphasized that the Project is meant to address oak-hickory ecosystems: "When I'm talking about oak forest throughout this presentation I want you to keep in mind that I'm talking about the broad ecosystem oak history forest. […] When talking about oak forests we are really talking about oak-hickory ecosystems." AR 13515 (EA, Corrected Purpose and Need PPT Presentation). Elsewhere in the administrative record, Defendants also couch the forest plan's objectives in ecosystem terms:

> The Wayne's management is guided by overarching goals and objectives expressed in the 2006 Forest Plan (USFS 2006a). Desired conditions include, among other things: […] a continuation of the oak-hickory ecosystem on the landscape (Goals 4.1 and 6.1, Objectives 4.1b, 6.1a, and 6.1b). It should be noted that "oak-hickory ecosystem" represents the inclusive idea of oak-dominated forest types that support many other tree species and wildlife important to local ecology. AR 5615-5616.

Ectomycorrhizal networks and soils are a vital and inseparable part of oak-hickory ecosystems. *E.g.* ECF 18 at DocID 340-341. However, Defendants never analyzed the optimality or appropriateness of the Project's cuts for oak-hickory ecosystems because they refused or otherwise failed to consider the Project's reasonably foreseeable adverse effects on ectomycorrhizal networks and soils. Defendants' determination that the Project's clearcuts and shelterwood cuts are optimal and appropriate methods to meet the forest plan's oak ecosystem objectives is therefore arbitrary and capricious.

NFMA further limits the use of clearcuts, shelterwood cuts, and other even-aged cuts to situations in which "such cuts are carried out in a manner consistent with the protection of soil." 16 U.S.C. 1604(g)(3)(F)(v). Defendants' failure to consider the reasonably foreseeable adverse effects of the Project's authorized cuts on mycorrhizal networks and mycorrhizal soils, a relevant factor, was arbitrary and capricious and in violation of 16 U.S.C. 1604(g)(3)(F)(v). *See Sierra Club*, 38 F.3d at 799 (5th Cir.1994) (NFMA's provisions "mean that the Forest Service must

proceed cautiously in implementing an even-aged management alternative and only after a close examination of the effects that such management will have on other forest resources.").

V. OFA Mischaracterizes Plaintiff's Alternatives Analysis Arguments.

OFA argues that Plaintiff OEC is asking this Court to select a project alternative for Defendants. ECF 25-1 at DocID 1956. But OFA is mischaracterizing. Plaintiff noted that the oak retention alternatives it proposed would "better" meet certain Sunny Oaks purposes and needs. ECF 18 at DocID 351. But Plaintiff used the word "better" in this context simply to illustrate that Defendants' elimination of these alternatives from analysis was unreasonable. Plaintiff is not asking the Court to determine which alternative would be *best* from a *policy* standpoint. Although, as Plaintiff has noted in its briefing, SWF-TES-12's tree retention requirements combined with the numerical position of white oak in the Forest mean that, absent substantial amendment or revision of the forest plan, the Wayne's forest plan would likely *legally require* a project like Sunny Oaks to analyze and adopt an alternative similar to Plaintiff's proposed white oak retention proposal.

CONCLUSION

For the reasons stated above and for those stated throughout Plaintiff's briefing in this matter, the Court should grant Plaintiff's motion for summary judgment in its entirety and dismiss the Federal Defendants' cross motion for summary judgment in its entirety.

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 under penalty of perjury that, on February 27, 2023, I filed a copy of the foregoing supplemental brief on behalf of Plaintiff Ohio Environmental Council via the CM/ECF system which will provide electronic service to all counsel of record.

DATED: February 27, 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