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

OHIO ENVIRONMENTAL COUNCIL,	:	
	:	
Plaintiff,	:	**Case No. 2:21-cv-04380**
	:	
v.	:	**Chief Judge Algenon L. Marbley**
	:	
U.S. FOREST SERVICE, *et al.*,[1]	:	**Magistrate Judge Kimberly A. Jolson**
	:	
Defendants.	:	

OPINION & ORDER

I. INTRODUCTION

A crucial component of the Sunny Oaks Project ("SOP"), an initiative proposed by the United States Forest Service ("USFS") to create young, brushy forests, regenerate oak, respond to insect and disease threats, and contribute to local economies through commercial timber harvests, is an "adaptive management" approach to harvesting mature trees across 2,485 acres of the Wayne National Forest ("the Wayne") in southeastern Ohio. In 2021, Plaintiff Ohio Environmental Council ("OEC") sued Defendants, seeking to enjoin the Project for fear of detrimental effects of timber harvesting. At summary judgment, upon review of the Administrative Record ("AR"), this Court found that the adaptive management approach proposed in the Forest Service's Environmental Assessment ("EA") and Final Decision Notice and Finding of No Significant Impact ("FDN-FONSI") "failed to set forth sufficiently specific

[1] This suit initially named as Defendants the U.S. Forest Service; Randy Moore in his official capacity as Chief of the United States Forest Service; Carrie Gilbert in her official capacity as Forest Supervisor for the Wayne National Forest; Tim Slone in his official capacity as District Ranger for the Ironton Ranger District of the Wayne National Forest. Lee Stewart is now the Forest Supervisor of the Wayne National Forest and Mathias Wallace is now the District Ranger for the Ironton Ranger District. As Ms. Gilbert and Mr. Slone were sued in their official capacities, their successors, Mr. Stewart and Mr. Wallace, respectively, are substituted as defendants pursuant to Fed. R. Civ. P. 25(d).

criteria for determining which harvest option will be chosen for the shelterwood stands and for monitoring and assessing the impacts of the chosen harvest approach on oak regeneration in violation of NEPA." (Op. & Order at 36, ECF No. 50). The Court ordered supplemental briefing from the parties on the issue of what remedy is appropriate for that violation.

OEC argues in favor of vacatur of the EA and the FDN-FONSI, and asks the Court require Defendants prepare an Environmental Impact Statement ("EIS"). Defendants, on the other hand, suggest that the *Allied-Signal* factors favor deviating from the presumptive remedy of vacatur and instead support remand without vacatur. Because this Court finds that the defect it identified with the adaptive management approach in the Project is readily curable by Defendants, remand without vacatur is the appropriate remedy. Accordingly, this Court **REMANDS** the Forest Service's Sunny Oaks Project EA and corresponding FONSI for further consideration and **ENJOINS** timber harvest activities in the areas of the Project designated for shelterwood harvests pending the Forest Service's issuance of a supplemental EA.

II. BACKGROUND

The Sunny Oaks Project authorizes 2,485 acres of timber harvest across the Ironton Ranger District, one of two ranger districts in the Wayne, in addition to tree stand improvements ("TSI") and ancillary activities. The authorized harvests include 712 acres of clearcut, 1,408 acres of shelterwood harvests (implemented through the adaptive management approach referred to as Updated Alternative 2), and 365 acres of two-aged harvests. The Project was first proposed by the Forest Service in April 2018, with four stated purposes: (1) creating young, brushy forest; (2) regenerating oak forest; (3) addressing disease and illness; and (4) contributing to the local economy through commercial timber harvests. The Forest Service invited the public to submit scoping comments for the Project, prepared specialist reports on the potential effects of the

Project proposal and an alternative. It then issued an Environmental Assessment ("EA") in December 2018. (*See generally* Op. & Order at 5–9, ECF No. 50). The public had an opportunity to submit comments on the EA and later on the Draft Decision Notice and Finding of No Significant Impact ("DDN-FONSI"), in which the Forest Service proposed adopting Updated Alternative 2. (*See id.* at 8–9). After receiving, considering, and responding to objections to the DDN-FONSI, the Forest Service issued an FDN-FONSI on November 19, 2020, in which it adopted Updated Alternative 2. The FDN-FONSI concluded that the preparation of an EIS was not necessary, as the Project would not lead to any significant environmental impacts.

Plaintiff OEC filed suit pursuant to the Administrative Procedure Act of 1946 ("APA"), 5 U.S.C. §§ 551, 553–59, 701–06. It sought to enjoin the Project, alleging that the EA and FDN-FONSI were arbitrary and capricious in violation of the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321–4370h, and the National Forest Management Act of 1976 ("NFMA"), 16 U.S.C. §§ 1600–1687. Under the implementing regulations of NEPA, agencies may "first prepare a less burdensome environmental assessment as a method for determining whether a proposal needed an environmental impact statement." *Ky. Riverkeeper, Inc. v. Rowlette*, 714 F.3d 402, 408 (6th Cir. 2013) (citing 40 C.F.R. § 1508.9). An EA must consider the "context" and "intensity" of a proposed action and explain whether they suggest that an EIS is necessary; among the ten "intensity factors" are the degrees to which the effects on the quality of the human environment are likely to be highly controversial, highly uncertain, or involve unique or unknown risks. *See* 40 C.F.R. § 1508.27(b)(4), (5). This Court granted in part and denied in part the parties' cross-motions for summary judgment, finding that the Project poses "highly uncertain" effects due to the overly vague criteria in Updated Alternative 2. (*See* Op. & Order at 33–36, ECF No. 50).

The Forest Service, this Court explained, had failed to consider sufficiently the "substantial questions about the significance of the project's environmental impact" raised by the uncertainty of how Updated Alternative 2 will be implemented. *Anglers of the Au Sable v. U.S. Forest Serv.*, 565 F. Supp. 2d 812, 827 (E.D. Mich. 2008) (citing *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1240 (9th Cir 2005)). Updated Alternative 2 proposes implementing a shelterwood harvest for 1,408 acres of timber harvests in the Project in one of three ways: a two-stage shelterwood, a three-stage shelterwood, or a TSI treatment followed by a clearcut with reserves. AR 19322–23. The Forest Service, according to the proposal, will adapt its harvest approach between the three options based on forest conditions. But the proposal "lacks ascertainable criteria for how adaptation decisions will be made," as well as details about how the Forest Service will "weigh the relevant factors (whatever they may be) to determine the appropriate implementation method." (Op. & Order at 33, ECF No. 50).

The Court found that this particular aspect of the EA and FDN-FONSI violated NEPA, but denied the remainder of OEC's NEPA contentions and the entirety of its NFMA claim. The Court now considers what remedy is appropriate for the violation.

III. LAW & ANALYSIS

The standard remedy for violations of the APA is vacatur of the agency action. *See Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 96–97 (D.D.C. 2017). That is the remedy OEC seeks. In the Second Amended Complaint, it asks, *inter alia*, that the Court set aside the Forest Service's FDN-FONSI and EA for the Sunny Oaks Project and enjoin the Forest Service and any contractors, assigns, and other agents from engaging in timber harvests until the alleged violations of federal environmental laws have been corrected. It also

asks that the Court order the Forest Service prepare an EIS and revise the Project. (Second Am. Compl. at 38–39, ECF No. 45).

But vacatur is not a mandatory remedy; instead, courts have the discretion to fashion an appropriate remedy as equity requires. *See Ctr. for Biological Diversity v. U.S. Forest Serv.*, No. 2:17-cv-00372, 2021 WL 855938, at *2 (S.D. Ohio Mar. 8, 2021). The D.C. Circuit has put forth a two-factor test, which the Sixth Circuit has recently adopted, for when remand without vacatur may be warranted: "the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." *Allied-Signal v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (quoting *Int'l Union, United Mine Workers of Am. v. Fed. Mine Safety and Health Admin.*, 930 F.2d 960, 967 (D.C. Cir. 1990)); *see also Sierra Club v. EPA*, 60 F.4th 1008, 1022 (6th Cir. 2023). These are generally referred to as the *Allied-Signal* factors. Neither is dispositive on its own; rather, the Court must balance the factors in considering "the overall equities and practicality of the alternatives." *Sierra Club*, 60 F.4th at 1022 (citation omitted); *see also 350 Montana v. Haaland*, 29 F.4th 1158, 1177 (9th Cir. 2022) (noting that remand without vacatur should be ordered "only in 'limited circumstances'" (quoting *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015))), *amended and superseded by*, 50 F.4th 1254 (9th Cir. 2022) (denial of petition for rehearing en banc).

A. Seriousness of the Agency Error

In evaluating the seriousness of the agency's error, courts often consider how readily an agency may able to cure the defect in its decisionmaking process, *see Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009), if the "agency would likely be able to offer better reasoning[,] or whether by complying with procedural rules, it could adopt the same rule

on remand." *Pollinator Stewardship Council*, 806 F.3d at 532. The core of this consideration asks whether the error "incurably tainted the agency's decisionmaking process." *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1290 (11th Cir. 2015).

In this case, the deficiency with the Forest Service's analysis—its failure to address adequately the degree to which the Project's effects are likely to be highly uncertain—appears to be readily curable on remand. *See Standing Rock Sioux Tribe*, 282 F. Supp. 3d at 97–98 (noting that the first factor asks whether "there is 'at least a serious possibility that the [agency] will be able to justify its prior decision on remand'" (alteration in original) (citations omitted)). After all, Defendants did not entirely ignore the relevant issues or arrive at a conclusion that was wholly unsupported by the evidence in the record. They grappled extensively with the white oak concerns raised by OEC and others, and with concerns about the effects of the Project on other environmental and human factors. (*See* Op. & Order at 18–27, ECF No. 50). This is a case where the agency has largely complied with NEPA, *see WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 84 (D.D.C. 2019); *Ctr. for Biological Diversity*, 2021 WL 855938, at *3 (finding that remand without vacatur appropriate where Defendants had not "completed abandoned their duties under NEPA"), as evidenced by this Court's rejection of the majority of OEC's allegations of NEPA violations. (*See generally* Op. & Order, ECF No. 50).

Consider the scope of the NEPA violation identified by this Court. The Project poses highly uncertain effects because the Forest Service set out an adaptive management approach in its EA and FDN-FONSI that failed to provide the requisite degree of specificity. The plan called for using different shelterwood harvests approaches depending on conditions on the ground but did not explain what factors define the conditions or how the factors will be measured and weighed. The Court did not hold, on the other hand, that an adaptive management approach to

the timber harvests in the Project will necessarily entail highly uncertain or controversial effects in all cases—only that the specific adaptive management approach outlined by the Forest Service may. *Cf. Standing Rock Sioux Tribe*, 282 F. Supp. 3d at 98 (acknowledging that a "lack of a reasoned explanation is a serious failing in an agency's decision" but clarifying that "[t]he question with respect to vacatur, however, is the extent of that doubt" (emphasis in original) (first quoting *AARP v. EEOC*, 267 F. Supp. 3d 14, 37 (D.D.C. Aug. 22, 2017); then citing *Allied-Signal*, 988 F.2d at 150)). Nor did this Court find that any of the shelterwood harvest approach options (*i.e.*, two-stage shelterwood, three-stage shelterwood, and TSI followed by clearcut with reserves) are themselves inappropriate; to the contrary, the Court rejected OEC's challenge to the Forest Service's analysis of the effects of even-aged timber harvests. (*See* Op. & Order at 25–26, ECF No. 50).

Curing this deficiency does not require that Defendants begin anew. Instead, they must flesh out the contours of the adaptive management plan and identify its possible effects with greater certainty in a supplemental EA. Once the Forest Service does so, there is a "serious possibility" that Defendants will be able to substantiate their previous conclusion that the Project does not pose "highly uncertain" effects on remand. *Standing Rock Sioux Tribe*, 282 F. Supp. 3d at 98–99 (internal citations omitted); *see also id.* (noting that the question of "the degree to which the project is likely to be highly controversial fits squarely within the realm of those 'factual disputes' committed to agency expertise" (citations omitted)). This does not mean, of course, that further NEPA review on remand will be "a mere paperwork exercise," as OEC alleges. (Suppl. Br. on Remedies at 10, ECF No. 51). This Court trusts that the Forest Service carries out all of its NEPA obligations in good faith, *see Citizens to Pres. Overton Park, Inc. v.*

Volpe, 401 U.S. 402, 415 (1971), and, moreover, has faith that OEC will object to any attempts by the agency to end-run its obligations.

And in fact, this is the approach that Defendants suggest they will take if the Court grants remand without vacatur. The Forest Service has indicated that it would prepare a supplemental EA and has already identified some of the specific criteria it may rely on to fill in the details presently missing from Updated Alternative 2. (*See, e.g.*, Declaration of Lee Stewart ("Stewart Decl.") ¶¶ 16–18, ECF No. 52-1). Further, the Forest Service represents that it "may prepare an environmental impact statement if the [supplemental] EA indicates that is appropriate." (*Id.* ¶ 19). This proposed approach does not indicate, as OEC claims, that the Forest Service "is expressly abandoning its FONSI"; after all, remand without vacatur requires the Forest Service to reconsider its decision and prepare further NEPA analysis, at which point it may well find that its previous FONSI is still appropriate. (Suppl. Reply Br. at 7, ECF No. 53).

As this is precisely the type of case that is readily curable on remand, the first *Allied-Signal* factor weighs heavily in favor of remand without vacatur.

B. Disruptive Consequences of Vacatur

The second *Allied-Signal* factor considers whether vacatur "would lead to serious, disruptive consequences." *Nat'l Park Conservation Ass'n v. Semonite*, 422 F. Supp. 3d 92, 100 (D.D.C. 2019); *see also Coal. to Protect Puget Sound Habitat v. U.S. Army Corps of Eng'rs*, 466 F. Supp. 3d 1217, 1219 (W.D. Wash. 2020) (cautioning against vacatur where it "would cause serious and irremediable harms that significantly outweigh the magnitude of the agency's error" (quoting *AquAlliance v. U.S. Bureau of Reclamation*, 312 F. Supp. 3d 878, 881 (E.D. Cal. 2018))). Defendants highlight various potentially disruptive consequences of vacatur, including delays in creating the young, brushy habitat that the Wayne is lacking (and the attendant benefits

to the wildlife species that enjoy such habitat), concerns that some tree stands will progress towards maple, beech, and tulip-dominated ecosystems, which are undesirable (instead of oak-hickory ecosystems), interruption of Forest Service efforts to combat pathogen and disease in the Wayne, and, finally, adverse consequences to the local timber economy. (*See generally* Suppl. Resp. on Remedies at 14–17, ECF No. 52; Stewart Decl. ¶¶ 25, 28–46, ECF No. 52-1).

Delays in the implementation of plans can certainly cause disruption, in spite of the confusion that OEC expresses in that respect. (*See* Suppl. Reply Br. at 10, ECF No. 53). It is readily apparent that if, as Defendants assert, more young, brushy habitat is needed in the Wayne to support certain wildlife species or action is needed to address disease (both of which are explicit goals of the Project, *see, e.g.*, AR 13515), then delaying the aspects of the Project that create young, brushy habitat or apply TSI to combat insects and disease would be disruptive. It is similarly clear that any such delay is unlikely to be "relatively short," given the time needed to conduct a full EIS review, in addition to any ensuing litigation. On the other hand, it is unclear that the economic harms alleged by Defendants stand up to scrutiny, as they have provided little empirical basis for these assertions, *see WildEarth Guardians*, 368 F. Supp. 3d at 84 n.35, and "the risk of economic harm from procedural delay and industrial inconvenience 'is the nature of doing business, especially in an area fraught with bureaucracy and litigation.'" *Id.* (quoting *Standing Rock Sioux Tribe*, 282 F. Supp. 3d at 104).

Ultimately, the Court concludes that the potential disruptive consequences, while meaningful, are not so severe as to warrant deviating from the presumptive remedy of vacatur.

* * *

Despite the lack of severe, disruptive consequences of vacatur, remand without vacatur is the more appropriate course of action given the scope and curability of the NEPA deficiency

identified by the Court. *See Heartland Reg'l Med. Ctr.*, 566 F.3d at 198; *see also WildEarth Guardians*, 368 F. Supp. 3d at 84 ("Thus 'though the disruptive consequences of vacatur might not be great, the probability that [the agency] will be able to justify retaining [its prior decisions] is sufficiently high that vacatur . . . is not appropriate." (quoting *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1049 (D.C. Cir. 2002))). The deficiency is narrow; the Court took issue only with the lack of specificity in the adaptive management approach outlined in the Project. If the Forest Service is able to flesh out the details of how the shelterwood harvests are to be implemented, as it suggests it can, it is entirely "plausible that [the agency] can redress its failure . . . while reaching the same result." *Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 244 (D.C. Cir. 2013) (citation omitted). The Forest Service should be given the opportunity to try.

C. Injunction as an Alternative Remedy

Of course, the "decision to remand without vacatur . . . does not mean that all other activities can continue." *Ctr. for Biological Diversity*, 2021 WL 855938, at *4. Thus, as set forth below and pursuant to its discretion, the Court augments its remand order with injunctive relief with respect to the implementation of shelterwood harvests in the 1,408 acres of the Project designated for Updated Alternative 2. *See id.* (citing *WildEarth Guardians*, 368 F. Supp. 3d at 85; *Mont. Wilderness Ass'n v. Fry*, 408 F. Supp. 2d 1032, 1038 (D. Mont. 2006)). In so doing, the Court finds that the traditional four-factor test for permanent injunctive relief—requiring a plaintiff show that that she has suffered from irreparable injury, that remedies available at law are inadequate, that the balance of hardships tips in favor of the plaintiff, and that the public interest favors entering an injunction—supports granting an injunction pending completion of the supplemental NEPA review on remand. *See Cottonwood Env't L. Ctr. v. U.S. Forest Serv.*, 789

F.3d 1075, 1088 (9th Cir. 2015) (citing *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006)).

First, OEC has adequately demonstrated that its members, who presently enjoy the use of the forests within the boundaries of the Project, will likely be harmed irreparably if timber harvesting in the Project is allowed to continue. (*See, e.g.*, Suppl. Reply Br. at 14–16, ECF No. 53). It is well-established that logging activities in areas of national forests used and enjoyed by environmental plaintiffs can harm their "ability to view, experience, and utilize the areas in an undisturbed state." *All. for the Wild Rockies v. Pierson*, 550 F. Supp. 3d 894, 905 (D. Idaho 2021), *vacated sub nom.*, *All. for the Wild Rockies v. Petrick*, No. 21-35504/35785, 2023 WL 3472660 (9th Cir. May 16, 2023); *see also Native Ecosystems Council v. Mehlhoff*, CV 20-19, 2020 WL 3969343, at *5–*6 (D. Mont. July 6, 2020). *Second*, OEC points out—and Defendants do not dispute—that courts generally recognize that environmental injuries cannot be adequately remedied by monetary damages. (*See* Suppl. Br. on Remedies at 17, ECF No. 51) (collecting cases). *Third* and *fourth*, enjoining shelterwood harvests in the Project would "serve the public interest in protecting the environment from any threat of permanent damage," *Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 326 (D.C. Cir. 1987), and in ensuring "meticulous compliance with the law by public officials." *Fund for Animals, Inc. v. Espy*, 814 F. Supp. 142, 152 (D.D.C. 1993); *see also Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987) (noting that "the balance of harms will usually favor the issuance of an injunction to protect the environment").

It is important to note the limited scope of the injunction that is warranted here. *See United States v. Miami Univ.*, 294 F.3d 797, 816 (6th Cir. 2002) ("If injunctive relief is proper, it should be no broader than necessary to remedy the harm at issue." (citation omitted)). The NEPA defect identified by this Court relates only to the Forest Service's implementation of the

adaptive management approach for shelterwood harvests in the Project; the Court rejected OEC's NEPA and NFMA claims except with respect to that approach. Because the Court did not, on the other hand, find that other aspects of the Project—including the proposed TSI activities—were inappropriate, Defendants may proceed with those activities.

IV. CONCLUSION

For the reasons stated more fully above, the Court finds that remand without vacatur is appropriate in this matter. Accordingly, the Court:

1. **REMANDS** the Forest Service's EA and corresponding FONSI, for supplemental analysis to address the adaptive management approach deficiencies identified;

2. **ENJOINS** Defendants from issuing any new leases timber harvest leases for the areas of the Sunny Oaks Project designated for shelterwood harvests during the pendency of the NEPA review on remand; and

3. **ENJOINS** any timber harvest activities in the Wayne National Forest in the areas of the Sunny Oaks Project designated for shelterwood harvests during the pendency of the NEPA review on remand.

IT IS SO ORDERED.

ALGENON L. MARBLEY
CHIEF UNITED STATES DISTRICT JUDGE

DATE: August 3, 2023