

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION**

100 Otis Street, Room 309
Asheville, NC 28801

FILED
ASHEVILLE, N.C.
JUL 19 2019
U.S. DISTRICT COURT
W. DIST. OF N.C.

Case No. 1:19 cv 226)
)
William Orr, Individually, And In Behalf ESA Threatened)
And Endangered Species Of Roan Mountain,)
Plaintiff, Pro-Se)
v.)
U.S. EPA,)
U.S. Department of Interior)
U.S. Forest Service,)
U.S. Fish and Wildlife Service,)
French Broad Electric Membership Corporation,)
Jeff Loven, Personally and as General Manager,)
Defendants)

Hand-Delivered

**PLAINTIFFS' VERIFIED COMPLAINT FOR AN EMERGENCY
TEMPORARY RESTRAINING ORDER,
A PRELIMINARY/PERMANENT INJUNCTION
AND OTHER RELIEF**

1. Plaintiffs pray the Court for immediate entry of a Temporary Restraining Order¹ to enjoin: Defendants French Board Electric Membership Corporation ("FBEMC") and Jeff Loven, its General Manager, from further spraying/re-spraying EPA registered Rodeo (Glyphosate containing) and Polaris (Imazapyr containing) herbicides and any other herbicides on FBEMC's easement right of ways (ROW) on or near Roan Mountain, N.C., that operate to irreparably harm/kill ESA Protected Species, adversely harm/modify their habitats, including ESA designated

¹ See separate Motion for Emergency Temporary Restraining Order

critical habitat and any other activity otherwise constituting a
Endangered Species Act (ESA) § 9 "Take." See Plaintiff's
5/26/17 § 9 Take Notice (Attachment 3),² 4/30/18 EPA
Comment/Take Notice (Attachment 4)³ and 7/5/19 EPA
Comment/Take Notice (collectively herein "*Continuing Take
Notice*").⁴

2. Plaintiff prays the Court for a Preliminary and Permanent
Injunction to:

- Enjoin Defendants U.S. Department of Interior, U.S.
Forest Service, U.S. Fish and Wild Life Service and U.S. EPA
to strictly enforce the provisions of the Endangered Species
Act (ESA) (Endangered Species Act of 1973, 87 Stat.

² Plaintiff's 5/26/17 Notice was entitled "NOTIFICATION OF FBEMC'S VIOLATION OF THE ENDANGERED SPECIES ACT."

³ Plaintiff's 4/30/18 Comment/Notice (Attachment 4) was entitled "*EPA's Human Health and Ecological Risk Assessment Of Glyphosate Pursuant to 40 CFR 155.58---EPA's Assessment of Pesticides/Glyphosate Containing Herbicides Upon Critical Habitats, Endangered and Threatened Species, Including Those of Roan Mountain, N.C./TN, Pursuant to 16 U.S.C. § 1531, § 1540(g)(2)(A)(i), et. seq. (Endangered Species Act)...THIS COMMENT IS A SUPPLEMENT TO MR. ORR'S MAY 2017 ROAN MOUNTAIN ESA §1540(g) TAKE NOTICE...*," and was attached Plaintiff's 5/3/18 submission and served by certified mail upon the Secretary of DOI, Directors of USDA Forest Service, US Fish and Wild Life Services and Administrator of US EPA (Attachment 5).

⁴ Plaintiff's 5/26/17 "NOTIFICATION OF FBEMC'S VIOLATION OF THE ENDANGERED SPECIES ACT," his 4/30/18 EPA Comment/Take Notice "SUPPLEMENT TO MR. ORR'S MAY 2017 ROAN MOUNTAIN ESA §1540(g) TAKE NOTICE," and his 7/5/18 Comment "*Continuing § 9 Take Notice and Intention to Sue*," collectively are herein referred to as Plaintiff's *Continuing Take Notice*.

884, 16 U.S.C. 1531- 1543), as applicable to Roan Mountain's ESA protected species and their habitats.

- Enjoin French Broad Electric Membership Cooperative (FBEMC) from any further spraying of EPA Registered Herbicides, including Glyphosate Herbicides (Rodeo) under its Right of Way (ROW) clearing program on or proximate to Roan Mountain, where said Injunction shall be at least for a period until EPA has completed its *Interim Registration Review of Glyphosate*⁵ under FIFRA, 7 U.S.C. §136 et seq. (1996), 7 U.S. Code § 136a, which includes Plaintiff's evidence.

⁵ See # [EPA-HQ-OPP-2009-0361](#), # EPA-HQ-OPP-2009-0361-2340, *Glyphosate Proposed Interim Registration Review Decision*, <https://www.regulations.gov/document?D=EPA-HQ-OPP-2009-0361-2340>

- Enjoin EPA to Consider Plaintiffs 5/26/17, 4/30/18,⁶ 7/5/18 Comments/Take Notice(s), e.g. *Continuing Take Notice*, Plaintiff's 4/30/18 requested presentation of *Visual/Video* evidence of the heretofore unknown massive secondary hydrous transport mechanism of Glyphosate Herbicides, in EPA's *Registration Review of Glyphosate*,⁷ including within EPA's Ecological Risk Assessment under FIFRA (7 U.S.C. 7 U.S. Code § 136a). [Said Assessment to include consideration of the heretofore unknown secondary hydrous transport mechanism that operates to contaminate air, rain, soil, et. al., many miles away from original spray sites where hazardous concentrations of Formaldehyde are generated severely/adversely modifying ESA protected

⁶ In EPA's November 21, 2018 MEMORANDUM SUBJECT: Response to Public Comments on the Preliminary Ecological Risk Assessment for Glyphosate, <https://www.regulations.gov/document?D=EPA-HQ-OPP-2009-0361-2341>), where EPA had the benefit of Plaintiff's 4/30/18 Comments, there is no apparent consideration of toxic secondary hydrous spray transport. EPA only apparently considers non-related "spray drift," which hazard to protected species/habitats is incomparable to secondary hydrous drift. Further, EPA did not afford Plaintiff's request to present visual/video evidence of this secondary transport mechanism. Despite Plaintiff's urgent request to present said visual/video data, EPA refused/neglected to invite Plaintiff to present it. Thus, neither Plaintiff's 4/10/18 comments or his visual/video data were apparently considered. Plaintiff's data is timely because he discloses the mechanism that is likely devastating insects/pollinators, not only on Roan Mountain, but globally.

⁷ See <https://www.regulations.gov/document?D=EPA-HQ-OPP-2009-0361-0066> # EPA-HQ-OPP-2009-0361, # EPA-HQ-OPP-2009-0361-2340, *Glyphosate Proposed Interim Registration Review Decision*, <https://www.regulations.gov/document?D=EPA-HQ-OPP-2009-0361-2340>

species habitat, critical habitat and which otherwise harm protected species under § 9 of ESA (See 4/30/18 Comment/Take Notice, Attachment 4 and 7/5/19 Comment/Take Notice, Attachment 6).

- Enjoin EPA's registration of herbicides and pesticides, including but not limited to glyphosate containing herbicides in applications that otherwise constitute a "Take" under § 9 ESA of threatened/endangered species residing on Roan Mountain.

Plaintiffs have previously formally demanded defendants French Broad Electric Membership Corporation and Jeff Loven correct their Section 9 of the ESA violations alleged herein (see Bill Orr 2017 Decl, 5/26/17 and 4/30/18 Notices), but the defendants have refused instead spraying May/June 2017 and now currently re-spraying July 2019. FBEMC's re-spraying is estimated to be through July into September 2019.

Plaintiff has formally sought intervention by Federal (U.S. Forest Service, U.S. Fish and Wildlife Service, and EPA) and State Agencies (N.C. Utilities Commission, N.C. Department of Agriculture, N.C. Rural Electrification Authority, N.C. Department of Environmental Quality) to affect a cessation of FBEMC's spraying on the Roan Mountain, absent success. (Orr 2017 Decl, Attachment 8, Orr 2019 Decl,

Attachment 14, Orr's 5/26/17, Attachment 3, 4/30/18 and 7/5/19 Take Notices, Attachments 4 and 6, respectively).

An actual controversy exists between the parties within the meaning of 28 U.S.C. § 2201(a)(10) (declaratory judgments).

JURISDICTION AND VENUE

Venue is proper in this U.S. District pursuant to 28 U.S.C. § 1391(b) because Defendants reside, conduct business, have office, authorize use of federally registered pesticides and/or are subject to regulatory/judicial oversight within this district.

Jurisdiction is claimed pursuant to Fed. R. Civ. P. 65 and Local Civil Rules 7.1, 7.2 and 10.1, 16 U.S.C. §§ 1531 et seq [ESA], ESA § 3 (5) a, § 11(g)(1), (5), 16 U.S.C. § 1540(g)(1),⁸ 16 U.S.C. § 1540(g)(3)(A) and, 28 U.S.C. § 1331, 28 U.S.C. 1343, 28 U.S.C. § 1331, 42 U.S.C. 2201 and 42 U.S.C. 1983, 42 U.S.C. 1985 and the court's general jurisdiction under Title 28, United States Code. Pendent jurisdiction over inseparable state law and other claims is requested pursuant 28 U.S. Code § 1367, in the event such claims may exist.

CAUSE OF ACTION/PRELIMINARY STATEMENT

⁸ The ESA allows any person, including entities, to: commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof 16 U.S.C. § 1540(g)(1).

This action arises out of Defendants French Board Electric Membership Cooperative (FBEMC) and Jeff Loven's (FBEMC General Manager) herbicide spraying program of FBEMC's alleged "right of way" (ROW) easements located on or proximate to Roan Mountain - a major repository of ESA threatened/endangered species protected under the Endangered Species Act (ESA), 16 U.S.C. §§ 1533-44 (ESA), and where individual Plaintiff also resides.

FBEMC began re-spraying parts of Roan Mountain on or about July 10, 2019, including its alleged ROW easements proximate to Plaintiff's residence. FBEMC intends to re-spray the balance of their other allegedly ROW easements over the balance of Roan Mountain, over the upcoming month or longer. Estimated length of FBEMC's easements on or proximate to Roan Mountain are about 200 miles. FBEMC's spraying will be where endangered and threatened species exist under FBEMC's alleged ROW easements and whereby secondary hydrous transport from its spraying will be transmitted all over Roan Mountain into protected species habitat, ESA critical habitat.

Given, the nature of the FBEMC's herbicides (Rodeo and Polaris) and manner in which they have been employed by French Board Electric Membership Cooperative (FBEMC) and/or its contractors, irreparable damage/harm to ESA protected species and adverse modification of their habitats is occurring (See *Continuing Take Notice*).

Defendants U.S. Department of Interior, U.S. Forest Service, U.S. Fish and Wildlife Services and U.S. EPA are in violation of ESA by failing to enforce ESA, allowing FBEMC to employ EPA registered herbicides in a manner that is destructive to ESA threatened/endangered species and their habitats, constituting a § 9 Take.

EPA has violated its legal duties under the ESA, 16 U.S.C. §§ 1533-44, by failing to properly consult with the United States Fish and Wildlife Service (USFWS), U.S. Forest Service to insure that registered uses of Rodeo and Polaris in electric utility company vegetation management practices on Roan Mountain do not harm/jeopardize any listed species, destroy or adversely modify their habitats, including critical habitat, 16 U.S.C. § 1536 (a)(2).

EPA has further violated its Agency's duties under 7 U.S.C. §136 et seq. (1996) (Federal Insecticide, Fungicide, and Rodenticide Act, FIFRA), where EPA may only register a pesticide upon a showing that using a pesticide according to specifications "will not generally cause *unreasonable adverse* effects on the environment." FIFRA defines the term "**unreasonable adverse effects on the environment**" to mean: "(1) **any *unreasonable risk* to man or the environment**, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide (emphasis added)."

Plaintiff's prior 5/26/17 and 4/30/18 Take Notices unquestionable disclose overwhelming "**unreasonable risk**" under FIFRA, namely the existence of heretofore unknown, massive, environmentally harmful, secondary (non-spray) drift/transport mechanism, which explains the ubiquitous presence of pesticides/herbicides (Glyphosate/AMPA⁹) found in throughout the environment, especially in the soil, rain and atmosphere,¹⁰ at long distances from original spray sites.¹¹

Further, EPA violates under APA by failing to have considered Plaintiff's 4/20/18 Comment/Take Notice disclosure of the heretofore

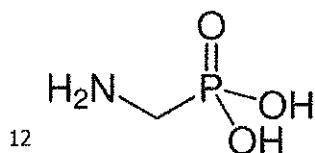
⁹ AmineMethylPhosphonic Acid

¹⁰ See 4/30/18 Comment (Attachment A), pages 32-53.

¹¹ See for example, *Atmospheric deposition of current-use and historic-use pesticides in snow at national parks in the western United States*, <https://www.ncbi.nlm.nih.gov/pubmed/16749678> ("Correlation analysis with latitude, temperature, elevation, particulate matter, and two indicators of regional pesticide use reveal that regional current and historic agricultural practices are largely responsible for the distribution of pesticides in the national parks in this study. **Pesticide deposition in the Alaskan parks is attributed to long-range transport because there are no significant regional pesticide sources.**") *Pesticides Found in Amphibians from Remote Areas in California* https://toxics.usgs.gov/highlights/frogs_pesticides.html ("[S]cientists looked at pesticides in Pacific Chorus frogs (*Pseudacris regilla*) and their habitat (water and sediment) in seven remote, high-elevation locations in California (including Giant Sequoia National Monument, Yosemite National Park, and Lassen Volcanic National Park)... USGS scientists have been investigating their decline for over a decade. Fungicides (pesticides used to control fungal diseases) were found in adult male frogs from all sites... Data generated from this study indicate that amphibians residing in these remote locations are exposed to and capable of taking up current-use pesticides.").

unknown *hydrous "adsorption" transport* mechanism driven by Glyphosate's metabolite AMPA's hygroscopic properties¹² (p 32 - 53). Critical evidence which EPA must consider regarding the true breath/scope/magnitude of this *hydrous transport* mechanism is presented in Plaintiff's 4/30/18 Comment (Attachment 4, pages 32-53), and Plaintiff's video/visual evidence, which thus far EPA has not considered.¹³

Plaintiff's 5/26/17, 4/30/18 Take Notices and his *Visual* evidence presentation shows that heavy amounts of glyphosate and AMPA are transported long distances from original spray sites for lengthy periods **after** original spraying, which is consistent with the evidence of numerous independent scientists¹⁴ (FN 13-14). This transport results in the generation of a new hazardous source of liquid and gaseous formaldehyde ("FA") in the environment and habitats of protected species, see Plaintiff's 7/5/19 Notice (Attachment 6). EPA in failing to consider Plaintiff's 5/26/17 and 4/30/18 Comments/Take Notices plainly fails to consider the existence of this massive here-to-



http://www.chemicalbook.com/ChemicalProductProperty_EN_CB5139354.htm
("Sensitive Hygroscopic")

¹³ The adage "a picture is worth a thousand words" applies in this instance, particularly when the pictures are evidentiary videos.

¹⁴ See 4/30/18 Comment (Attachment 4, pages 32-53),

for unknown transport mechanism, which is causing grave/adverse habitat modification and enormous harm to protected species. Thus, EPA fails to meet its obligations under FIFRA's "*unreasonable adverse*" effect standard, where there is "unreasonable risk."¹⁵

This action further arises out of Defendants FBEMC and Jeff Loven's foreknown advance knowledge of the hazards of their herbicide ROW clearing, yet knowing these hazards, none-the-less recklessly disregarded the risk posed to threatened/endangered species and their habitats.

Said reckless and wanton behavior by Defendants FBEMC and Jeff Loven requires immediate injunctive relief.

The harm done by FBEMC's use of EPA registered herbicides to endangered/threatened species and their habitats is irreparable and cannot be undone or remedied, after the fact. The very existence of ESA endangered and threatened species, already only one step away from extinction, are being adversely imperiled to the point of no return.

¹⁵ The *Visual* data shows that a "Take" of ESA critical habitat, endangered and threatened species ("Protected Species") occurred with French Broad's 2017 spraying and is on-going, **and that another much more serious "Take" will occur** in FBEMC's re-spraying. A re-spraying will most certainly result in the extinction of protected species on Roan mountain.

Defendants' acts will result in the extinction of at least one or more ESA protected species on Roan Mountain (see Continuing Take Notice). Protected species of particular concern are the *Bombus affinis* (Rusty Patch Bumble Bee), Gray bat, Northern long-eared bat, Virginia big-eared bat and other species whose gut microbiome has been compromised by exposure to Glyphosate, AMPA and Formaldehyde from toxic secondary hydrous transport and contaminated food sources, whose compromised gut microbiome now exposes said species to disease and death due to secondary stressors, which heretofore said species could resist (see Continuing Take Notice, 2019 Orr Decl, Attachment 14).

This harm can never be compensated for by a subsequent monetary award.

On the other hand, the harm imposed FBEMC by an injunction is "de minimus" to non-existent. FBEMC cleared its ROW's for many decades absent "any" use of herbicides. It doesn't need herbicides to clear its ROW's on Roan Mountain and readily admits said ROW herbicide clearing is optional.¹⁶

PARTIES/BACKGROUND

¹⁶ <https://www.frenchbroademc.com/rightofway.cfm> ("[W]e have another strategy for maintaining our rights-of-way. In some areas, FBEMC is using an environmentally safe herbicide...")

Roan Mountain abuts the states of North Carolina and Tennessee near her summit. Roan Mountain is the repository of a plethora of endangered and threaten species, protected under the Endangered Species Act of 1973, 16 U.S.C. § 1531 et seq. Roan Mountain also has an ESA defined "critical habitat" provided by Section 3 (5)(A) for the Spruce fir-moss spider, which mostly resides upper levels of the mountain. Many of the mountain's threatened and endangered species, including those observed by individual Plaintiff/Declarants reside at lower to mid altitudes (See 2017 Decs, Attachments 8 to 13 hereto).

Roan Mountain was prior to FBEMC's initial 2017 spraying one of the most pure/pristine bio-diverse places on the earth. She claimed some of the purest waters, air and soils in North American. She reportedly had more diverse biological species per square mile than anywhere else. The renown majesty of this biological diversity is legendary, see <https://www.fs.usda.gov/recarea/nfsnc/recarea/?recid=48626> ("The first human visitors to Roan Mountain were American Indians, who lived at the base of the mountain and traveled across its gaps. The first people to study the mountain were botanists, such as Andre' Michaux, John Fraser, and Asa Gray. They described rare plant communities and discovered scores of "new" plants, including Fraser fir, Catawba rhododendron and Grays lily.") The famous Asa Gray (purportedly Charles Darwin's mentor/collaborator at Harvard) fell in love with the Roan studying her unique biology.

Famous naturalist John Muir also adored and loved Roan Mountain for her unique biological diversity, habitats and other features, http://vault.sierraclub.org/john_muir_exhibit/life/muir_michaux_gray_roan_mtn.aspx (" 'I don't want to die,' wrote John Muir in June, 1898, 'without once more saluting the grand, godly, round-headed trees of the east side of America that I first learned to love and beneath which I used to weep for joy when nobody knew me.' John Muir, then, traveled to Roan Mountain.")

Roan Mountain was also a favorite of the legendary Daniel Boone who named the mountain after his horse - Roan.

Roan is home to a plethora of endangered and threatened species in delicate harmony with the Mountain's ancient pure/pristine, yet fragile, ecosystems designated under the ESA. The population of these endangered and threatened species is believed among some of the highest in Appalachia.

Individual Plaintiff William Orr ("Orr") has been entrusted with the stewardship (under karmic and spiritual law) to guard and protect Roan Mountain's incredible species. He is a scientist and inventor. He resides directly under Roan's peak separated by a couple miles or less of wooded reserve and national forest. His isolated wilderness residence may be the closest of any human to the peak of Roan

Mountain. The closest human being below Orr is about a 1/4 mile. There are no other humans who live above him. He lives alone in the deep forest of Roan with his cats and spends a good deal of time studying/observing nature, hiking, communing and meditating in nature with all its marvelous protected species. Orr is a naturalist and organic gardener (or at least was before FBEMC's 2017 spraying contaminated his garden). Orr is a lover of Roan Mountain's ESA protected species, particularly the *Bombus affinis* (Rusty Patched Bumble bee), which based upon Orr's observations will go extinct on Roan with FBEMC's current 2019 spraying (see *Continuing Take Notice*). Orr also has assisted his son in the clearing of ROW easements containing protected species and their habitat, in order to avoid FBEMC's herbicide spraying thereof, so that protected species might survive.

Plaintiff Orr's family tree includes Cherokee Indian ancestry, which is believed at one time to have originated from native residents of Roan Mountain before the "Trail of Tears," where the Cherokees were forcibly relocated to Oklahoma. The Cherokee Indians considered Roan to be a sacred "alive and conscious" mountain and repository of remarkable life species, who loved humanity. Orr believes the same and he practices his native American family traditions in regard to honoring and communicating with the mountain and its nature. Orr,

like his Cherokee forefathers believes Roan Mountain is Deva,¹⁷ which means she is a spiritual having conscious awareness, just like humans. Orr's religious practices and meditations follow those of his native ancestors, where Orr has developed an intimate sacred relationship with the remarkable species on the mountain, its ESA protected species, including *Bombus affinis*. Orr appreciates how fragile these creatures are and how much they love him and vice versa.

In other words, there is real love coming from nature to humanity and Orr is the beneficiary of that love on Roan Mountain. That intensity is based upon the purity of Roan's ancient ecosystems. But, the intensity of that love is diminished/has been diminished when nature is under attack by humanity with toxic herbicides permeating their habitats, especially her most fragile ESA species. Their wounds and hurt are felt emotionally and spiritually by Orr. Orr hurts when they hurt. Thus, Orr's mission and life is to protect and preserve these remarkable ancient species in their natural environment. In other words, Orr is invested in maintaining the purity/integrity of their ancient habitats, which support ESA protected species living on Roan Mountain.

¹⁷ See The Deva Handbook: How to Work with Nature's Subtle Energies ("Mountain devas are among the most powerful members of the angelic hierarchy.")

Regrettably, they are now under an incredible assault - one of their very existence, due FBEMC's spraying. They are already suffering enormously (see *Continuing Take Notice*, Orr 2019 Decl, Attachment 14 hereto). Regrettably, no one else seems to care or willing to intervene in their behalf.

FBEMC's prior 2017 spraying, which substantially diminished and degraded the purity/integrity of the environment where Orr and ESA species reside, habitats generally and protect species habitat in particular have been seriously degraded. For example, prior to said 2017 spraying the endangered *Bombus affinis* (Rusty Patched bumble bee) was a regular visitor at Orr's residence and surrounding area where Orr spend his time (gardening, studying). The *affinis* was also a regular visitor of Orr's neighbors. Orr and *affinis* became friends and developed an intimate relationship.

Regrettably, after FBEMC's 2017 spraying the area became too toxic for *affinis* (see 4/30/18 and 7/5/19 Comments/Notice, attachments 4 and 6). Immediately after said 2017 spraying Orr found two dead *affinis*, which Orr thought unusual. In September 2017 Orr showed the dead *affinis* to a FWS biologist, who thought they were *affinis*. Regrettably, the *affinis* hasn't been seen since. This grieves Orr. Because FBEMC's current 2019 spraying will result on her extinction on the mountain, this especially aggrieves Orr (See *Continuing Take Notice*).

Plaintiff Orr is hypersensitive to contaminated/polluted air,¹⁸ radon gas, electro-magnetic influences, e. g. power lines, smart meters (aka Electromagnetic Hypersensitivity - EHS)¹⁹ and has physically painful immunological episodes when exposed. He also has food allergies. His adverse responses are typically in the form of an immune response. Living or visiting environments containing such antagonists, especially for extended periods, is physically painful for Orr. Orr's isolated wilderness residency in the woods on formerly pure/pristine Roan, with its formerly pure air, pure water and pure organic foods ameliorated Orr's immunological sensitivities. Orr's environmental sensitivities are likely the same as those of the higher genome protected species (4/30/18 Comment/Take Notice, Attachment 4, p 4-31) and have assisted Orr in his scientific investigation/ understanding of said protected species reactions to their exposure to FBEMC's herbicides.

Defendant Department of Interior (DOI) is charged with responsibility of enforcing the ESA.

Defendant U.S. Fish and Wildlife Service (USFWS or FLW), a department of DOI, is responsible for protecting Roan Mountain's threatened and endangered species and their habitat, including

¹⁸ Bill reacts almost immediately to hazardous air contaminants.

¹⁹ <http://emfsafetynetwork.org/safety-precautions/electrical-sensitivity/>

designated critical habitat under ESA, § (3) 5)(A). USFWS is tasked with coordinating with EPA and Forest Service in enacting the provisions of ESA. USFWS has designated a large "critical habitat" region on Roan mountain.

Defendant U.S. Forest Service has charge of the Pisgah National Forest, which occupies much of Roan Mountain, in both the states of North Carolina and Tennessee. The U.S. Forest Service is responsible for protecting threatened and endangered species under the ESA on Roan Mountain.

Defendant U.S. EPA "is responsible for reviewing information and data to determine whether a pesticide product can be registered for a particular use. As part of that determination, EPA determines if listed species or their designated critical habitat may be affected by use of the product. All pesticide products that EPA determines 'may affect' a listed species or its designated critical habitat may be subject to the ESPP (Endangered Species Protection Program)." ²⁰ EPA is in process of re-registering glyphosate and under law must consider its effect upon endangered/threatened species under ESA and FIFRA. In the mean time EPA's outdated/defective registration of glyphosate can be used by FBEMC to severely damage the habitat of endangered and threatened species.

²⁰ <https://www.epa.gov/endangered-species/about-endangered-species-protection-program>

Defendant French Broad Electric Membership Cooperative (FBEMC) provides Plaintiff electricity. FBEMC has an exclusive monopoly to provide electricity to Roan Mountain, Mitchell County, North Carolina, where a large repository of endangered and threatened species exist, particularly on Roan Mountain. FBEMC is allegedly regulated by the *N.C. Rural Electrification Authority* under the N.C. Electric Membership Corporation Act. (1935, c. 291, s. 1.). That regulation under § 117-2.1. of the Act provides the Rural Electrification Authority power to "promote and foster methods of conserving electric energy in accordance with provisions of the National Energy Act as delegated to the states (1979, c. 285, s. 1.)," which includes FBEMC's vegetation and tree trimming management of its alleged²¹ ROW easements on Roan Mountain.²² FBEMC is also allegedly regulated by the N.C. Department of Agriculture (regarding the spraying of herbicides), N.C. Department of Environmental Quality and N.C. Forest Service.²³ FBEMC or any party in its employ which

²¹ FBEMC easements are disputed by Plaintiffs as being legally invalid for several reasons, including the easement's failure to define the metes and bounds of the claimed easement, vagueness of the duties of the parties, breach by FBEMC to honor the required terms specifically set forth in the easement and for lack of mutual consideration. See 2017 Yvonne Hegney Decl, Attachment 10.

²²

<https://webcache.googleusercontent.com/search?q=cache:pJhReonpOSgJ:https://www.ferc.gov/industries/electric/indus-act/reliability/vegetation-mgt.asp+&cd=3&hl=en&ct=clnk&qI=us>

²³ Plaintiffs understand N.C.'s rural cooperative utilities developed a Herbicide Prescription program for their ROW easement vegetation management in consultation with N.C. DEQ.

"prescribes a herbicide's use or applies herbicide on another's property, they must be licensed by the state of North Carolina."²⁴

Defendant Jeff Loven is General Manager of FBEMC has executive responsibility managing the conduct and affairs of FBEMC, including its ROW herbicide spraying program.

BACKGROUND/STATEMENT OF FACTS

Plaintiffs incorporate by reference Plaintiff's 5/26/17 Notice entitled "NOTIFICATION OF FBEMC'S VIOLATION OF THE ENDANGERED SPECIES ACT" (Attachment 3), his 4/30/18 Comment "SUPPLEMENT TO MR. ORR'S MAY 2017 ROAN MOUNTAIN ESA §1540(g) TAKE NOTICE" (Attachment 4) and his 7/5/18 Comment "*Continuing § 9 Take Notice and Intention to Sue*" (Attachment 6), collectively herein *Continuing Take Notice*.

Plaintiffs further incorporate by reference the 2017 declarations of Bill Orr, Charles Orr, Yvonne Hegney, Natalie Greene, Keith Garland and Marshal Walden (Attachment 8-13,15, hereto) contained in their 6/1/17 U.S. District Court Action *William Orr, et. al. v U.S. EPA, U.S. Forest Service, U.S. Fish And Wildlife Service, et. al.*, Civil Case No. 1:17-cv-00141-MR-DLH, Western District Of North Carolina, <https://casetext.com/case/orr-ex-rel-orr-v-us-epa-us-forest-serv-us>

²⁴ <http://ncforestservice.gov/publications/Forestry%20Leaflets/FM19.pdf>

fish-wildlife-serv-french-broad-elec-membership-corp-1 and 4th Circuit Appeal thereof.

Defendant FBEMC's 2017 spraying has **already** loaded protected specie habitat with toxic contaminates due the hydrous transport mechanism (see *Continuing Take Notice*) causing an irreparable loss to one of natures last remaining ancient, pure, vibrant and uncontaminated jewels. FBEMC's current spraying will be a knockout blow to these habitats and others, which survived FBEMC's first 2017 spraying. FBEMC's current re-spraying will preclude recovery of those damaged habitats, which have a chance of recovery.

Like FBEMC's 2017 spraying (see 2017 Charles Orr Decl, Attachment 9; 2017 Bill Orr Decl, Attachment 8; 2017 Garland Decl, Attachment 12; 2017 Greene Decl, Attachment 11, Bill Orr Supplemental Decl, Attachment 15, hereto) Plaintiff and his son were provided no precise advance timing notice of FBEMC's spraying, needed in order to maintain their self-maintained easements, which are repositories of endangered species. These easements were sprayed July 10, 2019 for the first time ever, absent any advance notice to Plaintiff or his son, such that the these easements could be cleared to avoid spraying. FBEMC's treacherous act condemned resident protected species on these heretofore unsprayed easements and undermined attempts to preserve protected species. Other self-maintainers who

have yet to be sprayed will likely suffer this same fate, killing protected species residing on their easements.

FBEMC's current web site

<https://www.frenchbroademc.com/rightofway.cfm> currently discloses Roan mountain ROW spraying schedule is July 2019/August 2019 ROW Schedule "Burnsville District... Herbicide Schedule: Re-spray: Fork Mtn., Glen Ayre...(e.g. Roan Mountain) (Attachment 2).²⁵

FBEMC's web site discloses their herbicide spray is a combination of RODEO and POLARIS herbicides, which will be applied at 4.5% active ingredient concentration levels, which are believed well above standard agricultural levels, which are believed to be 1.0% or less.

FBEMC's herbicide is a blend of Glyphosate (GLY) @ 53.8% active ingredient in RODEO²⁶ and Imazapyr @ 22-23.3% active ingredient in POLARIS.²⁷

Plaintiff estimates there are about 200 hundred of miles of FBEMC easements on the N.C. side of Roan Mountain, which are/will be subject to re-spraying. Due to secondary hydrous transport of

²⁵ <http://www.frenchbroademc.com/rightofway.cfm>

²⁶ <https://www.conncoll.edu/media/website-media/offices/ehs/envhealthdocs/Rodeo.pdf>

²⁷ <http://www.brmemc.com/PDFs/Information/mp8KR001.pdf>

FBEMC's 2017 spraying the damage done to Roan's once precious pristine ecosystems was catastrophic. Re-spraying will greatly exacerbate already severely modified habitats, which will be irreparable.

The vibrancy and health of the Roan Mountain's ecosystems, plants and animals, including those of its threatened and endangered species, completely depend upon the continuation of the mountain's pristine purity, which has already been severely compromised by FBEMC's 2017 spraying. They will now collapse with a re-spraying (See *Continuing Take Notice*).

In other words, FBEMC'S re-spraying implicates secondary load contamination via hydrous transport on already severely modified protected species habitat (See *Continuing Take Notice*).^{28 29}

²⁸ See *Getting the Drift on Chemical Trespass* http://www.beyondpesticides.org/assets/media/documents/infoservices/pesticide_sandyou/Summer%202004/Getting%20the%20Drift%20on%20Chemical%20Tresp ass.pdf ("Pesticides drift for miles - A 2001 study by Texas A&M University researchers shows that pesticides can ... be transported over long distances fairly rapidly through wind and rain. A U.S. Geological Survey report reached similar conclusions, finding, "After they are applied, many pesticides volatilize into the lower atmosphere, a process that can continue for days, weeks, or months after the application, depending on the compound."); *What You Need To Know About Chemical Drift*, <http://www.wtv-zone.com/infchoice/drift.html> ("Approximately 2.5 million tons of pesticides are applied to crops every year, but less than 0.1% actually reach the target pests. The excess pesticide spreads into the environment where it can detrimentally affect human health through the contamination of soil, water, and the atmosphere"), Also see *Amounts of pesticides reaching target pests: Environmental impacts and ethics* <https://link.springer.com/article/10.1007%2FBF02286399>

STATUTORY AND REGULATORY MATTERS

ENDANGERED SPECIES ACT

The ESA extends its protection to three categories of species: endangered, threatened, and essential or nonessential experimental populations. *Animal Welfare Inst. v. Martin*, 588 F. Supp.2d 70, 97 (D. Me. 2008).

Section 9 of the ESA makes it unlawful to, inter alia, "violate any regulation pertaining to [an endangered] species or to any threatened species," 16 U.S.C. § 1538(a)(1)(G). Section 9 specifically prohibits the "take"³⁰ of an endangered species without authorization; *take* is defined by the ESA as "to harass, harm... or attempt to engage in any such conduct."

The cornerstone of the statute is section 9(a)(1), which prohibits the *taking* of any endangered species without a permit or other authorization. *Id.* § 1538(a)(1)(B). The term "take" is defined as "to harass, harm, pursue, hunt, shoot,

²⁹ Wade, T., et al. 2001. *Atmospheric Deposition of PAH, PCB and Organochlorine Pesticides to Corpus Christi Bay*. Texas A&M Geochemical and Environmental Research Group. Presented at the National Atmospheric Deposition Program Committee Meeting.

³⁰ "Take -Take means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." (16 U.S.C. 1532).

wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." Id. § 1532(19).

Gibbs v. Babbitt, 214 F.3d 483, 487 (4th Cir. 2000)

§ 17.3 (c) defines "*Harass* in the definition of "take" in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering (emphasis added)."

§ 17.21 Prohibitions provide:

(a) Except as provided in subpart A of this part, or under permits issued pursuant to § 17.22 or § 17.23, it is unlawful for any person subject to the jurisdiction of the United States³¹ to commit, to attempt to commit, to solicit another to commit or to cause to be committed, any of the acts described in paragraphs (b) through (f) of this section in regard to any endangered wildlife. (1) It is unlawful to take endangered wildlife within the United States, within the territorial sea of the United States, or upon the high seas.

§ 17.21

³¹ This includes US citizens pursuant to 31 CFR 515.329 - "Person subject to the jurisdiction of the United States; person subject to U.S. jurisdiction."

Defendants FBEMC and Jeff Loven violate federal law and the prohibitions of ESA § 9 Take by engaging a contractor to perform its chemical spraying on alleged ROW easements and by coercing land owners to permit them to spray where endangered species reside, and where secondary hydrous transport will transmit into protected species habitat and severely and irreparably modify habitat.

Clearly, FBEMC by spraying on its alleged easements will harm/kill endangered species, which exist on said easements on Roan Mountain (2017 Charles Orr Decl; 2017 Orr Decl; 2017 Keith Garland Decl; 2017 Yvonne Hegney Decl; 2017 Natalie Greene Decl, Attachments 8 -12, hereto).³² The fact FBEMC's alleged easements may be on private property is inconsequential,³³ *Gibbs v. Babbitt*, 214 F.3d 483, 486-87 (4th Cir. 2000).

Further, the secondary hydrous transport resulting from FBEMC's spraying will *take* protected endanger/threatened species residing outside sprayed areas, including those within ESA designated critical habitats (see *Continuing Take Notice*).

³² Declarant's Charles Orr and Yvonne Hegney identified the Carolina Northern Flying squirrel (*Glaucomys sabrinus coloratus*) and **Virginia big-eared bat** Bat (*Corynorhinus (=plecotus) townsendii virginianus*) species on FBEMC's alleged easements of their properties.

³³ Plaintiff's are informed that FBEMC's alleged easements on Roan Mountain extend into Federal lands (pending Declarant Saylor Fox).

§ 1540(G)(2)(A)(I) NOTICE REQUIREMENT

Plaintiff's § 1540(g)(2)(A)(i) notice requirements were fulfilled with Orr's original May 26, 2017 Notice and his subsequent 5/3/2018 *Supplemental Notice of Imminent ESA § 9 Take of Critical Habitat/Protected Species on Roan Mountain* containing Orr's 4/30/18 EPA Comment/Take Notice,³⁴ which was formally served 5/3/17 upon the Secretary of the Department of Interior, US EPA Administrator, Director of U.S. Fish and Wildlife Service, Director of USDA Forest Service and Director of U.S. Fish and Wildlife Service, additionally fulfills said requirement.³⁵

FEDERAL REGULATION OF PESTICIDES - THE FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT ("FIFRA") IN VIEW OF THE ENDANGERED SPECIES ACT

³⁴ Plaintiff provided therein his 4/30/18 EPA Comment/Notice, which was filed in the matter of EPA-HQ-OPP-2009-0361, Glyphosate Case 0178, <https://www.regulations.gov/document?D=EPA-HQ-OPP-2009-0361-0066>, Entitled: "*EPA's Human Health and Ecological Risk Assessment Of Glyphosate Pursuant to 40 CFR 155.58 ----- EPA's Assessment of Pesticides/Glyphosate Containing Herbicides Upon Critical Habitats, Endangered and Threatened Species, Including Those of Roan Mountain, N.C./TN, Pursuant to 16 U.S.C. § 1531, § 1540(g)(2)(A)(i), et. seq. (Endangered Species Act)...*" THIS COMMENT IS A SUPPLEMENT TO MR. ORR'S MAY 2017 ROAN MOUNTAIN ESA §1540(g) TAKE NOTICE..." (Attachment 4). It was served (certified mail, return receipt requested) as an attachment on all Defendants in Plaintiff's 5/3/18 document entitled: "*Supplemental Notice of Imminent ESA § 9 Take of Critical Habitat/Protected Species on Roan Mountain.*"

³⁵ Id.

FIFRA governs the registration, labeling, use, and application of pesticides in the United States, 7 U.S.C. §§ 136, et seq., and with few exceptions, FIFRA requires all pesticides used in the U.S. to be registered with the EPA. 7 U.S.C. § 136a.

Under FIFRA EPA cannot register any pesticide or its specific use patterns unless it first determines that the pesticide and its label comply with FIFRA, 7 U.S.C. § 136a(c)(S)(B)) (e.g. it will perform its intended function "without **unreasonable adverse effects** on the environment, and that 'when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment," 7 U.S. Code § 136a).

Under law EPA is required to demand and consider extensive and detailed scientific data on the potential effects of the pesticide on human health, the environment, and non-target species to support initial registration, continuing registration, registration review and re-registration of each pesticide and its use patterns, 7 U.S.C. § 136a(c)(2)(A).

As part of the registration process, EPA may classify a pesticide or any of its specific use patterns for -general use, restricted use, or both" depending on the characteristics of the pesticide and its

intended use patterns, 7 U.S.C. § 136a(d)(1).

All pesticides, their use patterns, and their classifications are subject to periodic review and re-registration to account for advances in science and data collected in the pesticides' use, 7 U.S.C. § 136a(g). Each registration and re-registration specifies the crops and sites where a pesticide may or may not be applied, the manner of application, and the precautions relating to its use, all as set forth on the product's label, 40 C.F.R. §156.10.

Restricted use pesticides, and pesticides with a specific use pattern classified as restricted use, can only be applied by a federal or state certified applicator trained in the EPA specified label requirements to permit use without unreasonable adverse effects to the environment, 7 U.S.C. § 136i. These label requirements include any buffer zone restrictions determined to be appropriate for the individual pesticide based on scientific data and risk assessment, crop-specific application rates, drift control measures, environmental fate, and field re-entry intervals. 40 C.F.R. §§ 156.10, 156.200-.212 (worker protection) and Part 158 (data requirements for registration).

EPA has been remiss under its ESA and FIFRA obligations. For example, it is reported that its current re-registration of glyphosate herbicides (in view of ESA) will not complete its assessment until 2020, yet EPA currently allows these herbicides to be used in a destructive manner where protected species are harmed, as evident by the

actions of FBEMC's spraying of Roan Mountain, *Ctr for Biological Diversity, et al v. EPA*, 9th Cir., No. 14-16977, 2/2/17 (Federal regulators must do more to ensure that approved pesticides don't harm imperiled wildlife, a U.S. appeals court ruled Feb. 2, 2017 backing environmental activists' claims).

ALLEGATIONS

1. On or about 5/26/17 Defendants received Plaintiff's "NOTIFICATION OF FBEMC'S VIOLATION OF THE ENDANGERED SPECIES ACT," which threatened suit.
2. Said 5/26/17 Notice contained disclosure of Glyphosate based herbicides traveling long distance from original spray sites, resulting in a panoply of hazards to protected species and their habitats.
3. Beginning May/early June 2017, lasting through July or August 2017, FBEMC's commenced its first-ever herbicide spraying, spraying a combination of the registered herbicides Rodeo and Polaris, on its alleged ROW easements on or proximate to Roan Mountain.
4. On or about 6/1/17 Plaintiff Orr and others attempted to enjoin FBEMC's from its said 2017 herbicide spraying of Roan Mountain on the basis that an illegal ESA § 9 Take of protected species would occur.

5. On or about 6/5/17 said Injunction suit of Plaintiff Orr and others was dismissed, because Plaintiffs failed to meet the statutory 60 day notice rule.^{36 37}
6. FBEMC's first ever 2017 herbicide spraying came about one (1) year after FBEMC had clear cut vegetation via mechanical means on its alleged easements of Roan Mountain ROW's easements.
7. FBEMC was informed on or about 5/26/17 and with more particularity 4/30/18 that its sprayed herbicides were being transported long distance via toxic secondary hydrous transport from its original spray sites (via Plaintiff's 5/26/17 and 4/30/18 Take Notices).
8. On or about 4/30/18 Defendants, including FBEMC, received Plaintiff's EPA's Comment/Take Notice Entitled: "*EPA's Human Health and Ecological Risk Assessment Of Glyphosate Pursuant to 40 CFR 155.58 ----- EPA's Assessment of Pesticides/Glyphosate Containing Herbicides Upon Critical Habitats, Endangered and Threatened Species, Including Those*

³⁶ See 6/7/17 DC Order Denying Stay "On June 5, 2017, the Court dismissed the Plaintiffs' claims under the ESA without prejudice due to lack of subject matter jurisdiction because the Plaintiffs had failed to provide the Defendants with 60 days' notice as required by the ESA."

³⁷ See 16 U.S.C. § 1540(g)(1)(A), § 1540(g)(2)(A)(i), "[n]o action may be commenced under subparagraph (1)(A) of this section . . . prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of such provision or regulation." (Orr claimed in his 2017 suit he wasn't given sufficient notice of FBEMC's spraying in advance to comply with 16 U.S.C. § 1540(g)(1)(A), § 1540(g)(2)(A)(i).)

of Roan Mountain, N.C./TN, Pursuant to 16 U.S.C. § 1531, § 1540(g)(2)(A)(i), et. seq. (Endangered Species Act)...THIS COMMENT IS A SUPPLEMENT TO MR. ORR'S MAY 2017 ROAN MOUNTAIN ESA §1540(g) TAKE NOTICE..." (Attachment 4).

9. Said 4/30/18 Comment/Take Notice disclosed the high genome sensitivity of protected species to stressors such as EPA registered pesticides/herbicides, including Glyphosate, and further detailed the nature/cause of secondary toxic hydrous transport whereby said pesticides/herbicides were being transmitted into protected species habitats with devastating consequences.
10. On or about 5/3/18 Defendants DOI, USFS, USFWL, EPA and FBEMC were served via certified mail, return receipt requested said 4/30/18 Comment/Take Notice as an attachment to Plaintiff's 5/3/18 document entitled:
"Supplemental Notice of Imminent ESA § 9 Take of Critical Habitat/Protected Species on Roan Mountain." (Attachment 4).
11. Despite knowing from Plaintiff's 5/26/17 and 4/30/18 Take Notices that its toxic herbicides would travel long distance from its spray sites and expose individuals and protected species alike, FBEMC never informed its membership of the hazards.
12. Despite knowing from Plaintiff's 5/26/17 and 4/30/18 Take Notices that its toxic herbicides would travel long distance from its ROW spray sites and expose protected species, adversely

modifying their habitats, FBEMC refused to perform any environmental assessment or impact study.

13. FBEMC and Jeff Loven never conducted an environmental impact or other study or considered the effect of its herbicides killing or harming endangered/threatened species or adversely modifying habitat from the spraying.
14. On or about 7/5/19 FBEMC was again informed via Plaintiff's 7/5/18 Comment/Notice of ESA violation that its herbicides were being transported long distance from spray sites and adversely modifying protected species habitats.
15. In the case of Plaintiff's pre-spray 5/26/17, 4/30/18, and 7/5/19 Take Notices and disclosure of the risk associated with toxic secondary transport, FBEMC ignored same in every regard, as evident by their subsequent 2017 spraying and current 2019 herbicide re-spraying of Roan Mountain.
16. FBEMC and Jeff Loven knew or should have reasonably known their reckless disregard and callous behavior in spraying would adversely affect protected species habitat of Roan Mountain.
17. U.S. Forest Service, U.S. Fish and Wildlife and EPA were negligent in not demanding FBEMC conduct an environmental impact study or apply for an ESA § 10 incidental take permit.
18. U.S. Forest Service, U.S. Fish and Wildlife and EPA were negligent by not consulting under ESA § 7 regarding FBEMC's use of an EPA registered herbicide that harms

- endangered/threatened species and/or adversely modifies their habitat on Roan Mountain.
19. EPA's continuing herbicide registration of Rodeo and Polaris is defective because it allows FBEMC to spray in a manner that irreparably harms/destroys/adversely modifies habits of threatened and endangered species.
 20. FBEMC intends to continue spraying its registered herbicides into the future in a manner that adversely modifies protected species habitat on Roan Mountain, including designated critical habitat.
 21. FBEMC and Jeff Loven knew or reasonably should have known the irreparable damage they are causing protected species and their habitats on Roan Mountain cannot be compensated by a monetary award after the fact.
 22. Despite knowing the irreparable harm they would cause protected species habitat, FBEMC and Jeff Loven on or about July 10, 2019 FBEMC, acting under color of EPA Pesticide registrations, began³⁸ re-spraying their alleged "right of ways"

³⁸ FBEMC's web site on 5-28-17 discloses its May 2017/June 2017 ROW Schedule: Burnsville District "Herbicide Schedule: **Fork Mtn, Glen Ayre, Valley of the Roan**, Bald Mtn Transmission Line, Murphytown, Hwy 19W, Jacks Creek, Poplar, Pine Swamp and Bolens Creek." (Attachment 1), which include Roan Mountain locations. On 7/17/19 FBEMC's web site discloses its July 2019/August 2019 ROW Schedule: Burnsville District "Herbicide Schedule: Re-spray: **Fork Mtn., Glen Ayre**, McKinney Cove, White Oak, Brummetts Creek, Pigeon Roost, Cooper Branch, Brush Creek, Roses Branch, Spruce Pine, Little Switzerland, East Yancey, Town of Burnsville, West Burnsville and Transmission Line from Burnsville to Relief," (Attachment 2), which include Roan Mountain locations.

(ROW) easements on Roan Mountain and proximity with a mixture of Rodeo and Polaris on.

23. FBEMC's 2017 and current 2019 herbicide ROW spraying program consists of applying a herbicide mixture of Rodeo and Polaris in solution containing about 4.5% active ingredients by volume (Attachments 1, 2).³⁹
24. On or about 4/30/18 Defendant U.S. EPA, together with the other Defendants, received Plaintiff's 4/30/18 Comment in its EPA's *Human Health and Ecological Risk Assessment Of Glyphosate Pursuant to 40 CFR 155.58*, <https://www.federalregister.gov/documents/2018/02/27/2018-03986/registration-review-draft-human-health-and-ecological-risk-assessments-for-several-pesticides>, which included disclosure of protected species high genome hypersensitivity to pesticides and a heretofore unknown massive toxic secondary hydrous transport mechanism of pesticides/herbicides, including glyphosate, into their habitats causing adverse modification. Plaintiff requested an opportunity to present critical visual data in said Comment/Take Notice.
25. Defendant U.S. EPA on or about 5/1/2018 and 5/26/18 assured Plaintiff via email that his 4/30/18 Comment/Take Notice **would be entered into the record for review**.
26. On or about November 21, 2018 EPA published its *Response to Public Comments on the Preliminary Ecological Risk*

³⁹ <http://www.frenchbroademc.com/rightofway.cfm>

Assessment for Glyphosate,

<https://www.regulations.gov/document?D=EPA-HQ-OPP-2009-0361-2341>), where EPA, however, **did not consider** Plaintiff's disclosure protected species high genome hypersensitivity nor the toxic secondary hydrous spray transport effect upon them as disclosed in Plaintiff's 4/30/18 Comment/Take Notice.

27. EPA further never contacted or afforded Plaintiff's an opportunity to present his visual/video evidence of this toxic secondary transport mechanism and its adverse effect upon protected specie habitat, as requested in his 4/30/18 Comment/Take Notice, effectively ignoring highly critical evidence.
28. FBEMC's current 2019 herbicide re-spraying effort comes about three (3) years after it had clear cut vegetation on its alleged easements of Roan Mountain, about two years after its original 2017 herbicide spraying.
29. FBEMC claims per its web site <https://www.frenchbroademc.com/rightofway.cfm> that easement ROW clearing is conducted about once every 5- 6 years (Attachments 1, 2).⁴⁰
30. FBEMC's current 2019 herbicide, its 2017 herbicide spraying and its 2016 mechanical clearing, are the third ROW clearing in four (4) years of its Roan Mountain ROW's.

⁴⁰ <http://www.frenchbroademc.com/rightofway.cfm>

31. All prior (pre-2017) FBEMC easement ROW clearings of Roan Mountain easements by FBEMC were conducted by mechanical means, e.g. chain saws, bushhogs and the like, in approximate intervals of 10 years (see Yvonne Hegney 2017 Decl, Attachment 10).⁴¹
32. FBEMC discloses on their web site that their new herbicide spraying program is *optional* and not applied in all areas:
"Along with our work to clear cut the rights-of-way, we have **another strategy** for maintaining our rights-of-way. **In some areas**, FBEMC is using an environmentally safe herbicide to convert these wooded corridors to greenways... (Emphasis added)," (Attachments 1, 2)⁴²
33. FBEMC lacks legally valid and enforceable easements, for want of consideration, vagueness et. al., which permits FBEMC's spraying in the first instance of their alleged ROW's (2017 Hegney Decl, Attachment 10).
34. FBEMC provides a "Self Maintenance" list for its members who which to clear their own ROW's in order to avoid herbicide spraying.
35. FBEMC knows Plaintiff's son, Charles Orr, is on FBEMC's no-spray list, know as FBEMC "self-maintenance" list, and has been on it since 2017.

⁴¹ <http://www.frenchbroademc.com/rightofway.cfm>

⁴² <http://www.frenchbroademc.com/rightofway.cfm>

36. Plaintiff's son, Charles Orr, with assistance from Plaintiff, self-maintained FBEMC's ROW easements proximate to his residence and Plaintiff's residence to avoid FBEMC's herbicide spraying. This effort was done in order to protect his family, protect Plaintiff and to protect ESA endangered and threatened species residing in the easements and to reduce the effect of secondary hydrous transport's negative effect on protected species habitats outside the easements.
37. Charles Orr with assistance from Plaintiff self-maintained said ROW easements since 2017.
38. Despite knowing Charles Orr was self-maintaining said ROW easements and periodically consulting with Charles Orr on said maintenance, FBEMC on or about 7/10/19, absent any advance notice, surprised Plaintiff and Charles Orr by spraying these formerly self-maintained easements.
39. Both Plaintiff and Charles Orr were surprised and upset, given the loss of protected species residing on said ROW's and the exposure of toxic secondary hydrous transport.
40. Prior to FBEMC's 2017 spraying FBEMC was notified by U.S. Fish and Wildlife Services (FWS) of its concerns regarding ESA protected species and FBEMC's pending herbicide spraying.
41. In the period of May 2017 to Present, FWS on one or more occasions was requested FBEMC apply/file for a § 10 Incidental Take Permit regarding its herbicide spraying.

42. On every occasion FBEMC disregarded FWS's § 10 Incidental Take Permit request, as evident by its 2017 and 2019 herbicide sprayings.
43. FBEMC has never conducted an environmental impact study nor considered the adverse protected habitat modification of its herbicide spraying, nor applied for an ESA § 10 incidental take permit.
44. FBEMC has callously, purposely and intentionally never disclosed any of the credible contrary science or scientific opinion to its membership, whose properties contain FBEMC's ROWs' subject to herbicide spraying, that glyphosate (contained in Rodeo) has been deemed a probable carcinogen by the World Health Organization's (WHO) International Agency for Research on Cancer (IARC) May 20, 2015⁴³ to its membership.
45. On and after May 26, 2017 FBEMC and Jeff Loven, before FBEMC's spraying of Roan Mountain, knew or should have known their web site representations <https://www.frenchbroademc.com/rightofway.cfm> as to the safety of their herbicides was false based upon the information Plaintiff supplied them May 26, 2017 (See Orr 2017 DECL and its Attachment 2, Attachment 8 hereto).

⁴³ See 3/20/2015 WHO IARC findings, <http://www.iarc.fr/en/media-centre/iarcnews/pdf/MonographVolume112.pdf>

46. On and after May 26, 2017 FBEMC and Jeff Loven knew or should have reasonably known their acts of spraying herbicides on Roan Mountain endangered adversely effected protected specie habitats based upon the information Bill Orr supplied them May 26, 2017 (See Orr 2017 DECL and its Attachment 2, Attachment 8 hereto).
47. On and after May 26, 2017 FBEMC and Jeff Loven knew or should have reasonably known their acts of spraying herbicides on Roan Mountain endangered/and adversely effected the lives, property, health, bee colonies (domestic and native), mushroom growing operations, organic gardens and protected species habitats resident on Roan Mountain, based upon the information Plaintiff supplied May 26, 2017 (See Orr 2017 DECL and its Attachment 2, Attachment 8 hereto).
48. Despite this and other knowledge FBEMC and Jeff Loven did not modify their web site disclosure <https://www.frenchbroademc.com/rightofway.cfm>, did not cease and desist their spraying or intent to spray Roan Mountain, nor inform those they had already sprayed of the risks associated with their herbicides, including but not limited to being exposed to secondary toxic herbicide drift.
49. FBEMC knew or reasonably should know their 2017 spraying would risk irreparable harm to individual Plaintiff's unborn daughter, potentially exposing her to birth defects, genetic damage, autism and future health related disabilities, which

could also effect hypersensitive protected species and their habitats, based upon notification FBEMC received on or about May 28, 2017 (Charles Orr 2017 Decl, Attachment 9).

50. FBEMC has callously, purposely and intentionally not disclosed to its membership that the co-ingredients contained in it sprayed herbicides could harm unborn and young children,⁴⁴ and harm protected species alike.

51. FBEMC knows or reasonably should know their instant 2019 spraying is especially risky to the health of unborn and young children,⁴⁵ including Plaintiff's granddaughter who is now 2 years old, and harm protected species alike, based upon notification FBEMC received on or about May 28, 2017 (Charles Orr 2017 Decl, Attachment 9).

⁴⁴ *Weed-Whacking Herbicide Proves Deadly to Human Cells, Scientific American*, <https://www.scientificamerican.com/article/weed-whacking-herbicide-p/> ("One specific inert ingredient, polyethoxylated tallowamine, or POEA, was more deadly to human embryonic, placental and umbilical cord cells than the herbicide itself – a finding the researchers call "astonishing.")

⁴⁵

<https://icahn.mssm.edu/files/ISMMS/Assets/Departments/Environmental%20Medicine%20and%20Public%20Health/CEHC/CEHC%20Glyphosate%20Exposure%20&%20Your%20Child's%20Health.pdf> ("Studies suggest a number of health risks associated with exposure to glyphosate. Children and fetuses are most vulnerable to pesticide exposures due to their developing organ systems and differences in the way they metabolize toxins. In addition, developmentally normal hand-to-mouth behavior, close proximity to the ground where pesticides settle, and high respiratory rates result in higher exposures in children compared with adults.")

52. FBEMC knew and reasonably should have know their 2017 and 2019 sprayings would be especially risky to the health of unborn and young protected species.
53. FBEMC has callously, purposely and intentionally not disclosed to its membership that glyphosate (active ingredient in Rodeo) has been linked to a high incidence of non-Hodgkin lymphoma.⁴⁶
54. FBEMC has callously, purposely and intentionally not disclosed to its membership of the hazards of secondary toxic hydrous transport after being informed by Plaintiff on or about 5/26/17 and 4/30/18.
55. FBEMC has callously, purposely and intentionally not disclosed to its membership that glyphosate exposure (contained in Rodeo) was linked to kidney disease,⁴⁷ also likely adversely impacting protected species.

⁴⁶ See *Non-Hodgkin lymphoma and occupational exposure to agricultural pesticide chemical groups and active ingredients: a systematic review and meta-analysis*, <https://www.ncbi.nlm.nih.gov/pubmed/24762670>; *Pesticide exposure as risk factor for non-Hodgkin lymphoma including histopathological subgroup analysis*, <https://www.ncbi.nlm.nih.gov/pubmed/18623080>; *A case-control study of non-Hodgkin lymphoma and exposure to pesticides*, [http://onlinelibrary.wiley.com/doi/10.1002/\(SICI\)1097-0142\(19990315\)85:6%3C1353::AID-CNCR19%3E3.0.CO;2-1/full](http://onlinelibrary.wiley.com/doi/10.1002/(SICI)1097-0142(19990315)85:6%3C1353::AID-CNCR19%3E3.0.CO;2-1/full)

⁴⁷ See *Glyphosate, Hard Water and Nephrotoxic Metals: Are They the Culprits Behind the Epidemic of Chronic Kidney Disease of Unknown Etiology in Sri Lanka?*, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3945589/>, *Monsanto's Herbicide Linked to Fatal Kidney Disease Epidemic: Could It Topple the Company?*, <http://www.truth-out.org/news/item/24876-monsantos-herbicide-linked-to-fatal-kidney-disease-epidemic-will-ckdu-topple-monsanto>; *Monsanto's Roundup may be linked to fatal kidney disease, new study suggests*,

56. FBEMC has callously, purposely and intentionally not disclosed to its membership that glyphosate (contained in Rodeo) is a known metal chelator, linked to essential mineral depletion potentially leading to disease, including autism, Alzheimer's disease (AD), depression, anxiety syndrome, Parkinson's disease (PD), prion and others,⁴⁸ where said mineral depletion would also adversely effect protected species.
57. FBEMC has callously, purposely and intentionally not disclosed to its membership that its spraying was detrimental to pollinator bee health and their critical activity,⁴⁹ especially gut

<https://www.rt.com/news/monsanto-roundup-kidney-disease-921/>; *Glyphosate, Hard Water and Nephrotoxic Metals: Are They the Culprits Behind the Epidemic of Chronic Kidney Disease of Unknown Etiology in Sri Lanka?*, <http://www.mdpi.com/1660-4601/11/2/2125>

⁴⁸ See *Glyphosate, pathways to modern diseases III: Manganese, neurological diseases, and associated pathologies*, <https://www.ncbi.nlm.nih.gov/pubmed/25883837>; *Glyphosate's Suppression of Cytochrome P450 Enzymes and Amino Acid Biosynthesis by the Gut Microbiome: Pathways to Modern Diseases*[†] <http://www.mdpi.com/1099-4300/15/4/1416>

⁴⁹ See *Concerns over use of glyphosate-based herbicides and risks associated with exposures: a consensus statement*, <https://ehjournal.biomedcentral.com/articles/10.1186/s12940-016-0117-0>; *Roundup: What Impact Does this Herbicide Have on Bees and Food?*, <http://www.honeysolutions.com/roundup-what-impact-does-this-herbicide-have-on-bees-and-food/>; *Study Shows Honeybees Are Starving Because Of Roundup*, <http://www.glyphosate.news/2016-06-27-study-shows-honeybees-are-starving-because-of-roundup.html>; *Groundbreaking study shows that Roundup causes honeybees to starve*, http://www.naturalnews.com/046769_Roundup_honeybees_colony_collapse_disorder.html; *Effects of sublethal doses of glyphosate on honeybee navigation*, <https://www.ncbi.nlm.nih.gov/pubmed/26333931>

microbiome,⁵⁰ and this would expose domestic bees of local beekeepers and protected specie native bees alike to disease from secondary stressors, such as parasites, other pesticides, cold weather and the like.

58. FBEMC callously, purposely and intentionally sprayed in 2017 when they had knowledge⁵¹ or should have had knowledge that said spraying would decimate native bee species and their habitats, including ESA endangered species *Bombus affinis*, which it subsequently did.⁵²

59. In view of Plaintiffs 5/26/17 and particularly his 4/30/18 Take Notices, which showed herbicide contamination of surface and ground waters due to AMPA's hygroscopic properties, FBEMC purposely and intentionally misrepresented the ground water safety of it herbicides by stating on its web site <https://www.frenchbroademc.com/rightofway.cfm>: "Unlike petroleum products, Rodeo and Polaris *will not leach into*

⁵⁰ Glyphosate perturbs the gut microbiota of honey bees, <https://www.pnas.org/content/115/41/10305.short> ("The herbicide glyphosate is expected to be innocuous to animals, including bees, because it targets an enzyme only found in plants and microorganisms. However, bees rely on a specialized gut microbiota that benefits growth and provides defense against pathogens. Most bee gut bacteria contain the enzyme targeted by glyphosate, but vary in whether they possess susceptible versions and, correspondingly, in tolerance to glyphosate. Exposing bees to glyphosate alters the bee gut community and increases susceptibility to infection by opportunistic pathogens.")

⁵¹ Plaintiff's 5/26/17 ESA Notice, Attachment 3.

⁵² See 4/30/18 and 7/5/19 Comments/Notice.

groundwater. Any spray that does fall to the ground bonds to the upper layer of soil, and stays there until it becomes inert."

(Attachments 1, 2).⁵³

60. FBEMC and Jeff Loven callously purposely and intentionally misrepresented the safety of its herbicides on FBEMC's web site

<https://www.frenchbroademc.com/rightofway.cfm> stating:

"FBEMC is using an environmentally safe herbicide."⁵⁴

(Attachments 1, 2)

61. FBEMC and Jeff Loven callously, purposely and intentionally misrepresented to their membership the safety of its herbicides on FBEMC's web site

<https://www.frenchbroademc.com/rightofway.cfm> by stating:

"Rodeo and Polaris work with a plant's system *but are not metabolized by humans and other mammals,*"⁵⁵ when Plaintiffs

5/26/17 and particularly his 4/30/18 Take Notices showed peer

⁵³ See *Concerns over use of glyphosate-based herbicides and risks associated with exposures: a consensus statement*, <https://ehjournal.biomedcentral.com/articles/10.1186/s12940-016-0117-0>, "The half-life of glyphosate in water and soil is longer than previously recognized."); *Determination of glyphosate in groundwater samples using an ultrasensitive immunoassay and confirmation by on-line solid-phase extraction followed by liquid chromatography coupled to tandem mass spectrometry*, <http://www.greenmedinfo.com/article/glyphosate-despite-its-low-mobility-soils-capable-reaching-groundwater-41-140-groundwater> ("Glyphosate, despite its low mobility in soils, is capable of reaching groundwater. 41% of 140 groundwater samples from Catalonia Spain contained high levels, technically beyond the limit of quantification.")

⁵⁴ <http://www.frenchbroademc.com/rightofway.cfm>

⁵⁵ <http://www.frenchbroademc.com/rightofway.cfm>

reviewed evidence that they are metabolized by humans and mammals, including protected species.

62. FBEMC and Jeff Loven callously, purposely and intentionally misrepresented the safety of its herbicides on FBEMC's web site by stating: "Rodeo and Polaris is *safe for birds, fish, and honeybees*,⁵⁶ which would include protected species (Attachments 1, 2).
63. FBEMC and Jeff Loven knew or should have known their representations of safety were false or at least questionable, especially after the World Health Organization - International Agency for Research on Cancer, May 20, 2015, designated glyphosate (the active ingredient of Rodeo) a probable carcinogen.
64. From the inception of its herbicide spraying program, FBEMC and Jeff Loven have callously, purposely and intentionally not disclosed to its membership (whose properties contain FBEMC's ROWs' subject to herbicide spraying), information regarding the health concerns of glyphosate and its metabolites, namely that it has been banned in multiple jurisdictions around the world.⁵⁷

⁵⁶ <http://www.frenchbroademc.com/rightofway.cfm>

⁵⁷ See *Dutch Ban Roundup, France and Brazil to Follow*, <http://www.thehealthyhomeeconomist.com/roundup-banned-netherlands-france-brazil-likely-soon-follow/>, *EU may ban Monsanto weedkiller over health concerns*, <https://www.rt.com/business/345659-monsanto-weedkiller-glyphosate-eu/>

65. FBEMC has callously, purposely and intentionally never disclosed to its membership the multi-million dollar jury decisions finding that glyphosate herbicide exposure has caused cancer.⁵⁸
66. Despite knowing the dangers of glyphosate to humans and protected species FBEMC continues spraying glyphosate herbicides.
67. FBEMC and Jeff Loven knew their spraying would kill and irreparably modify protected specie habitat existing on its sprayed ROW easements.

WHEREFORE, plaintiffs pray that this Court:

1. Take jurisdiction over the parties and this cause;
2. Enter an immediate Temporary Restraining Order enjoining French Broad Electric Membership Corporation from spraying chemical herbicides on Roan proper and on at least a five (5) mile buffer zone surrounding Roan Mountain, where the base of the mountain is defined as: enjoining Defendants French Board Electric Membership Corporation and Jeff Loven, its General Manager, from spraying EPA registered glyphosate containing Rodeo and Polaris herbicides on FBEMC's alleged ROW easements, or spraying same or any other herbicide on any

⁵⁸ <https://www.theguardian.com/business/2018/aug/10/monsanto-trial-cancer-dewayne-johnson-ruling>; [https://abc7news.com/society/bay-area-man-awarded-\\$80-million-after-a-jury-said-roundup-caused-his-cancer/5221755/](https://abc7news.com/society/bay-area-man-awarded-$80-million-after-a-jury-said-roundup-caused-his-cancer/5221755/); <https://people.com/health/jury-awards-2-billion-couple-roundup-weed-killer-caused-cancer/>

other site, located on or proximate to Roan Mountain, and including a minimum of a five (5) mile spray free buffer zone beyond the base of Roan Mountain. Said Roan Mountain base defined as N.C. HWY 261 from Fork Mountain Road to the peak of Roan Mountain, Fork Mountain Road from N.C. HWY 261 to N.C. HWY 226, N.C. HWY 226 from Fork Mountain Road through Buladean to N.C. HWY 1329 (Tom's Creek Rd), N.C. HWY 1329 (Tom's Creek Rd) from N.C. HWY 226 to the Tennessee border. The spray free buffer zone must be at least a four (4) outside/beyond the defined base of Roan Mountain.

3. Enter a preliminary and permanent injunction and order defendants U.S. Forest Service, DOI, USFWS and EPA to enforce the relevant sections of the ESA as it relates to protecting the habitats of threatened and endangered species on Roan Mountain from adverse modification.
4. Suspend all registered herbicide usage by FBEMC and Jeff Loven on Roan Mountain;
4. Enter Declaratory Relief where appropriate;
5. Award plaintiff their costs of litigation, including reasonable attorney and expert witness fees, pursuant to the citizen suit provision of the ESA, 16 U.S.C. § 1540(g)(4); and, Grant Plaintiffs all other relief in law and in equity to which they may be entitled.

Respectfully Submitted By the Pro-Se Plaintiff,

DATED: Bakersville, North Carolina, July 19, 2019

VERIFICATION I, William (Bill) Orr, Pro-Se Plaintiff have personal knowledge of the facts stated above and hereby swear under the pains and penalties of perjury that these facts are true and accurate, to the best of my knowledge and belief. Date: 7/19/19

Signature: William (Bill) Orr

Bill Orr, Individually and in behalf of Roan Mountain

965 Hobson Rd

Bakersville, N.C. 28705

828-385-3223

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ATTACHMENTS:

1. French Broad Electric Membership Corporation - Right-of-Way (Web Site, 5/28/2017)
2. French Broad Electric Membership Corporation - Right-of-Way (Web Site, 7/17/2019)
3. Plaintiff's 5/26/17 Take Notice With Intent to Sue
4. Plaintiff's 4/30/18 EPA Comment/Take Notice
5. Plaintiff's 5/3/2018 *Supplemental Notice of Imminent ESA § 9 Take of Critical Habitat/Protected Species on Roan Mountain*, Containing 4/30/18 EPA Comment/Take Notice (Omitted, see Attachment 4)

6. Plaintiff's 7/5/19 EPA Comment/Take Notice (Containing 5/27/17 Take Notice and 4/30/18 EPA Comment/Take Notice, Omitted See Attachments 3, 4)
7. World Health Organization's Finding Glyphosate is Probable Carcinogen
8. 6/1/2017 Bill Orr Declaration
9. 2017 Charles Orr Declaration
10. 2017 Yvonne Hegney Declaration
11. 2017 Natalie Greene Declaration
12. 2017 Keith Garland Declaration
13. 2017 Marshall Walden Declaration
14. 2019 William (Bill) Orr Declaration
15. 6/22/17 Supplemental Declaration

CERTIFICATE OF CONFERENCE

I, William Orr certify that on 7/19/19 I telephoned or attempted to telephone FBEMC's General Counsel Ms. Jamie A. Stokes and Mr. Jeff Loven, G.M., to discuss cessation of FBEMC's spraying of Roan Mountain and the filing of the District Court TRO Motion.

SERVICE:

I certify that all parties for which I have an email address have or will be send a true and accurate copy of the pleadings of this day, including this VERIFIED COMPLAINT, Motion for an Emergency

Temporary Restraining Order and the Proposed TRO ORDER, including to: Ms. Jamie Stokes for FBEMC (jamie.a.stokes@gmail.com; stokeslawoffice@bellsouth.net), Mr. Jeff Loven, personally and registered agent FBEMC (jeff.loven@frenchbroademc.com); For all Governmental Defendants, U.S. Attorney's Office for the District of North Carolina Attn: Jill Westmoreland Rose (lbantavani@usa.doj.gov); Rachel Heron for EPA, United States Fish and Wildlife Service and United States Forest Service (rachel.heron@usdoj.gov); Elizabeth Ann Peterson for EPA, United States Fish and Wildlife Service and United States Forest Service (ann.peterson@usdoj.gov); Trent S.W. Crable, Wildlife & Marine Resources Section Environment & Natural Resources Division, U.S. DOJ (trent.crabble@usdoj.gov). I will further immediately serve the U.S. DOI, U.S. EPA, U.S. Forest Service, U.S. Fish and Wild Life Service, FBEMC and Jeff Loven at the addresses below a true and accurate copy of theses pleadings via USPS certified mail, return receipt requested.

**FRCP 65(B) COMPLIANCE
SERVICE**

I, William Orr certify that I have or will immediately serve this MOTION FOR TRO, COMPLAINT and PROPOSED TRO to Defendants FBEMC, Jeff Loven, U.S. DOI, U.S. EPA, U.S. Forest Service, U.S. Fish and Wildlife Services via hand delivery/or email and to all governmental Defendants via personal service to the U.S.

Attorney in Asheville. I will further serve same to all Defendants as soon as possible separately to their addresses below via certified mail, return receipt requested.



Pro Se Plaintiff - 7/19/19
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