Reforestation Project/National Environmental Policy Act: Federal Appellate Court Addresses Environmental Assessment /EIS Issues

Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

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Co-Author: Christine Dillard

The Ninth Circuit Court of Appeals ("9th Circuit") addressed issues associated with two United States Forest Service ("Forest Service") fire salvage and restoration projects. See *Alliance for the Wild Rockies v. Mary Farnsworth, Forest Supervisor, Idaho Panhandle National Forest,* 709 F. App'x 461 (9th Cir. 2018).

Three Forest Service decisions were addressed:

1. issuing an invitation for public comment on a project instead of the environmental assessment ("EA") specifically;
2. deciding that two projects could be fast-tracked through emergency situation determinations; and
3. foregoing an environmental impact statement ("EIS").

The Alliance for the Wild Rockies ("the Alliance") sued the United States to enjoin the Forest Service from implementing two projects that would remove burned trees and reforest the area where the trees burned. The Alliance challenged the Forest Service's failure to provide an opportunity for the public to comment on the EAs for the projects. The Alliance also claimed that the Forest Service improperly made emergency situation determinations and incorrectly decided that an EIS was not necessary.

NEPA requires federal agencies to include environmental values and issues in their decision-making processes. This federal mandate is accomplished by agency consideration of environmental impacts of proposed actions and reasonable alternatives to those actions. The statute requires federal agencies in certain instances to prepare a detailed EIS. However, the requirement to produce this document is only triggered in the event of a major federal action that will significantly affect the environment.

As opposed to an EIS, which is a much more detailed document, the EA provides sufficient evidence and analysis for determining whether a finding of no significant impact for an EIS should be prepared. Neither an EA nor an EIS need be prepared if a particular federal action falls within the scope of a NEPA categorical exclusion. Categorical exclusions are promulgated by the federal agencies and are described actions which have been determined to not involve significant environmental impacts.

NEPA differs from action enforcing environmental statutory programs such as the Clean Air Act or Clean Water Act. It does not impose substantive mandates. Instead, it is limited to requiring federal agencies to meet procedural requirements such as preparation of an EA or EIS in certain defined instances. As a result, NEPA does not require a certain alternative or meet a particular standard.

The 9th Circuit found that the Forest Service was not required to allow the public to comment on the EAs. This determination was based on the plain text of the applicable regulation. It requires the Forest Service to "involve environmental agencies, applicants, and the public, to the extent practicable" when preparing an EA. The 9th Circuit was satisfied, under the totality of the circumstances, that the Forest Service allowed public comment on the projects.

An emergency situation determination allows the Forest Service to bypass the ninety-day waiting period that is usually incurred after a final decision is issued on a project. It recognized two emergency situations in relation to the projects, but was only required to recognize one. The 9th Circuit found that the Forest Service's determination that "hazards to human health and safety posed by the dead and dying burned trees" existed was not an arbitrary and capricious determination.

An agency is required to prepare an EIS when the agency finds that the project will "'significantly affect [ ] the quality of the human environment.'" The Forest Service determined that the project would not have a significant effect on the quality of the human environment and the 9th Circuit found that the Forest Service properly made that decision.

A copy of the opinion can be downloaded here.