



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

National Environmental Policy Act/Endangered Species Act: Federal Appellate Court Addresses Challenge to U.S. Forest Service Smokey Project

06/24/2019

Co-Author: Krystina Barner

The United States Court of Appeals for the Ninth Circuit (“Court”) addressed in a June 4th Order whether the United States Fish and Wildlife Service (“FWS”) and the United States Forest Service (“USFS”) approval of the “Smokey Project” violated either the National Environmental Policy Act (“NEPA”) or the Endangered Species Act (“ESA”). See *Conservation Congress v. United States Forest Service*, No. 17-16153, 2019 WL 2359434 (9th Cir. 2019).

The Court reviewed a United States District Court (“District Court”) Order amending a judgment and dissolving an injunction addressing the Smokey Project.

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 Environmental Impact Statement (“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.

NEPA differs from action forcing 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 Environmental Assessment (“EA”) or EIS in certain defined instances. As a result, NEPA does not require an agency to pick a certain alternative or meet a particular standard.

The Smokey Project implemented a plan to administer fuel and vegetative treatments to further habitat and fire management goals in the Mendocino National Forest in Northern California. After reviewing the plan, the District Court issued a judgment ordering a limited remand requiring USFS to prepare a supplemental NEPA analysis. It also enjoined the removal of trees in the greater project area having a diameter of 20 inches or greater.

On remand, the USFS clarified that “Limited Operating Periods” (“LOPs”) applied only to “units” near known spotted owl activity centers, rather than to “all units.” The District Court found that USFS “provided a reasoned, clear, and thorough analysis for its conclusions,” and that the project had not

changed. It issued an Order and Final Judgment granting USFS's and FWS's motion to amend the judgment and dissolve the injunction.

Conservation Congress argued on appeal that the District Court's order constituted a "post-decisional elimination" of a "core mitigation measure" that violated NEPA. The Court determined the application of LOPs was disclosed throughout the decision-making process of the lower court. It held that whatever ambiguity that may have been introduced by the erroneous inclusion of the phrase "all units" in the initial appendix, did not cause prejudice or skew the results in such a way that the clarification on remand could not cure the issue.

The Court next held the District Court properly determined USFS's scope of analyzing the impacts of the Smokey Project in a limited geographic area did not violate NEPA. USFS conducted an EA that incorporated the analysis of the FWS biological assessment. The EA considered impacts in the 35,023 acres comprising the treatment units and land within a 1.3 mile radius of those units. On FWS's recommendation, USFS analyzed impacts within the scope of spotted owl's "home range," which appeared to produce an account for the location and movement patterns of the spotted owls.

The Court found that deference should be given to USFS's judgment. Therefore, it rejected Conservation Congress's argument that a meaningful analysis required consideration of the entire Buttermilk late successional reserve. This was based on the view that while this argument reflects a different judgment as to the best way to evaluate the project, it does not violate NEPA.

Conservation Congress further argued that the District Court erred in finding USFS adequately analyzed potential alternatives to the project. USFS, on remand, specifically considered alternatives with several different diameter cap limits on trees to be felled. It concluded there were no viable alternatives.

Conservation Congress claimed that USFS's submitted alternatives were arbitrary. It suggested that USFS should have considered undertaking forest thinning at a federal expense. The Court concluded that Conservation Congress failed to offer reasons why USFS's conclusions were flawed or show why it was improper to contract with private parties for timber removal.

The Court also reviewed whether the District Court properly declined to require a full Environmental Impact Statement for the Smokey Project. It concluded that the District Court properly held the agency to its "hard look" obligations when it issued the limited remand. See *League of Wilderness Defenders v. Connaughton*, 752 F.3d 755, 762-3 (9th Cir. 2014) (citing 40 CFR § 1502.1). Conservation Congress was deemed to have failed to show why the District Court's determination that a full EIS was not necessary to lift the injunction would be erroneous.

Finally, the Court affirmed the District Court's holding that USFS did not violate the ESA. Conservation Congress contended that the FWS assessment did not include a required biological opinion. It argued that the USFS was required under Section 7(a)(2) of the ESA to reinitiate formal consultation with FWS upon clarifying the LOP requirements of the plan.

The Court rejected this argument. It was deemed untenable due to its resting on the premise that the LOP requirements were substantively modified on remand. The project had not changed. Therefore, the District Court's Order was upheld.

A copy of the opinion can be downloaded [here](#).