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# Endangered Species Act/National Environmental Policy Act: Federal Appellate Court Addresses Challenge to Forest Service Post - Fire Projects

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The United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") addressed in a November 29th Opinion National Environmental Policy Act ("NEPA") and Endangered Species Act ("ESA") challenges to post-fire projects proposed by the United States Forest Service ("Forest Service"). See *Wildlands Defense vs. Seesholtz*, 2018 WL6262505

Plaintiffs Wildlands Defense and three other organizations (collectively "Wildlands") sought a preliminary injunction against the Forest Service to enjoin the operation of two post-fire projects in the Boise National Forest ("Forest").

A United States District Court concluded that Wildlands had not shown likelihood of success nor serious questions as to the merits of the NEPA and ESA claims.

Challenges to agency action under NEPA and the ESA are typically reviewed under the arbitrary and capricious standard.

The NEPA challenges focus on whether an Environmental Impact Statement ("EIS") should have been prepared. Wildlands had argued before the lower court that the Forest Services' decision to forego an EIS was improper.

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 issues associated with proposed action 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, an environmental assessment is undertaken by a federal agency to determine whether a finding of no significant impact is appropriate or an EIS should be prepared.

The Ninth Circuit in rejecting the NEPA claim stated that the Forest Service had properly concluded that the project would not significantly affect the environment. It concluded that both the context and the intensity of the proposed action were considered and stated:

In evaluating the context of the site-specific action at issue, the Forest Service considered the Projects' impacts not only on the total area affected by the fire as Plaintiffs contend, but also on the project areas.

In any event, “[t]he ‘identification of the geographic area’ within which a project’s impacts on the environmental resources may occurs ‘ is a task assigned to the special competency of the appropriate agencies.’”

The Forest Service was deemed to have appropriately considered cumulative impacts.

The Ninth Circuit stated that an agency can discharge its obligation to consider cumulative impacts by aggregating the cumulative effects of past projects into an environmental baseline, against which the incremental impact of a proposed project is measured. It approved the Forest Service inclusion within the relevant environmental baseline of the continued existence of roads within the Forest. Also deemed appropriate was the Forest Service consideration of the potential for added sediment contribution to streams from the use of roads during salvage operations.

The Ninth Circuit acknowledged scientific evidence suggesting that post-fire salvage logging may impact the environment. However, it determined the Forest Service’s non-significance determination for these specific Projects, (considered in the overall context of the fire area) and in light of mitigation measures used was not arbitrary and capricious.

As to the ESA claim, the Ninth Circuit held that Wildlands had not raised substantial questions to whether the project was likely to adversely affect designated critical habitat.

The ESA prohibits federal agency action that will result in the destruction or adverse modification of designated critical habitat. Destruction or adverse modification is defined by the federal regulations as to include “a direct or indirect alteration that appreciably diminishes the value of critical habitat.”

The Forest Services’ determination that the Project was not likely to adversely affect bull trout or bull trout critical habitat was not deemed improper. The Ninth Circuit noted that the Forest Service considered:

- Location of impacts in considering size and location
- Impact of Riparian Conservation Areas (“RCA”)
- No indication impacts ignored outside of RCA
- Slope failure incident review additional logging roads/salvage logging activities

The United States District Court decision on both claims is upheld.

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