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Hazard Tree Abatement Project/National Environmental Policy Act: Federal Appellate Court Addresses Whether Environmental Impact Statement Should Have Been Prepared

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The United States Court of Appeals for the Ninth Circuit (“Ninth Circuit”) addressed in a May 18th unpublished opinion whether two federal agencies should have prepared a National Environmental Policy Act (“NEPA”) Environmental Impact Statement (“EIS”). See *Conservation Congress v. United States Forest Service, et al.*, 2020 WL 2520090.

The Conservation Congress (“CC”) filed a lawsuit against the United States Forest Service and the Fish and Wildlife Service (collectively “FWS”) challenging their actions in connection with approval of the Bagley Hazard Tree Abatement Project (“Project”).

NEPA requires federal agencies to include environmental values on 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.

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 that a certain alternative be chosen or a particular standard be met.

The FWS Project was designed to remove fire-damaged trees that pose a danger to use of the Shasta-Trinity National Forest’s roadways.

The United States District Court granted Summary Judgment to the FWS in regards to CC’s argument that NEPA had been violated. CC appealed to the Ninth Circuit.

In determining that the FWS adequately considered the impact of post-fire logging on private land in its EA (as opposed to EIS) the Ninth Circuit noted that the Forest Service:

- Estimated the reasonably foreseeable impact of private-land logging on the forest in general

- Estimated the reasonably foreseeable impact of private-land logging on the northern spotted owl habitat in particular
- Developed an environmental baseline against which the incremental impact of the proposed Project was measured
- Detailed the methodology used to quantify the impact of the Project providing both the underlying data and illustrative maps

The Ninth Circuit noted that the Project:

- Would affect a small percentage of suitable owl critical habitat in the Shasta-Trinity National Forest
- Target only a narrow range of trees near open roads
- Remove only damaged trees hazardous to roadway users

The Court stated that it was reasonable to conclude that the impact on the Inventoried Roadless Areas and one Late Successional Reserve was not significant.

The Court also determined that it was reasonable for the agencies to refuse to adopt CC's proposed alternative which was to conduct no logging or felling within these areas and the northern spotted owl critical habitat. This was based on the fact that almost all of the Project area would fall within one of those areas. As a result, complete inaction was identified as conflicting with the Project's objective in making existing roads safe for use.

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