FILED
United States Court of Appeals
Tenth Circuit

June 12, 2020

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

WILD WATERSHED; MULTIPLE CHEMICAL SENSITIVITIES TASK FORCE; DR. ANN MCCAMPBELL, M.D.; JAN BOYER,

Plaintiffs-Appellants,

v.

SANFORD HURLOCKER, District Ranger, Santa Fe National Forest; JAMES MELONAS, Supervisor, Santa Fe National Forest; CAL JOYNER, Southwest Regional Forester, U.S. Forest Service; and VICTORIA CHRISTIANSEN, Chief of the U.S. Forest Service, an agency of the U.S. Dept. of Agriculture,

Defendants-Appellees.

No. 19-2106

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO (D.C. NO. 1:18-CV-00486-JAP-SCY)

Thomas J. Woodbury, Forest Defense, P.C., Missoula, Montana, for Appellants.

Eric Grant, Deputy Assistant Attorney General, Environment and National Resources Division, U.S. Department of Justice (Andrew C. Mergen and Andrew A. Smith, Attorneys, Environment and National Resources Division, U.S. Department of Justice, and Stephen A. Vaden, General Counsel and Dawn Dickman, Attorney, Office of General Counsel, U.S. Department of Agriculture, with him on the brief), Washington, D.C., for Appellees.

Before **TYMKOVICH**, Chief Judge, **EBEL**, and **HARTZ**, Circuit Judges.

TYMKOVICH, Chief Judge.

The United States Forest Service approved two forest thinning projects in the Santa Fe National Forest pursuant to statutory authority granted by a 2014 amendment to the Healthy Forests Restoration Act (HFRA). By thinning the forest and then conducting prescribed burns in the project areas, the Forest Service aimed to reduce the risk of high-intensity wildfires and tree mortality related to insects and disease. Certain environmental organizations and individuals (collectively Wild Watershed) challenged the projects' approval under the Administrative Procedure Act (APA). They assert the Forest Service[1] failed to comply with the National Environmental Policy Act (NEPA) and HFRA. The district court rejected these claims.

We similarly find the Forest Service complied with its obligations under NEPA and HFRA when it approved the projects. The Forest Service adequately considered the projects' cumulative impacts as well as their potential effects on sensitive species in the area and the development of old growth forest. We therefore AFFIRM.

[1] Appellees are employees of the Santa Fe National Forest and United States Forest Service whom Wild Watershed sued in their official capacities only.

I. Background

A. Statutory and Regulatory Frameworks

1. National Environmental Policy Act

NEPA requires federal agencies to analyze environmental consequences before initiating actions that potentially affect the environment. The Act has two broad aims. First, it "places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action." *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 711 (10th Cir. 2010). Second, it ensures "that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Id.* NEPA does not mandate any particular substantive result. Instead, it "prescribes the necessary process" that must accompany agency action. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

One of the hallmarks of NEPA is that agencies must prepare an environmental impact statement (EIS) when a proposed project will "significantly affect[] the quality of the human environment." 42 U.S.C. § 4332(2)(C). An EIS "involves the most rigorous analysis" that an agency may be required to perform. *See Utah Envtl. Cong. v. Bosworth*, 443 F.3d 732, 736 (10th Cir. 2006). NEPA's implementing regulations establish a tiered framework for agencies to consider in

deciding whether an EIS is necessary.[2] The regulations contemplate three categories into which a proposed project might fall. First, the action may be of the type that is generally so significant that it "[n]ormally requires an environmental impact statement." 40 C.F.R. § 1501.4(a)(1). Next, the action may be of uncertain significance, in which case the agency will prepare an environmental assessment (EA)—a more concise document designed to determine whether a full EIS is necessary. 40 C.F.R. § 1501.4(b)–(c). Finally, the action may be categorically excluded, meaning it normally does not require either an EA or an EIS. 40 C.F.R. § 1501.4(a)(2).

Categorical exclusions come in one of two varieties: those established by regulations and those established by statutes. Implementing regulations define *regulatory* categorical exclusions as "a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency . . . and for which, therefore, neither an environmental assessment nor an environmental impact statement is required." 40 C.F.R. § 1508.4.

[2] The Council on Environmental Quality is responsible for implementing NEPA's requirements by promulgating binding regulations. *See* 42 U.S.C. §§ 4342, 4344(3); 40 C.F.R. §§ 1501–08. Agencies such as the Forest Service comply with the Council's regulations by adopting supplemental procedures. *See, e.g.*, 36 C.F.R. § 220.1 *et seq*.

Although regulatory categorical exclusions generally do not require an EA or an EIS, implementing regulations provide that where "extraordinary circumstances" exist such that "a normally excluded action may have a significant environmental effect," the agency must engage in one of the more thorough forms of review before proceeding. *See* 40 C.F.R. § 1508.4; 36 C.F.R. § 220.6(b). Thus, when relying on a regulatory categorical exclusion, the Forest Service performs minimal procedures to assess whether such extraordinary circumstances exist. 36 C.F.R. § 220.6(b). We refer to these procedures as extraordinary circumstances review.[3]

In addition to regulatory categorical exclusions, Congress has intervened to establish certain *statutory* categorical exclusions. *See, e.g.*, 16 U.S.C. § 6591b. Many of these, including the provision at issue in this appeal, are codified in HFRA.

[3] In conducting extraordinary circumstances review, the Forest Service considers the existence of certain "[r]esource conditions," in the project area, including "[i]nventoried roadless area[s]," "potential wilderness area[s]," and "Forest Service sensitive species." 36 C.F.R. § 220.6(b)(1). The mere presence of resource conditions does not preclude the agency relying on a categorical exclusion. Instead, it is the "degree of the potential effect of a proposed action on the[] resource conditions that determines whether extraordinary circumstances exist," warranting an EA or EIS. *Id.*

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.