Ninth Circuit Declines to Apply EIS Requirements to an EA

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On September 20, 2012, the Ninth Circuit rejected a challenge mounted under both NFMA and NEPA to the validity of the Angora Fire Restoration Project. *See Earth Island Institute v. U.S. Forest Service*, No. 11-16718, slip op. (9th Cir. Sept. 20, 2012).

The Angora Fire Restoration Project was established by the U.S. Forest Service (Forest Service) in response to damage caused by the 2007 Angora Fire near South Lake Tahoe. The purpose of the project is to reduce the fuel load in the area while preserving habitat for sensitive species such as the black-backed woodpecker. The Earth Island Institute and Center for Biological Diversity challenged the Angora Project under the National Forest Management Act (NFMA) and The National Environmental Policy Act (NEPA), arguing that the Forest Service failed to ensure viable populations of the black-backed woodpecker under NFMA, and failed to take the requisite "hard look" at the Restoration Project's impacts on the environment under NEPA. Significantly, plaintiffs argued that the NEPA regulations applicable to environmental impact statements (EISs) also apply to environmental assessments (EA).

The NFMA Challenge

In 1982, the Forest Service issued planning regulations to execute the NFMA's viability requirements for plant and animal species. Specifically, the 1982 rule required the Forest Service to "identify and monitor management indicator species" and manage fish and wildlife habitats "to maintain viable populations of existing native and desired non-native vertebrate species." The 1982 rule was superseded in 2000 but its provisions may continue to apply to a particular forest plan "only to the extent they [are] incorporated into[] the relevant forest plan."

Plaintiffs alleged that the 1982 rule applied to the Angora Project because the Lake Tahoe Basin Management Unit's (LTBMU) forest plan had language describing the Forest Service's duty to "manage

habitat to, at the least, maintain viable populations of existing native and desired nonnative species." The Plaintiffs argued that this language incorporated the 1982 rule, thus requiring the application of the rule to the Angora Project.

The Ninth Circuit rejected the Plaintiffs argument and held that the "Lake Tahoe Forest Plan did not require the Forest Service to demonstrate at the project level that the Angora Fire Restoration Project would maintain viable population levels of management indicator species, including the black-backed woodpecker. "

The court explained that the Angora Project will leave approximately 40% of the burned area untreated, and within the area where snag and some living trees are slated for removal, the Angora Project establishes twelve "wildlife snag zones" that either limit or entirely prohibit removal of snag (i.e., standing dead trees that were burned in the fire). The purpose of limiting snag removal is to address concerns about adequate habitat for species, including the black-backed woodpecker. The court reasoned that "because the Forest Service determined that the Angora Project would not significantly impact the black-backed woodpecker's habitat, the Forest Service complied with any project-level viability requirements." Therefore, the "the Forest Service's analysis of the Angora Project's impact on the black-backed woodpecker's habitat was not arbitrary and capricious under NFMA."

The NEPA Challenge

The court also rejected plaintiffs' NEPA challenge to the Forest Service's Environmental Assessment (EA) and Finding of No Significant Impact (FONSI).

The plaintiffs argued, in part, that the Forest Service violated the requirement under NEPA to "respond explicitly and directly to ‘responsible opposing view[s],'" when preparing an environmental impact statement. See 40 C.F.R. § 1502.9(b). Specifically, they argued that the Forest Service did not respond to four comments on the EA submitted by a scientist who questioned the agency's reliance on a pair of studies to support its conclusions about the distribution of black-backed woodpeckers across the Sierra Nevada. However, the court rejected this attempt to extend a NEPA regulation that expressly applies to responses to comments on a draft EIS to the preparation of an EA and FONSI, holding that an EA is not the functional equivalent of an EIS. The court noted that in any event, the Forest Service had adequately responded to the comments in the final EA and FONSI.

Plaintiffs also argued that the EA failed to study an adequate range of alternatives because it only analyzed the "no-project" and preferred alternatives, and the Forest Service refused to study plaintiffs' proposed alternative that would have left 2-40 more snags standing per acre than the preferred alternative. The court rejected this challenge as well. It reasoned that prior Ninth Circuit precedent has conclusively established that NEPA does not require, in every instance, that an EA study any more alternatives than the no-project and preferred project alternatives. Again, the court rejected plaintiffs' reliance on the more stringent requirement for the analysis of alternatives applicable to an EIS to assess the adequacy of an EA. Moreover, the court found that the Forest Service adequately explained its basis for refusing to consider plaintiffs' proposed alternative because plaintiffs' alternative would not fulfill the project's purpose to reduce high fuel load, thereby reducing the risk of severe fire.

The court ultimately held that the Forest Service's analysis of the Angora project's environmental effects was not arbitrary and capricious under NEPA.