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Bark v. U.S. Forest Service—Environmental impact statement required for proposed variable density thinning project in the Mount Hood National Forest

The United States Forest Service has proposed to use variable density thinning in the Mount Hood National Forest Crystal Clear Restoration project. The timber project affects 11,742 acres of land including trees in the Forest’s moist and dry climate areas. Variable density thinning “gives the agency flexibility in choosing which trees to cut, thereby allowing the USFS to create variation within an area of forest so that the stands ‘mimic more natural structural stand diversity.’ The USFS plans to leave an average canopy cover of 35–60%, with a minimum of 30% where the forest is more than 20 years old.” The Forest Service prepared an environmental assessment under the National Environmental Policy Act that concluded the project would have no significant effects and therefore did not require preparation of an environmental impact statement. This determination prompted several environmental groups to sue alleging violation of NEPA and the National Forest Management Act. The district court granted the agency summary judgment. *Bark v. U.S. Forest Service*, 393 F. Supp. 3d 1043 (D. Or. 2019). The Ninth Circuit reversed the district court judgment in a memorandum opinion filed on April 3, 2020 and granted the appellants’ motion to publish the decision on May 4, 2020. *Bark v. U.S. Forest Service*, No. 19-35665, 2020 WL _____ (9th Cir. May 4, 2020).

The court of appeals limited its analysis to the NEPA claim. It explained that “The term ‘significant’ includes considerations of both the context and the intensity of the possible effects. ... ‘Context simply delimits the scope of the agency’s action, including the interests affected.’ ... Consideration of context involves analysis ‘in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality.’” Intensity “‘refers to the severity of impact.’ ... NEPA regulations list ten non-exhaustive factors that inform an agency’s intensity determination, including ‘[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial,’ ... ‘[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks,’ ... and ‘[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts[.]’”

The panel first found that “effects of the Project are highly controversial and uncertain, thus mandating the creation of an EIS.” It reasoned that “[a] project is ‘highly controversial’ if there is a ‘substantial dispute [about] the size, nature, or effect of the major Federal action rather than the existence of opposition to a use.’” ... ‘A substantial dispute exists when evidence . . . casts serious doubt upon the reasonableness of an agency’s conclusions.’” Here,

[s]ubstantial expert opinion presented by the Appellants during the administrative process disputes the USFS’s conclusion that thinning is helpful for fire suppression and safety. For example, Oregon Wild pointed out in its EA comments that “[f]uel

treatments have a modest effect on fire behavior, and could even make fire worse instead of better.” It averred that removing mature trees is especially likely to have a net negative effect on fire suppression. Importantly, the organization pointed to expert studies and research reviews that support this assertion.

But “[t]he effects analysis in the EA did not engage with the considerable contrary scientific and expert opinion; it instead drew general conclusions such as that ‘[t]here are no negative effects to fuels from the Proposed Action treatments.’” The panel added that “[t]his dispute is of substantial consequence because variable density thinning is planned in the entire Project area, and fire management is a crucial issue that has wide-ranging ecological impacts and affects human life. When one factor alone raises ‘substantial questions’ about whether an agency action will have a significant environmental effect, an EIS is warranted.”

Two panel members next concluded that “[t]he USFS also failed to identify and meaningfully analyze the cumulative impacts of the Project.” They recognized that the EA “ostensibly analyzed the cumulative effects of the CCR Project, and included a table of other projects that were ‘considered in the cumulative effects analyses.’” However, that analysis “merely named” the other projects without a substantive examination:

The section of the EA actually analyzing the cumulative effects on vegetation resources did not refer to any of these other projects. Nor are there any specific factual findings that would allow for informed decision-making. The EA simply concluded that “there are no direct or indirect effects that would cumulate from other projects due to the minimal amount of connectivity with past treatments” and that the Project “would have a beneficial effect on the stands by moving them toward a more resilient condition that would allow fire to play a vital role in maintaining stand health, composition and structure.” These are the kind of conclusory statements, based on “vague and uncertain analysis,” that are insufficient to satisfy NEPA’s requirements.

“Overall,” the majority concluded, “there is nothing in the EA that could constitute ‘quantified or detailed information’ about the cumulative effects of the Project. ... The USFS’s analysis creates substantial questions about whether the action will have a cumulatively significant environmental impact.”

One panel member (Graber, J.) concurred in judgment. She joined in the opinion generally but “would not reach whether the environmental assessment’s discussion of cumulative impacts also was arbitrary and capricious.”

Decision link: <https://cdn.ca9.uscourts.gov/datastore/opinions/2020/05/04/19-35665.pdf>