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Environmental Protection Information Center v. Carlson—Ninth Circuit reverses denial of preliminary injunction in challenge to Forest Service's use of NEPA categorical exclusion for Ranch Fire project

In 2018, the Ranch Fire burned approximately 288,000 acres in northern California's Mendocino National Forest. The United States Forest Service subsequently approved a plan to solicit bids from logging companies to fell and remove fire damaged trees. Under project criteria, "[a] logging company whose bid has been accepted may fell 'merchantable hazard trees' of fourteen or more inches diameter at breast height ... that are 'within one and a half tree-heights' of the road. Any tree within 200 feet of the centerline of the road that has been partially burned and has a 50 percent or higher probability of mortality is eligible for felling." A lesser range of timber cutting is authorized for roads adjacent to the Snow Mountain Wilderness. "In total, the Project authorizes the logging of millions of board feet of timber on nearly 4,700 acres of National Forest land." The Forest Service did not conduct an analysis under the National Environmental Policy Act, instead applying the categorical exclusion for road repair and maintenance in 36 C.F.R. § 220.6(d)(4). That exclusion provides:

> Repair and maintenance of roads, trails, and landline boundaries. Examples include but are not limited to:
> (i) Authorizing a user to grade, resurface, and clean the culverts of an established NFS road;
> (ii) Grading a road and clearing the roadside of brush without the use of herbicides;
> (iii) Resurfacing a road to its original condition;
> (iv) Pruning vegetation and cleaning culverts along a trail and grooming the surface of the trail; and
> (v) Surveying, painting, and posting landline boundaries.

EPIC filed suit, challenging the exclusion's use and unsuccessfully moving for preliminary injunctive relief. *Envtl. Protection Info. Ctr. v. Carlson*, 424 F. Supp. 3d 703 (N.D. Cal. 2019). On appeal from the motion's denial, the Ninth Circuit reversed, with one panel member dissenting. *Envtl. Protection Info. Ctr. v. Carlson*, No. 19-17479, 2020 WL 4433123 (9th Cir. Aug. 3, 2020).

On the likelihood-of-success factor, the majority stated that "[t]he question before us is whether an extensive commercial logging project that includes felling large, partially burned 'merchantable' trees—including 100- and 111-foot trees located 150 and 166 feet from roads, as well as taller trees even farther away—is 'repair and maintenance' within the meaning of § 220.6(d)(4)." It had "no doubt that felling a dangerous dead or dying tree right next to the road comes within the scope of the 'repair and maintenance' CE." Here, however, "the Project allows the felling of many more trees than that" and thus could not be squared with "[t]he rationale for a CE"—i.e, "that a project that will have only a minimal impact on the environment should be allowed to proceed without an EIS or and EA." Given the bid's timber-related authorizations,

"[u]nder no reasonable interpretation of its language does the Project come within the CE for 'repair and maintenance' of roads."

The majority found irreparable harm on the basis of an affidavit from an EPIC member "stating that her enjoyment of the National Forest will be diminished if extensive logging were to occur for 200 feet on either side of the roads running through the burned area of the National Forest, as would be allowed under the Project." The member added that preparation of an environmental assessment or environmental impact statement might identify alternatives "which would be extremely helpful to wildlife and soil health and improve my enjoyment of the affected areas if ... chosen." As to the balance of equities and the public interest factors, the majority agreed with the Forest Service "that the preservation of long-term forest health is important." Nevertheless, it was "not persuaded that public safety will actually be put at risk by granting the relief EPIC seeks. EPIC has never denied the Forest Service's right to rely on the CE for road repair and maintenance in order to fell trees next to the road that pose an immediate danger to users of the road." Rather, EPIC challenged the agency action only "[t]o the extent the Forest Service authorizes salvage logging that constitutes more than repair and maintenance."

The dissent stressed the "double dosage of deference" due the district court's discretion in denying a preliminary injunction and due the Forest Service's determination under the Administrative Procedure Act. In its view, "[w]hile we can question some of the assumptions and analyses provided by the Forest Service, the record shows a sufficient basis for the agency's decisions." The dissent added that "the record convinces me — as it did the district court, which believed the Project 'impos[es] a meaningful limit against a free-for-all harvest' — that the Service does not intend to mark every eligible tree in the Project area." On the remaining preliminary injunction factors, the dissent reasoned that "it is not clear that Project will lead to [irreparable] damage" and that the forest supervisor's declaration "makes clear ... that without these timber sales, the Service will be forced to close roads and recreation areas on a long-term basis. Certainly, the public has a strong interest in enjoying trips to Mendocino National Forest. The public also has an interest in protecting taxpayers' money through sound management by the Forest Service."

Decision link: https://cdn.ca9.uscourts.gov/datastore/opinions/2020/08/03/19-17479.pdf