

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

FOREST SERVICE EMPLOYEES FOR)
ENVIRONMENTAL ETHICS (FSEEE), an)
Oregon nonprofit corporation,)
)
Plaintiff,)
)
vs.)
)
UNITED STATES FOREST SERVICE,)
)
Defendant.)

Case No. 04-1628-KI

OPINION

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KING, Judge:

Before the court are motions for preliminary injunction in two cases, League of Wilderness Defenders-Blue Mountains Biodiversity Project v. Smith, et al, CV 04-1595-KI, and Forest Service Employees for Environmental Ethics v. United States Forest Service, CV 04-1628-KI, which both challenge the Forest Service's decision to authorize a post-fire "salvage" sale within the Malheur National Forest. For the following reasons, I grant both motions in part.

FACTUAL AND PROCEDURAL BACKGROUND

In July 2002, the High Roberts Fire burned approximately 13,535 acres in the Malheur National Forest. On September 30, 2004, the Prairie City Ranger District released a decision memo regarding post-fire logging in the area. The Forest Service proposes to log 209 acres, approximately 2.7 million board feet, of dead and dying trees in the Prairie City Ranger District. The project also involves the construction of 300 feet of a "temporary access" road. The temporary road will be located on top of a former temporary road.

The Forest Service did not perform an Environmental Assessment for the decision to authorize the logging project because the Forest Service concluded that it was “categorically excluded” from National Environmental Policy Act (“NEPA”) analysis. The agency determined that the project falls within category 13 of Forest Service categorical exclusion procedures. This category includes the “[s]alvage of dead and/or dying trees not to exceed 250 acres, requiring no more than 1/2 mile of temporary road construction.” 68 Fed. Reg. 44607 (July 29, 2003) (“Salvage CE”). The promulgation of the rule which created the categorical exclusion did not itself undergo NEPA analysis.

The Forest Service states in the High Roberts Fire Salvage decision memo that the purpose of the project is to allow the recovery of the economic value of dead and dying trees. The decision memo states that the project is a salvage sale which would only include incidental green trees. According to plaintiffs, however, a large majority of the marked trees are alive and appear healthy, and many of the trees are old trees of greater than 21 inches in diameter.

The diameter of the trees marked for cutting is important. In 1993, the Forest Service adopted a set of interim wildlife, ecosystem, and riparian standards for public lands east of the Cascade Crest, which were designed to preserve remnant late and old seral trees and other elements of the “Eastside” ecosystems pending completion of the “Eastside EIS.” This guidance is known as the “Eastside Screens.” The implementation of the Eastside Screens amended all Forest Plans east of the Cascade Crest, including the Forest Plan for the Malheur National Forest. The amendments direct the Forest service to “[m]aintain all late and old seral and/or structural *live trees*” greater than 21 inches in diameter at breast height. Pl. Ex. 3, Eastside Screens at 10 (emphasis added).

To determine which trees are “dead or dying” in the project area, the Forest Service used “Factors Affecting Survival of Fire Injured Trees: A Rating System for Determining Relative Probability of Survival of Conifers in the Blue and Wallowa Mountains” (Scott, et al 2002). The agency contends that these “Scott Guidelines” are the best science available for determining survivorship of fire-injured trees. Plaintiffs object to the Forest Service’s reliance on the Scott Guidelines and/or the application of the Guidelines.

Plaintiffs raise other ecological concerns with respect to the project. For example, plaintiffs contend that the project area contains streams in which threatened bull trout spawn and rear. The decision memo indicates that logging will be allowed on steep slopes above those streams, which plaintiffs believe could have significant impacts on bull trout rearing and spawning habitat. Plaintiffs also contend that the logging project authorizes the removal and significant alteration of lightly burned forest habitat containing “snag forests” for Management Indicator Species including the pileated and black-backed woodpeckers.

League of Wilderness Defenders-Blue Mountains Biodiversity Project (“LOWD”) and Forest Service Employees for Environmental Ethics (“FSEEE”) filed separate lawsuits challenging the Forest Service’s decision to authorize the High Roberts Fire Salvage Project. Plaintiffs requested a temporary restraining order/preliminary injunction to stop the auction and award of the sale as well as any logging on the project. I held a telephone conference with the parties on November 16, 2004, and informed them of my intent to hold a hearing in both lawsuits together. At that time, the Forest Service informed the court that although there had been no bidders at the first auction, it intended to schedule and advertise another auction for the project.

On November 23, 2004, the court heard testimony and argument and took evidence from plaintiffs and the Forest Service, primarily on the issue of whether plaintiffs were likely to prevail on the merits. I entered a temporary restraining order that provided as follows: “The Forest Service may proceed with advertising for and auctioning the High Roberts Fire Salvage Project. As stipulated on the record, the Forest Service shall not award the sale, nor shall any logging begin, before December 8, 2004.” I took the motions for preliminary injunction under advisement.

On December 3, 2004, I held a telephone conference with the parties to inform them of my intent to issue a preliminary injunction based on plaintiffs’ National Forest Management Act (“NFMA”) claims and requested that the parties confer regarding the scope of that injunction. This Opinion formalizes my oral rulings of December 3.

LEGAL STANDARDS

“The standard for granting a preliminary injunction balances the plaintiff’s likelihood of success against the relative hardship to the parties.” Clear Channel Outdoor Inc. v. City of Los Angeles, 340 F.3d 810, 813 (9th Cir. 2003). The plaintiff must demonstrate either: “(1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in its favor.” Id. “These two alternatives represent extremes of a single continuum, rather than two separate tests Thus, the greater the relative hardship to [the party seeking the preliminary injunction,] the less probability of success must be shown.” Id. (citation and internal quotations omitted).

DISCUSSION

LOWD and FSEEE bring claims under NEPA and NFMA.¹ FSEEE also brings a claim for violation of the Forest Service Decisionmaking and Appeals Reform Act (“FSDARA”).² I will briefly set forth NEPA and NFMA requirements and my views as to plaintiffs’ likelihood of success on these claims.

I. NEPA and NFMA Requirements

NEPA regulations require an agency to consider whether an action falls within a class of actions normally requiring an Environmental Impact Statement (“EIS”), or whether an action falls within a class of actions requiring no environmental evaluation (“categorical exclusion”). 40 C.F.R. § 1501.4(a). If a proposed action is neither a categorical exclusion nor the type normally requiring an EIS, then the agency is directed to prepare an EA to determine whether to prepare an EIS. 40 C.F.R. § 1501.4(a)-(c).

NEPA directs federal agencies to prepare an EIS for proposed “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). The preparation of an EA will either lead to a finding that an EIS must be prepared because of potentially significant environmental impacts resulting from the proposed action, or to a Finding

¹ Neither NEPA nor NFMA provides a private right of action. Plaintiffs’ right to review in this case is found in the judicial review provisions of the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et seq.* The APA authorizes a court to “hold unlawful or set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2).

² As indicated during the telephone conference of December 3, the court is not reaching this claim in its decision on the motions for preliminary injunction.

of No Significant Impact (“FONSI”), which means that an EIS is not required. 40 C.F.R. §§1501.4(c)-(e), 1508.13.

Categorical exclusions are a class of actions that “do not individually or cumulatively have a significant effect on the human environment” and are therefore excluded from the requirement of preparing an EA or EIS. 40 C.F.R. §§ 1508.4, 1507.3. An agency’s procedures regarding categorical exclusions must also “provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect,” and therefore require preparation of an EA or EIS. 40 C.F.R. § 1508.4. Thus, for each project that might fit into a categorical exclusion, the agency must determine whether there are any extraordinary circumstances that increase the significance of the action’s potential environmental effects.

In determining whether extraordinary circumstances exist, the Forest Service Handbook directs the Forest Service to consider resource conditions including but not limited to: (1) the presence of federally listed threatened or endangered species, candidate species, designated or proposed critical habitat, or Forest Service sensitive species, (2) congressionally designated areas such as Wilderness Areas, (3) inventoried roadless areas, (4) research natural areas, and (5) American Indian religious and cultural sites.

NFMA governs the Forest Service’s management of the national forests. NFMA requires the Forest Service to develop, maintain and revise land and resource management plans (“LRMPs” or “Forest Plans”). 16 U.S.C. § 1604(a). Forest Plans are broad, long-term programmatic planning documents for an entire National Forest. Forest Plans establish goals and objectives for individual units of the National Forest System and provide specific standards and guidelines for management of forest resources, ensuring consideration of both economic and

environmental factors. 16 U.S.C. 1604(g)(1) - (3); 36 C.F.R. § 219.1, 219.4(b)(3). NFMA mandates that “[r]esource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans.” 16 U.S.C. § 1604(I). Therefore, each site-specific project must be consistent with the Forest Plan.

II. Plaintiffs’ Likelihood of Success on the Merits

First, although this was not the focus of the preliminary injunction motions, LOWD claims the agency violated NEPA by failing to perform NEPA analysis on the Salvage CE rule itself. I do not believe LOWD will prevail on this claim.

The Ninth Circuit has recognized that in some instances, the Forest Service’s land management planning regulations can be construed as major federal actions that may significantly affect the quality of the human environment. Citizens for a Better Forestry v. United States Dept. of Agriculture, 341 F.3d 961, 969-70 (9th Cir. 2003). The Ninth Circuit has also held that NEPA is inapplicable to federal actions “that do nothing to alter the natural physical environment.” Douglas County v. Babbitt, 48 F.3d 1495, 1505 (9th Cir. 1995). There is a very strong argument that the type of rule promulgation at issue in this case fits within the holding of Douglas County, thus I do not believe LOWD has shown a likelihood of success on this claim. See also Heartwood Inc. v. United States Forest Service, 230 F.3d 947 (7th Cir. 2000) (holding that Forest Service’s promulgation of procedures for creating a categorical exclusion was not itself a major federal action that required an EA or EIS).

Second, with respect to their claims that the proposed project does not fit within the Salvage CE or that extraordinary circumstances warrant NEPA review, I believe plaintiffs have

raised some questions, but I am not willing to conclude on this basis alone that preliminary injunctive relief is appropriate. Although plaintiffs contend they are not asking the court at this point to determine that the Scott Guidelines are invalid or have been misapplied, at bottom, plaintiffs challenge the way the agency has determined that trees are “dying,” for purposes of invoking the Salvage CE in the first place. The Scott Guidelines are clearly the basis for these determinations.

Courts must defer to the expertise of the agency with respect to scientific matters. Anderson v. Evans, 371 F.3d 475, 489 (9th Cir. 2004). Additionally, an agency’s interpretation of the meaning of its own categorical exclusions “should be given controlling weight unless plainly erroneous or inconsistent with the terms used in the regulation.” Alaska Center for the Environment v. United States Forest Service, 189 F.3d 851, 857 (9th Cir. 1999).

Given the deference afforded the agency in choosing scientific methods, and the deference afforded the agency in determining when a given project fits within a CE, at this point, I cannot conclude plaintiffs are likely to prevail on their challenge to the decision that this project fits within the Salvage CE. I believe plaintiffs have raised good questions about whether the agency properly considered extraordinary circumstances that indicate this project may have a significant effect on the environment, but I am doubtful I would enter an injunction on this basis alone.

I do believe, however, that plaintiffs have made a strong showing on their NFMA claims. The Eastside Screens prohibit the logging of “live” trees greater than 21 inches in diameter at breast height. Although the Forest Service categorizes many of the marked trees as “dying,” the plain meaning of “live” is still living, in other words, not dead. Plaintiffs have presented

evidence, which the Forest Service has not rebutted, that numerous trees marked for cutting are alive and greater than 21 inches in diameter at breast height. See, e.g., LOWD Ex. 5, Royce Dec., page 12; LOWD Ex. 12, Coulter Dec., page 3; LOWD Ex. 15, Brown Dec., page 3; LOWD Ex. 19 - 21, Email from Dan Becker dated 10/14/04 and Attachments. Allowing the logging of these trees would be a violation of the Eastside Screens, which would be inconsistent with the Forest Plan, and therefore a violation of NFMA. The Forest Service has not provided any reason why the “dead or dying” language takes precedence over the “live” language in the Eastside Screens. Thus, I conclude plaintiffs are likely to prevail on their NFMA claims.

III. Irreparable Harm and Balancing Hardships

I believe the proposed logging of “live” (not dead) trees greater than 21 inches in diameter is a sufficient basis to enter a preliminary injunction. There is no evidence of significant decay and rotting of the trees or bug infestation to suggest that enjoining the sale at this time would reduce the economic value of the salvageable timber. Additionally, the sale has not yet been awarded to any third-parties. The only hardship suggested by the agency at oral argument is the loss of income to the government.

“Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.” Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 545, 107 S.Ct. 1396, 1404 (U.S. 1987). The harm to the environment, and in particular the irreversible decision of logging old growth trees, tips the balance in favor of the issuance of a preliminary injunction.

Because neither the court nor the parties has determined at this point how many marked trees fall within the prohibitions of the Eastside Screens, or whether the sale can go forward without cutting those trees, I ask the parties to confer on these issues and assist the court in determining the proper scope of the injunction.

CONCLUSION

Plaintiffs' motions for preliminary injunction (#3, CV 04-1595-KI; #4, CV 04-1628-KI) are granted in part. The parties are directed to confer regarding the scope of the injunction and report back to the court by December 22, 2004. Pursuant to the stipulation reached during the telephone conference of December 3, 2004, the Forest Service is prohibited from going forward with the High Roberts sale and prohibited from allowing any logging until matters regarding the scope of injunctive relief are resolved. FSEEE's motion for bond waiver (#10) is granted and the bond requirement is waived in both cases.

Dated this 9th day of December, 2004.

/s/ Garr M. King
Garr M. King
United States District Judge