

Ecosystem Management Coordination



Court Decisions

1. Timber | Region 5

The Eastern District Court of California found for the Agency on National Environmental Policy Act (NEPA) claims against the Bull Run Project, which sought to abate hazard trees in the Cedar Fire burn area in the Sequoia National Forest, in *Earth Islands Institute v. Elliott*.

The Agency determined that the Project fit into three categorical exclusions (CEs)—road repair and maintenance, timber stand and/or wildlife habitat improvement activities, and post-fire rehabilitation activities. Among these three, Plaintiffs challenged the use of a road-maintenance CE for a timber sale, and argued that the existence of extraordinary circumstances required a preparation of an Environmental Assessment (EA) or Environmental Impact Statement (EIS). The Court rejected the Plaintiff's claims, finding:

- **The removal of roadside hazard trees fall within the scope of the road-maintenance CE, and the Forest Service Handbook explicitly says that such removal might be subject to a commercial sale.**
- Deference should be given to the Agency's interpretation of the road-maintenance CE because it reflects the Agency's "fair and considered judgment," and not a post hoc rationalization. **While the Forest Service's use of the road-maintenance CE for the project only appeared in the Revised Decision Memo, the court found ample evidence the Agency was considering its use months before the project was to begin and was thus not a post hoc rationalization.**
- **Plaintiffs failed to persuade the Court that the Agency's decision to conduct an EA for a similar project requires that it proceed in the same manner here.**
- The Agency **adequately explained** that the potential impacts on the Pacific fisher and California spotted owl are insignificant and that **no extraordinary circumstances exist.**

(17-1320, E.D. Cal.)

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Photo credit: https://en.wikipedia.org/wiki/Storming_of_the_Bastille#/media/File:Prise_de_la_Bastille.jpg

Litigation Update

1. Nothing to report

New Cases

1. Nothing to report

Notices of Intent

1. Nothing to report

Natural Resource Management Decisions Involving Other Agencies

1. US Fish & Wildlife Service | Endangered Species

Environmental groups challenged the US Fish and Wildlife's (FWS) decision to delist the Louisiana black bear in *Public Employees for Environmental Responsibility et al. v. Zinke et al.* The Louisiana black bear, a subspecies of the American black bear, was listed as threatened in 1992 based on habitat and population reduction from historic levels. In 2014, FWS completed a five-year review of the subspecies pursuant to the ESA. One year later FWS proposed delisting the bear.

Claiming FWS' delisting decision violated the Endangered Species Act (ESA), **plaintiffs state the agency did not rely on the best available science in determining whether bear populations were viable.** Plaintiffs argue FWS **did not adequately address the impacts of genetic hybridization** occurring between native populations and non-native black bear subspecies introduced for hunting which could threaten species viability. Plaintiffs also argue the **removal of critical habitat designation and the impacts of climate change threaten the bears' continued existence.** Finally, plaintiffs argue FWS **inaccurately estimated population size** and did not compare the bears' current population numbers to their historic population numbers. **Plaintiffs seek to vacate the decision to delist.** (18-01547, D. D.C.)

2. US Army Corps of Engineers | Pipeline

The Fifth Circuit vacated and remanded a decision from the Middle District of Louisiana to grant a preliminary injunction against the construction of the Bayou Bridge Pipeline in the Atchafalaya Basin in *Basinkeeper et al. v. United States Army Corps of Engineers.* The US Army Corps of Engineers (Corps) appealed the District Court's decision on the grounds that the District Court misinterpreted provisions of the National Environmental Policy Act (NEPA) and the Clean Water Act (CWA). Pursuant to NEPA, the Corps conducted two environmental assessments (EAs): one under the Rivers and Harbors Act, and one under the CWA. The Corps issued a Finding of No Significant Impact (FONSI) based on the EAs, and granted Bayou Bridge a permit to build the pipeline in 2017.

The Circuit Court agreed with the Corps on all counts. First, the Circuit Court held the District Court **applied the wrong level of scrutiny** in concluding the mitigation measures proposed in the FONSI were "perfunctory." Second, the Court **upheld the mitigation alternatives** the Corps proposed for Bayou

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Bridge to offset effects on wetlands as required under CWA regulations. Finally, the Court **upheld the Corps' cumulative impacts analysis**. The dissent criticized the majority's analysis of the FONSI's mitigation measures and argued that the analysis on which the Corps based its CWA mitigation alternatives was flawed. (18-30257, 5th Cir.)

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