FILED
United States Court of Appeals
Tenth Circuit

October 15, 2021

Christopher M. Wolpert
Clerk of Court

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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JOHN SWOMLEY; TODD BARKER; DAVID GOLDSTEIN; ELIZABETH SWOMLEY; OLIVIA SWOMLEY; JAMES SWOMLEY; SARAH SWOMLEY; ROBERT COSINUKE; WILLA COSINUKE; JENNIFER KRIER; ABIGAYLE COSINUKE; AUGUST COSINUKE; KATHRYN VAGNEUR; BRUCE BARKER; GERRY BARKER; TOM STEWART; BARBARA STEWART; THOMAS H. STEWART; KATHERINE KENNY; ERIC VOTH; MICHELLE VOTH,

Petitioners - Appellants,

v.

KAREN SCHROYER, in her official capacity as District Ranger, Aspen-Sopris Ranger District, White River National Forest, United States Forest Service; UNITED STATES FOREST SERVICE, a federal agency of the United States Department of Agriculture,

Respondents - Appellees.

No. 20-1335
(D.C. No. 1:19-CV-01055-TMT)
(D. Colorado)

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**ORDER AND JUDGMENT***

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

Before **HARTZ**, **PHILLIPS**, and **McHUGH**, Circuit Judges.

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In 2018, the Forest Service issued a Final Decision Notice approving a timber project in the White River National Forest (the "Project"). As required by the National Environmental Policy Act ("NEPA"), the Forest Service evaluated the environmental impacts of the Project before granting final approval. The Forest Service prepared an environmental assessment ("EA"), concluding the Project was unlikely to significantly affect the environment. Twenty-one residents living near the Project ("Petitioners") disagreed. They filed a Petition for Review of Agency Action, alleging the Forest Service violated NEPA and the Administrative Procedure Act ("APA").

The district court ruled against Petitioners on all counts. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

## I. BACKGROUND

### A. *NEPA*

NEPA requires federal agencies to conduct environmental reviews before they take major action. *See* 42 U.S.C. § 4321; 40 C.F.R. § 1500.1.[1] The stringency of that

[1] The Council on Environmental Quality ("CEQ") revised NEPA's implementing regulations in July 2020. *See* Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020). The updated regulations do not apply here, as the Forest Service completed its NEPA review process in April 2018. As a result, we cite to the pre-revision version of the regulations. This court affords NEPA's regulations "substantial deference." *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 703 (10th Cir. 2009).

review, and the documentation required under NEPA, depends on the significance of the proposed action's environmental effects.

After various notice and comment requirements are satisfied, an agency ordinarily begins the environmental review process by preparing an EA. An EA is a "concise public document" providing "sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. § 1508.9(a)(1). An EA must include "brief discussions of the need for the proposal, of alternatives . . . , [and] of the environmental impacts." *Id.* § 1508.9(b).

If an agency concludes the proposed action is likely to "significantly affect[] the quality of the human environment," it must prepare an environmental impact statement ("EIS"). 42 U.S.C. § 4332(C). An EIS is a "detailed statement" discussing anticipated impacts, mitigation, and alternatives. *Id.*

If an agency decides no significant environmental impacts are likely to occur, the agency can prepare a "finding of no significant impact" ("FONSI"). A FONSI "briefly present[s] the reasons why an action . . . will not have a significant effect on the human environment and for which an [EIS] therefore will not be prepared." 40 C.F.R. § 1508.13.

### B. *Project Overview*

The Project authorizes logging on 1,631 acres of forest within the White River National Forest (the "Project Area"). This represents a little less than 10% of the total acreage the Forest Service considered for the Project. The Project Area is a lodgepole pine, aspen, and mixed conifer forest. The EA noted tree "species composition within the

[Project Area] landscape is relatively diverse, [but] age-class diversity and structural diversity is more homogenous." Supp. App. 110. When describing the environmental effects of foregoing the Project—the "No-Action" alternative—the Forest Service stated the "lack of young forest within the [Project area] landscape could make the area more vulnerable to large-scale insect epidemics and drought induced mortality. As fuels continue to increase, there would be increased risk of a large, severe wildfire." *Id.* at 212. The EA noted, "[s]evere wildfire can aggravate a problem posed by a potentially changing climate: If snowmelt ends earlier and the surrounding trees are also dead, it is possible that wetlands would have even faster drying time." *Id.*

The Project calls for using the "clearcut with leave tree" treatment method on 1,061 acres of forest. *Id.* at 292. This treatment would harvest all lodgepole pines over five inches in diameter but leave aspen and mixed conifer species on the landscape. Another 198 acres would be treated through a "coppice" method, in which all the merchantable trees would be harvested, and the non-merchantable trees would be either felled or burned. *Id.* at 293, 121. The remaining 369.6 acres would be treated through a "group selection" method that "create[s] small openings, a quarter acre to an acre in size, to create an environment suitable for conifer regeneration." *Id.* at 122. These openings "would be dispersed throughout" the Project Area and would not collectively exceed 25–30% of the acreage treated with this method. *Id*. The Project would require "[a]pproximately 9 miles of temporary roads . . . to access cutting units," which involves

"road maintenance (blading, drainage, surfacing, curve widening)" activities as necessary. *Id.* at 293.

The Project has three purposes. First, it will "[p]rovide commercial forest products and/or biomass to local industries." *Id*. at 111. Second, it will "[i]ncrease tree age/size class diversity at the stand and landscape scales, thereby increasing forest resistance and resilience to disturbances, such as future bark beetle outbreaks, fires, and other climate-related mortality events." *Id*. Third, it will "[p]rovide snowshoe hare habitat in both the stand initiation structural stage and in mature, multi-story conifer vegetation to benefit the Canada lynx, a federally threatened species." *Id*. at 112.

### C. *The Project's NEPA Process*

Neither the Petitioners nor Respondents disputes that the Forest Service's approval of the Project is a major federal action triggering NEPA review. *See generally* 40 C.F.R. § 1508.18.

The Forest Service first listed the Project in its Schedule of Proposed Actions in September 2016, after one year of engaging with community stakeholders. It then initiated the NEPA sixty-day scoping and comment period on October 6, 2016. The Forest Service received thirty-nine comments. Petitioners submitted a comment which, among other things, raised concerns about climate change, mycelium, and the broader impact of the Project.[2] The Forest Service addressed these concerns directly in its formal

[2] "Mycelium is the vegetative part of a fungus, such as a mushroom. A fungus absorbs nutrients from its environment through the mycelium, which breaks down food

response to comments and agreed to analyze certain issues in subsequent specialist reports.

After preparing the specialist reports, the Forest Service prepared an EA in August 2017. The EA considered two alternatives: (1) the "No Action" alternative and (2) the "Proposed Action" of moving forward with the Project. *Id.* at 120.

The Forest Service issued a draft Decision Notice in December 2017. The draft Decision Notice triggered a forty-five-day pre-decisional administrative review (the "Objection" process), during which the Forest Service received twelve objections. Petitioners filed an objection that again raised their concerns about climate change, mycelium, and the Project's environmental impact, and the Forest Service responded. On April 20, 2018, the Forest Service issued the Project's final Decision Notice, including a FONSI.

### D. *Procedural History*

Petitioners initiated this suit on April 10, 2019. The Petition for Review alleges three counts of NEPA and APA violations. In Count One, Petitioners assert the Forest Service "failed to adequately disclose and analyze the direct, indirect, and cumulative impacts of the [Project] on climate change" in violation of NEPA. App. 18. In Count Two, Petitioners argue the Forest Service "did not employ scientific integrity," as

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sources in the soil. Myceli[a] serve an important role in certain ecosystems due to their role in the decomposition of plant material, among other reasons." App. 175 n.6.

required by NEPA, "because it failed to address opposing scientific studies regarding the impact of the [Project] on mycelium." *Id.* at 19. In Count Three, Petitioners claim the Forest Service "failed to properly evaluate the intensity of the [Project]" and, as a result, failed to prepare an EIS as required under NEPA. *Id.* at 21. For each count, Petitioners allege the Forest Service's conduct was arbitrary and capricious under the APA.

The district court rejected all three counts. The district court denied Count One, stating "Petitioners fail to carry their burden to show that the Project's CO2 emissions will likely result in a cumulatively significant impact." *Id.* at 346. It denied Count Two, concluding the issues Petitioners raised based on the scientific studies used by the Forest Service were not capable of proving the Forest Service relied on insufficient or erroneous information. The district court also denied Count Three, holding the controversy "factor[] Petitioners rely on fall[s] well short of showing that the Forest Service engaged in a 'clear error of judgment' in finding no significant impact and declining to prepare an EIS." *Id.* at 353. Petitioners timely appealed.

## II. DISCUSSION

Petitioners challenging an agency's compliance with NEPA must bring their petitions under the APA. This court "give[s] no deference to a district court's review of agency action, reviewing its decision de novo." *WildEarth Guardians v. Nat'l Park Serv.*, 703 F.3d 1178, 1182 (10th Cir. 2013). Review of the Forest Service's decisions "is considerably more deferential," as this court will "set aside agency action only when it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.*

(internal quotation marks omitted). A "presumption of validity attaches to the agency action[,] and the burden of proof rests with the appellants who challenge such action." *Id.* at 1183 (quotation marks omitted).

"In the NEPA context, an agency's [review] is arbitrary and capricious if it fails to take a 'hard look' at the environmental effects of the alternatives before it." *WildEarth Guardians v. U.S. Bureau of Land Mgmt*., 870 F.3d 1222, 1233 (10th Cir. 2017). An agency takes a hard look when it "examine[s] the relevant data and articulate[s] a rational connection between the facts found and the decision made." *New Mexico ex rel. Richardson v. Bureau of Land Mgmt*., 565 F.3d 683, 713 (10th Cir. 2009). "Once environmental concerns are adequately identified and evaluated by the agency, NEPA places no further constraint on agency actions." *Citizens' Comm. to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1179 (10th Cir. 2008) (quotation marks omitted). "Deficiencies in [a review] that are mere 'flyspecks' and do not defeat NEPA's goals of informed decisionmaking and informed public comment will not lead to reversal." *Richardson*, 565 F.3d. at 704.

Petitioners argue the Forest Service violated NEPA and the APA by failing to (1) consider the Project's impact on climate change, (2) adequately consider scientific data on the Project's impact on fungi, and (3) prepare an EIS. We turn to these claims now.

### A. *Climate Change Impacts*

Petitioners claim the Forest Service's failure to consider and discuss the Project's indirect and cumulative effects on GHG emissions and climate change was arbitrary and capricious. They also claim the district court erred in concluding otherwise. But we need not review the district court's decision in great detail. We dismiss this claim because Petitioners fail to adequately brief this issue on appeal.

Federal Rule of Appellate Procedure 28 requires all appellants to identify their "contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant[s] rel[y]." Fed. R. App. P. 28(a)(8)(A). Yet, Petitioners present arguments divorced from legal or factual predicates. An illustrative example follows:

> Each year a mature tree can uptake at least 48 pounds of carbon dioxide in exchange for oxygen[3]—the loss of each tree's $CO_2$ absorption abilities must also be considered in addition to all the other negative impacts the project will have on the environment. Respondents argue that new growth will compensate for the loss of mature trees. This is a flawed argument. There is a significant difference between the amount of carbon dioxide that a sapling and a mature tree can absorb. It is incorrect to conclude that new growth, as a result of an unnatural human process, will be enough to offset the GHG emissions from the biomass fuel energy generation process.
>
> [3] https://www.arborday.org/trees/treefacts/

Aplt. Br. at 17.

Petitioners' failure to cite the administrative record merits dismissal of this claim. They cannot overcome the presumption of validity we afford agency actions without presenting any supporting evidence. "[C]ursory statements, without supporting analysis

and case law, fail to constitute the kind of briefing that is necessary to avoid application of the forfeiture doctrine." *Bronson v. Swensen*, 500 F.3d 1099, 1105 (10th Cir. 2007). We have "routinely [] declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief." *Id.* at 1104.

It is true "we have recognized that consideration of extra-record materials is appropriate in extremely limited circumstances," such as when "an initial examination of the extra-record evidence . . . may illuminate whether [an agency] has neglected to mention a serious environmental consequence, failed adequately to discuss some reasonable alternative, or otherwise swept stubborn problems or serious criticism under the rug." *Audubon Soc'y of Greater Denver v. U.S. Army Corps of Eng'rs*, 908 F.3d 593, 609–10 (10th Cir. 2018) (quotation marks omitted). But the circumstances here do not warrant deviating from our default rule that "review of agency action is normally restricted to the administrative record." *Id.* at 609.

The extra-record evidence includes photographs of unrelated projects, links to data from advocacy group websites, links to Wikipedia articles discussing wildfires, and links to media articles describing the biomass plant receiving the Project's timber. These materials do not raise concerns neglected during the Forest Service's NEPA review. *See, e.g.*, Supp. App. 212 (EA stating the "No Action" alternative poses an "increase[d] risk of a large, severe wildfire" and then describing how severe wildfires "can aggravate" problems posed by climate change). As a result, this evidence cannot be considered, and

we reject Petitioners wholly unsupported climate change claim.[3] *See Nance v. Sun Life Assur. Co. of Can.*, 294 F.3d 1263, 1269 (10th Cir. 2002) (stating extra-record evidence need not be considered).

### B. *Mycelium Impacts*

The Forest Service also found the Project's effect on mycelium was insignificant and did not warrant further review. Petitioners challenge this conclusion, arguing the agency failed to ensure their analysis had "scientific integrity" as required under NEPA. 40 C.F.R. § 1502.24. We also reject this claim due to inadequate briefing.

Petitioners have not prepared a record enabling judicial review of this claim. They allege three studies "independently [show] that" clearcutting causes "significant negative impacts on mycelium and the environment." Aplt. Br. at 29. They also allege the Forest Service "actively choose [sic] to ignore the results" of these studies in favor of other data, and thus violated NEPA and the APA by "reach[ing] a decision that ran 'counter to the evidence before' it." *Id.* at 28–29 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983)). But Petitioners do not include the studies in their appendix, meaning we cannot assess the rationale behind the Forest Service's scientific

[3] For the above reasons, we do not decide whether the Project's impacts on climate change are significant enough to warrant additional analysis. However, we agree with the district court that NEPA requires agencies to discuss an action's impacts "in proportion to their significance," and insignificant impacts merit "only enough discussion to show why more study is not warranted." 40 C.F.R. § 1502.2(b). It follows that, in some instances, NEPA may require an agency to undertake preliminary analysis of a Project's effects on climate change to demonstrate why no further study is warranted.

findings or determine whether the agency's decision runs counter to the evidence that was before it.[4]

This proves fatal to Petitioners' claim given the heavy dual burdens they face on appeal. Agencies are entitled to choose among conflicting reasonable scientific opinions. *San Juan Citizens All. v. Stiles*, 654 F.3d 1038, 1057 (10th Cir. 2011) ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." (quoting *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989))). Additionally, agencies' NEPA findings enjoy a "presumption of validity." *WildEarth Guardians*, 703 F.3d at 1183.

Petitioners' inadequate briefing cannot overcome these burdens. Without the disputed studies, we cannot determine whether the Forest Service's interpretation of them was arbitrary or capricious. We therefore decline to consider this claim. *See* 10th Cir.

[4] Petitioners also argue the EA lacked scientific integrity because it "did not explain the crucial importance of mycelium to forest health." Aplt. Br. at 27. Yet, the EA sufficiently acknowledged the importance of mycelium. The Vegetation Ecology/Botany Specialist Report noted the key role mycelium play in forest ecosystems. *See* Supp. App. 28 ("Fungal communities . . . provide important function of breaking down wood and are important to plant germination and growth."). The Forest Service also cited reports that, according to Petitioners, stated mycelium is vital to the environment. *See id.* at 192 (EA quoting the 1999 Hagerman study). An EA is prepared "to assist agency planning and decisionmaking." 40 C.F.R. § 1501.3(b). Here, including more information about the benefits of mycelium would not have altered the Forest Service's decisionmaking process. The Forest Service already viewed fungal health as a positive environmental attribute.

R. 10.4(B) ("When the party asserting an issue fails to provide a record or appendix sufficient for considering that issue, the court may decline to consider it.").

### C. *EIS Analysis*

Finally, Petitioners assert the Forest Service needed to prepare an EIS because the Project "will have a significant impact on the environment." Aplt. Br. at 32. They offer two justifications for this claim. Petitioners first restate their argument that the Project's climate change impacts are significant. We reject this argument for the reasons described *supra* Part II.A. Petitioners then argue the Project is controversial enough to render its impact significant. We turn to that argument now.

NEPA regulations state that if an action's "effects on the quality of the human environment are likely to be highly controversial," then that action may require an EIS. 40 C.F.R. § 1508.27(b)(4). Petitioners provide three reasons why the Project is sufficiently controversial, none of which is persuasive.

First, Petitioners assert the Forest Service's failure to "consider potential climate impacts" is controversial. Aplt. Br. at 42. This is mistaken. If alleged noncompliance with NEPA rendered a project controversial, this factor would be reduced to surplusage. *F.T.C. v. Kuykendall*, 466 F.3d 1149, 1155 (10th Cir. 2006) ("[A] cardinal principle of statutory construction is the duty to give effect, if possible, to every clause and word of a statute." (internal quotation marks omitted)).

Second, Petitioners maintain the Project is controversial because it "leaves considerable uncertainty about the Project's effects that should be addressed in an EIS."

Aplt. Br. at 42. This uncertainty, however, is merely Petitioners' claims about climate change and mycelium repackaged in a different form. *See id.* ("The Forest Service denies that the Project would cause significant damage to mycelium, and simply refuses to consider potential climate impacts. A high level of uncertainty as to the Project's effects persists largely because the Forest Service has failed to provide any support for these assertions.") (internal citation omitted). For reasons previously discussed, both claims are meritless, meaning they do not create sufficient controversy to require an EIS.

Third, Petitioners contend "the Project [is] controversial among area residents and visitors." Aplt. Br. at 33. This controversy exists because, Petitioners assert, the project "would gravely impact the recreational, aesthetic, and economic interests of [] residents." *Id.* at 37. This claim is unavailing. "Controversy in this context does not mean opposition to a project, but rather a substantial dispute as to the size, nature, or effect of the action." *Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156, 1181 (10th Cir. 2012) (internal quotation marks omitted). There is no substantial dispute about the effects of this action given Petitioners' inadequate briefing. And even if there were, "[c]ontroversy is only one of ten factors the [Forest Service] must consider when deciding whether to prepare an EIS . . . So even if a project is controversial, this does not mean the [Forest Service] must prepare an EIS." *Id.* Petitioners do not demonstrate that any other factors weigh in favor of an EIS. And we cannot conclude the Forest Service's decision to forego preparing an EIS is arbitrary or capricious where only one of ten factors suggests an EIS might be appropriate.

## III. CONCLUSION

For these reasons, we AFFIRM the district court's order.

Entered for the Court

Carolyn B. McHugh
Circuit Judge

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October 15, 2021

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**RE: 20-1335, Swomley, et al v. Schroyer, et al**
Dist/Ag docket: 1:19-CV-01055-TMT

Dear Counsel:

Enclosed is a copy of the order and judgment issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. Rule 40(a)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rules 35 and 40, and 10th Cir. R.35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Robert Lundman

CMW/na