October 11, 2012
California Land Use & Development Law Report

Ninth Circuit Emphasizes Deference to Federal Agencies under NEPA

In two recent cases involving challenges to U.S. Forest Service projects under the National Environmental Policy Act, the Ninth Circuit emphasized that courts must accord substantial deference to the environmental analysis conducted by federal agencies. *Earth Island Institute v. U.S. Forest Service* (9th Cir. Sept. 20, 2012), and *Native Ecosystems Council v. Weldon* (9th Cir. Sept. 21, 2012). In *Earth Island Institute*, environmental groups challenged the Forest Service's Environmental Assessment for the Angora Project, which seeks to reduce fire risk by removing trees from national forest lands in the Lake Tahoe basin. The plaintiffs challenged the scientific integrity of the EA, the Forest Service's response to dissenting opinions, and the consideration of proposed alternatives. Rejecting these challenges, the Ninth Circuit explained that in reviewing scientific issues "courts must defer to the informed discretion of the responsible federal agencies." It also explained that the NEPA regulations require responses to comments only for Environmental Impact Statements and not for EAs. The court also emphasized that even if agencies were required to respond to comments on an EA, the Service did not need to "perform the point-by-point type of counter-argument to experts that Plaintiffs appear to desire," since "our precedent makes clear that an agency need not respond to every single scientific study or comment." Finally, the court upheld the consideration of only two alternatives – the proposed project and the no action alternative – on the ground that NEPA's requirement to evaluate alternatives is less rigorous for an EA than it is for an EIS. In *Native Ecosystems Council*, an environmental group challenged the Forest Service's EA for a similar type of fire risk reduction project in Montana. Echoing the decision in *Earth Island Institute*, the court rejected the claim that the Forest Service used an improper scientific methodology to evaluate impacts on elks, explaining that courts are required to "apply the highest level of deference" when reviewing scientific judgments by federal agencies. The court also stated that the Forest Service "is entitled to substantial deference" in the interpretation of its own regulations and forest plans. The cases don't break new ground, but they reinforce important principles of judicial deference to federal agency analysis and decision-making under NEPA.

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