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Environmental Impact Statement Required Due to Conflicting Evidence About Project's Effects



vidence
n EIS
ct. *Bark v.*

The case

involved a forest management project and timber sale in Mt. Hood National Forest. The primary purpose of the project was to reduce the risk of high-intensity wildfires and promote safe fire-suppression activities. The project would involve variable density thinning, which removes trees and reduces canopy cover. To comply with NEPA, the Forest Service prepared an Environmental Assessment and issued a Finding of No Significant Impact. The plaintiffs argued that the Forest Service should have prepared an EIS instead, citing three of the ten factors listed in the NEPA regulations that can trigger the need for an EIS: The degree to which the environmental effects are likely to be highly controversial, the degree to which the possible environmental effects are highly uncertain or involve unique or unknown risks, and whether the action is related to other actions with individually insignificant but cumulatively significant impacts. The court ruled that all three of these factors mandated an EIS. **Controversial and Uncertain Effects** The court held that the project's effects were both highly controversial and uncertain. The plaintiffs had submitted to the Forest Service numerous expert studies indicating that fuel reduction does not necessarily prevent large forest fires, and may even intensify a fire. The Forest Service did not meaningfully address these studies in the EA and FONSI. Thus, the evidence cited by the plaintiffs showed a substantial dispute about the effect of variable density thinning on fire suppression. This dispute warranted an EIS because it raised substantial questions about whether the project would have a significant environmental effect. **Cumulative Impacts** As a separate basis for its decision, the court ruled that an EIS was required because there were substantial questions about whether the project would have a cumulatively significant environmental impact. The EA included a list of other projects considered in its cumulative effects analysis but did not provide any quantified or detailed information about these other projects and their combined

impacts. The analysis largely consisted of cursory and conclusory statements. The court held that this analysis of cumulative impacts was insufficient. **Post-Script: Effect of the New NEPA Regulations** The court's rulings were based on the NEPA regulations in effect at the time the case was decided. The Council on Environmental Quality's [updated NEPA regulations](#) took effect September 14, 2020 (40 C.F.R. parts 1500–1508). The new regulations do not include the list of factors that had been used to determine whether a project will have a significant effect on the environment. Under the new regulations, the assessment of whether a project's impacts are significant, and thus whether to prepare an EIS, is to be based on "the potentially affected environment and degree of the effects of the action." (40 C.F.R. § 1501.3(b)). It is not clear whether the courts will interpret and apply the new regulations (assuming they withstand pending legal challenges) to require the same degree of scrutiny of an agency decision to prepare a FONSI as the regulations they replace.