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## A New View, or Just Being Difficult? The Ninth Circuit's View on Categorical Exclusions. *Sierra Club v. Bosworth*

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**A NEW VIEW, OR JUST BEING DIFFICULT?  
THE NINTH CIRCUIT'S VIEW ON CATEGORICAL EXCLUSIONS**

*Sierra Club v. Bosworth*<sup>1</sup>

I. INTRODUCTION

Circuit splits can be one of the most frustrating and complicated matters the courts face today. However, it is rare and interesting to see how a new circuit split on an issue begins. The Ninth Circuit has created an unfortunate split of appellate authority in its recent interpretation of the National Environmental Policy Act (“NEPA”), specifically section 1508.4 which governs categorical exclusions. In the instant case, *Sierra Club v. Bosworth*, the Ninth Circuit decided that before promulgating a categorical exclusion under NEPA, an environmental assessment must be conducted to determine whether the agency action will have a significant effect on the human environment, and if an environmental impact statement is needed because there is a significant effect. However, the text of the NEPA regulations would seem to render such action unnecessary, because the statutory definition of a “categorical exclusion” states that actions in excluded categories do not have a significant effect. Obviously, the Supreme Court has never ruled on this issue, but the Seventh Circuit decided on this issue a few years ago. It held that categorical exclusions do not have enough of an effect on the human environment to invoke the production of an environmental assessment. The Ninth Circuit has erred by not examining closer the reasoning used by its fellow Circuit Court on the same issue and has held the opposite in this instant case. This note will explore the Ninth Circuit reasoning for its decision.

II. FACTS AND HOLDING

The appellants involved in this case are the Sierra Club and the Sierra Nevada Forest Protection Campaign.<sup>2</sup> The appellees are the United

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<sup>1</sup> 510 F.3d 1016 (9th Cir. 2007).

<sup>2</sup> *Id.* at 1018.

States Forest Service and Department of Agriculture.<sup>3</sup> The Sierra Club sued the Forest Service, alleging that the Forest Service violated the National Environmental Policy Act (“NEPA”).<sup>4</sup> The main issue here was the Forest Service’s establishment of a NEPA categorical exclusion, the Fuels Categorical Exclusion (“Fuels CE”) for fuel reduction projects up to 1,000 acres and prescribed burn projects up to 4,500 acres on all national forests in the United States.<sup>5</sup>

The facts of this case began as early as 2002.<sup>6</sup> The Deputy Chief of the Forest Service declared intentions to establish a fuels categorical exclusion for fuels reduction activities on national forest land.<sup>7</sup> Along with this announcement, the Deputy Chief also requested data from all Regional Foresters regarding fuels treatment projects.<sup>8</sup> The data call collected “2,500 hazardous fuels reduction and rehabilitation/stabilization projects involving treatment of more than 2,500,000 acres.”<sup>9</sup> By the end of 2002, the Forest Service gave public notice and requested comments on the proposed Fuels CE.<sup>10</sup> Approximately 39,000 comments were received on the Fuels CE.<sup>11</sup>

The Sierra Club filed this suit challenging the Fuels CE and sought an injunction enjoining the Fuels CE nationwide.<sup>12</sup> The Sierra Club claimed that the Fuels CE is invalid for the following reasons: “(1) the categorical exclusion inappropriately included activities that have significant effects; (2) data underlying the Fuels categorical exclusion did not support promulgation of the categorical exclusion; (3) the Forest Service did not adequately identify activities covered by the categorical exclusion; and (4) the Forest Service did not adequately determine there

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.* (citing 42 U.S.C. §§4321-4370f (2000)).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 1019.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*; see also See 76 Fed. Reg. at 77038.

<sup>11</sup> *Sierra Club*, 510 F.3d at 1019.

<sup>12</sup> *Id.* at 1018.

## CATEGORICAL EXCLUSIONS IN THE 9<sup>TH</sup> CIRCUIT

were no ‘extraordinary circumstances’ under which the categorical exclusion would not be appropriate.”<sup>13</sup>

The Sierra Club also claimed that the Forest Service violated NEPA by not preparing an Environmental Assessment (“EA”)/Finding of No Significant Impact (“FONSI”) or an Environmental Impact Statement (“EIS”) for the Fuels categorical exclusion.<sup>14</sup> In the instant case, the Sierra Club challenged the Fuels CE for three specific national forest projects.<sup>15</sup>

One of the main arguments that the Sierra Club makes is that the Fuels CE required an EIS or an EA/FONSI because the categorical exclusion is a “major federal action”<sup>16</sup> that has a significant impact on the environment.<sup>17</sup> The Sierra Club argued that the Fuels CE is a major

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<sup>13</sup> *Id.* at 1021-22.

<sup>14</sup> *Id.* at 1022.

<sup>15</sup> *Id.* at 1021. The projects were scheduled for 2004 in Eldorado National Forest—the Grey Eagle Fuels Reduction Project (logging 984 acres and prescribed burning 4.149 acres), the Forests Guard Fuels Reduction Project (logging and prescribing burning 412 acres), and the Rockeye Fuels Reduction Project (logging and prescribing burning 513 acres). *Id.* The Sierra Club withdrew its motion to challenge the fourth project because the Forest Service decided not to continue with the project. *Id.* The most recent schedule of proposed actions show that the Forest Service has 15 or more Fuels CEs planned for the Eldorado National Forest, which would cover more than 8,000 acres. *Id.* See also Schedule of Proposed Action 4-1-2007-6-30-2007 Eldorado National Forest, available at <http://www.fs.fed.us/sopa/components/reports/sopa-110503-2007-04.pdf>. The Forest Service also has Fuels CEs planned for the Lassen National Forest. *Sierra Club*, 510 F.3d at 1021. The Sierra Club continues the challenge the Fuel’s CE for those projects on this appeal as well. *Id.*

<sup>16</sup> The Regulations define a major federal action as actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly. 40 C.F.R. 1508.27 (2000). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action. 40 C.F.R. 1508.18 (2000).

<sup>17</sup> *Sierra Club*, 510 F.3d at 1024, 1024. See also 42 U.S.C. §4332(2)(C) (2000).

federal action because it is a rule.<sup>18</sup> The Council of Environmental Quality (“CEQ”) regulations say that federal actions include “new or revised agency rules, regulations, plans, policies or procedures; and legislative proposals.”<sup>19</sup> Alternatively, the Sierra Club argues that even if the Fuels CE does not qualify as a rule, it would still qualify as a major federal action because it meets the definition of a “program” under the regulations.<sup>20</sup>

However, the defense relied on CEQ regulations which state categorical exclusions do not have a significant impact on the environment.<sup>21</sup> The Forest Service also relied on the Seventh Circuit decision in *Heartwood, Inc. v. United States Forest Service*<sup>22</sup> on this issue, which was discussed in great detail by the district court.<sup>23</sup>

In addition, the district court also relied on that court’s statement that the “CEQ promulgated a rule requiring agencies to establish ‘agency

<sup>18</sup> *Id.* at 1025. The Administrative Procedure Act defines a rule as ...the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefore or of valuations, costs, or accounting, or practices bearing on any of the foregoing. 5 U.S.C. §551(4) (2000).

<sup>19</sup> *Id.* (quoting 40 C.F.R. § 1508.18(a) (2008)).

<sup>20</sup> *Id.* “Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.” 40 C.F.R. §1508.18(b)(3) (2008).

<sup>21</sup> *Id.* The flaw in the Sierra Club’s argument is that a categorical exclusion is by definition not a major federal action because the CEQ regulations define it to be ‘a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect.’ The CEQ regulations also explicitly state that for this ‘category of actions,’ no EIS or EA is required. *Id.* (citing 40 C.F.R. §1508.4 (2008)).

<sup>22</sup> *Heartwood, Inc. v. U.S. Forest Serv.*, 230 F.3d 947 (7th Cir. 2000).

<sup>23</sup> *Sierra Club*, 510 F.3d at 1022. In *Heartwood, Inc.*, an environmental group brought suit against the United States Forest Service alleging that the Service’s promulgation of categorical exclusions violated NEPA. *Id.* The Seventh Circuit stated that the creation of new categorical exclusions is an agency procedure and that those exclusions are not proposed actions, but rather categories of actions that do not necessitate an EA or EIS. *Heartwood, Inc. v. United States Forest Service*, 230 F.3d 947, 954 (7th Cir. 2000). *Id.*

## CATEGORICAL EXCLUSIONS IN THE 9<sup>TH</sup> CIRCUIT

procedures' that included 'specific criteria for and identification of those typical classes of action...which normally do not require either an environmental impact statement or an environmental assessment,' in other words, procedures to establish [categorical exclusions]."<sup>24</sup> Pursuant to 40 C.F.R. §1508.4, categorical exclusions are a category of actions that have not been found to have a significant effect on the environment.<sup>25</sup> The Seventh Circuit also relied on the Supreme Court case *Andres v. Sierra Club*<sup>26</sup> where the Court indicated great deference must be given to the CEQ's interpretation of its regulations.<sup>27</sup> Thus, because the CEQ does not require agencies to conduct an EA before promulgating a new categorical exclusion, one is not needed.<sup>28</sup> The CEQ regulations specifically state that agency procedures have to comply with the regulations that include "specific criteria for and identification of those typical classes of action...which do not require environmental impact statements or an environmental assessment."<sup>29</sup> The regulations only require each agency to "consult with the Council [CEQ] while developing its procedures and before publishing them in the Federal Register for comment."<sup>30</sup> Also, it is not a change in the Forest Service's policy to not produce an EIS or EA prior to the promulgation of a categorical exclusion.<sup>31</sup> Another significant point to discuss is that the Sierra Club argued that EIS's have been required for rules and regulations for over 20 years, it cannot point to any prior instance where an agency produced an EA/FONSI along with the promulgation of a new categorical exclusion.<sup>32</sup>

Using all of the facts and legal theory discussed above, the District Court granted summary judgment in favor of the Forest Service.<sup>33</sup> The

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<sup>24</sup> *Sierra Club*, 510 F.3d at 1025 (quoting 40 C.F.R. §1507.3 (2008)).

<sup>25</sup> *Id.*; see also 40 C.F.R. §1508.4.

<sup>26</sup> *Andres v. Sierra Club*, 442 U.S. 347 (1979).

<sup>27</sup> *Heartwood*, 230 F.3d at 954; see also *Andrus*, 442 U.S. 347, 358.

<sup>28</sup> *Heartwood*, 230 F.3d at 954.

<sup>29</sup> 40 C.F.R. §1507.3(b)(2)(ii) (2008).

<sup>30</sup> 40 C.F.R. §1507.3(a) (2008).

<sup>31</sup> *Sierra Club*, 510 F.3d at 1026.

<sup>32</sup> *Id.* See e.g., *Colo. Wild v. U.S. Forest Service*, 435 F.3d 1204, 1211-14 (10th Cir. 2006); see also *Cellular Phone Task Force v. Fed. Comm'n Comm'n*, 205 F.3d 82, 94-95; see also *Heartwood*, 230 F.3d at 954.

<sup>33</sup> *Sierra Club*, 510 F.3d at 1021. In the same ruling, the District Court also allowed Sierra Club's motion to add its declarations from three of its experts. *Id.*

District Court relied on Seventh Circuit's authority in *Heartwood*,<sup>34</sup> which held that the Forest Service was not required to make an EIS or EA/FONSI before promulgating a categorical exclusion.<sup>35</sup> The District Court also found that the Sierra Club had not proved that the Forest Service's procedures were irrational or had misplaced reliance on expert opinions.<sup>36</sup> The court also determined that the Forest Service had "adequately determined and documented that no extraordinary circumstances existed in the four projects which would trigger the requirement for an EA or EIS and that the proposed fuels treatment did not increase fire risk."<sup>37</sup>

The Ninth Circuit reversed and remanded this decision.<sup>38</sup> The court stated that the Forest Service failed to prove that it made a reasonable decision to promulgate the Fuels CE, thus making the promulgation arbitrary and capricious.<sup>39</sup> When the Forest Service stated that no significant environmental effects were likely to result, without complying with NEPA requirement, the Forest Service made a "clear error of judgment."<sup>40</sup>

### III. LEGAL BACKGROUND

#### A. National Environmental Policy Act

The National Environmental Policy Act<sup>41</sup> was enacted into law in 1970.<sup>42</sup> The purpose of NEPA is to establish national environmental

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<sup>34</sup> *Id.*; See also *Heartwood*, 230 F.3d at 955.

<sup>35</sup> *Sierra Club*, 510 F.3d at 1025. Accordingly, the one court to address this issue, the Seventh Circuit in *Heartwood*, determined that because categorical exclusions 'by definition, do not have a significant effect on the quality of the human environment,' the promulgation of a new categorical exclusion does not require issuance of an EIS or an EA/FONSI.' *Id.* (quoting *Heartwood*, 230 F.3d at 954).

<sup>36</sup> *Id.* at 1022.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 1034.

<sup>39</sup> *Id.* at 1026 (citing *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989)).

<sup>40</sup> *Id.* at 1032 (citing *Marsh*, 490 U.S. 360 at 378 (1989)).

<sup>41</sup> National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4347 (1970).

<sup>42</sup> *Id.*

## CATEGORICAL EXCLUSIONS IN THE 9<sup>TH</sup> CIRCUIT

policy and goals for “the protection, maintenance, and enhancement of the environment.”<sup>43</sup> NEPA also developed a process for implementing the set goals along with the Council on Environmental Quality.<sup>44</sup> The Declaration of National Environmental Policy is in Title I of NEPA.<sup>45</sup> Specifically, the policy “requires federal agencies to incorporate environmental considerations in their planning and decision-making through a systematic interdisciplinary approach.”<sup>46</sup> Federal agencies are required to prepare detailed statements, known as Environmental Impact Statements (“EISs”), that assess the impact on the environment and alternatives to any major federal action that significantly affect the environment.<sup>47</sup> Title II established the Council on Environmental Quality.<sup>48</sup> The CEQ is established within the Executive branch as part of NEPA with responsibilities provided by the Environmental Quality Improvement act of 1970 as well as NEPA.<sup>49</sup> The CEQ is in charge of ensuring that federal agencies meet their obligations under NEPA.<sup>50</sup>

NEPA does not mandate specific results, but it is a procedural statute that provides the necessary process for federal agencies to take a “hard look at the environmental consequences of their actions.”<sup>51</sup> In order to meet this “hard look” requirement, NEPA requires federal agencies to prepare an Environmental Impact Statement (“EIS”) for “every recommendation or report on proposals for legislation and other major Federal acts significantly affecting the quality of the human environment.”<sup>52</sup>

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> 42 U.S.C. § 4321 (2000)

<sup>46</sup> National Environmental Policy Act (NEPA): Basic Information, (NEPA), <http://www.epa.gov/oecaerth/basics/nepa.html> (last visited Nov. 24, 2008).

<sup>47</sup> 42 U.S.C. § 4332 (2000).

<sup>48</sup> National Environmental Policy Act (NEPA): Basic Information, <http://www.epa.gov/oecaerth/basics/nepa.html> (last visited Nov. 24, 2008).

<sup>49</sup> The White House, Council on Environmental Quality, <http://www.whitehouse.gov/ceq/aboutceq.html> (last visited on Nov. 24, 2008).

<sup>50</sup> *Id.* “The Challenge of harmonizing our economic, environmental and social aspirations has put NEPA at the forefront of our nation’s efforts to protect the environment.” *Id.*

<sup>51</sup> *Sierra Club v. Bosworth*, 510 F.3d 1016, 1018 (9th Cir. 2007) (citing *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1070 (9th Cir. 2002)).

<sup>52</sup> *Id.* (quoting 42 U.S.C. § 4332(2)(C) (2000)).



According to the CEQ regulations, an agency may prepare an EA to “determine whether the environmental impact of the proposed action is significant enough to warrant an EIS.”<sup>53</sup> An EIS must be prepared if an EA establishes that the agency’s proposed action “*may* have a significant effect upon the...environment...”<sup>54</sup> If the EA establishes that the agency’s proposed action does not have a significant effect on the environment, the agency must issue a finding of no significant impact (a “FONSI”) along with a statement of reasons to explain why there is not significant effect.<sup>55</sup> However, neither an EIS nor an EA is necessary if the agency’s proposed action falls under a categorical exclusion.<sup>56</sup> “Pursuant to CEQ regulations, each agency is required to identify categories of actions which do not individually or cumulatively have a significant effect on the human environment.”<sup>57</sup> The categorical exclusion procedures also provide for certain circumstances where a normally excluded action may have a significant environmental effect, in which case an EIS or an EA/FONSI will be required.<sup>58</sup>

On August 22, 2002, President Bush announced on the Healthy Forests Initiative.<sup>59</sup> The Initiative ordered the Departments of Agriculture and Interior and the CEQ “to improve regulatory processes to ensure more timely decisions, greater efficiency, and better results in reducing the risk of catastrophic wildfires by restoring forest health.”<sup>60</sup> In light of the Healthy Forests Initiative, the Forest Service developed the Fuels

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<sup>53</sup> *Id.*; 40 C.F.R. § 1508.9 (2008); Nat’l Parks & Conservation Ass’n v. Babbitt, 241 F.3d 722, 730 (9th Cir. 2001).

<sup>54</sup> *Id.* (quoting 40 C.F.R. § 1508.9 (2008)).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* (citing *Alaska Ctr. For the Env’t v. U.S. Forest Serv.*, 189 F.3d 851, 853-54 (9th Cir.1999)).

<sup>57</sup> *Id.* at 1019 (quoting *Alaska Ctr. for the Env’t*, 189 F.3d at 853-54).

<sup>58</sup> *Id.* (citing 40 C.F.R. §1508.4 (2007)).

<sup>59</sup> *Id.* See National Environmental Policy Act Documentation Needed for Fire Management Activities, Categorical Exclusions, 67 Fed. Reg. 77038, 77039 (Dec. 16, 2002) (codified at Forest Service Handbook 1909.15, ch. 30, §31.2(10) (2004)).

<sup>60</sup> *Sierra Club*, 510 F.3d at 1019. The Initiative was induced by 2000 fire season, one of the worst fire seasons in 50 years. *Id.* There were 123,000 fires that burned more than 8.4 million acres. *Id.* This was twice the national average for the past 10 previous years. *Id.*

## CATEGORICAL EXCLUSIONS IN THE 9<sup>TH</sup> CIRCUIT

categorical exclusion.<sup>61</sup> “The Fuels categorical exclusion is designed to reduce and thin hazardous fuels, which are ‘combustible vegetation (live or dead), such as grass, leaves, ground litter, plants shrubs, and trees, that contribute to the threat of ignition and high fire intensity and/or high rate of spread.’”<sup>62</sup> The Fuels CE includes “hazardous fuels reduction activities using prescribed fire, not to exceed 4,500 acres, and mechanical methods for crushing, piling, thinning, pruning, cutting, chipping, mulching and mowing, not to exceed 1,000 acres.”<sup>63</sup> If a proposed project falls under the Fuels categorical exclusion, there must be a project file that explains why the project is excluded and an explanation why no extraordinary circumstances exist.<sup>64</sup> Preceding the Fuels CE, the Forest Service Handbook (“FSH”) added language in the extraordinary circumstances section that allowed an action to continue under a categorical exclusion even though a listed resource condition exists.<sup>65</sup> The 1992 Forest Service guidance had given a non-exhaustive list of extraordinary circumstances.<sup>66</sup> However, now the factors on this non-exhaustive list are “resource conditions that should be considered” when determining if an extraordinary circumstance exists.<sup>67</sup> The new FSH guidelines give the Forest Service more discretion when determining if an extraordinary

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* (quoting Categorical Exclusions, 67 Fed. Reg. at 77,040). “Hazardous fuels reduction involves manipulation, including combustion or removal of fuels, to reduce the likelihood of ignition and/or to lessen potential damage to the ecosystem from intense wild fire and to create conditions where firefighters can safely and effectively control wildfires.” *Id.* (quoting Categorical Exclusions, 67 Fed. Reg. at 77,040-41).

<sup>63</sup> *Id.* (citing Forest Service Handbook § 1909.15, ch. 30 § 31.2(10) (1992)).

<sup>64</sup> *Id.* at 1019-20. See Forest Service Handbook § 1909.15, ch. 30 § 31.2(10) (1992)).

<sup>65</sup> *Sierra Club*, 510 F.3d at 1020.

<sup>66</sup> *Id.* at 1020-21 The list included: steep slopes or highly erosive soils; threatened and endangered species or their critical habitat; flood plains, wetlands, or municipal watersheds; Congressionally designated areas, such as wilderness, wilderness study areas, or National Recreation Areas; inventoried roadless areas; Research Natural Areas; and Native American Religious or cultural sites, archaeological sites, or historic properties or areas. *Id.* (citing Forest Service Handbook § 1909.15, ch. 30, § 31.2(2) (1992)).

<sup>67</sup> *Sierra Club*, 510 F.3d at 1021 (citing Forest Service Handbook § 1909.15, ch. 30, § 30.3(2) (2007)).

circumstance exists.<sup>68</sup> The new version of extraordinary circumstances of the FSH was prepared because of “public and employee confusion,” and judicial rulings interpreting the previous regulations to require that preparation of an EIS whenever a condition existed.<sup>69</sup>

### *B. Fuels Categorical Exclusion*

Categorical exclusions are strictly limited to situations where the impact on the environment is insignificant.<sup>70</sup> The threshold question for an NEPA case is whether or not the action to be taken will “significantly affect” the environment, thus triggering an EIS.<sup>71</sup> To assess significance properly, a programmatic cumulative impact analysis must be conducted for the Fuels categorical exclusion.<sup>72</sup> According to *Neighbors of Cuddy Mountain v. Alexander*,<sup>73</sup> conclusory statements in the cumulative impact analysis will not suffice because “general statements about ‘possible’ effects and ‘some risk’ do not constitute a ‘hard look’ absent a justification regarding why more definitive information could not be provided.”<sup>74</sup> Also, if determined that this will not be a significant effect on the environment, the agency must show that it made “reasoned decisions” and adequately explain its decision.<sup>75</sup> The Deputy Chief of the Forest Service required a data call for the main purpose of supporting the reasoning behind establishing the Fuels CE.<sup>76</sup> In the case of *California v. Norton*,<sup>77</sup>

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<sup>68</sup> *Id.* (citing Forest Service Handbook § 1909.15, ch. 30, § 30.3(2) (2007)).

<sup>69</sup> *Id.* See 67 Fed. Reg. at 54623-24; see also *Jones v. Gordon*, 792 F.2d 821, 828 (9th Cir. 1986) (holding that because the elements of the extraordinary circumstances provision were in this disjunctive, “if any of the elements is present, the Service must prepare an environmental assessment or an environmental impact statement”).

<sup>70</sup> 40 C.F.R. § 1508.4 (2008); see also *Alaska Ctr. for the Env't v. U.S. Forest Serv.*, 189 F.3d 851, 859 (9th Cir. 1999).

<sup>71</sup> 42 U.S.C. § 4332(2)(C) (2006). See *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998).

<sup>72</sup> *Sierra Club*, 510 F.3d at 1029.

<sup>73</sup> *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059 (9th Cir. 2002).

<sup>74</sup> *Id.* at 1380.

<sup>75</sup> *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989); see also *Alaska Ctr. for the Env't*, 189 F.3d at 859; see also 40 C.F.R. § 1505.1 (2005).

<sup>76</sup> *Sierra Club*, 510 F.3d at 1026.

<sup>77</sup> *California v. Norton*, 311 F.3d 1162 (9th Cir. 2002).

## CATEGORICAL EXCLUSIONS IN THE 9<sup>TH</sup> CIRCUIT

the Ninth Circuit court commented that a post-hoc examination of the data is not sufficient because it would “frustrate the fundamental purpose of NEPA, which is to ensure that federal agencies take a ‘hard look’ at the environmental consequences of their actions, early enough so that it can serve as a important contribution to the decision making process.”<sup>78</sup>

### C. 7th Circuit Decision

*Heartwood, Inc v. United States Forest Service*<sup>79</sup> is the only other case that has been decided on this issue. The plaintiffs in *Heartwood* claim that the Forest Service violated NEPA regulations because the Forest Service“(1) failed to conduct an EA on the proposed CE procedures and instead issued a finding of no significant environmental impact for the CE procedures (or alternatively, failed to conduct more extensive EIS once it was known that a FONSI was not appropriate); (2) failed to address or consider extraordinary circumstances before issuing the CEs; and (3) utilizing a ‘case-by-case’ CE procedure in part in an attempt to avoid NEPA requirements.”<sup>80</sup> The Forest Service responded with the same argument as in the instant case: it contended that when the CE rules were established, it was not adopting a federal action which would need an EA or EIS, but merely adopting an agency procedure.<sup>81</sup>

The Southern District Court of Illinois granted summary judgment to the Forest Service and the Seventh Circuit agreed.<sup>82</sup> The court relied on the CEQ definition of “major federal action” as “actions with effect that may be major and which are potentially subject to Federal control and responsibility...Actions include new and continuing activities...new or revised agency rules, regulations, plans, policies of procedures; and legislative proposals.”<sup>83</sup> This regulation also lists several categories of

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<sup>78</sup> *Id.* at 1175

<sup>79</sup> *Heartwood v. U.S. Forest Serv.*, 230 F.3d 947 (7th Cir. 2000).

<sup>80</sup> *Id.* at 951.

<sup>81</sup> *Id.* at 953.

<sup>82</sup> *Id.* at 954. “The Service action creating CE’s looks more like an implementing procedure than a federal action of the type contemplated in 42 U.S.C. § 4332(2)(C).” *Id.*

<sup>83</sup> *Id.* (quoting 40 C.F.R. § 1508.18 (2007)).

major federal action.<sup>84</sup> The Seventh Circuit rejected the Plaintiff's argument that the CE's fell into one of the categories.<sup>85</sup> The court stated that CE's are agency procedures and not proposed actions which make them categories of actions that do not necessitate an EA or EIS.<sup>86</sup>

#### IV. INSTANT DECISION

The Ninth Circuit disagreed with the District Court's decisions in the instant case. The Ninth Circuit concluded that because the Forest Service did not demonstrate that it made a "reasoned decision" to promulgate the Fuels categorical exclusion, the promulgation itself was "arbitrary and capricious."<sup>87</sup> The court also stated that "when an agency decides to proceed with an action in the absence of an EA or EIS, the agency must adequately explain its decision."<sup>88</sup> The court noted that the Forest Service failed to define the categorical exclusion with enough specificity, thus making an inadequate record because it conducted the data call as a post-hoc rationale for its determination to promulgate the Fuels CE.<sup>89</sup>

The Ninth Circuit also decided that the Forest Service took the inappropriate measure of deciding to establish a Fuels CE prior to conducting the data call because the Deputy Chief of the Forest Service intended for the data call to be good information for supporting a categorical exclusion for fuels treatment, rehab and salvage.<sup>90</sup> The court stated that to conduct a post-hoc examination would be going against the purpose of NEPA, which is designed for agencies to "take a hard look" at

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<sup>84</sup> *Id.* The list includes "Adoption of official policy, such as rules and regulations, and interpretations adopted pursuant to the APA, 5 U.S.C. § 551, et seq." 40 C.F.R. § 1508.18 (2007).

<sup>85</sup> *Heartwood*, 230 F.3d at 954.

<sup>86</sup> *Id.*

<sup>87</sup> *Sierra Club*, 510 F.3d 1016, 1026 (9th Cir. 2007). Under the Administrative Procedure Act (APA), a court may reverse a decision if the action is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at 1022 (quoting 5. U.S.C. §706(2)(A) (2000)).

<sup>88</sup> *Id.* (quoting *Alaska Ctr. for the Env't v. U.S. Forest Serv.*, 189 F.3d 851, 859 (9th Cir.1999)).

<sup>89</sup> *Id.* at 1026.

<sup>90</sup> *Id.*

## CATEGORICAL EXCLUSIONS IN THE 9<sup>TH</sup> CIRCUIT

the environmental consequences of actions under consideration.<sup>91</sup> The court also believed that the Forest Service failed to do the required “scoping process” before the promulgating the Fuels CE.<sup>92</sup> This process would require the appropriate Forest Service officer to consider “the cumulative impacts of connected, cumulative, and similar actions and...to produce an EA if the proposed project may have a significant effect on the environment.”<sup>93</sup> The Forest Service did not dispute the argument that they did not perform a cumulative impact analysis on the Fuels CE.<sup>94</sup> This court stated that performing impact analysis during the project level of the Fuels CE is not sufficient because it does not take into consideration impacts from the “past, present, or reasonably foreseeable future Fuels CE projects.”<sup>95</sup>

Another issue the Ninth Circuit had with the District Court decisions was that categorical exclusions are supposed to be for situations where there is minimal effect on the environment,<sup>96</sup> and the Forest Service failed to document that the proposed action was going to have a minimal effect on the environment.<sup>97</sup> The main question in a NEPA case is whether the proposed action will “significantly affect” the environment.<sup>98</sup> The court found that the Forest Service failed on this point by not “considering adequately the unique characteristics of the applicable geographic areas, the degree to which effects on the quality of the environment were controversial or the risks were unknown, the degree to which the [categorical exclusions] might establish a precedent for future action with significant effects or represented a decision in principle about future considerations, the degree to which the action might affect endangered species, and whether there existed cumulative impacts from other related action.”<sup>99</sup>

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<sup>91</sup> *Id.* (quoting *California v. Norton*, 311 F.3d 1162, 1175 (9th Cir. 2002)).

<sup>92</sup> *Id.* at 1026.

<sup>93</sup> *Id.* at 1027.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* See *Alaska Ctr.*, 189 F.3d at 859; see also 40 C.F.R. §1508.4.

<sup>97</sup> *Sierra Club*, 510 F.3d at 1027.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*; see also 40 C.F.R. § 1508.27(b) (2005).

The court also found that the Forest Service made a mistake by not considering “the extent to which the impact of the fuels reduction projects on the environment was highly controversial and the risks uncertain.”<sup>100</sup> Several state and federal agencies responded to the Fuels categorical exclusion expressing concerns on whether it would cause significant environmental harm and risks.<sup>101</sup> The Forest Service did not meet the burden to explain why the Fuels categorical exclusion would not have a significant environmental harm.<sup>102</sup>

The Ninth Circuit also noted that the Fuels CE lacked the requisite specificity of the CEQ regulations.<sup>103</sup> The regulations required that categorical exclusions include “specific criteria for and identification of those typical classes of action...which normally do not require either an environmental impact statement or an environmental assessment (categorical exclusions (§1508.4)).”<sup>104</sup> The court found that the Fuels CE did not have the requisite specificity that is needed to ensure that projects taken under it can “achieve the objective of hazardous fuels reduction, but do not individually or cumulatively inflict a significant impact.”<sup>105</sup>

Finally, the court held that the Sierra Club met the burden for injunctive relief.<sup>106</sup> The court noted that because environmental injury is difficult to remedy, damages may often be permanent.<sup>107</sup> Injunctive relief is not always the answer, but when the proposed project is highly likely to harm significantly the environment, injunctive relief is appropriate.<sup>108</sup>

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<sup>100</sup> *Sierra Club*, 510 F.3d at 1030.

<sup>101</sup> *Id.* at 1031. The Court noted that this was a sufficient controversy because there were close to 39,000 comments from different agencies concerning the Fuels categorical exclusion. *Id.* at 1020.

<sup>102</sup> *Id.* at 1032.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* (quoting 40 C.F.R. § 1507.3(b)(2) (2005)).

<sup>105</sup> *Id.* The Court stated that the Forest Service “must take specific account of the significant impacts identified in prior hazardous fuels reduction projects and their cumulative impacts in the design and scope of any future Fuels categorical exclusion so that any such impacts can be prevented.” *Id.*

<sup>106</sup> *Id.* at 1033.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* (quoting *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 733 (9th Cir. 2001))

## CATEGORICAL EXCLUSIONS IN THE 9<sup>TH</sup> CIRCUIT

The District Court's decision was vacated and the Ninth Circuit remanded the case with injunction instructions to prevent the Forest Service from implementing the Fuels CE until it has completed the proper NEPA assessment.<sup>109</sup>

### V. COMMENT

Valid arguments are made on both sides of the instant case. However, this note will discuss why there may not be enough evidence to support the decision that the Forest Service must complete the proper NEPA assessment before implementing the Fuels CE. One of Sierra Club's main arguments is that NEPA applies to agency rules, and thus an EA or EIS is required.<sup>110</sup> However, as Forest Service argues, the regulation does not apply to "all agency rules, but only those that have a *significant effect* on the environment."<sup>111</sup> In addition, the regulations also explicitly state that an EA or EIS is not required for categorical exclusions, by their mere definition that they do not have a significant effect on the human environment.<sup>112</sup> The Federal Register Notices for the Fuels CE also explained that CEQ "does not direct agencies to prepare a NEPA analysis before establishing agency procedures [such as new categorical exclusions] that supplement the CEQ regulations for implementing NEPA."<sup>113</sup> Because the CEQ has the authority over interpreting NEPA and how agencies implement NEPA, it should be given substantial deference. The CEQ examined both the procedures and

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<sup>109</sup> *Id.*

<sup>110</sup> Brief of Appellee at 16, n. 8, *Sierra Club v. Bosworth*, 510 F.3d 1016 (9th Cir. 2007) (No. 05-16989), 2006 WL 3032965.

<sup>111</sup> *Id.* (emphasis added).

<sup>112</sup> 40 C.F.R. § 1508.4 (2005) 'Categorical Exclusion' means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in §1508.9 even though it is not required to do so. *Id.*

<sup>113</sup> 68 Fed. Reg. 33,814, 33,823 (June 5, 2003).



substance of the Fuels CE and approved without finding anything that did not conform to the statute or regulations.<sup>114</sup> It seems clear that the language of the regulations do not require an EA or EIS for categorical exclusions. The basic definition of a categorical exclusion indicates that they do not have a significant effect on the human environment. Also, Congress has given the CEQ the authority to be in charge of how NEPA is implemented. Thus, the analysis and decision of the CEQ regulations should have been given due deference.

The Ninth Circuit also should have referred more to the Seventh Circuit's decision in *Heartwood v. Forest Service*.<sup>115</sup> The Seventh Circuit examined this very same issue: if the Forest Service must prepare an EA or EIS prior to issuing a categorical exclusion. It held that the Forest Service was not required to do so. In its analysis, the Seventh Circuit said that the Forest Service's action creating categorical exclusions seemed more like implementing procedure, rather than a federal action that is stated in 42 U.S.C. § 4332(2)(C).<sup>116</sup> The CEQ defines "major federal action" along with several categories of them including "adoption of official policy, such as rules and regulations, and interpretations adopted pursuant to the APA..."<sup>117</sup> The court stated that the creation of categorical exclusions is an agency procedure and not proposed actions that would require an EA or EIS. The creation of categorical exclusions falls into a category of actions for which EA and EIS are not necessary.<sup>118</sup> The plaintiffs in *Heartwood* seem to believe that conducting an EA would

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<sup>114</sup> Brief of Appellee, *supra* note 110, at 16.

<sup>115</sup> *Heartwood*, 230 F.3d at 954

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* (citing 40 C.F.R. § 1508.18 (2005)). Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 et seq., with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions. 40 C.F.R. 1508.18(a).

<sup>118</sup> *Heartwood*, 230 F.3d at 954.

## CATEGORICAL EXCLUSIONS IN THE 9<sup>TH</sup> CIRCUIT

be the only way to determine if an EIS is necessary, however, the Seventh Circuit pointed out that categorical exclusions, by definition, have no significant effect on the human environment.<sup>119</sup> Although, this decision is by another Circuit Court, the Ninth Circuit should have taken a more detailed assessment of that circuit's reasoning and made a stronger argument why it thought that decision was incorrect. The similarity in fact patterns should have indicated the persuasive authority of the case to the Ninth Circuit.

Instead, the Ninth Circuit relied on two of its own cases for support. However, neither addresses the same legal issue as in the instant case. In *Kootenai Tribe of Idaho v. Veneman*,<sup>120</sup> almost 60 million acres of land were at issue. This court stated that a decision to end active management of the area was a significant effect. But the Fuels CE in the instant case involves a small amount of hazardous fuel reduction. It does not change how land is managed. The court also referenced *Citizens for Better Forestry v. U.S. Dept. of Agriculture*.<sup>121</sup> That case stated that an EA was issued for nation-wide forest planning, but nowhere did the case state that the EA was a requirement. Thus, these two cases do not control the issue at hand.

Two Circuits have already addressed the issue of whether or not an EA or EIS is necessary for categorical exclusions. The CEQ regulations appear to be clear enough to resolve this issue. However, this is an issue that the Supreme Court should rule on to resolve the split amongst the Circuits. If Circuits refuse to refer to one another, without consulting rulings from other circuits, this issue will not resolve itself. However, there will always be arguments on the other side claiming that there was not sufficient analysis to determine that a categorical exclusion does not have a significant effect on the human environment. But it needs to be understood that the basic definition of a categorical exclusion states that it does not have a significant effect on the human environment.

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<sup>119</sup> *Id.* "...Plaintiffs seem to suggest that conducting an EA is the only way to determine whether or not the revised policy and procedures will significantly affect the quality of environment. We have found nothing in the statute, the regulations or the case law to substantiate this claim." *Id.*

<sup>120</sup> *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1104 (9th Cir. 2002).

<sup>121</sup> *Citizens for Better Forestry v. U.S. Dept. of Agric.*, 341 F.3d 961 (9th Cir. 2003).

VI. CONCLUSION

What seems to be a relatively easy issue has yielded different conclusions from the different circuits. Four separate courts have examined this same exact issue. The South District Court of Illinois, the Eastern District Court of California and the Seventh Circuit have all decided that an EIS or EA/FONSI is not required for a categorical exclusion because they, by definition, do not have a significant effect on the human environment. However, the Ninth Circuit refused to follow the persuasive authority of the Seventh Circuit nor give adequate deference to the Southern District Court of Illinois. By holding the opposite of the Seventh Circuit, the Ninth Circuit (perhaps inadvertently) created a circuit split on the issue of whether categorical exclusions need an EA or EIS. The best way to solve this issue would be for the Supreme Court of the United States to rule on this matter. Such a ruling would prevent further disagreement between the district and circuit courts.

JERRI J. ZHANG