

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

OCT 19 2022

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

CASCADE FOREST CONSERVANCY;
GREAT OLD BROADS FOR
WILDERNESS; WASHINGTON NATIVE
PLANT SOCIETY; SIERRA CLUB; JOHN
BISHOP; JAMES E. GAWEL; SUSAN
SAUL,

Plaintiffs-Appellants,

v.

UNITED STATES FOREST SERVICE,

Defendant-Appellee.

No. 22-35087

D.C. No. 3:21-cv-05202-RJB

MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Robert J. Bryan, District Judge, Presiding

Argued and Submitted October 7, 2022
Portland, Oregon

Before: OWENS and MILLER, Circuit Judges, and PREGERSON,** District
Judge.

Cascade Forest Conservancy and others (“Cascade”) appeal from the district

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The Honorable Dean D. Pregerson, United States District Judge for
the Central District of California, sitting by designation.

court’s summary judgment in their suit challenging a planned action by the United States Forest Service (“Forest Service”) under the Administrative Procedure Act (“APA”). The planned action—“Spirit Lake Tunnel Intake Gate Replacement and Geotechnical Drilling Project” (the “Project”)—intends to address the threat posed by a potential catastrophic breach of Spirit Lake, which is part of the Mount St. Helens National Volcanic Monument (“Monument”). We review *de novo* the district court’s grant of summary judgment. *Bark v. U.S. Forest Serv.*, 958 F.3d 865, 869 (9th Cir. 2020). “Under the APA, we may overturn an agency’s conclusions when they are ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” *Id.* (quoting 5 U.S.C. § 706(2)(A)). As the parties are familiar with the facts, we do not recount them here. We affirm.

1. The district court properly granted summary judgment on Cascade’s claims under the National Environmental Policy Act (“NEPA”).

“NEPA imposes procedural requirements designed to force agencies to take a ‘hard look’ at environmental consequences of their proposed actions.” *Id.* at 868 (citation and internal quotation marks omitted). Under NEPA, agencies must prepare an Environmental Impact Statement (“EIS”) for major federal actions “significantly affecting the quality of the human environment.” 42 U.S.C.

§ 4332(2)(C); *see also* 40 C.F.R. § 1502.3.¹ To determine whether a proposed action will have a significant effect, an agency may first prepare an Environmental Assessment (“EA”) to determine if a more detailed EIS is required. 40 C.F.R. §§ 1501.3, 1508.9. “An EIS is required when this process raises ‘substantial questions’ about whether an agency action will have a significant effect.” *Bark*, 958 F.3d at 868 (citation omitted). “If the agency concludes in the EA that there is no significant effect from the proposed project, the federal agency may issue a finding of no significant impact (‘FONSI’) in lieu of preparing an EIS.” *Id.* at 868 (citation omitted); *see also* 40 C.F.R. § 1508.13.

The record reflects that the Forest Service’s EA took the requisite “hard look” at the direct, indirect, and cumulative effects of the Project, including on scientific research and in conjunction with the effects of past, present, and reasonably foreseeable future actions. *Bark*, 958 F.3d at 868 (citation and internal quotation marks omitted); *see also* 40 C.F.R. § 1508.25.

The record also reflects that the Forest Service did not act arbitrarily, capriciously, or contrary to law in issuing a FONSI and determining that an EIS was unnecessary based on its conclusion that the Project would not have a

¹ All citations to the NEPA regulations refer to those codified at 40 C.F.R. Part 1500 (2018). “The NEPA regulations have been revised, 85 Fed. Reg. 43,304 (July 16, 2020), but we look to the regulations in place at the time of the challenged decision.” *Env’t Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 879 n.5 (9th Cir. 2022).

significant effect on the quality of the human environment. “Whether an action ‘significantly’ affects the environment requires analyzing both ‘context’ and ‘intensity.’” *Wild Wilderness v. Allen*, 871 F.3d 719, 727 (9th Cir. 2017) (citing 40 C.F.R. § 1508.27). Contrary to Cascade’s contentions, the Forest Service reasonably considered the factors for evaluating “intensity.” 40 C.F.R. § 1508.27(b).

2. In addition, the district court properly granted summary judgment on Cascade’s claim under the National Forest Management Act (“NFMA”). The NFMA claim arises from the Forest Service’s Project-specific amendment to the Gifford Pinchot National Forest Land and Resource Management Plan (“Gifford Pinchot Forest Plan”) to allow a “variance” and lower the visual quality objective from “retention” to “partial retention” for the approximately 475 acres affected by the Project (less than 0.5 percent of the Monument) and for the duration of the Project (5 to 10 years).

Contrary to Cascade’s contention that the Forest Service cannot “exempt” the Project from compliance with the Gifford Pinchot Forest Plan’s visual quality objective of retention, NFMA and the relevant regulations (“2012 Planning Rule”) allow for a project-specific amendment to a forest plan. *See* 16 U.S.C. § 1604(f)(4) (providing that a forest plan may be “amended in any manner whatsoever” as long as certain requirements are met); 36 C.F.R. § 219.13(a) (“A

plan may be amended at any time. Plan amendments may be broad or narrow, depending on the need for change[.]”); *id.* § 219.15(c)(4) (allowing for amendments “limited to apply only to the project” if a proposed project is inconsistent with a forest plan).

In addition, the Forest Service complied with the 2012 Planning Rule, determining that two substantive requirements were “directly related” to the amendment, applying these substantive requirements “within the scope and scale of the amendment,” and reasonably concluding that the amendment will meet the overarching goals of these substantive requirements. 36 C.F.R. § 219.13(b)(5).

Therefore, the Forest Service did not act arbitrarily, capriciously, or contrary to law through the Project-specific amendment.

AFFIRMED.