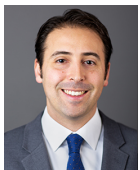


NEPA in the Ninth Circuit: A Rare Look at Impacts to Redwood Forests and "Downstream" Carbon Emissions

Key Points

- In a rare move, the Ninth Circuit Court of Appeals published two opinions about subjects that are hardly ever discussed in the court's published National Environmental Policy Act (NEPA) decisions. For the first time in more than three decades, the court examined impacts to an old-growth redwood forest, and for the first time since 2016, the court examined indirect (downstream) carbon emissions.
- In [*Bair v. California Department of Transportation*](#), the Ninth Circuit reversed a lower court decision that held the California Department of Transportation (Caltrans) failed to adequately study impacts of a roadway-widening project on an old-growth redwood forest. The Ninth Circuit emphasized that the lower court's disagreement with Caltrans' findings "does not constitute a NEPA violation" because Caltrans adequately considered all relevant evidence regarding potential environmental impacts.
- In [*Center for Biological Diversity v. Bernhardt*](#), the Ninth Circuit held that the Bureau of Ocean Energy Management did not provide an adequate analysis of the environmental consequences of an oil drilling project. The Ninth Circuit criticized the Bureau for providing an "implausible" analysis that concluded the project's approval would lead to fewer global carbon emissions than not approving the project.



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Since 1970, NEPA has required public agencies to disclose the environmental impacts of certain projects that affect environmental resources. When those disclosures are challenged in court, judges generally defer to the agency's findings unless the findings are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Courts apply a rule known as the "hard look doctrine," where an agency's actions are considered to be arbitrary and capricious if the agency failed to take a hard look at the consequences of its actions, based on a consideration of all relevant evidence. While courts are required to provide a "searching and careful" analysis of "whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment," a court "cannot substitute [its] own judgment for that of the [agency]." See *Ocean Advocs. v. U.S. Army Corps of Eng'rs* (9th Cir. 2005) 402 F.3d 846, 858-859. Courts will "uphold a decision

'of less than ideal clarity if the agency's path may be reasonably discerned,' but [courts] cannot 'supply a reasoned basis for the agency's action that the agency itself has not given.'" See *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.* (1983) 463 U.S. 29, 43.

For the first time since its 1988 decision in *Sierra Club v. U.S. Forest Service* (9th Cir. 1988) 843 F.2d 1190, the Ninth Circuit has published a new decision that applies the hard look doctrine in a case about impacts to an old-growth redwood forest. Specifically, in *Bair v. California Department of Transportation* (9th Cir. 2020) 982 F.3d 569, the court held that Caltrans satisfied the "hard look" requirement because Caltrans findings were supported by a detailed arborist's report. The *Bair* decision provides crucial guidance about the types of expert reports that are needed to support NEPA analyses for impacts to redwoods.

In a separately published decision, *Center for Biological Diversity v. Bernhardt* (9th Cir. 2020) 982 F.3d 723, the Ninth Circuit examined indirect "downstream" carbon emissions associated with the construction of a new oil extraction project in Alaska (e.g., emissions from transporting and storing oil). *Bernhardt* was the first NEPA case to examine indirect carbon emissions since the court's 2016 opinion in *Protect Our Communities Foundation v. Jewell* (9th Cir. 2016) 825 F.3d 571. In *Bernhardt*, the Bureau of Ocean Energy Management concluded that constructing an oil extraction facility would lead to fewer total carbon emissions than an alternative future outcome where the project is not constructed. According to the Bureau, without the project, oil would need to be sourced from foreign countries with weaker environmental regulations, where the transportation and storage of oil would result in increased total carbon emissions. However, the Ninth Circuit concluded that the Bureau's analysis was flawed and failed to comply with the hard look doctrine because construction of the project would lead to a greater supply of oil in the market, which would in turn lower global oil prices and incentivize increased oil consumption. The *Bernhardt* decision will provide important guidance for structuring future NEPA analyses of indirect carbon emissions for oil extraction facilities.

Fundamentally, both of these cases provide important insights for practitioners about the extent to which courts will scrutinize agency decisions, and both cases offer important lessons for agencies that will review similar environmental impacts for future projects.

Bair v. California Department of Transportation: A Road-Widening Project's Impacts on an Old-Growth Redwood Forest

The *Bair* case involved a project to widen portions of Highway 101 and straighten curves in Richardson Grove State Park in Humboldt County, California. Although a number of old-growth redwood trees were located adjacent to the roadway, the agency in charge of carrying out the project, Caltrans, ultimately determined that the impacts to trees in Richardson Grove would be minor. Consequently, in 2010, Caltrans issued an Environmental Assessment and a Finding of No Significant Impact.

After a group of local residents filed lawsuits in 2010 and 2014 to challenge Caltrans' NEPA findings, Caltrans revised the project to narrow the proposed roadway and commissioned additional arborist studies. Consequently, in 2017, Caltrans issued revisions to the 2010 Environmental Assessment and Finding of No Significant Impact. In its revisions, Caltrans included a detailed arborist report that examined each individual tree at the project site. The report concluded that "none of the proposed highway alterations is of sufficient magnitude to threaten the health or stability of any old-growth redwood" because "disturbances would be confined to a small percentage of the area occupied by roots and would be well within the adaptive capabilities of the tree[s]."

Despite these revisions, local residents filed another lawsuit in 2017 alleging that Caltrans' NEPA findings were still inadequate. The district court agreed with the plaintiffs that Caltrans failed to adequately consider several key issues:

1. potential root suffocation when roots are covered by pavement;
2. root disease caused by construction in root zones; and
3. potential collisions with trees.

Because of those deficiencies, the district court determined that Caltrans had not taken the requisite "hard look" at the environmental impacts of the Project.

The Ninth Circuit reversed the district court's ruling and held that Caltrans' NEPA findings, as supplemented and revised by the arborist reports, provided the required hard look at the project's effects. The Ninth Circuit offered a number of observations about the adequacy of Caltrans' findings for the project's impacts:

- **Tree Suffocation:** Caltrans considered the possibility that paving could harm the trees but simply (and reasonably) concluded that there was sufficient evidence to the contrary. The project would use a special material to allow "greater porosity" and to "promote air circulation" under the roadway asphalt, and Caltrans adequately assessed the amount of paving that would be placed over the root zone of each tree.
- **Construction Within Root Zones:** Caltrans appropriately considered the extent and effect of the construction activity that would occur in the structural root zones of redwood trees. Although there was one sentence in a California Department of Parks and Recreation handbook that recommended that no construction should take place in the structural root zone "of a protected tree," the Ninth Circuit held that Caltrans was not obligated to defer to that opinion. According to the Ninth Circuit, "NEPA anticipates that the administrative record may contain contradictory and conflicting opinions, expert and otherwise, and does not require an agency to follow all recommendations made by commentators, other agencies, or experts." The Court concluded that Caltrans did not need to defer to the generalized recommendations in the Department of Parks and Recreation handbook because Caltrans' analysis relied on an arborist's detailed schematic drawings of all trees with root zones within the Project area and provided individualized details for the impacts to each root zone.
- **Collisions With Trees:** Due to the width and curvature of the existing roadway, trucks that are longer than 65-feet were not permitted on the section of highway that would be widened by this project. The plaintiffs argued that longer trucks are more difficult to maneuver, and following the completion of the project, the presence of longer trucks would lead to increased collisions with (and damage to) redwoods located adjacent to the roadway. The Ninth Circuit held that Caltrans reasonably concluded that widening the roadway would decrease the incidence of vehicles colliding with trees. The court characterized the plaintiffs' argument as an "assumption" that was not supported by any evidence in the record.

In this case, the Ninth Circuit emphasized that while the district court may disagree with Caltrans' conclusions, that disagreement "does not constitute a NEPA violation." The Ninth Circuit's analysis of these environmental effects will likely provide important guidance for agencies carrying out other projects that may affect trees. Caltrans' detailed arborist report will be a key benchmark for the level of expert analysis that is needed to support future NEPA disclosures of impacts to sensitive tree species.

Center for Biological Diversity v. Bernhardt: An Oil Drilling Project's "Downstream" Carbon Emissions

The *Bernhardt* case involved an oil extraction project off the coast of Alaska in the Beaufort Sea. The project, known as the “Liberty Prospect Project” (the “project”), would be the first oil development project fully submerged in federal waters.

In its review of the indirect “downstream” carbon emissions associated with the transportation and storage of fuel produced by the project, the Bureau of Ocean Energy Management concluded that the construction of the project would result in fewer carbon emissions (64.5 million carbon dioxide [CO₂] equivalents) than a “no-action alternative” (i.e., a situation in which the project is not constructed, resulting in 89.9 million CO₂ equivalents). According to the Bureau’s NEPA findings, the no-action alternative would result in more emissions because oil not produced at the Liberty Prospect Project would come from foreign countries with “comparatively weaker environmental protection standards associated with exploration and development of the imported product and increased emissions from transportation.”

The Center for Biological Diversity (Center) filed a lawsuit challenging the Bureau’s NEPA findings. The Center argued that the Bureau failed to take the required hard look at the environmental effects of the project. According to the Center:

“[The Bureau] reached [its NEPA findings] by omitting a key variable in its analysis: foreign oil consumption. If oil is produced from Liberty, the total supply of oil in the world will rise. Increasing global supply will reduce prices. Once prices drop, foreign consumers will buy and consume more oil. The model used by [the Bureau] assumes that foreign oil consumption will remain static, whether or not oil is produced at Liberty.”

This omission, according to the Center, makes the Bureau’s analysis “misleading” because it fails to capture the emissions caused by increased global consumption in its estimate of the project’s carbon emissions. In response to the Center’s arguments, the Bureau claimed that impacts on greenhouse gas resulting from such reductions in oil consumption are not captured in the NEPA analysis because the Bureau determined it did not have sufficiently reliable information on foreign emissions factors and consumption patterns. The Center replied that the Bureau was both required and able to estimate this data and in its NEPA analysis.

Ultimately, the Ninth Circuit agreed with the Center and held that the Bureau’s analysis was “implausible.” The Ninth Circuit concluded that the Bureau failed to take a hard look at the consequences of its actions because it failed to provide an adequate explanation for its conclusion that the construction of the project would result in fewer carbon emissions than the no-action alternative. According to the Ninth Circuit:

“The record belies [the Bureau]’s contention that it could not have summarized or estimated foreign emissions with accurate or credible scientific evidence. [Citation.] Various studies provided by [the Center] in the administrative record confirm the effect of increasing domestic oil supply on foreign consumption and the feasibility of its estimation.”

The Ninth Circuit also concluded that if it were really impossible for the Bureau to quantify foreign oil consumption, the Bureau “still must thoroughly explain why such an estimate is impossible.” The Ninth Circuit held that the Bureau’s two-page rationale for its decision to omit foreign oil consumption from its methodology was “insufficient” because it “did not summarize existing research addressing foreign oil emissions nor attempt to estimate the magnitude of such emissions.” The Ninth Circuit emphasized that courts will “uphold a decision ‘of less than ideal clarity if the agency’s path may be reasonably discerned,’ but we cannot ‘supply a reasoned basis for the agency’s action that the agency itself has not given.’”

Like the *Bair* case, the *Bernhardt* decision will likely provide important guidance for similar projects in the future. When examining oil extraction projects, agencies will need to provide adequate evidence to substantiate findings regarding carbon emissions associated with no-action alternatives.

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