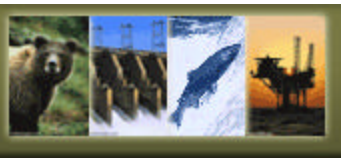
Land Letter
THE NATURAL RESOURCES WEEKLY REPORT



Printable version: Thursday, November 2, 2006

4. FORESTS: Parties must wait for decision on forest planning rule

Arthur O'Donnell, *Land Letter* editor

SAN FRANCISCO -- Judge Phyllis Hamilton told parties she is not ready to rule on summary motions filed in two consolidated cases challenging the Bush administration's revisions to a planning rule adopted last year that would affect all 192 million acres of national forest.

During oral arguments held yesterday in the U.S. District Court for Northern California, attorneys for Defenders of Wildlife, Citizens for Better Forestry (CBF) and the California Office of the Attorney General argued that the 2005 rule should be voided because the Forest Service failed to follow provisions of the National Environmental Policy Act, the Endangered Species Act and the Administrative Procedure Act. In particular, they challenged the agency's declaration of a "categorical exclusion" from public notice, comment and consultation provisions of NEPA [Defenders of Wildlife et al. v. Mike Johanns et al, C04-4512PJH; and Citizens for Better Forestry v. U.S. Department of Agriculture et al., 05-01144PHJ].

In response, the Department of Justice argued that the action of formulating the rule change was so far removed from any actual impacts on lands or species that the agency would not be able to conduct any meaningful environmental analysis. The Forest Service is not avoiding the law, said DOJ senior attorney Cynthia Huber. Instead it is reserving such analysis and activities until the more appropriate time, when a specific forest plan or program is being considered.

Both sides agreed that the revisions to the rule represent a "paradigm shift" in how the Forest Service directs local forest units to devise forest management plans. But what the government described as "changing to a more flexible and less prescriptive framework," the plaintiffs criticized as "moving from a protective standard to a weaker one."

What the plaintiffs want, said California Deputy Attorney General Raissa Lerner, is for the court to set aside the 2005 rule and reinstate the 1982 regulation. While there was a suggestion to use a rule promulgated by the Clinton administration in 2000, which was overturned by the Bush administration, the environmental groups were also opposed to that version. All of the forest management plans currently in effect were done under the 1982 regulations, Lerner said, and going back to that "will not cause chaos."

The environmentalists' attack on the rule was laid out in three parts. Attorney Pete Frost, representing CBF, said that the Forest Service failed to provide any kind of NEPA environmental assessment of the impacts its rule change would have on protected species and lands. While a full-blown environmental impact statement should be required under NEPA, he said, at the very least there should have been an environmental assessment involving three elements of NEPA: the viability requirement; a description of the affected environment; and a reasonable range of alternative. "That's entirely missing in this," Frost said.

Use of the categorical exclusion is inappropriate, Frost said. "The categorical exclusion doesn't fit. Even if it does, the rule has indirect effects that require the agency to prepare a NEPA analysis."

Frost similarly argued that the Forest Service ignored provisions of the ESA that require the agency to consult with other federal agencies, such as the Fish and Wildlife Service, on potential effects of the rule change. While the government again asserted a categorical exclusion, Frost said that the extent of impacts the new rules will have "stretched CE past the breaking point."

The plaintiffs frequently referred to the recent decision in the "States Petitions" case, which threw out the Bush

administration's attempt to revise the Roadless Area Conservation Rule of 2001 -- although the government attorney characterized that order as "mistaken" and subject to appeal.

Where the order should guide the current decision, Frost said, is "when an agency moves to a weakened and diminished standard, it is required by NEPA to analyze the consequences."

Surprise provisions

Representing Defenders of Wildlife, Earthjustice attorney Trent Orr further argued that the agency violated APA by not giving the public sufficient ability to comment on significant changes it was proposing. "In the final rule, the Forest Service deleted a variety of very specific protective standards that had been in the [prior] rules," he said. In addition, the rule declared that forest units should employ an adaptive management technique called "environmental management system" of which Orr said, "there was absolutely no mention of in the proposed rule."

The agency also applied an administrative corrections provision, that is meant to correct nonconsequential errors, maps and data without having to undergo a lengthy public review process. Instead, Orr said, the rule would apply it to such key determinations as timber harvest estimates or species monitoring programs that are "subject to intense public interest."

Together these amount to significant changes in the way the Forest Service manages its lands, Orr said. "I don't see how announcing a paradigm shift in the final rule can be considered by any stretch of the imagination as giving the public the chance to comment on it."

A distant tier of impacts

In defense, DOJ attorney Huber held to a consistent line of argument that the "2005 rule is so far removed from having on-the-ground or ground disturbing effects, there is no meaningful way to analyze what impacts there might be."

Huber also said that use of the categorical exclusion was "entirely appropriate" in cases of amending and revising existing plans, when the agency has reviewed its history of actions and determined the planning rules will not have a significant environmental impact. "Use of the CE is not getting out of NEPA. It is the right NEPA process for this action," she said. "These are service-wide rules, processes and instructions that deal with all 192 million acres of land. The simple fact that there are threatened and endangered species on some Forest Service lands does not mean there are significant environmental effects on those species."

Huber concluded, "The agency is not suggesting that analysis will never be appropriate, but the timing is not right."

In her comments prior to the oral arguments and in her line of questioning, Judge Hamilton seemed amenable to an argument against conducting a full environmental impact statement for the rule revision but said she did not understand the position that agency consultations were not necessary. "The defense raised an issue I find most troublesome," she said. "How does the Forest Service really analyze environmental impacts of changing its processes? This is not a discrete issue, but indeed the entirety of how it conducts these reviews."

On the other hand, with regard to the ESA, Hamilton observed, "The law requires a duty of consultation almost always on some level. Frankly, I don't understand the government's position on why no consultation was necessary." She also questioned the lack of public comment ability on the final rule's "paradigm shift."

On the question of remedies, should the government be found in violation on any of the counts, the judge seemed to contemplate issuing an injunction against the 2005 rule while remanding the issue back to the agency.

"We believe remand is an appropriate remedy," said DOJ attorney Huber. "But we don't believe an injunction is appropriate without further briefing ... until we have a better idea of what the nature and extent of the violations are."

In the end, though, the judge told the parties she was not prepared to rule on their summary motions and that they should not expect a decision "really soon."

Senior reporter Dan Berman also contributed to this story.