

Bush admin seeks reversal of USFS planning rule injunction

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The Bush administration is asking a federal judge in San Francisco to repeal her nationwide injunction against its forest planning rule, or limit the injunction to Northern California.

The administration is arguing that Judge Phyllis Hamilton of the U.S. District Court for the Northern District of California misread the Forest Service's actions in drafting the 2005 planning rule in regards to the Endangered Species Act and use of categorical exclusions under the National Environmental Policy Act.

"The holdings are based on clear errors of fact and law," the Justice Department says in a brief filed with Hamilton. "These errors form the underpinnings of the analysis, without which defendants believe the court's conclusions would be different."

In March, Hamilton enjoined the Forest Service rule that governs how 155 national forests and 20 national grasslands develop their individual forest plans, documents that govern activities from timber harvests to recreation and protecting endangered plants and animals.

The state of California and 19 environmental groups argued the administration removed environmental protections without providing for proper public comment or considering the effect on endangered species ([E&ENews PM](#), March 30).

Hamilton should also limit her ruling to the Northern District of California, DOJ argues, "based on the doctrine of non-acquiescence and the United States' unique interest in obtaining judicial consideration of the important issues raised in this case in different districts and circuits."

Defenders of Wildlife attorney Mike Leahy said DOJ has a difficult case. "They frame it as 'please clarify your scope because people might see it as being applied nationwide,' when presumably she intended it to be applied nationwide," Leahy said. Previous nationwide injunctions on Forest Service policies, including various versions of the Roadless Rule and on the use of categorical exclusions for timber cuts have been upheld.

A hearing is tentatively scheduled for May 23.

Moving ahead?

While attempting to reverse or limit Hamilton's ruling, the Forest Service plans to take additional public comment on the 2005 planning rule, conduct new environmental analysis and address ESA concerns raised by Hamilton, according to a memo from Deputy Chief Joel Holtrop.

No timeline has been set to address Hamilton's objections to the planning rule, an agency spokesman said.

Due to Hamilton's order, forest managers may not issue proposed plans or final plans under the 2005 rule, but forests such as Alaska's Tongass National Forest that were using the Reagan-era regulations may proceed.

"We do want you to maintain the collaborative relationships you have built and there are many forest and grasslands planning activities and analyses that are in accordance with the National Forest Management Act and independent of the planning rule in effect," Holtrop wrote.

The Forest Service and timber industry say the 2005 rule properly focuses attention at the project level, but critics say plans developed under the 2005 rule would make it more difficult to challenge individual projects, because the new plans have no enforceable standards such as specific limits on logging or watershed protections.

At least 39 forests and grasslands have begun to revise or draft forest plans under the 2005 rule. Only one new plan -- for the Cimarron and Comanche National Grasslands in Kansas and Colorado -- has been completed. In Colorado, the Forest Service on Monday suspended a public comment period on the Grand Mesa, Uncompahgre and Gunnison National Forests plan due to the uncertainty over the 2005 regulation.

In her March ruling, Hamilton declined to say whether the Forest Service's planning rule is lawful. Instead, Hamilton ruled the agency violated the Administrative Procedure Act, NEPA and ESA when it drafted, revised and published the rule.

DOJ argues the Forest Service properly documented the effect of the planning rule on endangered species, issuing a "no effect" determination and that Hamilton based her NEPA analysis on a "fundamental misunderstanding."

For ESA, the plaintiffs charged the Forest Service failed to consult with the Fish and Wildlife Service and National Marine Fisheries Service in particular -- on what the rule would mean for wildlife in national forests.

The 2005 planning rule removed a requirement to manage forests to ensure "viable populations" of at-risk species in national forests in forest plans and required managers to develop plans more broadly and put social and economic considerations on par with ecological sustainability.

On NEPA, Hamilton ruled the Forest Service improperly applied a categorical exclusion to the planning rule and therefore failed to adequately consider the environmental effects of the rule change.

The Forest Service argued the 2005 rule was "strategic and aspirational in nature and generally will not include decisions with on-the-ground effects that can be meaningfully evaluated." Therefore, it did not issue an environmental assessment or environmental impact statement for the planning rule.

[Click here](#) to view Judge Hamilton's ruling.