Supreme Court May Bar Groups From Contesting Federal Rules

By J.R. Pegg

WASHINGTON, DC, October 9, 2008 (ENS) - The U.S. Supreme Court on Wednesday appeared sympathetic to a legal position held by the Bush administration that would limit environmentalists and other public interest groups from challenging federal regulations.

The case centers on a dispute over rules imposed by the U.S. Forest Service, but legal experts contend the court's ultimate decision could have far-reaching impacts and make it nearly impossible for many individuals and third parties to contest rules enacted by federal agencies.

The origins of the case lie in regulations enacted by the Bush administration in 2003 that limited some federal timber sales and logging projects from the agency's usual notice, comment and appeal procedures.

The 2003 Forest Service rules affected timber projects of less than 250 acres and "forest thinning" projects of 1,000 acres or less.

The agency applied these rules to a decision it made in September 2003 authorizing a salvage timber sale in the Sequoia National Forest. The Burnt Ridge Project covered 238 acres of land burned in a massive fire that ravaged the California forest in 2002.

Volunteers from Earth Island Institute monitor a timber sale in the Sequoia National Forest
(Photo © Rachel Fazio courtesy Earth Island Institute)

A coalition of environmental groups sued to block the sale. The Forest Service subsequently withdrew the sale and settled the case, but environmental groups challenged the underlying regulations, arguing the Bush administration violated the Forest Service's Appeals Reform Act when it enacted the rules.

A U.S. district court sided with the environmental groups, blocking implementation of the regulations nationwide.

The Ninth Circuit Court of Appeals upheld that ruling, prompting the Bush administration to appeal to the Supreme Court.

U.S. Deputy Solicitor General Edwin Kneeler said the legal challenge should be dismissed because the

original dispute over the Burnt Ridge Project has been settled.

The environmental groups lack standing to challenge the underlying regulations, Kneeler told the court, because they only have the right to challenge specific implementations of the rules.

Third parties must wait until a procedural rule is applied before challenging it, Kneedler explained, otherwise it is not "ripe" for review.

"The procedural regulation does not cause the injury," Kneedler said.

"It is the on-the-ground activity, the site-specific decision … the agency action approving the site-specific action that causes the injury. That is what the person is entitled to judicial review on."

Further, Kneedler argued, the district court did not have the authority to impose a nationwide injunction on the regulations.

Matt Kenna, an attorney with the Western Environmental Law Center representing the environmentalists, countered that the challenge to the rules was appropriate because "we can show that the regulations had been applied to a project and continued to be applied."

"These are being applied to every forest on an ongoing basis," Kenna told the court.

The court's conservative justices, including Chief Justice John Roberts, appeared unconvinced by Kenna's arguments.

Other than the Burnt Ridge Project, the environmental groups had not pointed to any other "concrete action" affected the regulations, Roberts said.

"It seems like a high hurdle for you to surmount," he told Kenna. "You haven't shown any standing with respect to the Burnt Ridge Project on an ongoing basis because that has been settled. It's outweighed - it's out the door."

Justices Ruth Bader Ginsburg and David Souter were more sympathetic to Kenna's view and queried the deputy solicitor general's position.

Souter suggested that the situation outlined by Kneeling would block challenges until after the decision in question, including a "quickie lumbering action," had been implemented.

"If we do not find sufficient elasticity and standing to allow a challenge to the regulation … there will, in fact, be a preclusion of any challenge to a lot of specific actions," Souter said.

Ginsburg echoed that concern, noting that the statute in question provides third parties the "right to notice, comment and administrative procedures" before a specific action is taken.

The Bush administration in effect has cut such stakeholders "from that seat at the table," she added.

"These are people who said, 'We are concerned about saving our forests,'" Ginsburg explained. “It doesn't do us any good after the project has been authorized. We want to be there when the decision is

made to take action."

Kneeling responded that blocking "facial challenges" to the rules did not shut such individuals out of the process.

"These are people who pay very, very close attention to what the Forest Service is doing," he told the court.

A host of stakeholders have weighed in on this case, known as Summers v. Earth Island Institute, signalling the possible broader ramifications of the court's ultimate decision.

An array of industry groups, including organizations representing home builders, farmers, timber companies and the pesticide industry, have voiced support for the government's position, while public interest groups, environmental and administrative law professors and the state of California have favored the views of Earth Island Institute in the case.

The Supreme Court is expected to issue a decision early next year.