Four New Policies, Four Rejections

After Bill Clinton left office, those favoring increased commercial use of the nation’s natural resources no doubt had great expectations when George W. Bush became president. As the administration begins its final lap, however, it can boast of surprisingly little major reform. The White House’s best known failure is no doubt its inability to persuade Congress to open up the Arctic National Wildlife Refuge to oil exploration. Less recognized, but no less significant, however, is the administration’s repeated failure in the lower federal courts; in case after case those courts have struck down Bush’s efforts to reform natural resource policy.

In mid-January, the administration quietly dropped its appeal of the California federal district court ruling last March in Citizens for Better Forestry v. Johanns, which had invalidated the Forest Service’s attempted overhaul of national forest planning. Described by the Forest Service as “a paradigm shift in land management planning,” the 2005 rules were nearly the exact opposite of the equally paradigmatic shift adopted by the Clinton administration in 2000. While the Clinton rules sought to increase public participation in the planning process, promote ecological sustainability, and enhance species protection, the Bush rules limited public participation and eliminated the species viability and diversity requirements of the Clinton rules. The district court concluded that the 2005 rules violated the Administrative Procedure Act, National Environmental Policy Act, and Endangered Species Act.

But that was just one of several lower court rebuffs of administration reform efforts. The Forest Service was no more successful in its effort to displace the Clinton administration’s “roadless rule,” favored by environmentalists, with a dramatically different policy desired by development interests. The Clinton administration had adopted a massive reform of federal forest policy that in effect prohibited timber harvesting in the thousands of acres of national forest designated roadless based on their potential wilderness value. While the legality of that reform was being litigated, the Bush administration replaced it in 2005 with a policy that lifted all the restrictions and reverted planning back to the forest-by-forest approach opposed by environmentalists.

In California v. U.S. Department of Agriculture, a California federal district court struck down Bush’s new policy. NEPA and the ESA were once again the stumbling blocks, as the court concluded that the administration had violated both by failing to consider the significant reductions in environmental protection resulting from a shift from the Clinton rules. The district court, moreover, further held that the far more prescriptive Clinton roadless rule should be reinstated in the wake of the Bush rule’s invalidation.

Nor have the administration’s setbacks been limited to the national forests. Last June, in Western Watersheds Project v. Kraayenbrink, an Idaho federal district court invalidated the Bureau of Land Management’s revisions to its grazing regulations. As described by that court, the new regulations “loosen restrictions on grazing,” “limit public input,” “offer ranchers more rights,” “restrict the BLM’s monitoring,” and “dilute the BLM’s authority to sanction ranchers for grazing violations.”

The court enjoined the new BLM regulations. The source of their invalidity? Just as the Forest Service had in adopting its new planning and roadless regulations, BLM had violated both NEPA and the ESA in adopting the grazing reform. BLM had neither consulted with the Fish and Wildlife Service, as the ESA requires, nor adequately considered the adverse environmental effects of its new rules on the public lands, as NEPA requires. The court also held that BLM had violated the Federal Land Policy and Management Act.

Finally, completing a hat trick of federal natural resources agencies, last June a Washington state federal district court held unlawful the National Marine Fishery Service’s “hatchery listing policy,” which allowed for consideration of hatchery-raised fish when making decisions on whether salmon and steel-head populations should be listed as endangered or threatened under the ESA.

The NMFS policy was a departure from the Clinton administration’s policy, which had generally declined to allow for hatchery fish to be counted in ESA listing determinations. The district court in Trout Unlimited v. Lohn concluded that the NMFS hatchery policy was deficient because “it shifts status determinations away from the benchmark of naturally self-sustaining populations that is required under the ESA.”

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All in all, not an especially good time in the lower federal courts for Bush administration efforts to reform natural resource policy. Four district court rulings within the Ninth Circuit. And all four invalidated a major administration initiative. Each decision provides a stark reminder that fundamental reform of federal natural resource policy is easily promised, yet not easily achieved.

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