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Supreme Court to Consider Limiting Nationwide Injunctions

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On Friday, January 18, 2008, the United States Supreme Court agreed to hear the appeal in S*ummers v. Earth Island Institute*, No. 07-463, a case that may have dramatic implications for natural resources and public land management.

Summers addresses regulations promulgated by the Forest Service in June 2003 ("2003 Regulations") providing that the agency need not consider public notice, comment, and administrative appeals when approving projects where expected environmental impacts are sufficiently slight that neither an environmental impact statement nor an environmental assessment is required under the National Environmental Policy Act ("NEPA"). Just after it adopted these regulations, the Forest Service authorized a salvage timber sale of 238 post-fire acres in California's Sequoia National Forest that had burned the previous summer. Pursuant to the 2003 Regulations, the Forest Service did not provide an opportunity for public notice, comment or administrative appeal regarding approval of the timber sale.

Earth Island Institute, along with several other environmental groups, sued the Forest Service, challenging the 2003 Regulations as applied to the timber sale, and bringing a facial challenge to nine provisions of the 2003 Regulations. But several months later, the Forest Service withdrew its decision to implement the timber sale, and the parties entered into a partial settlement. The Forest Service agreed not to re-issue the timber sale without first preparing NEPA documentation and the plaintiffs dismissed their claims challenging the legality of the timber sale.

However, the plaintiffs continued to pursue their direct, facial challenges to the 2003 Regulations. The district court invalidated five regulations and upheld four others. The district court then issued a nationwide injunction against the application of the invalid regulations, thereby precluding the government from applying those regulations to projects not before the court, including projects in other districts and circuits. Both the Forest Service and the environmental groups appealed to the Ninth Circuit Court of Appeals.

The Ninth Circuit affirmed in part and reversed in part. The court of appeals ruled that the environmental groups' challenges to most aspects of the 2003 Regulations were unripe for judicial review because the contested regulations had never been applied in a concrete setting. The Ninth Circuit affirmed as to the two provisions that had been applied to the timber sale, however. Moreover, it held that the parties' agreement to settle

the site-specific claims did not affect the ripeness of the challenge to those two provisions. Finally, the Ninth Circuit approved the issuance of the nationwide injunction against enforcement of the two provisions, holding that the district court did not abuse its discretion is issuing the injunction, which was "compelled by the text of the Administrative Procedure Act."

The Supreme Court has granted a writ of certiorari to review four questions posed by the Ninth Circuit's decision. First, the Forest Service challenges the conservation groups' standing. Second, the Forest Service questions whether the parties' settlement agreement regarding the timber sale rendered moot any challenge to the 2003 Regulations. Third, the Forest Service argues that absent special circumstances, an agency regulation is not an independently reviewable agency action, even after the regulation has been applied in the course of making a site-specific decision. Rather, it says, only a site-specific decision in which the regulation has been applied in a concrete context is properly reviewable.

Perhaps the most consequential question presented to the Court, however, is whether the district court possesses the authority to issue a nationwide injunction forbidding application of the 2003 Regulations. The Forest Service contends that the Ninth Circuit's decision "authorizes a single district judge in a garden-variety [Administrative Procedure Act] suit to exercise the same broad power to vacate in their entirety agency regulations that Congress only rarely confers upon the District of Columbia Circuit, while freeing the plaintiff from the constraints (such as a specified appellate-court venue and a short filing period) that are characteristic of special judicial review provisions." Further, the Forest Service asserts, a nationwide injunction grants plaintiffs the same relief available in a nationwide class action, but without the procedural prerequisites and protections and without the prospect of a nationwide preclusive effect in the government's favor if the plaintiffs lose on the merits. Finally, the Forest Service assails the court of appeals' decision as effectively thwarting the exploration and development of difficult questions of law by other district and circuit courts.

The Forest Service's brief to the Supreme Court is due February 25, 2008; environmental groups' opposition briefing is due March 24, 2008. Companies or organizations concerned about nationwide injunctions may support the Forest Service's position by filing amicus curiae briefs on or before March 3, 2008.

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depending on the jurisdiction or circumstances. If you have specific questions as to the application of the law to your activities, you should seek the advice of your legal counsel.