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Subject: Nationwide Injunction Against Timber Harvest Categorical Exclusion

To: Regional Foresters

REPLY DUE OCTOBER 8, 1999

A nationwide injunction has been issued precluding use of the timber harvest categorical exclusion (CE) in Heartwood v. USFS, No. 98-CV-4289-JPG (S.D. Ill.). The court has retroactively enjoined "all project decisions approved relative to the timber harvest CE (FSH 1909.15, Chapter 30, 31.2(4)) since September 16, 1998."

The Washington Office will coordinate with the Office of the General Counsel and Department of Justice regarding any further steps in the litigation. The government is actively considering approaches for reconsideration of this nationwide ruling. In the meantime, the **following steps must be taken immediately**:

1. No further timber sale advertisements, awards or other authorizing decisions may be issued relying on categorical exclusions as described in FSM 1909.15, Chapter 30, 31.2(4).
2. All ongoing timber sale contracts, permits, or other authorizations resulting from project decisions issued on or after September 16, 1998 that relied upon FSM 1909.15, Chapter 30, 31.2(4) must be immediately suspended. Suspensions should reference contract provision C6.01(b) or comparable provisions as included in the contract or permit. The C6.01(b) provision states: Purchaser agrees to interrupt or delay operations under this contract, in full or in part, upon the written request of Contracting Officer: (b) To comply with a court order, issued by a court of competent jurisdiction."
3. You should work with the contract or permit holder to take steps necessary to affect an orderly shutdown of the contract or permit activity, addressing affects such as erosion and sedimentation.
4. By October 8th, each Region must submit to the WO Director, Forest Management, a list of timber sale projects subject to the suspension (all timber sales and permits with CEs authorized on or after September 16, 1998). For each timber sale identify:

Forest/District  
 Sale Name  
 NEPA Decision Date  
 Sale Type--salvage or green  
 Total sale volume/Estimated volume remaining/Estimated volume cut but not removed  
 Total sale acres/Estimated acres remaining

For permits, give the total number of permits and volume by type, i.e. fuelwood, posts and poles, special forest products, etc.



You should take steps immediately to notify any permit or contract holder whose authorization is based on use of the timber harvest CE provisions to assure that the permit or contract is suspended. Notification should be made by phone or personal contact and followed up by letter. Copies of the court's Order will be made available shortly.

The court's ruling does not extend to other categorical exclusions as the court ruled for the Government on Claims 1 and 2 (FS adequately coordinated with CEQ, and FS was not required to prepare an EA or EIS in promulgating its categorical exclusions). The third claim focused on the timber sale categorical exclusion (FSH 1909.15, Chapter 30,31.2(4) in the Forest Service's 1992 NEPA Procedures. The provision states:

Timber harvest which removes 250,000 board feet or less of merchantable wood products or salvage which removes 1,000,000 board feet or less of merchantable wood products; which requires one mile or less of low standard road construction (Service level D, FSH 7709.57); and assures regeneration of harvested or salvaged areas, where required.

The court found that the Forest Service had failed to explain in the record the volume limits for the timber sale categorical exclusion. The court stated:

In sum, the Court finds that the FS failed to adequately consider an important aspect of the issues involved, offered little explanation for its decision and failed to provide adequate evidence and support for its decision to greatly increase the volume limit and implement the proposed timber harvest CE. Therefore, the Court finds the FS' decision arbitrary and capricious and DECLARES the timber harvest CE NULL AND VOID. The timber sale CE is invalid under NEPA and should be set aside under the APA.

Opinion p.26.

The court denied the Government's request for a hearing regarding relief and stated:

The Court finds that the plaintiffs have met their burden. The Court finds that in considering the various harms to result from an injunction, the balance of factors weighs in favor of a nationwide injunction against the timber harvest CE. Enjoining further action under the voided CE is the only method by which the court can redress the irretrievable potential harm and implement its Order.

Accordingly, the Court DECLARES NULL AND VOID FS project decisions approved relative to the timber harvest CE (FSH 1909.15, Chapter 30, 31.2(4)) since September 16, 1998, and ENJOINS further actions through the application of the timber harvest CE.

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Any questions regarding this direction should be directed to Rod Sallee of the Forest Management Staff at (202) 205-1766 or Jim Schuler of the Ecosystem Management Staff at (202) 205-1278.

Additional information will be provided as it becomes available.

/s/ Hilda Diaz-Soltero

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