



File Code: 1570

Date: August 5, 2005

Route To:

Subject: Compliance with July 2, 2005, District Court Order in Earth Island Institute v. Pengilly

To: Regional Foresters

On July 2, 2005, the District Court for the Eastern District of California issued an order in Earth Island Institute v. Pengilly (subsequently renamed Earth Island Institute v. Ruthenbeck) upholding in part and striking down in part Forest Service regulations governing notice, comment, and appeal of certain agency decisions at 36 CFR 215 (see attached Exhibit 1). The Court's order states in part:

The ARA [Appeals Reform Act of 1992] certainly permits exclusion of environmentally insignificant projects from the appeals process. For example, actions such as maintaining Forest Service buildings or mowing ranger station lawns need not be subject to the notice, comment, and appeal procedures. ...Actions that concern "land and resource management plans," however, "shall" be subject to notice, comment and appeal procedures.

This letter responds to inquiries regarding implementation of 36 CFR 215 in light of the July 2, 2005, District Court order.

On July 26, 2005, the Department of Justice filed a Motion to Clarify and Amend Judgment (see Exhibit 2) seeking clarification of the geographic and temporal scope of the Court's order. In sum, the Government's legal position at this time is that agency decisions occurring on National Forest System lands that 1) are within the Eastern District of California (see Exhibit 3), 2) implement forest plans including those using categorical exclusions, and 3) are made after July 2, 2005, must be consistent with the Court's order. If you are contemplating the use of a categorical exclusion for an "environmentally insignificant project" within the Eastern District of California, please contact agency counsel and this office before issuing a decision. Furthermore, those portions of the, Forest Service Handbook (FSH) 1509.12 – Appeals Handbook adopted on June 28, 2005, that are inconsistent with the Court's order should be considered not applicable within the Eastern District of California for these decisions.

For National Forest System lands outside of the Eastern District of California, the Government's current legal position is that the Court's July 2, 2005, order does not apply.

We will continue to coordinate with the Department of Justice and the Office of the General Counsel and will keep you apprised of any further developments in this litigation. In the meantime, please be advised that within the Eastern District of California the agency must comply with the District Court's order in Earth Island Institute v. Pengilly concerning notice,



comment and appeal for projects and activities implementing land and resource management plans for all decisions issued after July 2, 2005.

We appreciate your efforts to responsibly manage National Forest System lands in conformance with applicable law, regulation, and the Court's order. If you have any questions about this guidance as applied to the forests in your region, please contact our National Litigation Coordinators Bill Supulski at 202-205-0948 or Eric Olson 202-205-1014.

/s/ Gloria Manning (for)
JOEL D. HOLTROP
Deputy Chief for National Forest System

cc: Station Directors, Deputy Chiefs, WO Staff Directors

Exhibits