DANIEL BOONE NATIONAL FOREST

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Subject:

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Remarks: Per your phone request on 10/31/00, I am sending you the Chief's 10/27/00 Reconsideration of Emergency Request.

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United States Department of Agriculture
Forest Service
Washington Office
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Date: October 27, 2000

File Code: 1570
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Subject: Reconsideration of Request for Emergency Exemption from Stay, Daniel Boone National Forest Storm Salvage Project (Kentucky Heartwood v. Worthington, 00-401 (E.D. Ky.))

To: Regional Forester, R-8

This letter constitutes my reconsideration of Forest Supervisor Ben Worthington's request for an emergency stay exemption for the 1998 storm damage salvage project as directed in the October 16, 2000, Court Order and Opinion in the case of Kentucky Heartwood v. Worthington, 00-401 (E.D. Ky.).

Background

On February 3, 1998, a snowstorm dropped approximately 2 feet of wet snow across the southern half of the Daniel Boone National Forest. This event was followed 2 months later with a tornado and intense linear winds on the Stearns Ranger District. A little over a month following the first wind storm, a second wind storm swept across the Stearns and Somerset Districts (Draft Environmental Impact Statement (DEIS), p. 1-4; Record of Decision (ROD), p. 1).

Storm and wind damage from these events resulted in substantial blow down of trees, increasing the fuel loading over portions of the Stearns and Somerset Districts. Fuel loading averaged 6.5 tons per acre prior to the events, and now averages 17 to 40 tons (ROD, p. 1). Blocks of private lands intermingle with National Forest System lands in the storm-damaged areas. According to the DEIS, potential for wildfires and threats to private property and public safety have sharply risen (DEIS, pp. 1-4 to 1-9; DEIS, pp. 4-24 to 4-29; ROD, p. 2). Also, additional risks to threatened and endangered species were discussed (DEIS, p. 1-6; DEIS, p. 4-84; Biological Assessment (BA), p. 84; ROD, p. 2).

The Daniel Boone National Forest initiated an environmental analysis and decisionmaking process to address extensive storm damage. On July 31, 1998, 2 months after the last windstorm, the Forest published a Notice of Intent to begin the scoping process for an Environmental Impact Statement (EIS) (63 FR 40874). Issues were identified as a result of scoping. Issues centered around risks to natural resources such as soil; water; scenic quality; economic opportunities; and proposed, endangered, threatened, and sensitive species (ROD, pp. 9-12; DEIS, p. 1-11).

On December 10, 1999, a Draft EIS for the "salvage harvest due to storm damage project" was made available to the public for a 45-day comment period. The DEIS was also made available on the internet (ROD, p. 17). The EIS was finalized by adding errata sheet changes to the DEIS and adding Appendix F, Response to Comments (Final EIS, pp. 1 through 3, Errata sheets; Appendix F). A Final EIS and ROD were made available to the public in September 2000. The

45-day administrative appeal period began on September 23, 2000.

Initial Granting Of Exemption From Stay

The Forest mailed a scoping letter on July 31, 1998, to people included on a project mailing list notifying them that a request for stay exemption was going to be requested from the Chief. Identical legal notices were published in the *Lexington Herald-Leader* and *McCreary County Record* on August 1, 1998, and August 4, 1998, respectively, also providing public notice that the Forest intended to request a stay exemption for the project.

On September 14, 1998, you forwarded an August 12, 1998, letter from Forest Supervisor Worthington requesting an exemption from stay for 122 units, the entire project. Supervisor Worthington reinitiated his request in an August 22, 2000, letter. His most recent letter discussed increased fuel loads, projected increase in fire rates of spread, and a decreased rate of building fire line in event of a fire because of large amounts of downed timber. Following consultation with the Regional Office and Washington Office, the Forest narrowed the scope of the request from all 122 units involved in the project to just 20 units that could reasonably be expected to be completed in an expedited manner (Defendant's Opposition to Temporary Restraining Order (TRO), p. 6). That is, units that could not be treated before the administrative appeal process would run its course were dropped from Supervisor Worthington's request. Also, in discussing reasons for including areas to ensure an economically viable sale, a reason not normally accepted for stay exemption, the Forest stated that an untenable situation would remain without the assistance of a sale of the timber as the Forest did not have the resources (personnel and funding) available to perform the work by force account or with a service contract. The Forest and Region were made abundantly aware that inclusion of units to make a viable sale was a clear exception to normal practice of granting stay exemptions. During discussions the Forest reiterated the threat to private property due to proximity of high risk areas.

Following those discussions, Associate Deputy Chief Collins granted an emergency stay exemption for 20 units of the project.

As a result of the Court's Opinion and Order of October 16, 2000, regarding Associate Deputy Chief Collins' granting of the exemption, a further review of the request has taken place with a more complete record. The record was requested shortly after the ruling and received in this office on October 20, 2000.

Reassessment Of Exemption

As ordered by the Court, the record was reviewed in terms of both whether an emergency situation exists and what would be an exemption's effects on resources. While the record was reviewed with regard to the stay exemption's effects on natural resources, the review should by no means be considered a review of the merits of the project. Such a review of the merits is more appropriately performed during the administrative appeal process. This review considers only whether the record supports a determination that a stay exemption would not adversely affect both natural resources.

The original request for exemption of stay, which was approved by Associate Deputy Chief Collins, was based on risks to private property and threatened and endangered species habitat from catastrophic fire. These same criteria are used again.

The record evaluated consists of the DEIS, Final EIS (Errata Sheets and Appendix F), Response to Comments, ROD, BA, correspondence from the Forest and Region concerning the waiver request, and maps showing the proposed treatment areas in relationship to private land and topographic features.

The rationale for requesting the exemption for each unit is summarized in Attachment A to the Exemption Request Record (Attachment A). Additional explanation is provided in correspondence from the Forest and Region (Worthington letters of August 12, 1998, and August 22, 2000), as well as discussions between the Forest, Region, and Washington Office (Defendant's Opposition to TRO, p.6).

This office also received a prospectus for the first sale intended to treat the emergency units approved by the Associate Deputy Chief and mailed to prospective bidder on October 2, 2000. The prospectus was then withdrawn after the October 16, 2000, Court Order.

Rationale

The Forest is requesting an exemption from stay for 20 treatment units. These units constitute about 16 percent of the 122 units identified in the selected alternative for treatment. Of the 3,913 acres identified for treatment in the selected alternative, 718 acres (18 percent) have been requested for exemption from stay.

Fuel loading does not, in and of itself, satisfy the provisions of 36 CFR 215.10(d) concerning criteria that must be met for granting an exemption of stay from implementation. Those criteria center around demonstrating that an emergency situation exists because of imminent risks to public health and safety, private property, or the environment. The record should demonstrate a reasonable basis for determining that there are imminent risks before the Chief may grant an exemption from stay.

A review of the maps accompanying the DEIS shows many more units adjacent to private property with structures than are requested for exemption from stay. The DEIS identifies 21 units that have excess fuel loading and pose potential threats to privately owned lands with structures (DEIS, p. 4-27). Of these 21 units, only 4 units (86A, 88, 94I, and 99) are requested for exemption from stay because of risks to private lands with structures (Attachment A). These 4 units constitute approximately 19 percent of the units that pose high wildfire risks to private land with structures.

I was unable to determine from the record the site specific ground conditions that led to the selection of the 4 units from the total 21 units. However, many of the 21 units listed in the EIS contain some acres in Class 1-2 while the 4 units requested for an exemption from stay contain Class 3-4 and Class 5-6 conditions. The conditions associated with Class 3-4 and Class 5-6 generally have high fuel loadings and higher risk to catastrophic wildfire (DEIS, Table 2-1).

Furthermore, historically, the fire season for the Daniel Boone National Forest is October 15 through December (Declaration of Benjamin T. Worthington). Catastrophic fire that can spread to private land, which would be a danger at any time given the current fuel loading, is even more likely now than at any other time of year. The risk to firefighters is also extreme at this time.

In summary, 4 units requested for an exemption from stay are units identified in the DEIS as having high potential for risk of wildfire spreading to private land with structures. All 4 units are adjacent to private land and conceivably could be the source of wildfire spread to private property.

With respect to the other 16 units in the exemption request, the record before me does not support a determination that an emergency situation exists. Eight of the 16 units are not identified as "critical" by the Forest in the DEIS. The remaining 8 units were identified as "critical" in the DEIS because of the risk to threatened and endangered species habitat (Cumberland elktoe). However, the record does not adequately show that an emergency situation requiring treatment before the end of the appeal period exists with respect to the endangered Cumberland elktoe.

Resource Considerations

One consideration that must be evaluated is the risk of sediment to Rock Creek from any action alternative. Could the treatments in the 4 units contribute sediment to Rock Creek and thereby impact the Cumberland elktoe? The DEIS evaluated these impacts and concluded that the action alternatives will not result in significant effects to aquatic resources (DEIS, pp. 4-10 through 4-23; Appendix F, pp. 19 through 23).

The overall assessment of increased risk from wildfire as a result of storm damage is presented within the EIS (pp. 1-4 through 1-9; 3-13 through 3-31; 4-23 through 4-58; Appendix F, pp. F-24 through F-28). The Environmental Protection Agency (F-71), U.S. Fish and Wildlife Service (F-58), and McCreary County Soil Conservation District (F-57) also recognize the potential risks from fuel buildup. However, this assessment of risk is not shared by all local, State, or Federal agencies. The Kentucky State Nature Preserves Commission (F-61) believes that not taking action will not pose significant risks. Most agencies observe that the action alternatives also pose environmental risks and offer advice on treatment priorities and mitigation measures. The ROD specifically lists mitigation measures and management requirements for the selected alternative to reduce environmental risks (ROD, pp. 33 through 39).

During the EIS process, comments were received proposing road closures as a means of reducing fire risk as an alternative to salvage harvest. The Forest addressed options for road closure in Appendix F, Response to Comments (p. F-27) and described why they believe road closures are not a feasible alternative for reducing fire risk.

Determination

As stated in Defendant's Opposition to TRO (p. 6), the fall fire season for the Daniel Boone

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National Forest is October 15 to December. With the fire season now upon us, creating a threat to private property, I believe it is prudent to treat the 4 units identified as posing the greatest threat to private property with structures in an expedited manner. While the other 16 units noted in Supervisor Worthington's exemption request may be in need of treatment, the record before me does not support a determination that an emergency situation exists.

From the information used in this review, I have determined that units 86A, 88, 94I, and 99 pose a threat to private property and meet the requirements for an emergency situation. I believe the record supports a determination that no adverse effects would occur as a result of a stay exemption. Therefore, in accordance with 36 CFR 215.10(d), I am granting an emergency stay exemption for units 86A, 88, 94I, and 99.

In making this determination, I note that the Forest had intended to accomplish timber removal from some of the units by means of a timber sale. My determination, to exempt only 4 units from the stay, may make a sale infeasible. Nevertheless, an emergency exists, and I expect the Region and Forest to find a means, by timber sale or otherwise, to begin timber removal on these units, and to accomplish as much of such work as possible, by the end of this calendar year.

Implementation may begin subject to lifting of the preliminary injunction.

/s/ Mike Dombeck

MIKE DOMBECK
Chief