



United States
Department of
Agriculture

Forest
Service

R3 Regional Office

333 Broadway SE
Albuquerque, NM 87102
FAX (505) 842-3800
V/TTY (505) 842-3292

File Code: 1570-1/2200

Date: August 30, 2004

Susan Molloy
8657 Hansa Trail
Snowflake, AZ 85937

**CERTIFIED MAIL – RETURN
RECEIPT REQUESTED**

RE: Appeal #04-03-00-0016-A215, Management of Noxious Weeds and Hazardous Vegetation on Public Roads on the National Forest System Lands in Arizona

Dear Ms. Molloy:

This is my review decision on the appeal filed regarding the Decision Notice (DN), Environmental Analysis (EA), and Finding of No Significant Impact (FONSI) on the above-referenced project, which authorizes herbicide treatments along approximately 2,700 miles of Federal and state highways passing through National Forest System (NFS) lands. The potential treatment area is about 170,100 acres, which is based upon an estimated right-of-way width of 120 feet plus an additional 200 feet on each side of the highway.

BACKGROUND

Tonto National Forest Supervisor Karl Siderits made a decision on May 27, 2004, for the Arizona forests on this project. The Forest Supervisor is identified as the Responsible Official, whose decision is subject to administrative review under 36 CFR § 215 appeal regulations.

Pursuant to 36 CFR § 215.17, an attempt was made to seek informal resolution of the appeal. The record indicates that informal resolution was not reached.

My review of this appeal has been conducted in accordance with 36 CFR § 215.18. I have reviewed the appeal record, including the recommendations of the Appeal Reviewing Officer. My review decision incorporates the appeal record.

APPEAL REVIEWING OFFICER'S RECOMMENDATION

The Appeal Reviewing Officer found that: a) the decision logic and rationale were generally clearly disclosed; b) the benefits of the proposal were identified; c) the proposal and decision are consistent with agency policy, direction, and supporting information; and d) public participation and response to comments were adequate.



APPEAL DECISION

After a detailed review of the record and the Appeal Reviewing Officer's recommendation, I affirm the Responsible Official's decision on the Management of Noxious Weeds and Hazardous Vegetation on Public Roads on the NFS lands in Arizona Project.

This decision constitutes the final administrative determination of the Department of Agriculture [36 CFR § 215.18(c)].

Sincerely,

LUCIA M. TURNER
Appeal Deciding Officer,
Deputy Regional Forester

Enclosures (2)

cc: Gene Onken, Constance J Smith, David M Stewart, Bill G Woodward, Paul M Stewart,
Mailroom R3 Tonto, Arleen D Martinez, Charles F Ernst

REVIEW AND FINDINGS

of

Susan Molloy's**Appeal #04-03-00-0016-A215**

ISSUE 1: The notice, comment and appeal regulations (36 CFR 215) were violated by not accepting some comments.

Contention A: Some people with Multiple Chemical Sensitivities were not aware of the EA and would have opposed this project had they been polled. The comments from various people were mistakenly and illegally discounted by your agency, so they were denied standing to appeal your agency's decision, such as Krista Munson and Misha Metzler. Several individuals' timely responses were disallowed, while others' responses sent within minutes were allowed. Letters from other individuals were submitted by the appellant (Molloy) for others with disabilities; these comments should have been accepted.

Response: The purpose of the 30-day comment period is to provide an opportunity for the public to comment on the proposed action prior to a decision by the Responsible Official and make the appeal process available to those who submit substantive comment during the comment period (36 CFR 215.1). For this project, there were two 30-day comment periods that overlapped. Legal notices for comment were published on July 25, 2003, and again on August 20, 2003 (Book 2, Document B). The total comment period was from July 25, 2003, through September 18, 2003.

In addition to the long comment period, there was notice given to the public through public meeting, notice to the Arizona Congressional delegation, and a scoping mailing sent to 2,088 potentially affected individuals in February, March, and May of 2002. The Forests' notification through their Schedule of Proposed Actions had mentioned the project since June 2002. The EA was mailed to individuals, organizations, Tribes, State agencies, and federal organizations that responded to the scoping letter or otherwise expressed an interest (Decision Notice at Book 3, Document K, pp. 2-3). See references FSH 1909.15, section 10.3, and 36 CFR 215.3(a) and 215.5 on requirements for public involvement.

During the comment period, there were 68 responses. Of these, 56 respondents provided substantive comment and were given appeal standing. For the 12 who did not receive appeal status (Book 2, Document D), there were:

- Five letters, #63, 64, 65, 66, and 67, that agreed with the preferred alternative, but did not provide substantive comments.
- One letter, #68, was received on 9-29-03 and determined to be untimely.
- Three letters, #9, 40, and 49, recommended the use of natural things such as vinegar or Burnout (a vinegar/lemon weed and grass killer). The use of vinegar was an alternative considered but eliminated from further study (Book 2, Document C, p. 30)

- One letter, #7, recommended using sheep to control kudzu, which is not found in the project area. Livestock utilization to control weeds was an alternative that was considered, but eliminated from further study. (Book 2, Document C, p. 31).
- One letter, #42, recommended establishing a no spray zone around residential areas and campgrounds, increased use of non-toxic alternatives, and recognized that traces of herbicides last long after applications.
- One submission, #51, was a petition signed by 1,140 persons.

During the comment period, no letters from either Munson or Metzlar were received; however, responses from Leanda Carr (#44), Ann McGregor/Ann McCampbell (#45), and Orion Crawford (#46) had Krista Munson's name typed at the top of the pages. These responses were submitted within the comment period and contained substantive comments that were considered. All had appeal standing.

The Project Record contains the following letters that Susan Molloy submitted: #55 for Susan Molloy, #57 for Marge Schmidt, #58 for Judy Lund, #59 for Tara Buhr, #60 for Elizabeth Streightif, #61 for Kathleen Sykora, #62 for Gail Dagostino. These responses were submitted within the comment period and contained substantive comments that were considered. All had appeal standing.

The Responsible Official reviewed and considered all substantive comments while making his decision (Decision Notice at Book 3, Document K, p. 3).

Krista Munson's comment letter was also submitted as an attachment to the Molloy appeal.

Finding: The Appeal Deciding Officer determined that since Krista Munson did not provide substantive comment during the comment period, she did not have appeal standing (ADO letter of August 4, 2004). The responses received during the comment period were correctly processed. The Responsible Official made the determination on which submissions were timely and/or substantive comments following regulations (36 CFR 215.6 (b)). The notice and comment requirements of 36 CFR 215 were followed. Interested parties' comments were sought and appropriately considered.

ISSUE 2: The project is in violation of NEPA, and an EIS should be prepared.

Contention A: An EIS is required because the project is highly controversial. A petition with signatures of over 1,100 individuals submitted shows that this project is highly controversial.

Response: "The term 'controversial' refers to cases where a substantial dispute exists as to the size, nature, or effect of the major federal action rather than to the existence of opposition to a use." *Town of Cave Creek, Arizona v. Federal Aviation Admin. And Dept of Transp*, D.C. Cir, 2003, referencing *Found. For N.Am. Wild Sheep v. U.S. Dept of Agric.*, 9th Cir., 1982.

A count of persons opposing or supporting herbicide use on weeds does not make it controversial in itself, rather it would be controversial if the effects of this project (size and nature being known) were disputed. Since the herbicides in question are approved and labeled for use by the US Environmental Protection Agency, the anticipated effects have been tested and are publicly known (Decision Notice at Book 3, Document K, pp. 1, 5; and EA at Book 2, Document C; and EA Appendix A).

Finding: An EIS is not required to address the numbers of comments. See next response, the significance of effects determines need for an EIS.

Contention B: The project involves extensive, cumulative, and complicated issues that require an EIS analysis. The EA is over 100 pages long, not including thousands of pages included by reference; it clearly indicates that an EIS is needed.

Response: The significance of environmental effects of a proposed action determines whether an EIS must be prepared (FSH 1909.15, Section 17). The issues that were considered and evaluated in the EA were derived from the project scoping effort on May 8, 2002 (Book 1, Document I). As the responses were evaluated, the issues were compiled (Book 1, Document K). These issues were used to develop the alternatives (Book 1, Documents L, MC). Effects were analyzed and disclosed in the EA (Book 2, Document C). The FONSI evaluated the context and intensity of the selected alternative's effects as described in the EA, and a determination was made that an EIS was not needed (Decision Notice at Book 3, Document K, p. 4).

Finding: The EA adequately analyzed the issues and effects for the project. A FONSI appropriately determined that the effects were not significant and an EIS is not required. The number of pages in the environmental analysis does not equate to significance.

Contention C: The effects of the proposed action are highly uncertain and involve unknown risks. The effects of these chemicals, especially inert ingredients and in combination with other active ingredients of all the herbicides, are not certain. The risk assessments underpinning the EA are analyses of active ingredients only and thus are incomplete. The reliance on risk assessments for herbicide use is not warranted. The 1992 risk assessment is outdated and reliance on it ignores significant new information. The risk analysis uses a factor of 10 to account for intra-species variation. This is inadequate since the reaction of chemically sensitive persons is ignored when this small factor is used in the analyses.

Response: In addition to the 1992 Risk Assessment for Herbicide Use, the EA incorporates by reference several documents to ensure that the most recent information is reflected in the EA (Book 2, Document C, pp. 10-14). The conclusions related to human risk and effects on non-target organisms from the references were found to be consistent with those previously identified in the 1992 Risk Assessment.

The environmental effects are typical for this type of program using herbicides to control unwanted vegetation. The levels of use would not exceed limits identified on the labels. A safety factor of 100 times below the No Observed Effect Level (NOEL) is the accepted method to extrapolate test data from animals to humans (EA Appendix A in Book 2, Document C and FONSI in Book 3, Document K, p. 5).

The effects of inert ingredients, breakdown products, and most commonly used additives are considered in the risk assessments underpinning the EA. Formulated product data is referenced during the assessment of risk.

The 1992 risk assessment is a summary of information compiled about 1990. More recent FS risk assessments (in appellants comment and found on the FS Washington Office website) were also incorporated by reference and used to assess the relative risk potential of the herbicides.

With the exception of the review of surfactants (1997) and the review of glyphosate (1999), all of the 14 remaining incorporated risk assessments were published in 2001 or more recently (Book 2, Document C, pp. 13-14 of the EA).

The quantitative risk analyses are done reflecting a normal population with allowances for variation in the specific scenarios. The selection of an inter-species factor of 10 to account for potential effects to humans based on testing done on other animals and an additional factor of 10 for intra-species variation is done in accordance with EPA's recommended protocol for assessing risk. In all of the newer assessments (incorporated by reference), the FS included an additional factor (built into the RfD or Reference Dose) which reflects data quality.

There is also a qualitative discussion of the results presented on risk. Relevant discussion of potential health and safety effects on children, elder persons, and hypersensitive individuals of those herbicides for which science was available is presented. These special cases were considered and found that "[a] comparison of the 1992 risk assessment and the updated risk assessments indicate that the conclusions are essentially the same" (EA Appendix A, p. 75).

The risk assessments consider the cumulative risk of multiple exposures to the individual chemicals. This risk assessment specifically considers the effect of repeated exposure, in that the chronic RfD Reference Dose is used as an index of acceptable exposure.

In addition, no synergisms have been reported among the chemicals proposed, with the exception of an unexplainable skin rash caused by mixtures of picloram and 2,4-D, a combination not proposed for use under this EA.

Given the current understanding of the nature of MCS, it is impossible to give a one-size-fits-all cumulative-effects analysis for chemical effect on potentially affected individuals. The scientific literature focuses on the individual genetics and the resulting individual physiological responses encountered.

Finding: The effects described in the EA are not considered highly uncertain, nor do they involve unique or unknown risks. The EA is based on the most recent risk assessments and does not rely exclusively on the 1992 data or conclusions.

Contention D: The EA attempts to reserve the right to use any herbicide that may become registered in the future without any analysis of its potential impacts. This violates NEPA requirements that environmental impacts of all Forest Service activities be analyzed.

Response: Adaptive management is an approach to natural resource management wherein the effects of policies, plans, and actions are monitored for the purpose of learning and adjusting future management actions. Successive reiteration of the adaptive process is essential in contributing to sustainability (from *Definitions* under NFMA 2000 Planning Rule at 36 CFR 219.36).

If implementation monitoring shows that the herbicides analyzed in the EA are not effective in meeting the purpose and need or a new or improved product is available, a new product could be considered for use without further analysis if the new or improved product fits within the same effects analysis disclosure for the herbicides covered in the EA. An analysis would be done to determine the similarities of effects and if the decision could be amended to include the new herbicide product (DN/FONSI, Book 3, Document K, pp. 1, 2).

Finding: The use of new or different herbicides could be used if and only if the new or improved product fits within the same effects analysis disclosed for the herbicides covered in the EA. This is a correct use of adaptive management.

Contention E: The agency discounts the cumulative effects, on vulnerable individuals, of the numerous exposures to high-risk chemical products that will interact with chemical herbicide mixtures. An EIS is required in order to address the cumulative impacts of exposure to herbicides used on roads in forests with 1) exposures to herbicides used on other roads, 2) herbicides and other pesticides used on public and private land to control noxious weeds and for other purposes, 3) residues of these herbicides on consumed food, 4) and the use of these herbicides and other pesticides used or proposed for use in other areas of the forest. It is unacceptable to postpone the assessment of potential cumulative impacts of the herbicides used on roads and those used in the forest until the risk of forest herbicides is done as proposed in the DN/FONSI. These risks need to be considered together.

Response: Effects of exposure in general are limited because of the limited life expectancy of herbicides and the low amount of yearly treatment (up to 5,000 acres on a total of six Forests, see EA, p. 18). The total would be about 3 percent of the total rights-of-way and adjacent lands to be treated on a yearly basis (Book 3, Document K, Decision Notice, p. 1). Cumulative risk of exposure from other projects on adjacent lands on State, private, or other National Forest System lands is very remote, because the spray mixture dries quickly and does not persist in the environment (from a few days to a few months). Exposure from various programs done in the past and proposed operations would not approach a limit of acceptable daily intake for any of the proposed herbicides (EA, Book 2, Document C, p. 47). The Revised Biological Evaluation also spells out that herbicides would only be applied directly adjacent to the roadway, once a year, in narrow strips using backpack sprayers and low-pressure spray units on trucks (Book 3, Document J, pp. 35, 40, 46).

Finding: The cumulative effects of exposure analyzed and disclosed in the EA is adequate for the decision that was made.

Contention F: Alternative weed management methods were not analyzed in the EA. Effects of non-chemical methods of weed management are summarily dismissed as being ineffective without any supporting documentation.

Response: The EA describes a variety of methods to manage vegetation along roadways throughout Arizona as part of an Integrated Vegetation Management (IVM) approach. This includes a combination of manual methods of cutting or pulling the vegetation, cultural methods using organic mulches to slow vegetation emergence, use of herbicides, controlled burning, road grading, mowing, tillage, biological controls, and restoration of desirable vegetation to compete with the undesirables (EA in Book 2, Document C, pp. 6, 7, 8). The Integrated Vegetation Management approach is being used exclusive of herbicides on roadways now.

Alternative methods including non-chemical alternatives were displayed and evaluated for effectiveness in the Alternatives chapter of the EA (Book 2, Document C, pp. 29-32). The No Action Alternative discussion on pages 43-44 also addresses many non-chemical methods currently in use to treat weeds and analyzes their effectiveness.

Finding: Alternative methods of treatment were adequately discussed and analyzed in the EA.

Contention G: No-spray buffers around homes were considered but eliminated from further study without adequate justification.

Response: The justification for eliminating the alternative from further consideration was detailed in the EA (Book 2, Document C, p. 30). The rationale is that the project is limited in scope to roads and to NFS lands and would have little influence over private lands and other roadway spraying (EA at Book 2, Document C, p. 30).

Finding: Eliminating an alternative from further consideration is within the authority of the Responsible Official. This follows Council of Environmental Quality guidelines (40 CFR 1502.14(a)) and FS Handbook direction for NEPA at FSH 1909.15, Sections 10.4(6) and 14.3.



File Code: 1570-1/2200
Route To:

Date: August 27, 2004

Subject: ARO, Appeals #04-03-00-0015 and 0016-A215, Management of Noxious Weeds and Hazardous Vegetation on Public Roads on NFS Lands in Arizona, Sisler and Molloy

To: Deputy Regional Forester, Appeal Deciding Officer

This is my recommendation on the disposition of the two appeals filed in protest of the Decision Notice and Finding of No Significant Impact concerning the Management of Noxious Weeds and Hazardous Vegetation on Public Roads on National Forest System Lands in Arizona. This project authorizes herbicide treatments along approximately 2,700 miles of Federal and State highways passing through National Forest System (NFS) lands. The potential treatment area is about 170,100 acres, which is based upon an estimated right-of-way width of 120 feet plus an additional 200 feet on each side of the highway.

Tonto National Forest Supervisor Karl Siderits made a decision on May 27, 2004, for the Arizona forests on this project. The Forest Supervisor is herein termed the Responsible Official. S. Elaine Sisler of Southwest Network for the Chemically Sensitive and Susan Molloy filed appeals of this decision under the 36 CFR 215 appeal regulations.

Informal Disposition

Pursuant to 36 CFR 215.17, an attempt was made to seek informal resolution of these appeals. The record reflects that informal resolution was not reached.

Review and Findings

My review was conducted in accordance with 36 CFR 215.19 to ensure that the analysis and decision are in compliance with applicable laws, regulations, policies, and orders. The appeal records, including the appellants' issues and requests for relief, have been thoroughly reviewed. Having reviewed the Environmental Assessment (EA), decision notice, and the project record file, as required by 36 CFR 215.19(b), I conclude the following:

- 1) The decision clearly describes the actions to be taken in sufficient detail that the reader can easily understand what will occur as a result of the decision.
- 2) The selected alternative should accomplish the purpose and need established. The purpose and need stated in the EA reflect consistency with direction in the Forest Plans for the six National Forests in Arizona.
- 3) The decision is consistent with policy, direction, and supporting evidence. The record contains documentation regarding resource conditions, and the Responsible Official's decision documents are based on the record and reflect a reasonable conclusion.



- 4) The record reflects that the Responsible Official provided ample opportunity for public participation during the analysis and decision making process. The Responsible Official's efforts enabled interested publics the opportunity to comment and be involved in the site-specific proposal.

After considering the claims made by the appellants and reviewing the record, I found that the Responsible Official conducted a proper and public NEPA process that resulted in a decision that is consistent with the Forest Plans of the six National Forests in Arizona. I found no violations of law, regulations, or Forest Service policy.

Recommendation

I recommend that the Responsible Official's decisions relating to this appeal be affirmed with respect to all of the appellants' contentions.

/s/ Patrick L. Jackson
PATRICK L. JACKSON
Director, Appeals & Litigation

cc: David M Stewart, Constance J Smith, Arleen D Martinez, Gene Onken, Bill G Woodward,
Douglas L Parker, Mailroom R3