



File Code: 1570-1

Date: February 15, 2008

Route To:

Subject: Allegheny National Forest 2007 Revised Land and Resource Management Plan (Plan) Appeal Decision

To: Regional Forester, Region 9

This is my decision on the appeals of the Record of Decision (ROD) for the Allegheny National Forest (NF) Revised Land Management Plan (Plan). All appeals of the Allegheny NF have been consolidated into one set of contentions and one decision is being issued. The issues were sufficiently similar to allow consolidation as described in (36 CFR 217.13(b)). The appeal reference numbers are abbreviated throughout this decision and Attachment 2 by the last four digits of the notice of appeal (NOA). Seventy-eight appeals were submitted under 36 CFR 217 and were considered in my decision. Two appellants requested intervenor status¹. A listing of the appeals and associated tracking numbers is included in Attachment 1. Each appellant and intervenor will receive notification of my decision. The final appeal decision is available via the Web at <http://www.fs.fed.us/emc/applit/nhappdec.htm> or in hard copy, upon request.

On February 2, 2007, Regional Forester Randy Moore signed the ROD for the Revised Plan, replacing the 1986 Forest Plan. The 2007 Revised Plan conforms to the 1982 planning regulations at 36 CFR 219 [1982, as amended] (ROD, p. 32). The record for the appeal to the Chief of the Forest Service was transmitted in conformance with the regulations at 36 CFR 217.15(a).

Allegheny NF 2007 Revised Plan

The Revised Plan replaces all previous resource management plans for the Allegheny NF². It provides multiple-use goals and objectives intended to achieve and maintain a suite of desired conditions across the national forest. Design criteria (standards and guidelines) included in the Revised Plan provide parameters for the development and implementation of projects and activities that will be proposed and considered during the life of the plan (16 U.S.C. 1604(i)). The Revised Plan is permissive in that it allows, but does not mandate, certain activities and will be amended or revised as needed to adapt to new information and changing conditions. If a project cannot be implemented in accordance with the standards, the plan must be amended before the project can proceed (ROD, p. 4).

¹ Intervenors include Thomas C. Buchele, Counsel for the Allegheny Defense Project, and Craig L. Meyer, Esq., representing Pennsylvania General Energy Company, L.L.C.

² The Allegheny NF 2007 Revised Plan was prepared under the Multiple-Use Sustained Yield Act (MUSYA) (16 U.S.C. 528 et seq.), the Forest and Rangeland Renewable Resources Planning Act (RPA) of 1974 as amended by the National Forest Management Act (NFMA) of 1976 (16 U.S.C. 1600 et seq.), the September 30, 1982 implementing regulations of the NFMA (36 CFR 219, as amended September 7, 1983), and the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 et seq.) and its implementing regulations (40 CFR 1500-1508).



Broader goals and objectives are realized through the development and completion of site-specific projects. Pursuant to 40 CFR 1508.28, an environmental analysis will be conducted for each project (ROD, p. 4). The ROD provides Need for Change goals and strategies for addressing revision issue areas described in detail in the Final Environmental Impact Statement (FEIS): 1) recreation and special areas, 2) vegetation management, and 3) habitat diversity (ROD, pp. 9-10).

Project-level analysis will determine which management techniques and any additional mitigation beyond those prescribed by the Revised Plan are best suited to each individual project (ROD, p. 37).

In its descriptions of desired future conditions, the Revised Plan provides a foundation for adaptive management and the basis for projects that can be carried out to achieve and maintain those conditions. The monitoring requirement in the Revised Plan supports the strategic and adaptive nature of forest plans. More specific monitoring methods, protocols, and analytical procedures will be included in a monitoring and evaluation implementation guide (ROD, p. 43).

In summary, the Allegheny NF Revised Plan establishes a framework for decision making and uses programmatic direction to provide for a balanced response to competing interests while providing for ecological, social, and economic sustainability of national forest resources.

Issues

This appeal decision is the outcome of a deliberative and extensive review process. My review of the appellants' concerns provides a response to issues involving complex regulatory and management issues. Although some issues raised in the appeals are not specifically cited in this decision, all appellants' concerns have been considered, as have intervenor's comments. My appeal review focused mainly on compliance of the ROD, Revised Plan and FEIS with applicable laws, regulation, and policy, as cited by appellants.

Appellants primarily raised concerns regarding legal and regulatory authorities and responsibilities relating to the rights of oil and gas development (OGD) held in private ownership; especially in regard to design criteria. As a result of my decision (Item 1, page 2) I determined a number of these issues to be moot. They are displayed as Attachment 3 to this decision letter.

Other appeal issues included wildlife species, watershed, soils, riparian zones and buffers, hardwood management, recreation, roadless area inventory, wilderness study areas and wilderness recommendations. Appellants contend the decision violates the National Environmental Policy Act (NEPA), National Forest Management Act (NFMA), Administrative Procedure Act (APA), Endangered Species Act (ESA), Migratory Bird Treaty Act (MBTA), National Historic Preservation Act (NHPA), 1911 Rules and Regulations, Executive Orders 13211 and 13212-National Energy Policy, Forest Service Policy (FSM 1920, FSH 1909.12), 36 CFR 251, and Commonwealth of Pennsylvania Law.

Decision

Regional Forester Moore's decision meets the requirements of applicable Federal law, regulations, and policy, upon the condition that certain actions are completed. Attachment 2 describes the issues raised by appellants, as well as where the record provides evidence to address those issues. I affirm the decision to select Alternative "C modified" from the FEIS and approve the Allegheny NF Revised Plan, with the following instructions:

1. I find the public was not provided the opportunity to comment on substantial changes made to the design criteria as it applies to private oil and gas development (OGD). The application of all forest-wide standards to private OGD was a change from the Preliminary Land and Resource Management Plan (LRMP). Further, the design criteria specific to private OGD in Section 2800 was changed. These changes occurred between the Draft Environmental Impact Statement (DEIS) and the FEIS. This does not fully comply with 40 CFR 1502.9 (c) (1). I instruct you to provide the public the opportunity to comment on these changes in accordance with FSH 1909.15, Chapter 18.2. Until that time, applying the use of the Revised Plan design criteria specific to private OGD is suspended. During this time, in order to carry out our surface management responsibilities, I expect you to follow the site-specific authority as provided in the 1986 ANF Plan to administer private OGD.

Appellants contend "The draft alternatives in the DEIS contain no hint of the significant OGD changes contained in the FEIS documents and that no opportunity for comment existed as to the significant changes", resulting in no opportunity to publicly comment on these changes (NOA #0010, pp. 11-12 (includes [***]³); NOA #0013, p.4). In addition, an appellant contends there is a distinct bias against OGD in the final documents that did not exist in the draft documents and was never discussed during the planning process (NOA #0017, p.6).

In the ROD, Regional Forester Moore concluded that the 1986 Plan was not specific enough with regard to forestwide standards and guidelines to protect the federal surface resources. Further, he chose to remedy this situation by explicitly utilizing design criteria in the 2007 Revised Plan (ROD, p. 29). The FEIS states that a number of design criteria for OGD have changed to reflect new knowledge and public comments (FEIS pp. 2-3 to 2-4; FEIS Appendix A, PI #74 to PI#116, pp. A-47 to A-68). However, the record provides insufficient explanation of why the design criteria were modified, specifically Section 2800, between DEIS and FEIS. Additionally, clarification was made in the final documents that the application of "all design criteria in the LRMP potentially apply to the consideration of [private]oil and gas development, not just the material in section 2800" (FEIS Appendix A, PI #79, p. A-51). I found nothing in the Appeal Record (AR) to specify the applicability of these design criteria to reserved and outstanding mineral estates for private oil and gas operations (RLRMP, pp. 90-93). This is a substantial change between DEIS and FEIS where there was no opportunity provided for public comment.

³ The symbol [***] represents NOA#0017 (Mead Township & Kane Area School District) who incorporate all portions of Pennsylvania Oil and Gas Association (POGAM) (NOA #0006) and Arthur J. Stewart (NOA #0010) by reference in addition to their specific appeal points relative to oil and gas.

2. Based upon my review of the appeal record, I instruct you to incorporate language in the ROD, Revised Plan and FEIS to clarify the Allegheny NF's authority to manage oil and gas activities. This includes:
 - Identifying the roles and responsibilities of the Forest Service, State of Pennsylvania and the private oil and gas operator for the purpose of protection of surface resources from oil and gas development.
 - Distinguishing between reserved and outstanding rights and how the management of these two distinct private mineral estates may vary depending upon language in individual deeds and/or the USDA Secretary's rules and regulations.
 - Reviewing and clarifying, where appropriate, the process identified in FEIS Appendix F (p. F-5).

Appellants variously contend the Allegheny NF does not acknowledge the privately-owned mineral estate as dominant nor recognize *United States v. Minard Run Oil Company, Civil Action No. 80-129 (W.D. Pa. 1980)* as the standard for development of private OGD on the Allegheny NF. *Minard Run* held that private oil, gas and mineral operators are entitled to reasonable use of the surface determined in accordance with applicable state law before being required to yield use of the surface. It did not authorize the Allegheny NF to summarily make that determination in the context of reserved or outstanding OGM estates (NOA #0006, pp. 7, 9 (includes [##]⁴ & [***]); NOA #0009, pp.3-4, 7-9; NOA #0010, pp. 11, 13-14 (includes [***]); NOA, #0012, pp.7-9; NOA #0013, pp. 6-7, 17; NOA #0014, pp.7-9). Further, appellants contend the Revised Plan needs to differentiate between Federal OGD and non-Federal oil and gas activities, recognizing that non-Federal activities cannot be restricted in the same manner as Federal activities (NOA #0010, pp. 27-28 (includes [***])).

When the Forest Service acquired the lands comprising the Allegheny NF, a determination was made that national forest objectives could be achieved with the mineral rights separated from the surface. Consequently, under most of the surface land acquired for the Allegheny NF, the subsurface rights are privately owned, either by a third party (outstanding rights), or reserved by the seller (reserved rights) (FEIS, p. 3-4). The Regional Forester acknowledges his responsibility to protect the publicly-owned surface resources while recognizing that mineral estate owners have the right to access and develop their privately owned minerals (ROD, p.29). Private mineral owners have the right to make reasonable use of the surface in order to develop their mineral estate. Forest Service land management decisions and administration of outstanding and reserved mineral rights will be in accordance with deed provisions as well as Commonwealth and Federal law (RLRMP, p. 90).

The regulations at 40 CFR 1502.22 require the use of complete information. The Allegheny NF's outline of the process of management of private oil and gas development under the "Description of Surface Oil, Gas, and Mineral Activity" (FEIS Appendix F, p. F-5) does not clearly describe private, state and federal responsibilities and authorities. In fact, there are inconsistencies throughout the record in regard to managing the

⁴ The symbol [##] represents POGAM (NOA #0006), which incorporates 63 non-unique appeals (NOAs #0019 through #0083).

private oil and gas development process. As an example, “In regards to soil erosion, sedimentation, and water quality issues, PA-DEP (Pennsylvania Department of Environmental Protection) is the regulatory authority, not the Forest Service” (FEIS Appendix F, p. F-5). This is not entirely accurate. While the PA-DEP has regulatory authority over these issues, the Forest Service also has responsibility to ensure surface resources are protected. Therefore there is a joint responsibility by both agencies. Clearly, the description of this process is essential to the decision particularly as the FEIS and Revised Plan rely upon Appendix F throughout the documents.

3. I find that the disclosure of cumulative effects of OGD on Allegheny NF air quality as well as impacts to regional air quality does not fully comply with NEPA regulations at 40 CFR parts 1502.16 and 1508.7. Therefore, I instruct you to more fully document the cumulative effects of OGD on air quality. I further instruct you to follow the agency policy for consideration of new information to determine any subsequent actions that may be necessary.

Appellant contends the “FEIS’ scope of analysis for direct and indirect effects of air pollution is totally inadequate and ignores cumulative effects” (NOA #0007, pp. 158, 166 and 168).

I have reviewed the air resource effects analyses (FEIS, pp. 3-52 to 3-63) in light of the concerns raised by the appellant. The FEIS adequately discloses the direct, indirect, and cumulative effects of emissions resulting from Allegheny NF management activities such as all terrain vehicles and off highway motorcycle travel, prescribed fire, and vegetation management (FEIS, pp. 3-57 to 3-63). This disclosure is adequate to make a comparison of effects between alternatives. However, I find the disclosure of cumulative effects of oil and gas development on Allegheny NF air quality as well as impacts to regional air quality do not fully comply with NEPA regulations at 40 CFR parts 1502.16 and 1508.7.

The FEIS indicates that the estimate of 20,000 wells is “used to estimate the long term cumulative consequences of OGD by the Allegheny NF in Chapter 3” (FEIS, pp. 2-59 to 2-60; FEIS Appendix F, pp. F-8 to F-10, F-12). The air resource cumulative effects analysis, however, does not evaluate the impacts of future OGD (FEIS, pp. 3-62 to 3-63). The disclosure of cumulative effects of OGD does not adequately consider past, present, and reasonably foreseeable future actions; additionally, the disclosure does not adequately explain whether or how those actions may impact air quality on the Allegheny NF or impact regional air quality. The AMS for the Air Quality Assessment Report explains that current management (activities) of the Allegheny NF have minimal negative effects on air quality compared to the air pollution sources in the region; however, “. . . it is important to realize that these small sources of air pollutants can have cumulative effects with large sources and other small sources. These effects could lead to forest or human health problems if not limited in scope and amount” (AR File Code 830.4, p. 7). Further, analysis states “Current air pollution impacts occurring on the Allegheny NF are the cumulative result of numerous sources. Pollution from sources such as automobiles, off-road construction equipment, wildland fires, factories, oil refineries, and power plants all contribute to the regional pollution load” (FEIS, p. 3-57). The cumulative effects analysis provides no discussion of

how OGD may combine with effects associated with implementing the Revised Plan and impact air quality.

Appellant contends that extensive oil and gas drilling in the Allegheny NF means that a massive amount of methane gas is being released into the atmosphere; yet the Forest Service has made no attempts to quantify these emissions or to study their effect (NOA #0007, pp. 115-116). Further, the air pollution analysis fails to identify the hydrogen sulfide content of crude oil being extracted on the Allegheny NF and the extent of hydrogen sulfide emissions (NOA #0007, p. 168).

Methane gas and hydrogen sulfide are pollutants associated with OGD. The scope and duration of oil and gas drilling and extraction affect methane and hydrogen sulfide emissions. The PA-DEP has regulatory authority for air quality that extends over federal lands. While the FEIS indicates that the estimate of 20,000 wells is “used to estimate the long term cumulative consequences of oil and gas development. . .” (FEIS, pp. 2-59 to 2-60; FEIS Appendix F, pp. F-8 to F-10, and F-12), the air resource cumulative effects analysis fails to disclose the type or amount of emissions that might result from the projected OGD (FEIS, pp. 3-62 to 3-63).

Appellant also contends the Revised Forest Plan completely eliminated analyzing emissions from vehicles and equipment used in oil and gas extraction and oil and gas drilling, storage, processing, transport, and marketing because it "would be difficult to estimate" (NOA #0007, p. 160).

The PA-DEP has regulatory authority for air quality that extends over federal lands. Therefore, issues related to the storage, processing, and marketing of oil and gas products are outside scope of the Revised Plan. However, as noted in this appeal response, the cumulative effects analysis does not fully comply with NEPA in the disclosure of impacts on air quality resulting from OGD. Specifically, the cumulative effects analysis does not adequately evaluate emissions from vehicles and equipment used in OGD.

This decision is the final administrative determination of the Department of Agriculture, unless the Secretary, on his own initiative, elects to review the decision within 15 days of receipt (36 CFR 217.17(d)).

JOEL D. HOLTROP
Reviewing Officer for the Chief

Enclosures: Attachment 1 – List of Appellants
Attachment 2 – Issues Reviewed and Decision Affirmed
Attachment 3 – Issues Considered Moot in Light of Decision

cc: All Appellants

/s/ Joel D. Holtrop