



File Code: 1570-1

Date: September 17, 2004

Mr. Jim Bensman, et al  
Heartwood  
585 Grove Avenue  
Wood River, IL 62095-1615

RE: Appeal of the Decision Notice and Finding of No Significant Impact of the Forest Plan Amendment for Threatened and Endangered Species of the Monongahela National Forest Land and Resource Management Plan (LRMP), Appeal 04-09-21-0024 A217

Dear Appellants:

I have completed my review of Forest Supervisor Clyde N. Thompson's, Decision Notice and Finding of No Significant Impact approving the Threatened and Endangered Species Amendment to the Monongahela National Forest Land and Resource Management Plan (MNF-LRMP). Forest Supervisor Clyde Thompson signed this Decision on March 12, 2004 and published it on March 15, 2004.

The Forest Supervisor selected Alternative 1 of the EA with some modifications. Alternative 1 incorporates standards into the Forest Plan based on new information about threatened and endangered species including, eleven "Mandatory Terms and Conditions" and two conservation recommendations identified in the United States Fish and Wildlife Service (USFWS) March 2002 Biological Opinion on Indiana bat, and the "Guidelines for the Identification and Management of West Virginia Northern Flying Squirrels" that were part of the "Appalachian Northern Flying Squirrels' Recovery Plan" updated in 2001.

## **DISCUSSION**

Your appeal, filed April 29, 2004, for Heartwood, representative Jim Bensman, Virginia Forest Watch, representative Sherman Bamford and Wild Virginia, representative Steve Krichbaum was timely. Issues included: failure to prepare an SEIS, an arbitrary and capricious FONSI, inadequate range of alternatives, concerns on the Indiana bat and other species, inadequate cumulative impact analysis, no population data, and failure to maintain minimum viable populations.

Pursuant to 36 CFR 217.15 and 217.16, to ensure the analysis and decision are in compliance with applicable laws, regulations, policy and orders, I have carefully reviewed and considered each of your appeal issues and the decision documentation submitted by the Monongahela National Forest. My review incorporates by reference the entire Project Record including the



scoping letter and public comments, the Environmental Assessment (EA) and public comments, the Biological Assessment/Biological Evaluation/Biological Opinion, and the Decision Notice (DN).

Forest Service regulations provide for a 160-day review period for administrative appeals of non-significant Plan amendment decisions. (36 CFR 217.8(f)(1)). This review period is calculated from the filing date of the last appeal filed. (36 CFR 217.8(f)(2)).

The decision documentation and transmittal letter were received from the Responsible Officer on June 14, 2004. The transmittal letter identified where your appeal issues were addressed in the decision documentation. You were provided a copy of the transmittal letter. There were no requests for intervention.

This letter constitutes my decision on the disposition of the appeal of the decision to amend the Monongahela National Forest Land and Resource Management Plan (Forest Plan) for Threatened and Endangered Species. The following pages document my findings on the issues.

## **APPEAL ISSUES**

Thirty-four (34) issues were raised in this appeal. These appeal points will be addressed in the order presented in the appeal. Unless otherwise noted, the Appellants raised these issues during the 60-day comment period.

### **Issue I: Failure to Prepare an SEIS**

The Appellants, during the 60-day comment period, expressed concerns about adopting this Amendment prior to completion of the Plan revision for the Monongahela National Forest (MNF). Concerns were also raised that “*the best scientific and commercial data available*” should be considered in the evaluation of the Indiana bat. However, they did not specifically address the need for a Supplemental EIS to the existing Forest Plan as they now contend.

**Issue A: Procedures:** The Appellants state, “*The Forest Service has not prepared a finding that a supplement to the EIS was not needed after reviewing the new information (finding the Indiana bats). This in of itself violates the FSH.*” (NOA, p. 2). They also contend, “*The Forest Service appears to be confused on what the “Federal action” is. The Federal action is the approval of the Forest Plan. New information and changed circumstances necessitate the need to revisit the FEIS to see if it needs to be revised.*” (NOA, p. 3). They further allege, “*Heartwood raised this issue in its scoping comments and its comments on the EA. The Forest Service did not respond to this issue.*” (NOA, p. 3).

**Response:** In 2000, the MNF prepared a programmatic Biological Assessment (BA) to evaluate the effects of ongoing management practices regarding the endangered Indiana bat and eight (8) other species. These species were the bald eagle, cheat mountain salamander, Virginia big-eared bat, West Virginia northern flying squirrel, running buffalo clover, shale

barren rock cress, small whorled pogonia, and the Virginia spiraea. In 2001 the MNF revised the BA to address the USFWS's informal comments to the BA and the USFWS's amended West Virginia Northern Flying Squirrel Recovery Plan. The revised BA also evaluated the effects on the aforementioned species of management activities anticipated to occur into the future to implement the Forest Plan. The revised BA concluded that the continued implementation of the Forest Plan would have "no effect" or "may affect, not likely to adversely affect" determinations for the bald eagle, cheat mountain salamander, Virginia big-eared bat, West Virginia northern flying squirrel, running buffalo clover, shale barren rock cress, small whorled pogonia and Virginia spiraea. It also made a "may affect, not likely to adversely affect" for individual Indiana bats for all activities that involve tree cutting within the 5 mile zones, and for prescribed fire, gypsy moth and range activities. A "no effect" determination was made for firewood cutting. A "may affect, likely to adversely affect" determination was made for individual Indiana bats for activities that involve tree cutting (regeneration harvest, thinning and single tree selection, timber stand improvement, road construction/reconstruction, recreation, wildlife habitat improvement, fisheries improvement, and mineral activities) that occur outside of the 5 mile zones. (Project Record, Volume 2, Revised BA, pp. 2-3).

The USFWS reviewed the BA, and on March 26, 2002, issued its Biological Opinion (BO) which stated, "...the anticipated effects of the continued implementation of the 1986 Forest Plan, as amended, it is the Service's biological opinion that the proposed action is not likely to jeopardize the continued existence of the Indiana bat." With the BO, the USFWS issued an incidental take statement that authorized the incidental take of the Indiana bat with the establishment of management areas and prescriptions to protect Indiana bats and their habitat.

The Monongahela National Forest proposed to amend its Forest Plan to meet Forest Service responsibilities for threatened, endangered, and proposed species of the MNF consistent with the (1) Endangered Species Act (ESA) of 1973, as amended, and (2) approved recovery plans of each threatened and endangered species of the MNF. In a letter dated February 25, 2004, the USFWS acknowledged that concerns they had raised, "have been thoroughly addressed...through informal consultation between our respective staff", and concurred with the determinations made in the Biological Evaluation for the Amendment. They further state that the amendment provides a process for the positive contribution toward the conservation and recovery of listed species. They noted the action alternatives, including Alternative 1, are consistent with the "Terms and Conditions" outlined in the Biological Opinion (BO) and additional formal consultation is not necessary because implementation of the Amendment, in and of itself, will not result in the loss of Indiana bat habitat. (DN/FONSI, p. 3).

To assess the effects of its proposed action, the Forest completed an Environmental Assessment (EA). Based on the EA, the Forest Supervisor issued a Decision Notice. The Decision Notice clearly states that the decision is an amendment to the Forest Plan incorporating the "Reasonable and Prudent Measures" and the "Terms and Conditions" of the Biological Opinion.

As set forth above, the Appellants contend that the Forest should have prepared a supplemental EIS to the Monongahela Forest Plan after reviewing new information regarding Indiana bats. Appellants cite court cases to support their argument.

Given that the Forest prepared a comprehensive EA to address the new information regarding ESA-listed species in the BO, it's difficult to determine the Appellants' issue. The Forest was clearly concerned with its ongoing duty to address new information and keep its Forest Plan current. Acknowledging that an EA was prepared for the new information, Appellants appear to be arguing for an EIS for a different type of action. Although not directly stated, Appellants' argument implies that a broader scope of EIS should be prepared that would reauthorize the entire Forest Plan. That effort, the revision of the Forest Plan, is currently ongoing and is expected to be completed by 2005. However, until that process is complete, the "Reasonable and Prudent Measures" and the "Terms and Conditions" of the BO need to be incorporated into the existing Forest Plan.

A supplemental EIS is not required "every time new information comes to light after the EIS is finalized." Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 370 (1989). "The new circumstances must present a seriously different picture of the environmental impact of the proposed project from what was previously envisioned." Sierra Club v. Froehlke, 816 F.2d 205, 210 (8<sup>th</sup> Cir. 1987). Appellants provide no explanation for why they believe the information analyzed by the Forest was different from what they seek in a SEIS. In essence, Appellants challenge the methodology used by the Forest to address new information regarding ESA-listed species. Acknowledging that the Forest prepared an EA for this information, they seek an EIS for a broader, different proposed action. However, the proposed action is not the reauthorization of the Forest Plan.

My review of the record indicates that the Forest reasonably addressed the relevant issues and new information regarding ESA-listed species in conjunction with the Biological Opinion. The EIS for the revised Forest Plan will analyze and address many of the broad issues of concern to the Appellants. I find that a SEIS was not necessary for the Monongahela Threatened and Endangered Species Amendment.

The Appellants' claims are incorrect in regards to the assertion that "*Heartwood raised this issue in its scoping comments and its comments on the EA. The Forest Service did not respond to this issue.*" Comments by Heartwood did not specifically address the issue of a Supplemental EIS. Notwithstanding, the Forest Service did discuss the need for a significant amendment to the Forest Plan under the section, "Issues not Addressed in Detail" as Issue 10 (EA, Appendix F, p. F-4). "The proposed amendment is not expected to result in significant effects: therefore, an environmental impact statement is not needed (see "Relationship to Other Laws," on pp. 4-7 of Chapter I)." This was further clarified in "Responses to Comments" stating, "After considering the environmental effect, described in the EA, the Forest Supervisor determined that this Amendment is not a major federal action, individually or cumulatively, and it will not significantly affect the quality of the human environment (DN/FONSI, p.11). Therefore, an environmental impact statement is not needed." (EA, Appendix I, p. 2).

My review of the record indicates the Forest reasonably addressed the issues brought forth by the Appellants.

**Issue B: Actual Standard:** The Appellants state, "*The Forest Service violated NEPA by failing to prepare a Supplemental EIS for the Forest Plan FEIS. The listing of additional*

*species and new information on the Indiana bat requires a SEIS. The Forest Service violated NEPA by preparing an EA instead of an SEIS.”* (NOA, p. 3).

**Response:** See Response under Section I-A – “Failure to Prepare an SEIS, Procedures”

## **Issue II: FONSI**

The Appellants contend the FONSI was arbitrary and capricious. Although they expressed the concern, during the 60-day comment period, that an EIS was required for this Amendment, they did not discuss their rationale as presented in the appeal.

**Issue 1: Need for an EIS.** The Appellants state, “*NEPA requires all federal agencies to prepare environmental impact statements (EIS’s) on ‘major Federal actions significantly affecting the quality of the human environment’.*” (NOA, p. 5).

**Response:** See Response under Section I-A – “Failure to Prepare an SEIS, Procedures”

**Issue 2: Size of the EA.** The Appellants contend that the EA is more than 300 pages long, and the Council on Environmental Quality (CEQ) 40 Questions generally advises agencies to keep the length of EAs to not more than approximately 10 –15 pages. (NOA, p. 6).

**Response:** There are no mandated page limits for EAs. CEQ provides general guidance. Courts have held that the length of an EA does not establish the need for an EIS. Heartwood v. Forest Service, No. 1:02-CV-54 (E.D. Mo. July 29, 2003). “What ultimately determines whether an EIS rather than an EA is required is the scope of the project itself, not the length of the agency’s report.” (Heartwood v. Forest Service, No. 03-3267 (Eighth Circuit, Court of Appeals, August 25, 2004). I find an EIS was not warranted in this instance.

**Issue 3: Allegheny National Forest.** The Appellants contend that since the Allegheny National Forest prepared an EIS for its threatened and endangered species amendment, the MNF should prepare an EIS for its amendment. The Appellants allege there is no explanation as to why the Allegheny National Forest prepared an EIS, and the Monongahela did not. They contend that differences between National Forests must be explained. (NOA, pp. 6-7).

**Response:** In determining whether an action is significant and, therefore, requires an EIS, CEQ regulations direct agencies to consider both the context and intensity of the proposed action (40 C.F.R. 1508.27). Context refers to the setting of the proposed action, while intensity refers to the severity of the impact. Ten factors are to be considered in evaluating intensity (40 C.F.R. 1508.27(b)). The degree to which these factors are impacted normally depends on the location of the proposed action and its ecological characteristics.

The Eastern Region of the Forest Service encompasses states from Maine to Missouri and

Minnesota to West Virginia. There is extreme ecosystem variability within the Region. National forests within the Region vary from central hardwoods to Lake States pine plantations, to northern New England forests. There is variability between different sites on an individual National Forest depending on slope, aspect, soils, fragmentation and other factors. Based on this variability, it's expected that decision analysis will vary from National Forest to National Forest and even within a National Forest. Because variability is expected, the Forest Service rarely explains such differences in analyses between administrative units. This is especially true where members of the public do not raise this concern during the public comment period, as was the case here.

The Appellants allege the MNF should have completed an Environmental Impact Statement ("EIS") for its Threatened and Endangered Species Amendment since it has more Indiana bats than the Allegheny. It's unknown exactly how many Indiana bats are on each Forest. While West Virginia has an increasing number of Indiana bats (EA, p. III-3), scientists conducting surveys have not located any maternity colonies on the Forest, despite extensive summer surveys. (EA, p. III-4-5). In addition, it is the Allegheny and not the Monongahela that has the long-term amendment. At the time of its amendment, the Allegheny was six years from completion of its revised Forest Plan. Its decision had long-term effects. Contrarily, the Monongahela expects to complete its revision by 2005.

The reasons the Appellants gave for why an EIS should have been completed are not factually correct. I find the Responsible Official was accurate in determining that an EIS was not warranted.

**Issue 4: Context:** The Appellants claim the FONSI does not address the context of the decision.

**Response:** As the Appellants point out, CEQ regulations require a federal agency consider both the context and intensity of an action when making significance determinations. Context may be analyzed in terms of national effects, the affected region, the affected interests and the locality (40 C.F.R. 1508.27(a)). In this case, the Forest Service analyzed the context of the proposed amendment in terms of the Monongahela "Forest Plan and MNF lands that represent habitat or potential habitat for threatened and endangered species known to occur on the MNF and habitat for those that could be proposed in the future. The context also includes knowledge of these species and their use of habitat, which has been acquired since the 1986 Forest Plan was approved." (DN/FONSI, p. 11). I find this was appropriate given the Forest-wide scope of the proposed amendment.

**Issue 5: Listed Species:** The Appellants claim the FONSI does not address the degree to which the action may adversely affect an endangered or threatened species. They state, "*The FONSI...does not address the actual criterion, 'the degree to which the action may adversely affect an endangered or threatened species.'*" (NOA, p. 8).

**Response:** The CEQ regulations provide that in "evaluating intensity," agencies must "consider...[t]he degree to which the action may adversely affect an endangered or threatened species." (40 C.F.R. 1508.27(b)(9)). [emphasis added]. The Appellants are

incorrect to suggest that under these regulations, an EIS is required any time a proposed action “may affect” an endangered species, regardless of the magnitude of that effect. Rather, the regulations plainly require the agency evaluate the severity of the effect on the species as part of its process of determining whether the impact of the project rises to the level of significance requiring an EIS.

The FONSI clearly addressed the degree to which the action may adversely affect an endangered or threatened species. The action here is the Forest Plan amendment that includes the “Terms and Conditions” and “Reasonable and Prudent Measures” to protect the Indiana bat. A Biological Evaluation (BE) for the amendment found that while the amendment could “...result in the incidental take of the Indiana bat, it will not jeopardize the continued existence of the species, and many aspects of it will further protect, conserve, and aid in the recovery of Indiana bats.” The USFWS stated in its February 25, 2004, letter to the Forest Service (FS) that implementation of Alternative 1 will strengthen protection, conservation, and recovery of MNF threatened and endangered species. (DN/FONSI, p. 14; Project File, Volume 40, pp. 30-31).

The FONSI is based on an extensive analysis set forth in the EA. The EA analyzed the effects of the alternatives on federally threatened and endangered species. (EA, pp. III-1 through III-20). This detailed analysis was based on the BE (EA, Appendix G), the BO (EA, Appendix D), and the revised programmatic BA (Project Record, Volume 2, Revised BA, pp. 26-112) completed by the Forest for its programmatic consultation.

The Appellants point to nothing in the record calling into question the Forest Service’s or USFWS’s conclusions regarding the effects of the Monongahela Threatened and Endangered Species Amendment on the Indiana bat, nor anything that would call into question the Forest Service’s conclusion that no EIS was required. The determination of significance is “a classic example of a factual dispute the resolution of which implicates substantial agency expertise.” March v. Oregon Natural Resources Council, 490 U.S. at 374-377. The Forest adequately exercised that expertise after reviewing the relevant evidence.

I find that the Forest clearly addressed the degree to which the action adversely affects T & E Species.

**Issue 6: Precedent Setting:** The Appellants contend, “S & Gs [standards and guidelines] *do set a precedent for future actions.*” They also state, “S&Gs also ‘represents a decision in principle about a future consideration’.” (NOA, pp. 8-9).

**Response:** The FONSI, p. 13, Item 6, states, “The Amendment is not likely to establish a precedent for future actions with significant effects. This is because... [t]hese modifications do not constitute significant changes from current management.” It also states, “Chapter III of the EA indicates the effects of Alternative 1 will be minor and fall within the scope of the effects disclosed in the Environmental Impact Statement for the MNF Forest Plan.”

I find the Forest is not setting a precedent for future actions with this Amendment.

**Issue 7: Violations of the ESA:** The Appellants contend the ESA will be violated. (NOA, p. 9).

**Response:** See Response under Section IV-A – “Top Priority to Listed Species” and IV-B – “Adverse Effects.”

**Issue 8: Drs. Whitaker and Hoffmanns’ Messages**

**Response:** See Response under Section IV-B, “Indiana Bat, Adverse Effects”

**Issue 9: Appeal Regulations:** The Appellants quote from the Forest Service’s administrative appeal regulations at 36 C.F.R. 217 stating, “ *This demonstrates the Forest Service believes an EIS is required for an amendment.*” (NOA, pp. 9-10).

**Response:** The regulations at 36 C.F.R. 217 are entitled “Appeal of Regional Guides and National Forest Management Plans.” The section that the Appellants quote is entitled “Decisions Subject to Appeal.” These regulations are clearly about appealability of National Forest Plans and Regional Guides and are not about the type of NEPA documentation required.

It should be noted the section the Appellants quote refers to significant amendments; it does not refer to non-significant amendments. 36 C.F.R. 217.8 clearly indicates that appeals may be filed on non-significant amendments documented in an EA/DN. The MNF issued a non-significant T&E Amendment. (EA, p. I-4 through I-6; DN/FONSI, pp. 5-9).

I find the Forest made the appropriate determination in issuing a non-significant amendment and documenting that analysis in an EA (Refer to Issue I, “Failure to Prepare an SEIS” and Issue II, “FONSI”).

**Issue III: Range of Alternatives**

The Appellants did not raise these issues during the 60-day comment period.

**Issue 1: Change in the Law:** The Appellants allege the EA has “...a fatal flaw as it represents a fundamental misunderstanding of what is required by NEPA.” (NOA, p. 12). “...the phrase ‘all reasonable alternatives’ has not been interpreted to require that an infinite or unreasonable number of alternatives be analyzed, but does require a range of reasonable alternatives be analyzed **whether or not they are within the Forest Service jurisdiction to implement.**” (NOA, p. 12). They further state, “Thus, it is clear the EA is fatally flawed. Laws cannot constrain the range of alternatives.” (NOA, p. 13).

**Response:** NEPA requires federal agencies to study, develop, and describe appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts of alternative uses of available resources (42 U.S.C. 4332). The Council on



Environmental Quality (CEQ) regulations implementing NEPA discusses alternative development. The CEQ's Forty Most Asked Questions states in question number 1a,

**“1a. Range of Alternatives.** What is meant by ‘range of alternatives’ as referred to in Sec. 1505.1(e)?

The phrase "range of alternatives" refers to the alternatives discussed in environmental documents. It includes all reasonable alternatives, which must be rigorously explored and objectively evaluated, as well as those other alternatives, which are eliminated from detailed study with a brief discussion of the reasons for eliminating them. Section 1502.14. A decisionmaker must not consider alternatives beyond the range of alternatives discussed in the relevant environmental documents. Moreover, a decisionmaker must, in fact, consider all the alternatives discussed in an EIS. Section 1505.1(e).”

While regulations require that a range of alternatives be analyzed, the no action alternative is the only alternative specifically required as an option to the proposed action (40 C.F.R. 1502.14(d)). There is no set number of alternatives required in order to reflect a reasonable range. Agencies have discretion to determine appropriate alternatives based upon the purpose of the proposal. In this EA, the Forest Service identified 21 alternatives; 4 “considered in detail” and 17 “not considered in detail.” In reviewing Forest Service decisions similar to this project, courts have found that the range of alternatives may be limited to those alternatives that meet the purpose of the proposed action. See e.g. Allegheny Defense Project v. Forest Service, No 01-895 (W. D. Pa 2003) (Forest limited the scope of a T&E Amendment to requirements of a Biological Opinion – Court upheld the narrow purpose and need -- Forest did not need to consider in detail alternatives that did not accomplish the purpose and need for the action.); Krichbaum v. Kelley, 844 F. Supp. 1107, 1109 (W.D. Va. 1994), aff’d 61 F.3d 900 (4<sup>th</sup> Cir. 1995) (Forest need not consider a “no logging” alternative that does not meet forest plan goals); Sierra Club v. Robertson, 810 F. Supp. 1021, 1029 (W.D. Ark. 1992), aff’d 28 F.3d 753 (8<sup>th</sup> Cir. 1994) (NEPA does not require an agency to consider alternatives that do not meet the purpose of the proposed action).

In response to the assertions that, “*Laws cannot constrain the range of alternatives.*” (NOA, p. 13), CEQ's Forty Most Asked Questions states in question number 23c.

**“23c.** What options are available for the decisionmaker when **conflicts with such plans** or policies are identified?

After identifying any potential land use conflicts, the decisionmaker must weigh the significance of the conflicts, among all the other environmental and non-environmental factors that must be considered in reaching a rational and balanced decision. Unless precluded by other law [emphasis added] from causing or contributing to any inconsistency with the land use plans, policies or controls, the decisionmaker retains the authority to go forward with the proposal, despite the potential conflict. In the Record of Decision, the decisionmaker must explain

what the decision was, how it was made, and what mitigation measures are being imposed to lessen adverse environmental impacts of the proposal, among the other requirements of Section 1505.2. This provision would require the decisionmaker to explain any decision to override land use plans, policies or controls for the area.”

Both the Endangered Species Act of 1973 and the Multiple Use Sustained Yield Act of 1976 preclude the decision maker from “going forward” with many of the alternatives not considered in detail (EA, p. II-35).

**Issue 2: No-logging Alternative:** The Appellants claim the Forest Service should have considered an alternative that does not allow logging on the Monongahela National Forest (NOA, pp. 13-15). They make statements such as “...*Basically the entire Forest is potential habitat for the Indiana bat. So ending logging on the entire Forest is a reasonable alternative.*” (NOA, p. 13). “...*Inconsistency with a law is not a legal basis to not consider an alternative.*” “*It is unclear what the Forest Service means by ‘inconsistent with Forest management policies.’*” (NOA, p. 13). “*The purpose of the analysis and considering alternatives is to see if the policies need to be changed.*” (NOA, p. 13). “*Claiming...that protecting forests may not be in the best interests is not a reason to consider an alternative. The alternative needs to be developed to see if it’s in the best interest of the listed species*” (NOA, p. 13). “*The Forest Service’s obligation under the ESA is more [than] just protecting T&E species. The ESA requires the Forest Service to ‘conserve’ these species.*” (NOA, p. 13). “*Therefore, the Forest Service cannot merely protect the species, they have to recover the species.*” (NOA, p. 14). “*Heartwood also provided citations to extensive scientific evidence that shows that logging harms the bats. The Forest Service ignored this evidence.*” (NOA, p. 13). “*This demonstrates that ending logging would be a reasonable course of action.*” (NOA, p. 15).

**Response:** See the Response to III-1, “Range of Alternatives – Change in the Law”, IV-A, “Indiana Bat – Top Priority to Listed Species” and IV-B, “Indiana Bat – Adverse Effects.”

In 2001, the MNF completed an extensive Revised Biological Assessment (RBA), which assessed the effects of implementing its Forest Plan (including its logging program) on the bald eagle, cheat mountain salamander, Indiana bat, Virginia big-eared bat, West Virginia northern flying squirrel, running buffalo clover, shale barren rock cress, small whorled pogonia and the Virginia spiraea. The USFWS reviewed this assessment as well as numerous other pieces of research and other sources. In a letter dated February 25, 2004, the USFWS acknowledged that concerns they had raised “have been thoroughly addressed... [t]hrough informal consultation between our respective staff “ and concurred with the determinations made in the Biological Evaluation for the Amendment.” They further state, “The amendment provides a process for the positive contribution toward the conservation and recovery of listed species.” They noted the action alternatives, including Alternative 1, are consistent with the “Terms and Conditions” outlined in the Biological Opinion (BO) and additional formal consultation is not necessary because implementation of the Amendment, in and of itself, will not result in the loss of Indiana bat habitat. (DN/FONSI, p. 3; Project

File, Volume 40, p. 31).

With the BO, the USFWS issued an incidental take statement that authorized the incidental take of the Indiana bat with the implementation of certain “Reasonable and Prudent Measures” and “Terms and Conditions.” None of these measures or “Terms and Conditions” included “no logging” on the MNF. (EA, Appendix D, pp. D-21 through D-23).

The purpose and need of the proposal to amend the Forest Plan was to ensure the Forest Plan meets Forest Service responsibilities for threatened, endangered, and proposed species of the MNF consistent with the (1) Endangered Species Act (ESA) of 1973, as amended, and (2) approved recovery plans of each threatened and endangered species of the MNF. (EA, p. I-2). The “No Action” Alternative (analyzed in detail) and a “No Logging” alternative (described as “Protect threatened and endangered species by prohibiting mineral extraction and removing the entire Monongahela National Forest from timber production.” (EA, p. II-35) was considered, but eliminated from detailed study) respond directly to the public issue of no harvest. The “No Action” alternative is an alternative that does not include logging. Contrary to the Appellants’ claims, the effects of not logging in the project area are described in the EA (EA, p. III-10 through 12). In addition, non-logging management activities are discussed in all alternatives. The “Proposed Action” and Alternatives 1 and 2 include management activities such as implementation of prescribed fires, and the management of recreation, wilderness, range, visual quality, special use, mineral, and transportation resources (EA, pp. II-10, II-21, II-22).

A response to the comment suggesting a “no-logging alternative” was also addressed in Appendix I, “Responses to Comments” (EA, Appendix I, pp. 6-10). Extensive explanation is provided in Appendix I, pages 6-10 regarding the rationale for not analyzing the “no logging” alternative in detail.

Furthermore, in a recent court decision the Judge found that analysis of a separate detailed “no-logging” alternative was not necessary, as timber harvest is one of the purposes for which the National Forests are to be managed under the Multiple Use Sustained Yield Act (Allegheny Defense Project v. Forest Service, No 01-895 (W. D. Pa 2003)).

Upon review of the Project Record, I find the Monongahela Threatened & Endangered Species Amendment Environmental Analysis adequately considered alternatives dealing with “no-logging.” The Appellants’ claims are unsupported.

**Issue 3: More Protective Alternatives:** The Appellants assert, “*Public comments pointed out the need to consider more protective measures.*” “*The Forest Service should keep more trees per acre to provide more protection.*” “*The Forest Service was legally required to consider alternatives that address these issues.*” (NOA, p. 15).

**Response:** See Response III-1, “Range of Alternatives -- Change in the Law” and III-2, “Range of Alternatives -- No-Logging Alternative.”

The MNF considered public comments either in “Issues addressed in Detail” (EA, p. I-8) or

“Issues not Addressed in Detail” (EA, Appendix F). Specifically, “Issues not Addressed in Detail” #22 states, “At least 35 snags per acre are optional (BA-41); so why only retain a minimum of 6/acre in cutting units?” The response indicated the BO identified 6 snags/acre as “Terms and Conditions.” “However, to address this concern, another standard was created for the “Proposed Action” and Alternative 1 that would require all snags to be retained in cutting units located within the primary range, key areas, or within a two-mile radii of maternity colonies of Indiana bat hibernacula...” (EA, Appendix F, p. F-7). The Forest Service also created Alternative 2, which was designed to maximize roost tree protection and reduce potential for incidental “taking” of an Indiana bat more than any other alternative.” (EA, p. II-22). The Forest Supervisor did not select that alternative because it allowed for greater effects to vegetation management activities and timber outputs than Alternative 1 without substantially aiding in the conservation, protection, and recovery of Indiana bats. (DN/FONSI, p. 11). “[C]omplete prohibition of vegetation management activities within five-mile radii of Indiana bat hibernacula may be counter productive to Indiana bat and other threatened and endangered species (Appendix H).” (DN/FONSI, p. 11).

In light of the above evidence, I find the MNF considered a reasonable range of alternatives.

**Issue 4: Uneven-aged Management:** Appellants allege that an alternative for uneven-aged management needed to be considered. *“First the Forest Service has a greater duty than simply protecting and recovering the Indiana bat. It has a duty to conserve the bat and the Supreme Court has made clear this must be the top priority of the Forest Service.” “How can it ensure its duties are met when the Forest Service refuses to consider an alternative that may lessen the impact.”* (NOA, pp. 15-16).

**Response:** See Response III-1, “Range of Alternatives – Change in the Law” and IV-A, “Top Priority to Listed Species.”

The Forest Service did consider an alternative that would “Emphasize/prioritize threatened and endangered species by changing the Forest Plan’s emphasis from even-aged management to uneven-aged management.” It was considered but not analyzed in detail. (EA, pp. II-36 through II-38). A number of reasons are given for not analyzing this alternative including: 1) the “... alternative is not ripe for decision at this time. It could be addressed during Forest Plan revision; 2) “...the application of uneven-aged management would tend to eliminate tree species requiring lots of sunlight in the early stages of development, such as most hard mast species. This may have long reaching and potentially negative effects on other threatened and endangered and numerous other wildlife species...”; and 3) management practices, such as even-aged and uneven-aged could be used to help manage quality habitat. This option is also discussed in Appendix I, “Response to Comments”. (EA, Appendix I, pp. 6-10).

In a similar complaint filed in Allegheny Defense Project v. Forest Service, No 01-895 (W. D. Pa 2003), the Judge ruled it was not necessary to analyze, in detail, an uneven-aged management alternative based on the purpose and need for the project (i.e., T&E amendment to incorporate requirements of a Biological Opinion).

I find the Forest Service seriously considered whether or not to include an alternative that allowed only uneven-aged management on the MNF.

#### **Issue IV: Indiana Bat**

**Issue A: Top Priority to Listed Species:** Appellants allege a violation of ESA. “[Forest Service] *does not give top priority to the listed species.*” This statement is based on the fact the Forest Service did not develop alternatives such as ending commercial logging or alternatives that could provide more protection for the bats. (NOA, p. 16).

**Response:** See Response III-1, “Range of Alternatives – Change in the Law”; III-2 “Range of Alternatives – No-Logging Alternative”; III-3 “More Protective Measures” and III-4, “Uneven-Aged Management.”

In addition, the Forest Supervisor decided that a complete cessation of summer logging within five-mile radii of Indiana bat hibernacula to be unnecessarily restrictive. This decision was based on the analysis documented in the EA. It was revealed that cessation of summer logging within five-mile radii of Indiana bat hibernacula would increase the chance that sensitive soils would be disturbed during periods of high water saturation (DN/FONSI, p.10).

Contrary to the Appellants’ contention, this Plan Amendment gave top priority to the Indiana bat by recognizing the need to minimize the incidental taking of individual Indiana bats that may be roosting in a tree during the otherwise lawful implementation of MNF management activities (EA, p. I-2). While existing standards were adequate to manage and protect Indiana bat habitat, the standards were not adequate to prevent incidental take. The chances of harming an individual Indiana bat during MNF tree cutting activities or prescribed fire in the general forest area was relatively small, but it was not discountable. Therefore, the MNF entered into formal consultation with the USFWS, using the revised Programmatic Biological Assessment (RBA)(2001). The RBA concludes: “Many of these activities will indirectly benefit Indiana bat by providing diverse roosting and foraging habitat. Some potential roost trees could be removed, but since bats use multiple roost trees and these activities can improve roost tree availability, adverse habitat effects would be minimal.” (Project Record, Volume 2, Revised BA, p. 58).

Contrary to the Appellants’ assertion, the MNF has, over time, implemented hibernacula protections across the Forest, and by this Decision has amended the Forest Plan to adopt “Terms and Conditions” associated with the BO’s “Reasonable and Prudent Measures.” These actions will minimize direct adverse effects to the Indiana bat. The 11 “Mandatory Terms and Conditions” and two conservation recommendations from the USFWS were adopted by the decision to maintain suitable Indiana bat roosting and foraging habitat and protect Indiana bats from the potential effects of timber harvest and prescribed burning. (DN/FONSI, p. 2). In addition, the RBA concluded that in the last decade, West Virginia has seen a 45 percent increase in the number of hibernating Indiana bat (Project Record, Volume 2, Revised BA, p. 40).

I find the Forest Supervisor was diligent in adopting adequate protection measures for the Indiana bat. This decision does not constitute a violation of the Endangered Species Act or 16 USC 1536(a)(2).

## **Issue B: Adverse Effects**

**Issue 1:** Appellants allege, “*The decision violates the ESA due to his failure to use the best scientific and commercial data available*” (NOA, p. 17). “*The analysis needs to consider available research. We have enclosed a CD that has several Indiana bat studies that should be considered.*” (NOA p. 19). “*While the EA mentions the issue of **loyalty to habitat** [emphasis added], it does not mention what Dr. Whitaker says happens.*” (NOA, p. 18).

**Response:** Appellants provided a CD (Project Record, Volume 35, CD Index), during the comment period on the EA. This CD contained many reports about Indiana bats’ use of habitat. The Forest wildlife biologist reviewed this material. (Project Record, Volume 35, pp. i to iv). In his review letter, he concluded that some of the information had already been included in their extensive literature review, utilized in the EA, BA, and for species recovery plans formulated by a team of species experts. The references provided by the Appellants did not constitute a dispute between scientists, although portions of the information provided by Appellants were not relevant to the analysis or as robust as those used in the analysis. Furthermore, the science used by the Forest in assessing the effects to Indiana bat was shared and reviewed by other biologists, ecologists and species experts from the Forest Service, the US Fish and Wildlife Service and the West Virginia Division of Natural Resources. In response to these and similar comments on the EA, the Forest Service further explains the extensive nature of scientific review of pertinent literature, and the formulation of species recovery plans based on this available science (EA, Appendix I, p. 23).

There is no evidence in the Project Record that Dr. Whitaker and Dr. Hoffman sent messages to the Forest regarding the Forest Plan Amendment or this Project. The context and discussion of the e-mail messages sent by Dr. Whitaker and Dr. Hoffman to the Appellants and offered as comments by the Appellants are not clearly linked, connected or identified as pertaining to the Forest Plan Amendment. Therefore, it is difficult to discern exactly what these experts think of the MNF T&E Amendment.

**Issue 2:** The Appellants contend, “*The main problem with the analysis is it does not address what the impact of doing things like logging is on Indiana bats.*” “*What the EA fails to do is measure and disclose what the impact will be.*” “*The Forest Service has never preformed analysis of the impacts logging has on the Indiana bat.*” (NOA, p. 18).

**Response:** The Project Record clearly shows that direct, indirect and cumulative effects on Indiana bats are discussed in the EA, BE, RBA and BO. (EA, pp. III-10 through III-20; Appendix G; Project Record, Volume 2, Revised BA; Appendix D). See also Response to VII, “Cumulative Effects.” I find the claims made by the Appellants are unfounded.

**Issue 3:** The Appellants assert, “*There is no estimate of how many bats would be harmed or killed if they have to find new roosts.*” (NOA, p. 18).

**Response:** The effects to Indiana bats are analyzed in the EA, (Pages III-10 through III-20), BE (pp. 32, 33), BO (Appendix D), and revised BA (pp. 51-61). Specifically, the effects to bats that have to find new roosts are addressed on page D-13 of the BO. The conclusions in these documents do not single out the effects of causing bats to move to new roosts. The analysis takes into consideration all of the factors affecting potential take of bats, and still concludes: “that the proposed action is not likely to jeopardize the continued existence of the Indiana bat.” (BO, p. D-19).

I find the best available science was winnowed from the information available, and this material incorporated into a thorough analysis of effects and the revised Biological Assessment used to support this decision. While the actual numbers of bats harmed or killed if they have to find new roosts may be of interest to the Appellants, that information was not necessary to make an informed decision on adopting an amendment to the Plan that is designed to conserve and protect this species.

**Issue C: Surveys:**

The Appellants claim, “*Surveys cannot establish the absence of Indiana bats*” (NOA, p. 19); and “*The S&Gs [standards and guidelines] need to be modified to address this.*” (NOA, p. 20).

**Response:** The Amendment to the Plan authorized by this decision specifies Forest-wide protection measures (standards/guidelines) for the Indiana bat. Standards 10b and 10c explain that when areas are surveyed for Indiana bats according to protocols established by the USFWS, and when Indiana bats are not detected, it will be assumed they may be present, but in such low numbers that the project is not likely to adversely affect them (Appendix H, p. 86b).

**Issue D: Dr. Whitaker’s Letter:**

The Appellants contend, “*The EA does not mention or address the comments of the Indiana bat experts [Dr. Whitaker, Dr. Joyce Hoffmann] in any way what-so-ever.*” (NOA, p. 20).

**Response:** See Response IV-B, “Adverse Effects.”

**Issue E: 60-Day Notice:**

The Appellants wish to raise concerns identified in this section as appeal issues (NOA, p. 22). Only one of the allegations pertains specifically to the Forest Service and is as follows: “*The U.S. Forest Service is Jeopardizing the Continued Existence of the Indiana Bat in violation of 16 U.S.C. 1536(a)(2), and has not consulted with the FWS or carried out any programs for the conservation of the Indiana bat, in violation of 16 U.S.C. 1536(a)(1).*” (NOA, p. 20).

**Response:** See Response IV-A, “Indiana Bat- Adverse Effects”, and I-A “Procedures.”

I find the Project Record clearly shows consultation with the USFWS on the Indiana bat. Furthermore, the Record is ripe with a history of being pro-active on Indiana bat conservation. On March 26, 2002, the USFWS issued a Biological Opinion (BO) which stated, “...the anticipated effects of the continued implementation of the 1986 Forest Plan, as amended, it is the Service’s biological opinion that the proposed action is not likely to jeopardize the continued existence of the Indiana bat.” The Appellants’ claims are unfounded.

### **Issue V: Effects Determination**

The Appellants state, “*It appears to us the Forest Service is indicating they will do project level consultation the way we have been arguing is required. The Response to Comments appears to indicate the Forest Service will not be issuing any findings.... Please verify we are not misunderstanding.*” (NOA, p. 22).

**Response:** The EA states, “For all projects proposed within threatened and endangered species Areas of Influence, the MNF will seek technical assistance and/or consult (formal or informal) with the USFWS as required statutorily and by other guidance. Pursuant to the ESA, all project level activities that result in a “May effect, likely to adversely effect” determination will undergo formal consultation.” (EA, Appendix I, p. 15).

### **Issue VI: Other Species**

**Issue 1:** The Appellants contend, “*The Forest Service is not addressing metapopulation dynamics [for Plethodontids - Salamanders] that allow species to persist across the landscape. Nor is the agency fully and fairly addressing the ‘genetic isolation of populations, habitat degradation (e.g., acid deposition), habitat fragmentation, and habitat disturbance’ that they themselves have identified as significant factors.*” (NOA, p. 22). They further assert, “*An ‘area of influence has not actually been defined for the Salamanders nor is it being used in the Plan (Amended pg. 86d).*” (NOA, p. 22).

**Response:** In 1991, the USFWS established a species recovery plan for the salamander. The species recovery plan assesses population dynamics (including genetic isolation), habitat degradation, habitat fragmentation and disturbance, and recommends actions to help recover the species. The MNF adopted standards consistent with this Plan to protect the salamander even before the species was listed as threatened under ESA. (Project Record, Volume 2, Revised BA, p. 33). Forest Plan standards include surveying for and avoiding activities in known populations and high potential habitat (EA, Appendix H, Pages 84a and 86d). The standards also call for designation of an “area of influence” for listed species. Areas of influence will be based on known populations and results of on-site surveys. They are intended to be dynamic and based on the most current scientific information for a given species (EA, Appendix H, p. 84c). While areas of influence are designated by specific



Management Prescription and Zoological standards for several species in the amended Forest Plan, the cheat mountain salamander's occupied habitat is not continuous and is not easily discernible. On-the-ground survey for occupancy prior to vegetation and surface disturbance will be conducted. Located colonies, including their buffer, will be avoided (Appendix H, p. 86d). I find the Appellants' claims as unfounded.

**Issue 2:** The Appellants claim, "*The FS also failed to develop an alternative that would protect all the Salamanders range as was done for the Cow Knob salamander on the GWNF.*" (NOA, p. 22).

**Response:** It is unclear exactly what the Appellants are referencing when referring to an alternative that protects all the salamanders' range. While over 88 percent of the known populations occur on the MNF, the Forest Service does not have authority to mandate protections on the remainder of the populations on state and private lands. (Project Record, Volume 12, p. 153).

## **Issue VII: Cumulative Effects**

**Issue 1:** The Appellants allege, "*The BE does not consider or mention cumulative effects.*" (NOA, p. 23).

**Response:** The BE does address cumulative effects, as put forth in Forest Service Manual 2672.42 - Standards for Biological Evaluations. The section is entitled, "Cumulative Effects." (EA, Appendix G, p. 37; also found in Project Record, Volume 29, p. 425). I find the BE does, in fact, consider cumulative effects.

**Issue 2:** The Appellants allege, "*There is no credible cumulative impact analysis of the combined impact of logging, mining, ORV's, road building, etc., across the forest on the current populations of these listed species.*" (NOA, p. 27) "*Therefore [the EA] is not in compliance with the intent of NEPA.*" (NOA, p. 27).

**Response:** In the section titled, "Current and Projected Management on the MNF" of the RBA, the Forest does look at various management activities taking place, or to take place in the future, on the MNF. (Project Record, Volume 2, p. 12-21). These include timber harvesting levels, regeneration harvesting, prescribed fire, road construction, and recreation, to name a few examples analyzed in the RBA.

The RBA goes on to evaluate the effects of applicable activities on all the listed endangered species found on the MNF. For example, in the section dealing with the Indiana bat, the effects of the following activities are considered in detail: regeneration harvest, thinning and single tree selection, timber stand improvement, prescribed fire, firewood cutting, gypsy moth, road construction/reconstruction, recreation, wildlife habitat improvements, fisheries improvements, range, and mineral activity. (Project Record, Volume 2, pp. 51-59). The same format is followed for all the listed species of the MNF. Each section dealing with an

individual listed endangered species is concluded by summarizing the cumulative effects of the applicable activities, entitled “Summary of Cumulative Effects.” For example, in the aforementioned section dealing with the Indiana bat, the RBA looks at the cumulative effects of all pertinent activities on the summer roosting and foraging habitat, the fall swarming habitat, and the hibernacula. (Project Record, Volume 2, pp. 58-59).

As stated in the “Summary of Cumulative Effects” for the Indiana bat, in the subsection “Summer Roosting and Foraging Habitat”, the RBA states, “Even though road construction/reconstruction, trail construction, wildlife habitat improvements, fisheries improvements, and mineral activities themselves are relatively minor in terms and potential effects to Indiana bat, adding these effects to those of the timber harvesting (a total of approximately 4,600 acres annually) and prescribed fire, results in cumulative direct effects.” (Project Record, Volume 2, p. 58).

The same subsection goes on to say, “The direct effects of all activities added up cumulatively are discountable because all major projects (such as regeneration and other harvesting) are done during the hibernation period.” (Project Record, Volume 2, p. 58).

It is worth noting that in the case of the Indiana bat, populations in West Virginia have been increasing since the early 1980’s. In the last decade hibernating Indiana bat populations in the State have increased by 45 percent. (Project Record, Volume 2, p. 40).

Finally, the RBA looks at a summation of management activities that have taken place on the MNF, and those which are likely to take place. (Project Record, Volume 2, p.133-135). This data was used to establish the cumulative effects on the various species listed in the document. The EA clearly references that the detailed analysis is found in the RBA (EA, p. III-2).

I find the Revised Biological Assessment does address the combined cumulative effects of management activities that have taken place on the MNF, and those that are expected to take place. The Appellants’ claim is not supported. I find no violation of NEPA.

**Issue 3:** The Appellants allege, “*In addition, the cumulative effects analysis does not take into consideration what might be likely to occur to key habitat areas not in Forest Service ownership....*” (NOA, p. 27).

**Response:** In the Revised Biological Assessment, consideration is given to what is likely to occur on lands outside the MNF. Using the Indiana bat as an example we find the following statements made in the “Summary of Cumulative Effects”:

“These effects are magnified by activities on private lands, which may adversely affect habitat and force IB to move onto NF land.” (Project Record, Volume 2, p. 58).

“Activities on private land can reduce available habitat in the 5-mile zone so any work in these areas will be carefully planned to ensure adequate desirable habitat remains.” (Project Record, Volume 2, p. 58).

“Road construction is decreasing on the MNF. On some private industry lands, it is common. A lot of the private land in and around the MNF is neither developed nor well roaded.” (Project Record, Volume 2, p. 59).

The basis for the information concerning lands other than those administered by the MNF is found in reports or correspondence from Forest specialists (Project Record, Volume 4, pp. 1-52, “Cumulative Effects”). Within this section is a discussion of activities taking place on private, state, and other federal lands in the vicinity of the MNF.

I find the MNF adequately documented management activities currently taking place, or likely to take place, on non-Forest Service lands, and their impact on management activities on the Forest.

**Issue 4:** The Appellants allege, “...*the provisions to provide protection for the West Virginia northern flying squirrel fall short of doing the job. The areas proposed for protection aren’t necessarily the same areas where the squirrels have been found.*” (NOA, p. 27).

**Response:** Identifying suitable habitat for the West Virginia northern flying squirrel (WVNFS), as with any threatened and endangered species, is a common, yet problematic, task for resource managers (Project Record, Volume 17, p. 727). The existing standards for the protection of the WVNFS on the MNF ensure that “as WV northern flying squirrels are positively identified in an area (as through capture), a ½ mile area around the capture site is recognized as ‘occupied’ habitat.” (EA, Chapter II, p. 13). The standards go on to state, “1/2 mile radii may incorporate and protect habitat that is both suitable and unsuitable (i.e. areas that would not support WV northern flying squirrels because few or none of the habitat elements required by the species were present).” (EA, Page II-13). Thus, areas where the WVNFS have been found will be protected.

The contention remains that areas proposed for protection are not necessarily the same as these capture sites. In fact, the Appellants are correct. As per the WVNFS Recovery Plan Amendment of 2001, all suitable WVNFS habitat will be protected regardless of whether or not WVNFS may be present. Suitable habitat is defined as “areas that have the habitat characteristics required by WVNFS as indicated by known capture locations and the assumption is that WVNFS may potentially be present.” (Project Record, Volume 2, Revised BA, p. 83). Because the WVNFS is assumed to be present in this suitable habitat, the area will be protected. (Project Record, Volume 2, Revised BA, p. 84).

I find the MNF has adequately protected not only the areas where the WVNFS has been found, but also those areas that provide suitable habitat as well, even though they do not presently have squirrels. Contrary to the Appellants’ assertion that the plans provisions “*fall short of doing the job*”, the Plan, in fact, goes the full measure in ensuring the job is done to the highest scientific standards.

**Issue 5:** The Appellants allege, “...*the guidelines for...protecting endangered bats are inadequate.*” (NOA, p. 27). They claim, “*The proposal allows little protection for habitat for the Indiana bat...*” and “...*the guidelines as proposed do not protect alternate roost trees, nor do they provide protection against pesticides or warm winters when the bats will be out.*” (NOA, p. 27).

**Response:** The subject of the inadequacy of protecting endangered bats is a general statement that is subjective and non-specific. The Appellants do not go on to state why they think the protection of endangered bats, in general, is not adequate. Therefore, pursuing this allegation is not possible. However, the Appellants do have some specific concerns about the Indiana bat that can be addressed directly.

The Appellants state that the proposal does not give adequate protection to Indiana bat habitat. The Alternative selected does differ in some ways from the “Proposed Action”, but also allows for many of the same protections afforded by the “Proposed Action.” As stated in the EA, “The Forest Plan complies with ESA by addressing ‘Mandatory Terms and Conditions’ of the 2002 Biological Opinion.” (EA, p. II-2). There would be an increase in the acres managed specifically for the protection and recovery of Indiana bats from the current level of about 30 acres to approximately 158,000 acres (EA, p. II-3). This habitat would be managed through the creation of Management Prescription (MP) 6.3, and through the expansion of the Zoological Area already dedicated to the Indiana bat (EA, p. II-3). The alternative selected does not change the direction in the current Forest Plan allowing for tree-felling within the 5-mile radii of existing Indiana bat hibernacula at any time of the year (EA, p. II-21). However, tree-felling and associated activities would still need to be analyzed for any new project and could be implemented only if it was found that such activities would not adversely affect Indiana bat management and would not be contrary to the “Terms and Conditions” of the 2002 Biological Opinion (EA, p. II-21). Further, the alternative selected proposes that in addition to the existing standards for permanent water sources for the Indiana bat, permanent pools of water would be created or retained during road abandonment activities, when appropriate (EA, p. II-21).

The Appellants further contend that alternate roost trees are not considered and that no protection is afforded to the Indiana bat from pesticides and warm winters. The selected alternative deals with the aforementioned question of protection of habitat. In addition, the question of alternate roost trees is incorporated by reference from the proposed action (EA, p. II-21). In other words, revisions to the Forest-wide standards discussed for the “Proposed Action” are the same as those proposed for the selected alternative. There are several key recommendations made for the retention of potential Indiana bat roost trees:

As stated in the EA the forest would “[r]etain all shagbark hickory trees in cutting units except where public safety concerns exist.” Furthermore, the plan would “[m]onitor snag retention in cutting units. If an average of less than 6 snags/acre with 9” dbh exists, manually create additional snags.” Finally, the plan will “[p]rotect all known roost trees on the MNF until such time as they no longer serve as roost trees (e.g. lose their exfoliating bark or cavities, fall down, or decay).” (EA, p. II-5).

The question of protecting the Indiana bat from pesticide use is addressed in the RBA. The only time pesticides would likely be used on the MNF is in the spraying for gypsy moth infestations. In the RBA effects analysis for the Indiana bat, under the section for gypsy moth, the issue of impacts of pesticide use is quite clear. According to the study used in the RBA, “The direct effects to IB of spraying pesticides for gypsy moth are extremely limited, as these pesticides have shown no impacts to vertebrate species.” (Project Record, Volume 2, Revised BA, p. 55).

The MNF employs or will likely use three pesticides to treat areas subject to gypsy moth infestations. These pesticides are: *Bacillus thuringiensis* (Bt), Dimilin, or Gypchek. Dimilin has not been used on the MNF since 1991. (Project Record, Volume 2, Revised BA, p. 55). The use of Bt pesticides “may kill some moth and butterfly species, in addition to the gypsy moth, although the effect is most likely less with Bt as it is less persistent in the environment.” (Project Record, Volume 2, Revised BA, p. 55). As for Gypchek, the pesticide is “specific to gypsy moth, impacts from its application would be quite limited.” (Project Record, Volume 2, Revised BA, p. 55).

As far as direct effects to the Indiana bat, the use of pesticides would “reduce Indiana bat prey, making it harder to meet energy needs.” (Project Record, Volume 2, Revised BA, p. 55). For adult bats that can likely fly to untreated areas for prey, the effects would be minimal. However, the RBA goes on to say that since young Indiana bat are not able to fly as far in search of prey, they could be affected by the reduction of its food source. The preferred treatment for use on the MNF would be Bt. The RBA gives the following considerations for the use of pesticides on the MNF:

“Efforts will be made to avoid spraying within 5 miles of a hibernacula.” (Project Record, Volume 2, Revised BA, p. 55).

“If spraying within the 5 mile radius is necessary, Gypchek will be the preferred method.” (Project Record, Volume 2, Revised BA, p. 55).

The question of protecting the Indiana bat from “warm winters” is clearly beyond the scope of this document. The MNF does not control the weather and therefore is unable to protect the Indiana bat from unusual meteorological events.

Again, it is worth noting that Indiana bat populations in West Virginia have been increasing since the early 1980’s. In the last decade hibernating Indiana bat populations in the State have increased by 45 percent. (Project Record, Volume 2, Revised BA, p. 40).

I find the MNF has provisions in their planning documents that, contrary to the Appellants’ contention of “*little protection for habitat*”, in reality greatly increases the area managed specifically for the protection and recovery of Indiana bats. Furthermore, the Plan adequately protects roost trees currently in use, and, in addition, protects potential roost trees. Finally, although the necessary use of pesticides may have some effect on Indiana bats, especially younger individuals, efforts are in place to limit the use of pesticides around Indiana bat critical habitat.

**Issue VIII: Population Data**

The Appellants contend, “*The Forest Service does not have the population data required by NFMA.*” (NOA, p. 27).

**Response:** The Appellants fail to state what population data they wish the Forest Service to seek. However, the Forest Service, in partnership with other agencies including the USFWS, the West Virginia Department of Natural Resources, and various universities collected credible inventory and monitoring data for species occurring or having suitable habitat in the Monongahela National Forest. This data is presented in Forest annual “Monitoring and Evaluation Reports.” Examples of population data and trends analyses are referenced in the table below:

<b>Year of M &amp; E Report</b>	<b>Population Trends references</b>
1989	Pgs. 12-17
1991	Pgs. 10-16
1992	Pgs. 10-15
1999	Pgs. 39-46

The analysis for this amendment also relied on data from research projects and species Recovery Plans.

I find an ample amount of credible population information on MIS, regional sensitive species, and federally listed species for the MNF.

**Issue IX: Minimum Viable Population**

The Appellants claim, “*The Forest Service has completely ignored this requirement. There is no analysis or finding that with this amendment that viable populations of the listed species will be maintained.*” (NOA, pp. 27-28).

**Response:** The Responsible Official makes findings throughout the DN/FONSI concerning species population viability contrary to the Appellants’ claims. An example is found on page 15 of the DN: “The actions of this decision comply with the requirements of the NFMA of 1976 and NFMA implementing regulations at 36 CFR 219. This Amendment is in response to new information regarding threatened and endangered species, evaluated through preparation of the Revised Biological Assessment, the March 2002 Biological Opinion, the programmatic Biological Evaluation (EA, Appendix G), and environmental effects section of the EA. These documents described, in the context of viability, the risk to Management Indicator Species and threatened, endangered, and sensitive species known to occur on the MNF (EA, pp. III-1 through III-41). This evaluation responds directly to the NFMA requirement to maintain viable populations of species within the MNF (36 CFR 219.19; also USDA 9500-43.a (1))” (DN/FONSI, Page 15). This finding is also made in the DN (p. 14): “Although individual Indiana bats could be harmed, adverse effects on the species as a whole are not significant, and

many aspects of the Amendment will increase protection, conservation, and aid in the recovery of this and other threatened and endangered species of the MNF.”

## DECISION

It is my decision to affirm Forest Supervisor Clyde N. Thompson’s, Decision Notice and Finding of No Significant Impact approving the Threatened and Endangered Species Amendment to the Monongahela National Forest Land and Resource Management Plan. Pursuant to 36 CFR 217.7(d)(1). This decision is subject to discretionary review by the Chief of the Forest Service. If within 15 days following receipt of my decision, the Chief takes no action to review my decision, then my decision as Reviewing Officer stands as the final administrative decision of the Department of Agriculture, 36 CFR 217.17(d).

Sincerely,

/s/ Forrest L. Starkey (for)  
RANDY MOORE  
Regional Forester

cc:  
Monongahela National Forest:  
Forest Supervisor, Clyde N. Thompson  
Forest NEPA Specialist, Laura Hise  
Forest NEPA Coordinator, Bill Shields  
WO, Chief