



File Code: 1570-1

Date: September 17, 2004

Ms. Mary C. Krueger
Eastern forest Action Center
The Wilderness Society
45 Bromfield Street, 11th Floor
Boston, MA 02108

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 04-09-21-0020 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 (BO) 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 the Wilderness Society, Friends of Blackwater, the West Virginia Highlands Conservancy and the West Virginia Chapter of the Sierra Club was timely. Your issue: *"The cumulative effects analysis is inadequate under the National Environmental Policy Act (NEPA). The issuance of the Decision Notice and FONSI is arbitrary and capricious."*

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 concerns and the decision documentation submitted by the Monongahela National Forest (MNF). 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 1, 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

The appeal contained seven (7) separate sub-issues related to cumulative effects. These appeal points will be addressed, for the most part, in the order presented in the appeal. These appeal issues were raised during the 60-day comment period.

Issue A: “The Cumulative Effects Analysis is Inadequate Under the National Environmental Policy Act (NEPA)/The Issuance of the Decision Notice and FONSI is Arbitrary and Capricious.” (NOA, p. 3).

Issue 1: The Appellants claim, *“The Amendment...fails to analyze cumulative effects (to the listed species) by focusing solely on the effects of the proposed standards and guidelines on the Forest program of work and projected outputs (NOA, p. 3).”* *“The effects analysis is backwards .”* *“The focus should have been on the effects the Forest program of work had on the threatened and endangered (T&E) species.”* (NOA, p. 4).

Response: The focus of this assessment was “to disclose the direct, indirect, and cumulative impacts that may result from adding, deleting, revising, and/or retaining *Forest Plan* threatened and endangered species’ standards and monitoring requirements” (EA, p. ii). To conclude this process, the Responsible Official is charged with making two determinations, both of which are documented in the DN/FONSI: 1) significance of the effects of the Amendment on the quality of the human environment, and 2) whether this is a significant amendment to the Forest Plan.

The analysis contained in the EA, its appendices, and the Project Record is rife with assessments of the cumulative effects of this amendment upon listed species. The revised BA (RBA) goes into an evaluation of the effects of applicable activities on all the listed species found on the MNF. For example, in the section dealing with the Indiana bat (IB), 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 titled “*Summary of Cumulative Effects*” (dealing with an individual listed species), is concluded by summarizing the cumulative effects of the applicable activities. For example, in the aforementioned section dealing with the IB, the RBA looks at the cumulative effects of all pertinent activities on the summer roosting and foraging habitat, the fall swarming habitat, and the hibernaculum (Project Record, Volume 2, pp. 58-59).

The well-balanced analysis also covers the effects to all the Forest resources and programs, including effects to T&E Species, Sensitive species, Management Indicator species, Forest Type & Age Class Diversity, Silviculture Program, Forest Health, Prescribed Fire, Air Quality, Soil and Water, Riparian & Aquatic Resources, Transportation, Timber Sale Program, Minerals, Range, Recreation, Lands Management & Special Use Administration, Heritage Resources, Special or Unique Areas, Scenery, Wetlands & Floodplains, Wild & Scenic Rivers, Wilderness, Economics, and Environmental Justice (EA, pp II-29 to II-34, and the entire Chapter III). As it relates to effects on various forest resources, the Responsible Official 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.” (DN, p. 13). The comprehensive assessment of effects to both the Forest’s resources and its programs was necessary to make the two determinations of significance (DN/FONSI, pp. 11 and 15).

I find the Responsible Official relied on extensive documentation of the effects on the environment, as well as the effects on the Forest’s program of work, in making the findings documented in the DN/FONSI. The issuance of these findings was neither arbitrary nor capricious.

Issue 2: The Appellants assert, “*This (NEPA) analysis of significance of impacts must be conducted before the decision-maker can issue a “finding of no significant impact (FONSI).”*” (NOA, p. 4). “*The analysis ... did not answer the question of significance (of impacts) under the National Environmental Policy Act (NEPA).*” (NOA, p. 3).

Response: A Finding of No Significant Impact (FONSI) was documented once the Responsible Official reviewed the Environmental Assessment, and determined the proposed action does not have a significant effect on the quality of the human environment (FSH 1909.15, Sec 43.1). The EA does not make the determination of “significance”, but serves as the information source for the Responsible Official to make the FONSI determination. The FONSI concludes this Amendment does not constitute a significant effect on the quality of the human environment, consistent with NEPA (DN/FONSI, pp. 11).

Issue 3: The Appellants allege the cumulative effects analysis was insufficient for those lands outside of the MNF’s jurisdiction. Several of the assertions were similar and will be addressed in a single response.

As stated by the Appellants:

- *“The cumulative effects analysis must also assess the effects of the selected alternative in combination with past, present and reasonably foreseeable land management activities of the WV State Department of Natural Resources both on state land and on the MNF (as they implement habitat management actions on federal land).”* (NOA, p. 3).
- *“The cumulative effects analysis must look at connected and reasonably foreseeable future actions on private and state lands in and around the forest.”* (NOA, p. 4). *“This amendment contains almost no discussion of any actions on private land in-holdings within the Forest boundary, as well as those nearby that can reasonably be thought of as ecologically connected.”* (NOA, p. 4).
- *“The cumulative effects analysis must look at connected and reasonably foreseeable future actions on other federal lands in and around the MNF including the George Washington and Jefferson National Forests.* (NOA, p.4). *“This amendment contains no discussion of any actions on other federal lands.”* (NOA, p.4).

Response: The West Virginia Department of Natural Resources (WVDNR) is tasked with the management of West Virginia’s state lands including the management of state parks, forests, and wildlife resources. It can be reasonably assumed, therefore, that although the cumulative effects sections do not mention the WVDNR by name, when the effects analysis refers to state lands it is WVDNR-managed lands, in addition to other State agencies, it is referring to. It is also reasonable to assume that management activities occurring on State land that may impact activities taking place on the MNF are likely under the jurisdiction of the WVDNR. There are multiple examples of consultation with the WVDNR in the *“Environmental Consequences”* section of the EA. (EA, Chapter III):

“WVDNR data have indicated no population problems from human disturbance in this cave. In fact, maternity colony populations have increased since 1983.” (EA, Chapter III, p. 6)

“...reviewing the map periodically and refining it collaboratively with the USFWS and the WVDNR.” (EA, Chapter III, P. 8)

“The USFWS, WVDNR, MNF, and the Recovery Team agree, based on the data gathered over the past ten years, that this approach may not have protected WV northern flying squirrel habitat to the fullest extent possible.” (EA, Chapter III, P. 11)

“If WV northern flying squirrels do in fact occupy some of these acres or use areas as corridors, those areas identified would be incorporated into

the suitable map as USFWS, WVDNR, and the MNF refine the map at the watershed and project levels.” (EA, Chapter III, P. 15)

In the Revised Biological Assessment, at the end of each section detailing the effects of management activities on a particular endangered species, titled “*Summary of Cumulative Effects*”, consideration is given to what is likely to occur on lands outside the MNF. When the management of private lands was considered it included all private lands in the vicinity of the MNF, including in-holdings of private land. Using the IB as an example I 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).

Additionally, there is a thorough response to this very concern in the “*Response to Comments*” found in the Project Record. The commenter states that the EA “failed to disclose past, present, and reasonably foreseeable future actions that may occur on [the] MNF and private lands.” (Appendix I, p. 47) The response to this comment points out many examples in the RBA of actions that are likely to occur on private lands adjacent to the MNF. (Appendix I, p. 48)

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

Finally, as to the allegation that no discussion has taken place concerning management actions on other federal lands, and in particular to those lands administered by the George Washington/ Jefferson National Forest (GWJNF), is also not based on fact. Again turning to the EA Chapter dealing with Environmental Consequences we find the following statement:

“The MNF contains greater than 90% of the known habitat within WV northern flying squirrel range. A small amount of habitat (one to two percent) is located in VA on Allegheny Mountain, which is adjacent to the MNF on the George Washington/Jefferson National Forest. This area,

known as the Laurel Fork Area, is considered a semi-wilderness/backcountry area.” (EA, Chapter III, p. 7).

“The 1986 *Forest Plan* established the MIS approach to wildlife management so that the effects to all MNF wildlife species could be assessed without the complexity of addressing each species individually. As part of the planning process, wildlife species were designated as MIS for the MNF. These were selected in consultation with the WVDNR and the George Washington and Jefferson National Forests.” (EA, Chapter III, p. 29).

It obvious that adjacent federal agencies and the lands they manage, especially the GWJNF, was considered in the analysis of this document. It is important to note that all National Forests operate under the same laws, regulations, and guidelines. It is documented the MNF worked in conjunction with the GWJNF when formulating this document. Planning documents from the GWJNF, and other federal agencies, is part of the Project Record. (Volumes 22, 23, 24).

Furthermore, under the heading “*Forest Goals*” (EA, Chapter III, Page 2), one of the primary considerations is to: “Cooperate with, and coordinate plans with, other Federal, State, and local agencies and with private groups to improve the management of natural resources and reduce potential conflicts (Forest Goal XIII, *Forest Plan*, p.39).”

I find the MNF gave proper consideration to past, ongoing and reasonably foreseeable activities on WVDNR (State) lands, as well as on private land and adjacent federal lands, including the GWJNF, in their cumulative effects analysis.

Issue 4: The Appellants allege: “*Nowhere in the amendment is there any discussion of age class diversity that already exists off the MNF lands in the wider area. Nor is there discussion of predictable timber management likely on these lands in the future.*” (NOA, p. 5). “*The cumulative effects analysis failed to examine reasonably foreseeable and on-going active timber management on state and private lands in and around the Monongahela NF that may have changed or reduced the need for habitat manipulation.*” (NOA, p.5).

Response: The Project Record clearly shows that age class diversity was examined across the entire State of West Virginia, including private and State lands, and was found to be of minimal impact at the programmatic level. In addition, the timber management activities occurring outside the MNF were examined and were considered not to have a significant cumulative impact at the programmatic level.

In the specialist report titled “*Forest Type and Age Class Diversity*” a table displays the results of two survey years, 1989 and 2000, for the entire State of West Virginia by forest type group and size class. (Project Record, Volume 4, p. 6). The report states: “Forest type and age class diversity and the ability to provide this diversity on private and other public lands will not be affected by the proposed changes to the *Forest Plan*.” The report goes on to say, “Conversely,

management, or lack of, for age class and forest type diversity on private or other public lands does not affect the standards and guidelines of the [Monongahela] National Forest.” (Project Record, Volume 4, pp. 7-8).

In the specialist report titled “*Silvicultural Program*” management activities occurring outside the MNF are examined. The report states:

“On these lands, both [sic] active, passive, commercial and non-commercial forest management is occurring.” (Project Record, Volume 4, p. 32).

“Both even-aged and uneven-aged management is occurring on land other than National Forest.” (Project Record, Volume 4, p. 32).

“On private lands in counties with national forest land, uneven-aged management is largely practiced.” (Project Record, Volume 4, p. 34).

The report also states, “This broad range of management options possible, but unpredictable in application, was considered not significant in any direct, indirect, or cumulative way for this programmatic analysis.” (Project Record, Volume 4, p. 32).

Due to the conclusions drawn in the two specialist reports cited, it was determined that neither age-class diversity nor probable timber management activities on private land would have an impact at the programmatic level. As the specialist noted in correspondence concerning timber harvesting, “I do not feel the collective actions of private/State/Industry harvest operations will have a significant effect on age class diversity.” (Project Record, Volume 4, p. 10).

It should be noted, “Standards and guidelines to meet the goal of protecting and enhancing threatened and endangered species habitat on the [MNF] were developed regardless of the diversity of forest types and ages on lands other than the [MNF], even though private and other public lands do support threatened and endangered species.” (Project Record, Volume 4, p. 8).

I find the MNF did, in fact, consider both age class diversity and harvest operations outside National Forest boundaries when considering cumulative effects. Analysis indicated the effects would be insignificant at the programmatic level.

Issue 5: The Appellants contend, “*This decision proposes to forego formal consultation with the USF&WS and implement a tiered programmatic consultation approach.* (NOA, p. 5). *Determinations “...will tier to this analysis [in the TE&S species amendment] and decision and claim that the effects analysis herein addressed the issue at hand at the project level. “We do not believe that the effects analysis as currently written is sufficient to do this.”* (NOA, p. 5).

Response: “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” (DN Appendix I, p. 15). The USFWS agreed to the process for further

consultation in their Biological Opinion (Appendix D, p. D-23). Comments about the consultation process were responded to in Appendix H (pp. H-14 to H-17). The EA refers to more information on the process for formal and informal consultation with FWS at the following web site: http://endangered.fws.gov/consultations/sec7_faq.html (EA Appendix F-2).

Issue 6: The Appellants claim, “*The rationale for choosing the selected alternative, ..., is arbitrary and capricious because the decision maker could not make an informed decision without the disclosure of cumulative effects*” (NOA, p. 5).

Response: See response to Issues 4, 5, 6, and 8.

Issue 7: Lastly, the Appellants conclude, “*The amendment and Decision Notice/FONSI fail to provide sufficient analysis to determine that management activities in the forest that could affect the Indiana bat and the West Virginia Northern Flying Squirrel are without significance. The decision ... is arbitrary and capricious.*” (NOA, p.5).

Response: Indiana Bat - The revised BA found a very limited number of individual bats potentially taken, as a result of timber harvest and prescribed burning (RBA p. 61). In the Biological Opinion (Appendix D) the FWS concurred with the findings in the BA, and summarized their concurrence in a letter (Project Records, Vol. 40, pp. 29-33).

West Virginia Northern Flying Squirrel - As a result of implementing the WVNFS Recovery Plan as amended, a “MAY AFFECT, NOT LIKELY TO ADVERSELY AFFECT” determination is made in the RBA for regeneration harvest, thinning and single tree selection, TSI, road construction/reconstruction, recreation, fisheries improvements, prescribed fire, firewood cutting, wildlife habitat improvements and mineral activity. A “NO EFFECT” determination is made for gypsy moth (treatment) and range (management) (RBA p. 92). The FWS letter dated November 9, 2001, concurred with the “May Affect, Not Likely to Adversely Affect” finding for the West Virginia northern flying squirrel, and concluded that the amended Plan “will not negatively impact the.... endangered West Virginia northern flying squirrel.” (Project Record Vol. 40, p. 218).

The Responsible Official weighed the information presented in the effects analysis sections of the EA for these species (EA, p. III-10 & 11), along with the FWS opinions of effects to these species, and concluded there would not be significant effects (DN/FONSI, p. 14). I find the Decision is neither arbitrary, nor capricious.

Mary Krueger

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