Glenn D Howard /R9/USDAFS
10/09/2008 04:46 PM

To James Seyler/R9/USDAFS@FSNOTES
cc ascardina@fs.fed.us, gdhoward@fs.fed.us, pweese@fs.fed.us
bcc
Subject Re: Duhring Lot 8 - North Country Trail

Jim,

Operators must provide the Forest Service with a copy of the plat that accompanied their DEP well permit application. After receiving the plat, we have 15 days to object.

Simply put, that should be our standard. Nonetheless, there are shades of grey.

Scenario 1: If the operator requires a return receipt, I suspect that the clock begins to run on the day we sign for the mailing.

Scenario 2: If the operator does not require a return receipt, we may have 30 days from the postmark date. (The objection period is only 15 days. Additional time is added here because DEP assumes receipt 15 days after it was postmarked). Since it is only presumed that we receive the mailing 15 days later, I suspect the presumption is rebuttable. That means that, at trial, the operator could prove that we received the mailing sooner. If so, the clock would start sooner.

Scenario 3: The operator submits a plat that does not comply with DEP application requirements. (The requirements are below). Either: (1) the clock never starts; or (2) one of the two above scenarios applies and we should object based on the inadequate plat.

Plat Requirements: Along with their permit application, operators must submit the following to DEP a: (1) plat; (2) prepared by a competent engineer or competent surveyor; (3) on forms furnished by DEP; (4) showing the political subdivision and county in which the tract of land upon which the well to be drilled is located; (5) the name of the surface landowner of record; (6) the name of all surface owners or water purveyors whose water supplies are within 1,000 feet of the proposed well location; (7) the acreage in the tracts to be drilled; (8) the proposed location of the well determined by survey; (9) the courses and distances of such location from two or more permanent identifiable points or landmarks on said tract boundary corners; (10) the proposed angle and direction of such well (if substantially deviating from vertical); (11) the number or other identification to be given the well; and (12) any additional information needed by DEP to administer the Oil and Gas Act. (Note: I omitted additional requirements pertaining to coal seams).

Let me know if additional information is needed.

Glenn

-----James Seyler/R9/USDAFS wrote: -----

To: Glenn D Howard/R9/USDAFS@FSNOTES
From: James Seyler/R9/USDAFS
Date: 10/09/2008 02:43PM
cc: ascardina@fs.fed.us, gdhoward@fs.fed.us, pweese@fs.fed.us
Subject: Re: Duhring Lot 8 - North Country Trail

Glenn,

I appreciate you pulling this together. When does the objection period start? Does it start when an operator shows you map with a proposed well on it, when the DEP notifies us, or when the operator submits all of the proper information (i.e. E&S plan, ownership, etc...).

Tony,

I agree with Glenn if we were dealing with 250 wells per year. However, that isn't the case. Therefore, we need to object as soon as the package hits the door. We can put language in the letter as we've done before that says "we are objecting for whatever reason and hope to be able to rectify the situation by directly working with the operator." If the operator(s) are not going to work with us up front before applying for a permit as we've asked them to do, then we should pursue this course. We both know that DEP is working on getting permits issued within 30 days if not sooner.

We should be working on the case load based on when the projects come in the door with all of the information (information necessary to make a reasonable decision), not based on the absurdity of the proposal.

Jim Seyler
Operations Staff Officer
Allegheny National Forest
814.728.6239

Glenn D Howard/R9/USDAFS

Glenn D Howard/R9/USDAFS

10/08/2008 03:19 PM

Toascardina@fs.fed.us

ccjseyler@fs.fed.us, pweese@fs.fed.us, gdhoward@fs.fed.us

SubjectDuhring Lot 8 - North Country Trail

DRAFT DELIBERATIVE
NOT FOR PUBLIC RELEASE
PREPARED IN ANTICIPATION OF LITIGATION

Tony,
I'm following up regarding Duhring's proposed placement of a well in close proximity to the North Country Trail on B-028, Lot 8. Duhring's reserved mineral rights on Lot 8 are subject to the Secretary's 1911 regulations.

The scope of this response is limited to addressing: (1) tasks that should be accomplished as soon as possible; (2) potential well placement options; (3) the potential for refusing to issue a notice to proceed (thereby barring access) under paragraph 7 of the 1911 regulations; and (4) how the placement of other wells near, and even on, the North Country Trail may harm our stance should litigation arise. Whether relocation of the Trail is subject to NEPA, as we mentioned in the field, requires further evaluation.

(1) Tasks that should be accomplished as soon as possible .

Unless each has already been accomplished, three things should be done as soon as possible.

First, research whether we can provide DEP with a valid basis to rescind Duhring's permit(s). This requires understanding the physical requirements of the development and projecting their consistency with DEP laws and regulations. If inconsistency is located, a field meeting with DEP should be requested to determine whether a reason for rescinding any permit has been properly identified. (Note: Duhring's violation of any law or regulation administered by DEP, on any Duhring project in the state, may provide a valid basis).

Objecting to permitting is no longer possible since the objection deadline expired on or around May 27th.

In future projects, the preferable first step would be negotiating with Duhring and, if needed, filing an objection within the Oil and Gas Act's 15-day landowner notification window. This shows that the Forest Service attempted to resolve the matter under the Oil and Gas Law before selecting other options. If litigation arises, this will help show that the Forest Service actively attempted to negotiate with Duhring before taking other action. It may also be a pre-requisite (i.e., exhaustion of administrative remedies) to any Forest Service lawsuit against DEP challenging permit issuance. (Note: to my knowledge, a suit against DEP has not been discussed and isn't on the table, and objecting under the Oil and Gas Law may not even be viewed as an administrative remedy).

Second, have the site reviewed for recreation concerns specifically related to the North Country Trail. Any change to well placement should be based on these (or other) expertly evaluated concerns to protect our determination should a legal challenge arise. This is critical given the existing placement of other wells on and near the trail. We'll have to differentiate existing wells on the trail from the proposed well, or simply admit that someone dropped the ball on previous proposals.

Finally, as mentioned in the field, GPS the development to determine whether alternative well spacing is possible. If alternative spacing is possible, we may have a valid basis for claiming that Duhring is seeking unreasonable and unnecessary access - possibly allowing us to bar access. Similarly important, we can't negotiate with Duhring properly if we're in the dark on technical details.

(2) Well placement options .

After the above are accomplished, we may internally weigh alternative well spacing options. Options include, among other things, (1) no change; (2) requiring screening on the current site; (3) well relocation; (4) dropping the well; (5) maintaining well placement while informing stakeholders of its location; and (6) refusing to issue a

notice to proceed based either on the Secretary's 1911 regulations, or on our internal determination that Duhring is requesting unreasonable or unnecessary access.

Option 1 is not preferred since the well's impact on the North Country Trail will be unmitigated. Options 2 through 4 will require negotiation with Duhring. The likelihood of successful negotiation is not something I'm in a position to evaluate. Option 5 (going public) should be considered regardless of which alternative is selected to prevent other stakeholders from being blindsided. Conversely, it may also invite heavily invested recreational stakeholders to sue the Forest Service (and enjoin Duhring's development) based upon our failure to perform NEPA analysis. Option 6, which will yield a major lawsuit - and potentially the controlling law re. ANF private mineral development - should be treated as a last resort. This option should only be used, if at all, by selecting a test case dealing with an exceptionally important resource and clearly egregious development.

(3) The potential for refusing to issue a notice to proceed (thereby barring access) under paragraph 7 of the 1911 regulations.

The 1911 regulations may give you, the "Forest officer in charge," final authority over well site placement. This may provide you with the basis to withhold both the issuance of a notice to proceed and provision of surface access to Duhring.

Paragraph 7 of the 1911 regulations provides that:

> Buildings, camps, roads, bridges, and other structures or improvements necessary in carrying on mining operations shall be located as approved by the Forest officer in charge. When a building, camp or other structure is removed from one location to another, all debris resulting from such removal shall be burned or otherwise disposed of as directed by the Forest Officer in charge.

If this paragraph provides you with authority over well placement, it may alter (or somewhat replace) our obligations Pennsylvania common law. As long as your decision to deny access has a valid basis, Duhring may be required to sue the Forest Service under the Administrative Procedure Act (APA) rather than Pennsylvania OGM law. Instead of claiming a denial of rights under PA law, a Duhring lawsuit would be claiming that the decision to block access under the 1911 regs and deed is unreasonable - i.e., arbitrary, capricious, or otherwise contrary to law. I suspect that the arbitrary, capricious, or otherwise contrary to law standard of the APA would be far more favorable to the Forest Service.

Whether paragraph 7 actually conveys well site placement authority, however, is debatable. It may only apply to accessory structures akin to "buildings, camps, roads, [and] bridges . . . ." under the *e jusdem generis* canon of statutory construction. Wikipedia provides a fairly clear and accurate description of the canon's meaning:

> When a list of two or more specific descriptors are followed

> by more general descriptors, the otherwise wide meaning of the general descriptors must be restricted to the same class, if any, of the specific words that precede them. http://en.wikipedia.org/wiki/Canons_of_statutory_construction (Note: it's never good to cite Wikipedia. The definition provided should be provided by caselaw in the future).

Unfortunately, well equipment and sites, although " necessary in carrying on mining operations, " may not be of the same class as "[b]uildings, camps, roads, [and] bridges . . . ." This potential interpretation, although indicative of a real problem, may not be entirely accurate. The canon cited is one of statutory construction; different rules may apply to regulatory construction. Alternatively, it's even possible that inclusion of the regulation in deed language could lead a court to interpret the provision under general contract interpretation rules instead. OGC input would be helpful here, although it's unlikely that any firm answer could be provided.

(4) The problem of existing wells near , and even on, the North Country Trail .

Should litigation arise, the existence of wells near and on the North Country trail will threaten any determination that Duhring's proposed well placement is unreasonable. During litigation, this would be a serious complicating factor.

At the moment, I only see two options to mitigate this problem. First, base all determinations on the opinions of agency experts and be able to differentiate all existing wells on the trail as less harmful than Duhring's proposed well. Whether this is possible is unknown to me. Second, simply admit that the Forest Service failed to properly review the proposals that yielded existing wells on and near the trail. I don't know whether this statement would be true.

Once the three tasks needing immediate attention are accomplished (i.e., determining whether DEP has a basis to rescind permitting, expert analysis, and GPS data collection are accomplished), further consideration may be given to Duhring's proposed well placement. If I can provide further assistance, feel free to contact me as needed.

Glenn