

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THE ALLEGHENY DEFENSE PROJECT,)
INC.; HEARTWOOD, INC.; THE)
PENNSYLVANIA ENVIRONMENTAL)
NETWORK; THE NATIONAL FOREST)
PROTECTION ALLIANCE; COMMUNITIES)
FOR SUSTAINABLE FORESTRY; Jim)
KLEISSLER; Rachel MARTIN;)
Susan CURRY; Ryan TALBOT; Bill)
BELITSKUS; Arthur CLARK;)
Alexander DENMARSH; John)
KESLICK, JR.; and SIERRA CLUB,)
Plaintiffs,)

v.)

THE UNITED STATES FOREST)
SERVICE; Robert T. JACOBS, in)
his official capacity as the)
Regional Forester for the)
Eastern Region; Kevin)
ELLIOT, in his official capacity)
as Supervisor of the Allegheny)
National Forest,)
Defendants;)

ALLEGHENY FOREST ALLIANCE;)
RUFFLED GROUSE SOCIETY; and)
AMERICAN FOREST AND PAPER)
ASSOCIATION,)
Intervenor)
Defendants.)

Civil Action No. 01-895
Judge William L. Standish/
Magistrate Judge Ila Jeanne
Re: Doc. #s 18, 36

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is recommended that Plaintiffs' Motion for Summary Judgment be granted as to Counts I, II, III, IV, V, VII, and VIII and that Defendants' Cross-Motion for Summary Judgment as to these same counts be denied. It is also recommended that Defendants' Cross-Motion for Summary Judgment be granted as to Counts VI, IX and X and that Plaintiffs' Motion for Summary Judgment be denied as to those counts.

It is further recommended that implementation of the East Side Decision be enjoined until Defendants are in compliance with NEPA and NFMA, and more specifically that the East Side Decision be reversed and remanded to the United States Forest Service ("USFS") as follows: (1) as to Count I, for USFS to reconsider alternative logging methods in the EIS and not rely primarily on the highest dollar return to dictate choice of method in contravention of 16 U.S.C. § 1604(g) (3) (E) (iv); (2) as to Counts II and IV, that USFS revisit the EIS for the ESA to meet the requirements of NEPA and its implementing regulations at 42 U.S.C. § 4332 and 36 CRF § 219.12(f)) by considering a broad range of alternatives that include uneven-aged logging; (3) as to Count III, for USFS to reconsider the optimality and appropriateness requirements by giving meaningful consideration to options involving uneven-aged and no-logging alternatives pursuant to the requirements set forth at 16 U.S.C. §

1604(g)(3)(F)(i); (4) as to Count V, that USFS analyze and include in its EIS for the East Side Decision the effects of even-aged logging on the old growth Tionesta and adjacent areas as required by 40 CFR § 1502.16(b), 36 CFR § 62.3 and § 62.6(f); (5) as to Counts VII and VIII, that USFS should reconsider and revise its analysis regarding soil disturbance to determine the actual state of the soil in the affected areas and the effects on that soil of the proposed even-aged logging to comport with the requirements of NFMA at 16 U.S.C. § 1604(g)(3)(F) and 36 CFR § 219.27(a).

II. REPORT

Plaintiffs The Allegheny Defense Project, et al., bring this action against Defendants, the United States Forest Service agency, Robert T. Jacobs in his official capacity as the Regional Forester for the Eastern Region, and Kevin Elliot in his official capacity as Supervisor of the Allegheny National Forest. Plaintiffs seek judicial review under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, of two decisions by USFS, one made December 12, 2000 (the "East Side Decision") authorizing approximately 8000 acres of timber harvesting, 100 miles of road construction, and over 3500 acres of herbicide spraying, and the other decision made on July 28, 2000 (the "Endangered Species Amendment") regarding management of endangered species in the Allegheny National Forest (the "Allegheny"). The Allegheny

Forest Alliance, the Ruffed Grouse Society, and the American Forest and Paper Association were granted intervenor-defendant status by an order entered by this court on September 17, 2001 granting their Motion to Intervene, and their arguments and briefs in support of Defendants' Cross-Motion for Summary Judgment and in opposition to Plaintiffs' Motion for Summary Judgment have also been considered.

Plaintiffs allege that the East Side Decision and the Endangered Species Amendment violate the law because they authorize certain logging management strategies, such as clearcutting, primarily with the goal of enhancing the growth of the lucrative black cherry trees of the forest; these trees provide the greatest dollar return to Defendants and their contractors. Defendants argue that Plaintiffs have failed to meet their burden to establish that the USFS's decisions were arbitrary, capricious, or otherwise contrary to law as required under the APA, and aver their decisions were valid as they considered the environmental impact and followed all necessary procedures required by law.

Plaintiffs' Complaint contains ten counts alleging that the East Side Decision and the Endangered Species Amendment ("ESA") violate various provisions of the National Forest Management Act ("NFMA"), 16 U.S.C. ¶ 1604; the Multiple Use Sustained Yield Act ("MUSYA"), 16 U.S.C. ¶¶ 528-530; the National

Environmental Policy Act ("NEPA"), 42 U.S.C. ¶ 4321, *et seq.*; and the APA, 5 U.S.C. ¶ 551 *et seq.* They seek a declaratory judgment that the East Side Decision and the ESA are void, and an injunction against any of the forest management activities authorized by the East Side Decision until the Defendants have reconsidered and reissued the Decision in accordance with the law. The parties have filed cross-motions for summary judgment.

A. Statement of Facts

The Allegheny National Forest lies within Elk, Forest, McKean and Warren Counties in Northwestern Pennsylvania and covers more than 500,000 acres of land. (Admin.R. Book 35 at 1-2). In the early 1800s the forest was dominated by hemlock and beech tree species, but was heavily logged by clearcutting by the turn of the century. When the forest regenerated it had a much higher percentage of black cherry which today amounts to 28% of the overstory forest and 47% of the understory forest. (Admin. R. Book 31, Tab 2).

Loss of the hemlock and beech hardwood forest has resulted in flooding, erosion, and loss of wildlife species. (Admin.R. Book 27, Tab 17). These old growth species, however, are less commercially viable than the black cherry. Almost all of the commercial black cherry timber in the entire United States comes from the Allegheny Plateau, of which the 500,000 acres of

the Allegheny National Forest form a part. (Admin.R. Book 35 at 1-2; Admin.R. Book 27, Tab 17 at 5). Black cherry is shade-intolerant (thriving in the absence of shade), while the hemlock-beech varieties are shade-tolerant. (Admin.R. Book 33, Tab 6, at 453).

Pure black cherry stands are more likely to have understories dominated by plants that interfere with the establishment and growth of herbaceous and woody vegetation. (Admin.R. Book 31, Tab 2). Beech trees, in contrast, produce a very high quality of mast (food produced by trees) for many wildlife species. (Admin.R. Book 42, East Side EIS at 169). Black cherry does not benefit wildlife as much as the hemlock-northern hardwood trees, but it is much more commercially valuable, often bringing more than five times the price of sugar maple, American beech and hemlock. (Admin.R. Book 42, East Side EIS at p. 256).

During the late 1980s and early 1990s the Allegheny suffered a series of droughts, epidemics of elm spanworm, forest tent caterpillars and cherry scallop shell moths, causing defoliations. (*Id.*). The repetitive defoliations weakened trees, making them more susceptible to disease. By 1994 the USFS found that the forest contained sizeable areas of tree mortality and decline. (*Id.*) Nutrient-demanding trees such as the hardwoods were more vulnerable to draught and defoliation stress

and died at a much greater rate than black cherry. Black cherry is easier to regenerate because it has lower nutritional requirements. (*Id.* at 151-52).

As a result of these events, the USFS in 1995 proposed a project, Mortality II, to address ecosystem sustainability, harvesting and reforestation concerns. Prior to implementation the USFS's decision was challenged by many of the Plaintiffs in the instant case, who alleged that the timber sales proposed in the project violated the NFMA, the Migratory Bird Treaty Act, and NEPA. See Curry v. United States Forest Service, 998 F.Supp. 541 (W.D. Pa. 1997) (Standish, J.). Mortality II authorized 4800 acres of even-aged logging and 2750 acres of post-logging herbicide spraying, some of which was immediately adjacent to the Tionesta Scenic and Research Natural Areas, a national landmark containing 4100 acres of ecologically valuable old growth forest. Curry, 988 F.Supp. at 552. USFS had created an environmental assessment ("EA") of the impact of its decision and had made a finding of "no significant impact." *Id.* at 544.

On October 15, 1997, Judge Standish issued an order in Curry vacating USFS's finding of no significant impact, granting Plaintiffs' motion for summary judgment on the NFMA and NEPA claims, and enjoining USFS from proceeding with the Mortality II timber sales in the Allegheny until it complied with its obligations under NEPA and NFMA. Judge Standish further directed

USFW to reconsider its determination that the "even-aged management¹ techniques proposed by the Mortality II project for Management Area 3 ("MA") meet the 'optimality' and 'appropriateness' requirements set forth at 16 U.S.C. § 1604(g)(3)(F)." Curry, 988 F.Supp. at 556.

In April of 1998 Defendants issued a notice of intent to prepare an Environmental Impact Statement ("EIS") for a project called the East Side Project, which included all the logging and herbicide use from the prior Mortality II project that was the subject of Curry. In addition, the East Side Project included plans to implement even-aged logging on even more acreage (approximately 7800) and to conduct post-logging herbicide application on 3500 acres. (Admin.R. Book 44). Some of the additional proposed logging is directly adjacent to the Tionesta old growth. (*Id.* at Book 1, Tab 13). As part of the East Side Project USFS also initiated formal consultations in the form of an Endangered Species Amendment ("ESA") pursuant to the

1. "Even-aged management" refers to a logging method which is characterized by clearcut, shelterwood, or seed tree cutting, resulting in all or a large percentage of trees in an area being cut down at one time, so that when the forest regenerates all the trees that grow will be the same age. In contrast, "uneven-aged management" is a logging method that involves selecting trees to cut either one by one or by groups, resulting in a continuous level of high-forest cover, recurring regeneration of trees, and the orderly development of trees through a range of age classes. 36 CFR § 219.3. (See also Admin.R. Book 21, Tab 2; EIS at 4-26 and 4-27 in Admin.R. Book 34).

Endangered Species Act, 16 U.S.C. § 1531 et seq., regarding new information about four endangered species found in the Allegheny (the Bald Eagle, the Indiana bat, and two species of freshwater mussels). USFS addressed and responded to this information via an amendment to its LMRP, the ESA. The ESA had to be completed before USFS could issue its decision on the East Side Project.

A draft EIS was made available to the public on April 12, 1998 and the public was provided a 45 day review and comment period. (Admin.R. Book 7 Tab B.2-1 at 1). USFW received 143 letters and e-mails regarding the project but did not hold a public hearing on the East Side Project. Plaintiffs commented extensively on both the draft EIS and the ESA, suggesting that measures to protect the endangered species were insufficient and requesting that Defendants consider alternative amendments that eliminated logging or adopted uneven-aged logging as the predominant and preferred logging method for the Allegheny. (Admin. R. Book 23, Tab 27).

On July 28, 2000, John Palmer, Defendant Elliot's predecessor as Supervisor, issued a final ESA and EIS that did not adopt any of Plaintiffs' requests. (Admin.R. Book 21, Tabs 1, 2). On September 25, 2000 Plaintiffs filed an administrative appeal raising multiple issues and on March 15, 2001 Defendant Jacobs denied their appeal. (Admin.R. Book 25, Tab 49). On December 12, 2000, forest Supervisor Michael Hampton issued the

East Side Decision, proposing the use of even-aged silvicultural systems on 7643 acres within MA 3 and the use of uneven-aged silvicultural systems on only 404 acres within MA 2. "The selected alternative also proposes vegetative management prescription and wildlife habitat enhancement activities" [i.e., spraying herbicide and fencing off the clearcut areas to keep deer out]. (See Defs.' Mem. in Supp. of Opp. to Summ. J. at 14 (Doc. # 37a)).

While the East Side Decision evaluates the use of even-aged logging and purports to consider the option of uneven-aged logging as required by Curry, ultimately the Decision concludes that even-aged logging is "appropriate" and clearcutting "optimal" under the NFMA. Plaintiffs take issue with these findings, however, arguing that the Decision finds these methods appropriate because they "regenerate black cherry and other commercially desirable species" and will net "an extremely high economic return in comparison to the uneven-aged or no logging alternatives." (Plts. Corrected Br. in Supp. of Mot. for Summ. J. at 19 (Doc. # 25)). Plaintiffs' Complaint has ten counts brought pursuant to the APA, for judicial review of the East Side Decision, alleging that the Decision and the ESA violate NFMA and NEPA because they authorize clearcutting and even-aged management

to enhance the black cherry component of the Allegheny and provide the greatest dollar return to Defendants. (Compl. ¶ 2).

B. Standard of Review

When the court reviews a decision reached by an administrative agency, the administrative record provides the complete factual predicate for the court's review. In such a situation, "[t]o survive summary judgment a plaintiff must point to facts in the administrative record--or to factual failings in that record--which can support his claims under the governing legal standard." Krichbaum v. Kelly, 844 F.Supp. 1107, 1110 (W.D. Va. 1994), *aff'd*, 61 F.3d 900 (4th Cir. 1995).

When conducting judicial review of an agency action or decision, the court applies the standard set forth in the Administrative Procedures Act ("APA"), 5 U.S.C. § 706. An agency decision is reviewed under the arbitrary and capricious standard. The APA requires a court to find that an agency's "actual choice made was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. To make this finding the court must consider whether the decision was based on a consideration of relevant factors and whether there has been a clear error of judgment." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416-17 (1971). The inquiry into the facts must be searching and careful. The court is not empowered to substitute its judgment for that of the agency. The final

inquiry is whether the agency's actions followed the necessary procedural requirements. *Id.*

After review of the record, a court may find that an agency's action was arbitrary and capricious only if the record indicates 1) that the agency relied on factors outside of those Congress intended for consideration; 2) completely failed to consider an important aspect of the problem; or 3) if the agency's explanation is implausible in light of the evidence. Bradford Hospital v. Shalala, 108 F.Supp.2d 473, 481 (W.D. Pa. 2000).

If the court finds that the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the court simply cannot evaluate the challenged agency action on the basis of the record before it, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. The reviewing court is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." Florida Power & Light Co., v. Lorion, 470 U.S. 729, 744 (1985).

Agency actions challenged pursuant to the NFMA are reviewed under the arbitrary and capricious standard. For actions challenging the adequacy of an EIS brought under NEPA, a rule of reason standard is applied to determine whether the EIS

contains a "reasonably thorough discussion of the significant aspects of probable environmental consequences" that demonstrates that the agency took a "hard look." Neighbors of Cuddy Mountain v. United States Forest Service, 137 F.3d 1372, 1376 (9th Cir. 1998), quoting Oregon Natural Resources Council v. Lowe, 109 F.3d 521, 526 (9th Cir. 1997). The rule of reason analysis and the review for an abuse of discretion are essentially the same. See Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 377 n. 23 (1989).

C. Discussion

The NFMA requires that the USFW adopt a Land and Resource Management Plan ("LMRP") to set goals and objectives for managing the national forests, including specific standards, guidelines and protective measures. See 16 U.S.C. § 1604. A LMRP must provide for multiple use and sustained yield of forest products and services in accordance with MUSYA, 16 U.S.C. §§ 528-531, pursuant to which it must "include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness." 16 U.S.C. § 1604(e)(1).

In 1986, Defendants adopted the 1986 Land and Resource Management Plan which divided the Allegheny into management areas ("MAs") and determined the desired future condition and preferred logging method for each MA, setting specific standards and

guidelines for maintaining and developing the Allegheny as a whole and for different MAs in particular. (Admin.R. Book 35, Tab 2, LMRP at 4-1). Defendants aver that the East Side Decision is in accordance with the goal of moving these areas of the forest from their existing conditions toward the desired future condition as developed in the 1986 LMRP. (Defs. Opp. and Cross-Mot. for Summ.J. at 13 (Doc. # 37a)).

Count I.

In Count I of the Complaint, Plaintiffs allege that Defendants have violated the requirements of MUSYA, 16 U.S.C. § 528 and NFMA, 16 U.S.C. § 1604, which require Defendants to manage the Allegheny for a variety of uses, including timber but also wildlife, recreation and watershed protection. Specifically, they state that NFMA bars Defendants from selecting a logging method "primarily because it will give the greatest dollar return or the greatest unit output of timber" 16 U.S.C. § 1604(g) (3)(E)(iv); 36 CFR § 219.27(b)(3).

Defendants assert that money was not their primary concern in selecting even-aged management as the method to be used to harvest trees on the bulk of the forest at issue. In support of their decision they state that uneven-aged silviculture would result in a reduction of a variety of habitats, loss of mast and loss of other sun-loving wildlife plants leading to less diversity. (Admin.R. Book 27, Tab 18;

Admin.R. Book 42 at pp. 161-163 and 207-209). They also argue that Plaintiffs have not cited authority for their position that consideration of the economic value of particular tree species is inappropriate. (Doc. # 37a at 24).

Plaintiffs do not argue that any consideration of economic value is illegal in the decision-making process, but only that NFMA prohibits the choice of a harvesting method made "primarily because it will give the greatest dollar return" 16 U.S.C. § 1604(g) (3) (E) (iv). They have adduced evidence that Defendants openly and primarily relied on this factor in making their decision to use even-aged management techniques on the bulk of the acreage at issue. USFS admits that its use of even-aged management instead of uneven-aged management is based on the high value of the black cherry, or "Allegheny hardwood":

- in its EIS USFS states that the potential for use of uneven-aged management should be restricted to a small amount of riparian areas, wet soils or visually sensitive areas, while even-aged management should be chosen as the featured silvicultural system for larger timber areas like MA 3.0, because that area "emphasizes] production of high value, high quality, Allegheny hardwoods" (EIS, Admin.R. Book 42 at 147);
- in its EIS USFS states that in the area at issue, due to the recent mortality/decline in the 1990s, northern hardwoods and sugar maples showed the biggest losses (over 900 acres total, or 21% and 88% of each type) while Allegheny hardwoods gained over 1000 acres; USFS, however, still chose Alternative 1 which shifts "300 acres from northern hardwoods (sugar maple and beech primarily)

to Allegheny hardwoods (+76 acres)...
consistent with the emphasis in MA 3.0 on producing high quality Allegheny hardwoods
...." (EIS, Admin.R. Book 42 at 174-75);

- Defendants are careful to note that Black Cherry Saw timber is worth \$1614.53/mbf while Beech Saw timber is worth \$28.78/mbf and Conifer Saw timber is worth \$25.45/mbf (EIS, Admin.R. Book 42 at 174-75);

- USFS discards uneven-aged management techniques as an option because "[o]ver the long term, cash flows for uneven-aged management would become even more negative, as lower value, shade tolerant tree species replace high value species (black cherry) which thrive under the current even-aged conditions." (Admin.R. Book 42, EIS at 260).

Plaintiffs have presented an abundance of evidence that Defendants chose the even-aged management system over other harvest alternatives because it best fostered the growth of black cherry, the most lucrative tree and the one which would more easily regenerate. Making the decision primarily on this basis is in direct contradiction of NFMA, which requires that the decision of which method to use to harvest timber must not be chosen "primarily because it will give the greatest dollar return or the greatest unit output of timber" 16 U.S.C. § 1604(g) (3) (E) (iv). Defendants' decision to select even-aged logging is, therefore, arbitrary and capricious under the APA as it is "not in accordance with law." 5 U.S.C. § 706 (2) (A).

It is therefore recommended that Plaintiffs' Motion for Summary Judgment be granted as to Count I as the East Side

Decision, being based primarily on greatest dollar return, violates Section 1604(g)(3)(E)(iv) of the NFMA and is therefore arbitrary and capricious. The East Side Decision should be enjoined from implementation and reversed and remanded to the USFS for further proceedings to make the EIS compliant with the NFMA in this regard.

Counts II, III and IV.

In Count II of the Complaint, Plaintiffs state that Defendants have failed to consider a full range of reasonable alternatives to even-aged logging in its Endangered Species Amendment, as required under NEPA. In Count IV, they likewise allege that USFS improperly refused to consider the Landscape Corridor Proposal to promote and maintain old growth forest as an alternative under the ESA. NEPA provides that a detailed statement by the responsible official must be provided concerning alternatives for proposed major Federal actions that significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(C)(iii); Curry, 988 F.Supp. at 553. The regulations implementing NEPA require the formulation of "a broad range of reasonable alternatives according to NEPA procedures ... to provide an adequate basis for identifying the alternative that comes nearest to maximizing net public benefits" 36 CFR § 219.12(f).

Plaintiffs demonstrate that USFS refused to consider an appropriate range of reasonable alternatives to even-aged logging in the EIS for the Endangered Species Amendment. USFS considered only three alternatives in detail. Two alternatives proposed changes to the LRMP's monitoring plan to avoid jeopardy to any of the endangered species at issue and to minimize incidental take of those species; a third alternative proposed "no action" at all. (ESA EIS at 45). No alternatives that benefit endangered species and protect, maintain or increase old growth, such as increasing uneven-aged management or cessation of commercial logging, were considered.

The few alternatives USFS considered only related to avoiding a jeopardy finding as required by Section 7(a)(2) of the Endangered Species Act. 16 U.S.C. § 1536(a)(2). In addition to avoiding jeopardy, USFS also has a statutory obligation under Section 7(a)(1) to conserve endangered species. It is not simply a generalized duty to conserve but requires that "all Federal departments and agencies" shall seek to conserve and must use "all methods and procedures which are necessary to bring any endangered species or threatened species to the point" where they are no longer endangered. Sierra Club v. Glickman, 156 F.3d 606, 615 (5th Cir. 1998). In the instant case, USFS only considered three alternatives in its EIS for the ESA, none of which

contained measures for enhancing endangered species. (ESA EIS at 45).

Defendants do not present any evidence that they seriously considered other alternatives for maintaining or enhancing old growth or endangered species when they compiled the EIS for the ESA. Rather, they argue that the Endangered Species Act does not require them to adopt specific measures in their conservation efforts and that they have discretion in how they fulfill their duty to conserve. (Defs.' Opp. and Cross-Mot. for Summ.J. at 40).

USFS also did not consider any alternatives that would work toward fostering old growth forest (in addition to the heightened conservation of endangered species) such as the Landscape Corridor Proposal, a proposal developed by USFS itself. (Admin.R. Book 31, Tab 2, App. D). The Landscape Corridor Proposal involved designating old growth forest areas and landscape to connect such areas to benefit several regionally sensitive species for which viability is a concern including goshawks, eastern woodrat, water shrews and cerulean warblers. (Id. at D-4).

USFS states it did not consider the Landscape Corridor as an alternative because it determined that such an alternative was outside the scope of the ESA as it did not address standards and guidelines "outlined by the BO ["Biological Opinion]."

(Def's. Opp. and Cross-Mot. for Summ.J. at 42-43 (Doc. # 37a)). Plaintiffs, however, have produced evidence that the USFWS specifically told Defendants that the USFWS BO and Findings under Section 7(a)(2) were not a valid reason for refusing to analyze uneven-aged or no logging alternatives, and that such alternatives might provide significant benefits for the species at issue. (Admin.R. Book 22, Tab 18).

USFS also states it did not consider the Landscape Corridor as an alternative because it determined that although implementation of the proposal might benefit several of the ESA listed species, the four species at issue in the ESA were not the ones benefitted by the Corridor, nor were any of the species "solely dependant upon old growth." (Admin.R. Book 25, Tab 49 at 12). Plaintiffs, however, showed that Defendants' 1998 BA specifically states that the Indiana Bat, one of the endangered species covered by the ESA, would benefit from old growth protection and connective corridors such as those provided by the Landscape Corridor Proposal. (Admin.R. Book 21, Tab 8 at 31).

When the Forest Service only considers alternatives that lead to even-aged harvesting, such circumscribed consideration does not comport with the procedural requirements of NEPA. See Ayers v. Espy, 873 F.Supp. 455, 468 (D.Colo. 1994) (finding that USFS's consideration of eight alternatives, none of which utilized an uneven-aged logging method, was not a

'broad range of alternatives' as contemplated by 42 U.S.C. § 4332 or 36 CFR § 219.12(f)). A deficient consideration of alternatives "is not in accordance with law" under Section 706 of the APA; as the EIS for the ESA did not consider a broad range of alternatives, it violates NEPA, 42 U.S.C. § 4332 and 36 CFR § 219.12(f)) and is therefore arbitrary and capricious. It is therefore recommended that Plaintiffs' Motion for Summary Judgment as to Counts II and IV be granted, that implementation of the East Side Decision be enjoined, and that the EIS for the ESA be remanded to the USFS so it can revisit the requirements of NEPA and its implementing regulations to consider a broader range of alternatives in connection with the ESA.

Similarly, Count III of the Complaint alleges that Defendants have violated the provisions of NFMA by choosing even-aged logging over all other methods of harvest without proper considerations of "optimality" and "appropriateness" as required by the statute. NFMA provides in pertinent part that land management plans must:

insure that clearcutting, seed tree cutting, shelterwood cutting, and other cuts designed to regenerate an even-aged stand of timber will be used as a cutting method on National Forest System lands only where - (i) for clearcutting, it is determined to be the optimum method, and for other such cuts it is determined to be appropriate, to meet the objectives and requirements of the relevant land management plan

16 U.S.C. § 1604(g) (3) (F) (i) (emphasis added).

In Curry, Judge Standish found Defendants' choice of the even-aged management techniques proposed for its Mortality II project, the precursor to the East Side Decision at issue here and which encompassed much of the same acreage, to be inadequate under NFMA, based on Defendants' failure to consider any alternatives that did not lead to even-aged management. Defendants considered only two alternatives: no action at all, and the proposed action of a majority use of even-aged logging. Judge Standish remanded the case, instructing them "to reconsider their determination that the even-aged management techniques ... meet the 'optimality' and 'appropriateness' requirements set forth in 16 U.S.C. § 1604(g)(3)(F)(i)."

Where there is a failure to consider alternatives that do not lead to even-aged harvesting, NFMA's requirements of optimality and appropriateness have not been met. Curry, 988 F.Supp. at 554. Under NFMA, undue consideration of alternatives that do not include uneven-aged management does not comport with an agency's obligation "to give meaningful consideration to all feasible and reasonable alternatives." *Id.*, citing Ayers v. Espy, 873 F.Supp. 455, 468-69 (D. Colo. 1994). Plaintiffs have presented evidence that in the instant case, while Defendants did look at uneven-aged alternatives, they emphasized only the alternatives that promoted the growth of black cherry and other commercially desirable species, and evaluated the alternatives

based on their ability to "provide a sustained yield of high quality Allegheny hardwood and oak sawtimber through even-aged management" (Ex. 1, Record of Decision ("ROD") at 17 (Doc. # 19)). When the choice of harvesting methods is primarily based on the greatest dollar return, that constitutes a failure to give meaningful consideration to all feasible and reasonable alternatives. Such a failure does not meet the optimality and appropriateness requirements set forth under 16 U.S.C. 1604(g) (3) (F) (i). See Curry, 988 F.Supp. at 555; Ayers, 873 F.Supp. at 468. The failure to meaningfully consider alternatives including even-aged management renders the agency's decision arbitrary and capricious.

Therefore, it is recommended that Plaintiffs' Motion for Summary Judgment be granted as to Count III as it violates the requirements of the NFMA set forth at 16 U.S.C. § 1604(g) (3) (F) (i). As such, implementation of the East Side Decision should be enjoined and the Decision should be remanded to the agency for reconsideration of the optimality and appropriateness requirements by giving meaningful consideration to options involving uneven-aged and no-logging alternatives.

Count V.

Plaintiffs allege in Count V that the East Side Decision does not fulfill the goals set forth in the 1986 LRMP

for the Allegheny, which provides in part that a significant portion of the forest should be maintained as old growth habitat. Old growth is that which is 111 years or older. (East Side EIS, Admin.R. at Book 42 at 146). Part of the mission stated in the LRMP is to designate new areas for old growth and to maintain established areas of old growth:

We believe that, if we don't attempt to designate future old growth areas, we will not be fulfilling our mission. In addition we believe [protecting old growth via the Landscape Corridor Proposal] is an opportunity to enhance the natural resources of the future and to improve the quality of life of those who recreate in the Allegheny National Forest.

(Landscape Corridor Scoping Notice, drafted as an amendment to the LRMP, Admin.R. Book 31 Tab 2, App. D at D-39). Plaintiffs allege that the East Side Decision does nothing to further develop old growth areas as required by the LRMP and in fact will damage existing old growth. As such, the Decision violates the LRMP and the statutory requirements of NFMA and the NEPA, making it arbitrary and capricious under the APA.

The NEPA requires that Defendants consider and analyze the direct and indirect environmental impacts of conducting logging and other management in old growth forest areas. 40 CFR § 1502.16(b). In addition, federal regulations regarding landmarks (such as the Tionesta Scenic Area) require that federal agencies consider the effects of their proposals on the "unique

properties" of such areas in their planning and impact analysis under NEPA. 36 CFR § 62.3 and § 62.6(f).

In Curry, Judge Standish stated that "it is undisputed that an area adjacent to the Tionesta Scenic Area, an old growth forest, is proposed for logging." 988 F.Supp. at 552. This was one reason that the court remanded the decision to the agency and required USFS to prepare an Environmental Impact Statement that contained an analysis of the impact of such logging on protected old growth areas like the Tionesta. In the instant case, once again Defendants appear to have failed to consider the impact of even-aged logging on areas adjacent to the Tionesta and have not properly addressed this issue in the EIS prepared for the East Side Decision.

The EIS asserts, incorrectly, that for the East Side Decision "no harvesting is planned near Tionesta Scenic and Natural Research Areas." (EIS, Admin.R. at Book 42 at 241). Plaintiffs have presented evidence that at least one logging site directly abuts the Tionesta old growth and that numerous other sites exist near the old growth. (See Map F and East Side Final EIS and accompanying maps, East Side EIS, Admin.R. Book 42, P. B-47; Admin.R. Book 41, Alternative 1, Map F; Plts.' Br. in Supp. of Summ.J. at 45 n.10 (Doc. # 25)).

Defendants admit that its EIS for the East Side Decision stating that there will be no logging near the Tionesta

is "obviously an error, as is evidenced by the fact that it is inadvertently contained within the 'Facilities' discussion of the 'Recreation' section" of the EIS. (Defs. Opp. and Cross-Mot. for Summ.J. at 44-45 (Doc. # 37a)). Yet Defendants present no support for their conclusory finding that "Tionesta Scenic Area is not affected by any final harvest activity proposed in the East Side Project." (EIS, Admin.R. Book 42 at 250).

In Curry, the ancestor lawsuit to the instant case, the lack of an impact analysis of logging adjacent to the Tionesta was deemed a violation of NEPA as it was an "intensity factor" that triggered the necessity of preparing an environmental impact statement, warranting a finding that the agency's decision to approve the Mortality II project was arbitrary and capricious. Curry, 988 F.Supp. at 552-553.

Similarly, USFS's failure once again to analyze the impact of even-aged logging on the areas adjacent to the Tionesta old growth violates the goals set forth in the LRMP and is contrary to NEPA. NEPA requires that Defendants consider and analyze the direct and indirect environmental impacts of conducting logging and other management in old growth forest areas. 40 CFR § 1502.16(b). In addition, federal regulations regarding landmarks require that federal agencies consider the effects of their proposals on the "unique properties" of such areas in their planning and impact analysis under NEPA. 36 CFR §

62.3 and § 62.6(f). As USFS's EIS for the East Side Project fails to do this for the areas targeted for even-aged harvesting next to the Tionesta old growth, to that extent the East Side Decision advocating such harvesting is arbitrary and capricious. Therefore it is recommended that Plaintiffs' Motion for Summary Judgment as to Count V be granted; that implementation of the East Side Decision be enjoined; and that the Decision be remanded to the agency to have the effects of even-aged logging on the old growth Tionesta and adjacent areas addressed in the EIS.

Counts VI and IX

Plaintiffs allege in Count VI that the EIS for the East Side Decision improperly concludes that logging will not have any impacts on watersheds within the East Side Project area. They further allege that the cumulative impacts analysis was insufficient and that the EIS is inadequate because it relies on "tiering," a process by which documents are allowed to be incorporated into the record by reference. See 40 CFR § 1508.28.

Defendants have proffered evidence that they based their watershed findings on reasonable research. USFS is required to provide impact information on cumulative effects which occur as a result of a cumulation of discrete impacts in the past and in the foreseeable future. See 40 CFR § 1508.7, § 1508.27(b)(7). Defendants studied the cumulative effects of the

East Side project on the eleven streams that would be impacted. (Admin.R. Book 42 at 94-105, East Side EIS). Further, within the "Watershed Descriptions" section of the EIS, USFS described each of the watersheds in terms of location, aquatic surveys and resource activities within the watershed. (*Id.* at 76-82). The direct and indirect environmental effects of herbicide use, timber harvesting and road construction were also analyzed. (*Id.* at 83-93).

Plaintiffs have not presented evidence that USFS's analysis of these impacts was unreasonable. Upon review of an impacts analysis to determine if an EIS contains "a reasonably thorough discussion of the significant aspects of the probable environmental consequences," the court must find that it provides information that "enables the decision-maker to consider environmental factors and make a reasoned decision." Oregon Env'tl. Council v. Kunzman, 817 F.2d 484, 492 (9th Cir. 1987). "If reasonable persons could rely on the agency's studies to reach the agency's conclusion, the conclusion is not arbitrary." County of Bergen v. Dole, 620 F.Supp. 1009, 1054 (D.N.J. 1985). As USFS presented evidence that it conducted research and made reasonable findings based on that research, including addressing the issue of cumulative impact, the watershed impact analysis in the EIS is not arbitrary and capricious. It is therefore recommended that Plaintiff's Motion for Summary Judgment as to

Count VI be denied and that Defendants' Cross-Motion for Summary Judgment as to Count VI be granted.

Similarly, in Count IX Plaintiffs allege that USFS's analysis in the EIS for the East Side Decision is defective on the issue of the impact of herbicide use. Plaintiffs challenge the methodology used by USFS in reaching its determination regarding the impact of the use of herbicides and assert that their information on the herbicide glyphosate is not up to date.

Defendants presented evidence that they considered in detail several types of herbicide monitoring data and "tiered" to documents that consider in-depth treatment of the use of glyphosate, one of the herbicides at issue. As recently as 1998 they conducted a cooperative research project with the Northeast Forests Experiment station examining the impact of glyphosate on songbirds, tree seedlings, plants, mammals and reptiles.

(Admin.R., Tab 1 at 65, FY 1998 Monitoring Report). They have also conducted monitoring of buffer zones on a powerline right-of-way project. Defendants agree that the buffer zones for these studies differ somewhat from those in the Allegheny, but assert that they have accounted for this in their impact analysis.

(EIS, Admin.R. Book 42 at 83).

The statutory strictures of NEPA require that "an agency has before it detailed information on significant environmental impacts when it makes its decision and guarantees

that this information is available to a larger audience.”
Concerned Citizens Alliance v. Slater, 176 F.3d 686 (3d Cir.
1999). The court may not “set aside agency action as arbitrary
and capricious unless there is no rational basis for the action.”
Friends of the Earth v. Hintz, 800 F.2d 822, 831 (9th Cir. 1986).
As the EIS demonstrates that Defendants had updated and abundant
herbicide data to use as a rational basis to create their
vegetation control plan, their Decision in this regard was not
arbitrary and capricious. It is therefore recommended that
Plaintiff’s Motion for Summary Judgment as to Count IX be denied
and that Defendant’s Motion for Summary Judgment as to Count IX
be granted.

Counts VII and VIII

In Count VII Plaintiffs allege that the East Side
Decision misconstrues monitoring data regarding soils and that
USFS’s refusal to properly analyze the soil compaction data is
arbitrary and capricious. (Compl. ¶¶ 76-77).

The LRMP provides for soil protection measures and
safeguards among its Standards and Guidelines. In order to
prevent excessive soil compaction which impairs tree
regeneration, the LRMP requires that 15% or less of the soil in
each timber sale area be disturbed by logging operations.
(Admin.R. Book 35, LRMP at 4-21 through 4-23). Further, the NFMA
requires that if even-aged logging occurs, it can only be used if

"carried out in a manner consistent with the protection of soil, watershed, fish, wildlife" and other resources. 16 U.S.C. § 1604(g)(3)(F). Under the implementing regulations, all management prescriptions must "conserve soil and water resources and not allow significant or permanent impairment of the productivity of the land." 36 CFR § 219.27(a). Further, any "vegetative manipulation of tree cover [must] avoid permanent impairment of site productivity and ensure conservation of soil and water resources" 36 CFR § 219.27 (b).

Plaintiffs presented evidence that the EIS for the East Side Decision did not report accurate soil disturbance data upon which the Decision relied. Plaintiffs state that "for four out of the past five years the Allegheny has violated the 15% soil disturbance limitation." (Plts. Br. in Supp. of Summ.J. at 36 (Doc. # 25)). Defendants admit that this is true in their Answer to the Complaint: "soils monitoring data shows that more than 15% soil disturbance has occurred in the harvest units for four of the last five years." (Answer ¶ 75). Defendants then report contradictory information in the East Side EIS, stating that in "eight-out-of-nine years the guideline has been obtained of keeping soil disturbance to 15% or less." (EIS, Admin.R. Book 42 at 73). In 1998 the total disturbed area was 19.4%. (*Id.*).

Upon a summary judgment motion for judicial review under the APA, "[t]o survive summary judgment a plaintiff must

point to facts in the administrative record--or to factual failings in that record--which can support his claims under the governing legal standard." Krichbaum v. Kelly, 844 F.Supp. 1107, 1110 (W.D. Va. 1994), *aff'd*, 61 F.3d 900 (4th Cir. 1995). Remand is proper where defendants have offered only conclusory assertions in support of mitigation measures to prevent soil damage. See Graber v. USFS, No. 98-CV-4247, slip op. at 10-11 (S.D. Ill. September 27, 1999).

Here Plaintiffs have pointed to a seminal factual failing in the record. The NFMA requires that even-aged logging only be utilized in a manner consistent with the protection of soil, and the implementing regulations require conservation of the soil, yet the facts relied on by Defendants in promulgating the EIS for the East Side Decision are contradictory at best and do not show that protection or conservation of the soil will be achieved by the introduction even-aged management. As such, Defendants' reliance on such questionable data as a basis for the East Side Decision does not comport with the requirements of NFMA at 16 U.S.C. § 1604(g)(3)(F) nor the implementing regulations at 36 CFR § 219.27(a), and is therefore arbitrary and capricious. It is therefore recommended that Plaintiffs' Motion for Summary

Judgment be granted as to Counts VII and VIII.² Further, implementation of the East Side Decision should be enjoined and it should be remanded to USFS for reconsideration including analysis regarding soil disturbance to determine accurately the past and present state of the soil in the affected areas and the effects on that soil of the proposed even-aged logging.

Count X.

Plaintiffs allege that Defendants' failure to hold a public hearing on the East Side Decision and the ESA constitute a violation of NEPA, as NEPA's implementing regulations provide that federal agencies should hold public hearings when there is "substantial environmental controversy concerning the proposed action or interest in holding the hearing." 40 CFR § 1506.6 (c)(1). Plaintiffs asked for a hearing but the USFS refused the request, whereupon Plaintiffs held their own public hearing at which more than 100 people were in attendance and more than 50 people testified. Defendants were invited but did not attend. (Compl. ¶ 52).

The criteria used to decide whether to hold a public hearing include evaluating whether the project at issue "involves

2. Count VIII contains a similar allegation regarding the imposition of even-aged logging on 400 acres of poorly drained and riparian soils. USFS has chosen to use the even-aged method in contravention of its own guidance in the LRMP, which requires uneven-aged logging on such soils. (LRMP at 4-23). Ignoring its own guidance in the Plan is arbitrary and capricious.

substantial environmental controversy" and whether there is "substantial public interest" in holding a hearing. Plaintiffs submitted evidence that the East Side Decision constituted a substantial environmental controversy. In Curry, Judge Standish noted about Mortality II, the precursor to the East Side Decision here, that "it cannot seriously be disputed that the Mortality II Project is a highly controversial project." 988 F.Supp. at 553. Defendants included in the EIS the fact that the news release, scoping letter and notice of intent sent to the public about the project netted "242 responses representing a wide range of interests and comments" and they also included an entire appendix of public comments in the EIS, consisting of 143 letters. (See Appendices to EIS, Admin.R Book 43 at A-1; A-G). Plaintiffs have thus demonstrated that the East Side Decision could be classed as a substantial environmental controversy. By the same token, this same evidence demonstrates that there was substantial public interest in the project.

Defendants argue, however, that the prescription to hold a hearing under 40 CFR § 1506.6(c) is to do so "whenever appropriate" and that this gives USFS broad discretion to decide to hold a hearing. Defendants conducted interviews, held field tours with the media and interested parties and provided for public input in the process. (Admin.R. Book 11, Tab 2 at 11). Where public meetings have already adequately informed the public

and where there is no need to gather more data, it is not an abuse of discretion to deny requests for a public hearing.

Friends of the Payette v. Horseshoe Bend Hydroelectric Co., 988 F.2d 989, 997 (9th Cir. 1993) (finding no abuse of discretion where there were more than 250 requests for public hearing). See also River Road Alliance v. Corps of Eng'rs, 764 F.2d 445, 451 (7th Cir. 1985) (NEPA does not mandate specific type of procedure to follow by federal agencies; there is no statutory requirement that a public hearing be held); see also Friends of the Ompompanoosuc v. FERC, 968 F.2d 1549, 1557 (2d Cir. 1992).

Failure to hold a public hearing does not preclude the agency from weighing all factors necessary to exercising its judgment in a reasonable manner. Sierra Association for Environment v. FERC, 744 F.2d 661, 664 (D.C.Cir. 1984).

As there exists no federal mandate under NEPA to hold a public hearing, USFS's decision not to do so was a reasonable exercise of its discretion. Therefore it is recommended that Plaintiffs' Motion for Summary Judgment as to Count X be denied and that Defendants' Cross-Motion for Summary Judgment as to Count X be granted.

III. CONCLUSION


It is therefore recommended that Plaintiffs' Motion for Summary Judgment be granted as to Counts I, II, III, IV, V, VII,

and VIII and that Defendants' Cross-Motion for Summary Judgment as to these same counts be denied. It is also recommended that Defendants' Cross-Motion for Summary Judgment be granted as to Counts VI, IX and X and that Plaintiffs' Motion for Summary Judgment be denied as to those counts.

It is further recommended that implementation of the East Side Decision be enjoined until Defendants are in compliance with NEPA and NFMA, and more specifically that the East Side Decision be reversed and remanded to the United States Forest Service as follows: (1) as to Count I, for USFS to reconsider alternative logging methods in the EIS and not rely primarily on the highest dollar return to dictate choice of method in contravention of 16 U.S.C. § 1604(g) (3) (E) (iv); (2) as to Counts II and IV, that USFS revisit the EIS for the ESA to meet the requirements of NEPA and its implementing regulations at 42 U.S.C. § 4332 and 36 CRF § 219.12(f)) by considering a broad range of alternatives that include uneven-aged logging; (3) as to Count III, for the agency to reconsider the optimality and appropriateness requirements by giving meaningful consideration to options involving uneven-aged and no-logging alternatives pursuant to the requirements set forth at 16 U.S.C. § 1604(g) (3) (F) (i); (4) as to Count V, that the agency analyze and include in its EIS for the East Side Decision the effects of even-aged logging on the old growth Tionesta and adjacent areas

as required by 40 CFR § 1502.16(b), 36 CFR § 62.3 and § 62.6(f); (5) as to Counts VII and VIII, that USFS should reconsider and revise its analysis regarding soil disturbance to determine the actual state of the soil in the affected areas and the effects on that soil of the proposed even-aged logging to comport with the requirements of NFMA at 16 U.S.C. § 1604(g) (3) (F) and 36 CFR § 219.27(a).

In accordance with the Magistrates Act, 28 U.S.C. § 636(b) (1) (B) and (C), and Rule 72.1.4(B) of the Local Rules for Magistrates, the parties are allowed ten (10) days from the date of service to file objections to this Report and Recommendation. Any party opposing the objections shall have seven (7) days from the date of service of objections to respond thereto. Failure to file timely objections may constitute a waiver of any appellate rights.



ILA JEANNE SENSENICH
U.S. Magistrate Judge

Dated: September 4, 2002

cc: The Honorable William L. Standish
United States District Judge

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