

March 10, 2009

Ms. Phyllis Fong
Inspector General
U.S. Department of Agriculture
Administration Building
1400 Independence Ave., SW
Washington, DC 20250

RE: Request for Investigation and Performance Review

Dear General Fong:

I am writing on behalf of Public Employees for Environmental Responsibility (PEER) to request that your office review the recent events concerning a natural gas drilling and pipeline project (B-800) by the Berry Energy Inc. on the Fernow Experimental Forest in Tucker County, West Virginia within the Monongahela National Forest (MNF).

According to materials that PEER has obtained under the Freedom of Information Act from the various units of the U.S. Forest Service (USFS) involved with B-800, the agency appears to have mishandled this project, violated laws and its own regulations and proceeded contrary to the clear advice of its own specialists, in several instances ignoring scientific conclusions about negative effects on federally listed species with habitat within the Fernow Experimental Forest.

PEER is requesting that your office undertake both 1) an investigation to ascertain violations, identify responsible officials and recommend appropriate action; and 2) a performance review to determine how the MNF could have better handled this project and to assist the USFS in developing new regulations in this area. As you know, on December 29, 2008 USFS formally solicited public comment on how to craft “regulations to provide clarity and direction on the management of National Forest System surface resources when the mineral estate is privately held”. A review by your office into the events of the MNF would directly aid USFS decision-making in this important yet contentious and apparently uncertain resource protection issue.

Specifically, PEER is requesting that your office:

1. Determine why the MNF deliberately evaded the requirements of the Endangered Species Act (ESA) in avoiding consultation with the U.S. Fish & Wildlife Service (USFWS), despite a) being advised that USFWS believed that formal

consultation was required; and b) the unambiguous warnings of USFS specialists that ESA resources may be put in jeopardy by the B-800 project.

2. Ascertain the responsibility for MNF improperly invoking a Categorical Exemption under the National Environmental Policy Act (NEPA) for the B-800 drilling project by, among other things, a) inappropriately limiting which aspects of B-800 were under consideration in terms of both the size of the project and the exclusion from consideration of pipelines or other associated facilities from the scope of the project for NEPA purposes; and b) using a Categorical Exemption on a project with clear ESA consequences.
3. Evaluate the actions by the MNF in failing to address drill pit fluids that accumulated from B-800 activities in such volumes as to a) violate state and federal anti-pollution laws; and b) threaten birds and other wildlife that would drink or come into contact with the toxic fluids.
4. Review the decision by unnamed senior USFS officials to block a request for legal guidance from the USDA Office of General Counsel on several thorny questions posed by this project.
5. Assess whether MNF and Region 9 leadership improperly ignored the scientific findings of the agency's own experts. President Obama recently declared in a visit to the Interior Department headquarters "The work of scientists and experts in my administration, including right here in the Interior Department, will be respected".

In the absence of involvement by your office, USFS will again drift into the legal and policy morass in which it found itself on the Allegheny National Forest in Pennsylvania. A similar, but more extensive, oil and gas drilling program on the Allegheny BF drew dueling lawsuits by both industry and environmentalists with USFS in the middle. While the MNF is not now in litigation, it may soon be, as may several similarly situated national forests.

These conflicts will be most acute in the most sensitive national forest lands. According to documents that PEER obtained under the Freedom of Information Act, USFS controls only a fraction of the mineral rights beneath wilderness areas and experimental forests in the eastern U.S. In Region 9, records show that 33% of the mineral rights beneath wilderness areas and experimental forests are privately owned but that the Region has no data about ownership of subsurface rights in several areas. The 13-state Southern Region (Region 8) conceded that it had no records identifying who controlled the subsurface estate for the vast majority of its wilderness lands and experimental forests.

In support of this request we append several documents that illustrate the nature of the problems alluded to above:

1. January 22, 2008 letter from three Northern Research Station scientists to their chain-of-command outlining the ESA and NEPA violations in connection with the B-800 project.
2. 2008 scientific evaluation of the effects of the B-800 project on sensitive wildlife and habitat resources by USFS Wildlife Biologist Sybil Amelon.
3. April 23, 2008 “Field Trip to Berry B-800 Gas Well” notes describing resource concerns by other USFS specialists, especially those impacting the endangered Indiana bat.
4. May 28, 2008 “Meeting Notes: After Action Review – Berry B-800 Well Project” in which MNF leadership discuss that it is the position of USFWS that Adequate provision to avoid the likelihood of adverse effects to listed species have not been taken” and that USFWS recommends that USFS “pursue formal consultation to avoid violating the take prohibitions of Section 9 of the ESA.” [emphasis in original]
5. July 2008 USFS e-mails and memos outlining the desire to seek clarification from the USDA Office of General Counsel and indicating that the request for legal guidance would not be forwarded to OGC.

In addition to these enclosed documents, PEER is in custody of several hundred pages of additional documents that we obtained from FWS pursuant to a series of requests filed under the Freedom of Information Act. We would be happy to provide any or all of these documents to your office if it would aid your inquiries.

Apart from this extensive paper trail, if there is anything more that PEER can do to clarify or supplement the basis for this request please do not hesitate to contact me.

Sincerely,

Jeff Ruch
Executive Director