

**Decision Memo**  
**Berry Energy, Inc. B-800 Natural Gas Pipeline Project**

USDA Forest Service  
Cheat-Potomac Ranger District, Monongahela National Forest  
Tucker County, West Virginia

**I. Decision to be Implemented**

I have decided to approve the location of the B-800 natural gas pipeline (gas pipeline) as shown in Berry Energy, Inc.'s (Berry Energy's) plans (Berry Energy, Inc., Fernow Operating Agreement For Pipeline Installation, received June 9, 2008, and Operating Plan modifications, received August 4, 2008), hereafter referred to as Berry Energy's operating plan.

Berry Energy's operating plan for the B-800 gas pipeline location is on file at the Monongahela National Forest Supervisor's Office in Elkins, West Virginia. Its components are listed below under the Description of the Proposed Gas Pipeline Activities. Figure 1 (attached at the end of this document) is a map showing the planned gas pipeline location on Monongahela National Forest System land. The project area is located south of Parsons, West Virginia in the McGowen to Fork Mountain area of the Fernow Experimental Forest portion of the Monongahela National Forest.

Portions of the planned gas pipeline route on Monongahela National Forest land in Berry Energy's lease area were previously approved and would be installed with this proposed gas pipeline. Figure 1 shows the previously approved locations. The B-800 gas well access road location, in which the planned gas pipeline would be placed, was approved in the Decision Memo for the Berry Energy, Inc. Gas Well B-800 Project (signed by Clyde N. Thompson, 11/2/07). On the west side of the project area, a gas pipeline location was approved in the Decision Memo for the Berry Energy, Inc. Gas Well B-782 Project (signed by Clyde N. Thompson, 1/31/06).

**A. Description of the Proposed Gas Pipeline Activities**

Berry Energy has requested a 30-foot wide right-of-way for sections of the proposed route that do not follow a Forest System road (FR) (cross country), approximately 5900 feet of length, and a 15-foot wide right-of-way adjacent to and contiguous with the existing clearing on FR 709 on approximately 2500 feet. A 30-foot wide right-of-way is needed to safely operate construction equipment and install buried gas pipeline in the terrain present along the cross country sections. A narrower, 15-foot wide cleared area will be used when located adjacent to the existing clearing of a forest road because the existing road clearing provides working space for construction equipment operation. A 200-foot long section will be placed within the existing clearing of FR 701 near the access road to the B-800 gas well. The area required for the gas pipeline right-of-way is 4.9 acres.

Other components of Berry Energy's gas pipeline operating plan include:

1. Use of existing forest roads 701, 709 and 827 to transport people, construction equipment and supplies to complete the gas pipeline installation, including the operation of a limited amount of construction equipment on forest roads to support the logistics of cross country gas pipeline installation. Roads damaged during construction will be restored to pre-pipeline conditions.
2. Merchantable timber will be purchased by Berry Energy, Inc. and removed using existing skid trails or the gas pipeline right-of-way. Unmerchantable tree limbs, brush, and stumps may be removed to the outside of the right-of-way or burned, depending on conditions and the amount of material, so that the cleared width used for construction can be kept to a minimum.
3. When crossing under a Forest System road, a pipeline burial depth of 36 inches will be attempted, depending on rock encountered.
4. Pipeline burial depth will be 30 inches when in natural ground, where such depth is achievable. In rock, the pipeline burial depth could be less. Berry Energy will try to bury the pipeline as deep as possible up to 30 inches with the equipment available.
5. Along the entire gas pipeline route, two-inch wide detectable tape will be buried near the surface of the pipeline trench to provide warning of the pipeline's presence.
6. Pipeline markers will be placed within visible sight distance of each other once the pipeline is completed. Contact information for Berry Energy, Inc. will be placed on each marker.
7. Pipeline drips, which allow the removal of liquid condensate and traces of waste hydrocarbons from the pipeline, will be located at low points along the pipeline along FR 701 at Elklick Run, along FR 709 where the pipeline intersects it at its southernmost point, and at the crossing of the unnamed stream on the west side of the project area.
8. Gas pipeline installation under FR 701 near Elklick Run, Elklick Run and, if water is present at the time of construction, an unnamed stream in the west side of the project area will be accomplished by directional boring, eliminating the need for excavating a trench to install pipeline crossings through these areas.
9. Straw bales will be placed as necessary to act as a barrier to help control sediment delivery to streams.
10. Disturbed areas will not remain bare for more than 30 days after gas pipeline installation is completed. Reclamation will be completed within 30 days using a seed mixture, lime, fertilizer, and mulch at rates appropriate for soil conditions and as specified by the Forest Service to protect soil from erosion. The introduction of non-native invasive species will be avoided by using non-aggressive or native plant seed and straw mulch.

11. Waterbars will be placed as necessary to control erosion by water on the gas pipeline right-of-way. Where the final slope of the constructed pipeline right-of-way does not provide for dispersion of surface runoff, waterbars will be installed in an alternating herringbone pattern at intervals not to exceed:
  - 100-200 feet on right-of-ways sloping 5%-10%
  - 67-100 feet on slopes 10%-15%
  - 50-67 feet on slopes 15%-20%
  - 50 feet on slopes over 20%.
12. Earthen barriers will be constructed at the sections of gas pipeline right-of-way that intersect forest roads to act as barricades to motorized vehicle use on the gas pipeline right-of-way.
13. Berry Energy plans to use all terrain vehicles (ATVs) for pipeline maintenance and operation. As part of gas pipeline maintenance and operation, equipment will be brought in when needed to make necessary repairs and maintain the right-of-way.
14. Mowing of the gas pipeline right-of-way will not be done between April 1 and July 31 to reduce the chance of injury to ground-nesting birds.
15. Berry Energy's construction and maintenance equipment shall be free of soil and seeds to help prevent non-native invasive plant materials from entering the Fernow Experimental Forest.
16. Due to the extensive garlic mustard infestation along Forest Road 827, Berry Energy will remove mud from equipment in this location as necessary to help reduce the spread of this non-native invasive species from this area to other areas.

Berry Energy has the right to access their planned gas operations as specified in the mineral reservation. Berry Energy, Inc.'s existing commercial road use permit will be updated to authorize the use of Forest System Roads needed to install the planned gas pipeline. Updating the commercial road use permit is an administrative action that identifies Berry Energy's contribution to the maintenance of Forest System Roads they will be using to install the gas pipeline.

Berry Energy plans to install this gas pipeline in the summer to fall of 2008.

## **B. Purpose of Decision**

As the Forest Supervisor with authority for administering mineral reservations on Monongahela National Forest System land, I received a plan from Berry Energy to install a buried gas pipeline from the B-800 gas well on Monongahela National Forest System land. Berry Energy holds an oil and gas lease of the privately owned mineral rights under the National Forest System land on which the planned gas pipeline is to be located.

National Forest System land on which the gas pipeline is planned is underlain by mineral rights that were reserved by the seller when the United States acquired the land in 1915. This means that these mineral rights are privately owned, and the mineral owner has a reasonable right to remove their minerals, including moving

them to the point of sale. The deed for this land purchase in 1915 identifies the terms of the mineral reservation that the seller and all subsequent mineral owners and their lessees are required to comply with whenever exercising their rights to develop minerals.

The purpose and need for the federal action is identified by and limited to the terms of the mineral reservation. Although there are 10 terms in the mineral reservation (Department of Agriculture, General Rules and Regulations for the Mining and Removal of Minerals of 1911), the mineral reservation terms pertinent to the subject federal action require the Forest Service to:

- 1) Approve the locations of structures or improvements, such as roads or bridges on National Forest System land, needed to carry out the operation; and
- 2) Ensure that operations prevent the obstruction, pollution, or deterioration of National Forest streams, lakes, ponds or springs, and the escape of harmful or deleterious material or substances to National Forest System land from the operations.

The remaining mineral reservation terms are either not pertinent to the Berry Energy proposal, such as those that apply to the conduct of underground mining, or provide no discretion as to how to meet them, such as paying market value for the timber cleared to carry out the mineral operation.

In order to respond to Berry Energy's gas well operating plan, I, as Forest Supervisor, needed to review and either approve or disapprove the location of the proposed Berry Energy B-800 gas pipeline as shown in Berry Energy's plans, and to determine what, if any, conditions or mitigating measures Berry Energy must implement to prevent adverse impacts to water quality from their planned gas pipeline.

## **II. Reasons for Categorically Excluding the Decision**

Decisions may be categorically excluded from documentation in an environmental impact statement or an environmental assessment when they are within one of the categories identified by the U.S. Department of Agriculture in 7 CFR part 1b.3, or one of the categories identified by the Chief of the Forest Service in Forest Service Handbook (FSH) 1909.15 sections 31.1b or 31.2, and there are no extraordinary circumstances related to the decision that may result in a significant individual or cumulative effect on the quality of the human environment.

I have concluded that this decision is appropriately categorically excluded from documentation in an environmental impact statement or environmental assessment as the proposed land use is a routine activity within a category of exclusion, and there are no extraordinary circumstances related to the decision that may result in a significant individual or cumulative effect on the quality of the human environment. My conclusion is based on information presented in this document and the entirety of the Record (project file).

## **A. Category of Exclusion**

The decision fits within the category of exclusion 31.2(3): “Approval, modification, or continuation of minor special uses of National Forest System lands that require less than five contiguous acres of land.” Although issuance of a special use permit is not required by the terms of the mineral reservation, Berry Energy, Inc.’s exercise of private mineral rights requires Forest Service approval of the location of proposed improvements on National Forest System land. As such, my approval of the location included in Berry Energy’s proposal is the same as approving the use of National Forest System land as described in category 31.2(3), absent issuing a special use permit.

The Berry Energy B-800 gas pipeline location approved in this decision uses approximately 4.9 acres of National Forest System land.

## **B. Relationship to Extraordinary Circumstances**

### 1. Threatened and Endangered Species or Their Critical Habitat

The Endangered Species Act requires that federal activities do not jeopardize the continued existence of any species federally listed or proposed as threatened or endangered, or result in adverse modification to such species’ designated critical habitat. In accordance with Section 7(c) of this Act, a list of the listed and proposed, threatened or endangered species that may be present in the project area was obtained from the U.S. Fish and Wildlife Service.

A Biological Assessment (BA) determined that Berry Energy’s proposed activities: 1) will have no effect on Cheat Mountain salamander (*Plethodon nettingi*), West Virginia northern flying squirrel (*Glaucomys sabrinus fuscus*), shale barren rock cress (*Arabis serotina*), and Virginia spirea (*spiraea virginiana*), 2) may affect, but are not likely to adversely affect running buffalo clover (*trifolium stoloniferum*), small whorled pogonia (*Isotria medeoloides*), and Virginia big-eared bat (*Corynorhinus townsendii virginianus*), and 3) may affect, and are likely to adversely affect Indiana bat (*Myotis sodalis*).

The project is considered likely to adversely affect Indiana bats due to tree clearing during the non-hibernating period. Despite many measures that will be taken to avoid the loss of potential roost trees (BA, pages 35-36), it is still possible that adverse effects could occur if an undetected roost tree is cut down. However, there would be no effects beyond those previously disclosed in the Biological Assessment for the 2006 Forest Plan (USDA 2006) and its associated Biological Opinion (USFWS 2006). Potential impacts are well within the incidental take authorized by the U.S. Fish and Wildlife Service, and activities would have no effect on designated critical habitat for the Indiana bat.

Although my authority in making this decision does not extend to imposing protection measures for threatened or endangered species, a copy of this BA was sent

to the U.S. Fish and Wildlife Service. They responded with a concurrence letter for species with “no effect” or “may affect but not likely to adversely affect” determinations in the BA, and a biological opinion for Indiana bat, including reasonable and prudent measures that will appropriately minimize the impact of incidental take anticipated for the proposed activities (USFWS 07/25/08). Therefore, I anticipate that this project will not jeopardize the continued existence of any species federally listed or proposed for listing, or result in adverse modification to any designated critical habitat.

## 2. Floodplains, Wetlands, or Municipal Watersheds

*Floodplains:* Executive Order 11988 directs federal agencies to avoid adverse impacts associated with the occupancy and modification of floodplains. Floodplains are defined by this order as, “...the lowland and relatively flat areas adjoining inland and coastal waters, including floodprone areas of offshore islands, including at a minimum, that area subject to a one percent [100-year recurrence] or greater chance of flooding in any one year.” The project is not located in or near floodplains. This has been validated by map and site-review. Therefore, this decision will not affect floodplains.

*Wetlands:* Executive Order 11990 directs federal agencies to avoid adverse impacts associated with destruction or modification of wetlands. Wetlands are defined by this order as, “...areas inundated by surface or ground water with a frequency sufficient to support and under normal circumstances does or would support a prevalence of vegetative or aquatic life that requires saturated or seasonally saturated soil conditions for growth and reproduction. Wetlands generally include swamps, marshes, bogs, and similar areas such as sloughs, potholes, wet meadows, river overflows, mud flats, and natural ponds.” Except as noted below, the project is not located in or near wetlands. This has been validated by map and site review. The project avoids impacting a small (less than 1 acre) wetland through the project design feature that requires the pipeline to be installed by boring under this wet area without disturbing the surface or altering the current saturated condition and subsurface water flow. Therefore, this decision will not significantly affect wetlands.

*Municipal Watersheds:* Municipal watersheds are managed under multiple use prescriptions in land and resource management plans. The Elklick Run watershed, in which Berry Energy’s operation will occur, was formerly a municipal watershed for Parsons, West Virginia. Parsons no longer uses Elklick Run for a water supply, and it is no longer a municipal watershed. Therefore, this decision will not affect any municipal watersheds.

## 3. Congressionally Designated Areas

This project is not in, nor does this decision affect, any Wilderness Study Areas, Wild and Scenic Rivers, or National Recreation Areas. Increases in the amount of noise audible within a small portion of the Otter Creek Wilderness may occur associated with the operation, such as traffic and motors associated with Berry Energy’s operation on the eastern portion of the gas pipeline. The added noise will be similar

to existing noise associated with activities routinely occurring within the Fernow Experimental Forest. This decision does not affect any other Wilderness areas. Therefore, this decision will not result in significant effects to Wilderness areas.

#### 4. Inventoried Roadless Areas

There are no inventoried roadless areas (RARE II or Forest Plan) in or adjacent to the project area. Therefore, this decision will not affect inventoried roadless areas.

#### 5. Research Natural Areas

There are no candidate or Research Natural Areas within or adjacent to the project area. Therefore, this decision will not affect any Research Natural Areas or candidate areas.

#### 6. American Indian and Alaska Native Religious or Cultural Sites

The Federal government has trust responsibilities to Tribes under a government-to-government relationship to ensure that the Tribes' reserved rights are protected. No tribal concerns were identified for this project. Therefore, this decision will not affect American Indian and Alaska native religious or cultural sites.

#### 7. Archaeological Sites or Historic Properties or Areas

Consultation with the West Virginia Division of Culture and History has occurred and is on-going for this project. Except as noted herein, no eligible archaeological or historic properties or areas were found as a result of a heritage resource survey of the proposed pipeline corridor. Shovel test pits at the southeastern end of the proposed pipeline corridor found a very low density lithic scatter. The Forest Service and West Virginia Division of Culture and History agreed to a plan to monitor construction as it proceeds through the site. The profile and artifact data documented during monitoring will be used to evaluate the site as part of a larger strategy of evaluation that will include controlled excavation of measured test units. With implementation of the agreed-to plan, this decision will not result in significant effects to archaeological sites or historic properties or areas.

In summary, the categorical exclusion is appropriate in this situation because there are no extraordinary circumstances that may significantly affect the environment.

#### **Additional Considerations**

##### 1. Fernow Experimental Forest

I considered the project's potential to affect the Fernow Experimental Forest current research studies and its research values.

Most of the Berry Energy's proposed gas pipeline route follows the location suggested by the Fernow Experimental Forest staff. The Fernow staff recommended this route because it minimized the potential for the gas pipeline to impact research.

Combined with the route location, Berry Energy's proposed right-of-way width is as narrow as reasonably possible in order to safely operate the pipeline construction and installation equipment. In addition, operational features have been built in to the right-of-way clearing that are designed to reduce the potential for damage to vegetation surrounding the gas pipeline corridor, and include such features as slash disposal requirements and a written agreement governing the removal of timber to minimize the amount of impact to on-going research outside of, but adjacent to the pipeline right-of-way.

## 2. Non-Native Invasive Species (NNIS)

Concern was expressed about the Project's potential to be a vector of NNIS spread. The commenter suggested that there needs to be a plan for NNIS management associated with the proposal.

Berry Energy's operating plan includes the use of straw as mulch (Berry Energy's operating plan items 9 and 10). Berry Energy's operating plan also identifies measures that will be taken for reducing the spread of non-native invasive plant species (Berry Energy's Operating plan items 15 and 16). It also provides for Forest Service specification of the seed mix, which has been designed to match Fernow Experimental Forest staff revegetation objectives and strategies (Berry Energy's Operating plan item 10). NNIS are typically monitored as part of routine Forest Service inspections at gas operations, and similar monitoring will occur for the B-800 gas pipeline.

### **III. Public Involvement**

Public involvement included mailing notification of an opportunity to comment along with a description of the Berry Energy, Inc. B-800 Natural Gas Pipeline Project to 10 interested and potentially affected parties (June 12, 2008), publishing notice in *The Inter-Mountain* newspaper Elkins, WV (June 13, 2008), and posting the project description and opportunity to comment on the Monongahela National Forest public internet site (June 13, 2008) and in the Forest Service Schedule of Proposed Actions for the Monongahela National Forest (July-September 2008 report).

Five comments or letters were received related to this decision. The comments were used to refine the analysis and explore the possibility of extraordinary circumstances and potential effects to resources. All comments were read and considered, and responses to substantive public issues or concerns in the comments can be found in the project file, available at the Forest Supervisors Office in Elkins, West Virginia.

Most comments were related to the potential environmental effects that this project may have, and some even questioned the need for, or applicability of, this project on the National Forest. My general response is that this project is a valid exercise of private mineral rights under an existing lease, it addresses a recognized national need for fuel and a legitimate use of National Forest System lands, and I feel that every effort has been made by my staff to work with Berry Energy to facilitate their operation while reducing or eliminating potential impacts to other Forest resources.



#### **IV. Findings Required by Other Laws**

My decision complies with all applicable laws and regulations. I have summarized some pertinent ones below.

Forest Plan Consistency (National Forest Management Act) – The Act requires all projects and activities be consistent with the Forest Plan. The Monongahela National Forest Land and Resource Management Plan (Forest Plan) (September 2006) has been reviewed in consideration of this project. This decision is consistent with the direction, and standards and guidelines contained in the Plan. In particular, the Plan directs “Allow for and support reasonable use of National Forest System (NFS) land for the exercise of reserved and outstanding mineral rights consistent with deed terms and law” (Forest Plan, II-45). Berry Energy operating plan includes rehabilitation of areas affected by their proposal (Forest Plan, II-46).

Endangered Species Act - See Section II, Item B1 of this document. This decision is consistent with the Endangered Species Act.

Regional Forester Sensitive Species (Forest Service Manual 2670) – Forest Service Manual direction requires analysis of potential impacts to sensitive species for which the Regional Forester has identified population viability as a concern. Potential effects of this decision on sensitive species have been analyzed and documented in a Biological Evaluation (project file). Although Berry Energy’s activities may impact individual timber rattlesnakes (*Crotalus horridus*), southern rock voles (*Microtus chrotorrhinus carolinensis*), eastern small-footed bats (*Myotis leibii*), and southern water shrews (*Sorex palustris puntulatus*), they are not likely to lead to a loss of species viability or a trend toward federal listing. Activities could also impact 29 sensitive plant species (BE, Tables 2-4, pages 21-22), but are not likely to lead to a loss of viability or a trend toward federal listing for any species. Site-specific surveys discovered no occurrences of these species within the project area. Therefore the potential for impacts from project activities is considered very low.

Clean Water Act – This Act addresses the need to restore and maintain the integrity of waters. This decision recognizes that based on the operating plan submitted and additional conditions identified to protect water quality, operations will be subject to and are in compliance with State and Federal laws, including the Clean Water Act.

Wetlands (Executive Order 11990) – See Section II, Item B2 of this document. This decision will not affect wetlands.

Floodplains (Executive Order 11988) - See Section II, Item B2 of this document. This decision will not affect floodplains.

Federal Cave Resources Protection Act - This Act secures, protects, preserves, and maintains significant caves, to the extent practical. No caves or indication of karst features are present on the planned gas pipeline right-of-way location based on field examination of the route. This decision will not affect caves.

National Historic Preservation Act and Archaeological Resources Protection Act – See Section II, Item B7 of this document. This decision will not adversely affect archaeological sites, or historic properties or areas.

Native American Graves Protection and Repatriation Act – See Section II, Item B6 of this document. This decision will not affect American Indian and Alaska native religious or cultural sites.

Wild and Scenic Rivers Act – See Section II, Item B3 of this document. No designated rivers or study rivers are affected by this decision.

Environmental Justice (Executive Order 12898) - This Order requires consideration of whether projects would disproportionately impact minority or low-income populations. This decision complies with this Act. Public involvement occurred for this project, the results of which I have considered in this decision-making. Public involvement did not identify any adversely impacted local minority or low-income populations. This decision is not expected to adversely impact minority or low-income populations.

National Environmental Policy Act - This Act requires public involvement and consideration of potential environmental effects. The entirety of documentation for this decision supports compliance with this Act.

## **V. Administrative Review or Appeal Opportunities**

This decision is subject to appeal pursuant to 36 CFR 215. An appeal may be filed by those who provided comment or otherwise expressed interest in the proposed action during the comment period. To appeal this decision, a written Notice of Appeal must be postmarked or received within 45 calendar days of when the Legal Notice is published in *The Inter-Mountain* newspaper. However, when the 45-day filing period would end on a Saturday, Sunday or Federal holiday, then the filing time is extended to the end of the next Federal working day. The date of publication of the Legal Notice is the exclusive means for calculating the time to file an appeal. Those wishing to file an appeal should not rely upon dates provided by any other source.

Send the Notice of Appeal to: Appeal Deciding Officer, Attn: Appeals and Litigation, USDA-Forest Service, Eastern Region, 626 E. Wisconsin Avenue, Milwaukee, WI 53202-4616. The Notice of Appeal may be alternately faxed to: Attn: Appeal Deciding Officer, (414) 944-3963 or hand-delivered to the above address, during the normal business hours of 7:30 a.m. to 4:00 p.m., Monday Through Friday. If submitted electronically, appeals should be directed to [appeals-eastern-regional-office@fs.fed.us](mailto:appeals-eastern-regional-office@fs.fed.us). They should be in TXT, RTF, DOC, PDF or other Microsoft Office-compatible formats. In cases where no identifiable name is attached to an electronic message, a verification of identity will be required. Contents of an appeal must meet the requirements of 36 CFR 215.14.

**VI. Implementation Date**

The appeal period for this decision begins the day after notice of this decision is published in *The Inter-Mountain* newspaper. Those wishing to file an appeal must do so within 45 days after the legal notice is published. If an appeal is not filed, implementation may begin on, but before the fifth business day from the close of the appeal filing period (36 CFR 215.9(a)). If an appeal is received, implementation may occur on or before the fifteenth business day following the date of appeal disposition.

**VII. Contact Person**

Further information about this decision can be obtained from Linda Tracy during normal office hours (weekdays, 8:00 a.m. to 4:45 p.m.) at the Monongahela National Forest Supervisor's Office at 200 Sycamore Street, Elkins, West Virginia; phone: voice (304) 636-1800, ext. 275; facsimile (304) 636-1875.

**VIII. Signature and Date**

*/s/Nadine A. Pollock (for)*

CLYDE N. THOMPSON  
Forest Supervisor

8/12/08

Date

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