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Agriculture

Forest  
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**File Code:** 1570-1

**Date:** March 19, 2008

Ms. Leigh Haynie  
Heartwood  
1009 Kidder Road  
Carencro, LA 70520

RE: Appeal of the Decision Notice and Finding of No Significant Impact for the Kosmos ATV/OHM Trail Addition Environmental Analysis Project Environmental Assessment, Ironton Ranger District, Wayne National Forest, Appeal 08-09-14-0029 A215

Dear Ms. Haynie:

On January 1, 2008, you filed a notice of appeal pursuant to 36 CFR 215.11 on behalf of Heartwood. District Ranger Gloria Chrismer signed the Decision Notice on December 18, 2007, and the legal notice was published in *The Ironton Tribune*, on December 19, 2007. I have reviewed the Appeal Record and have also considered the recommendation of the Appeal Reviewing Officer (ARO), District Ranger Douglas Oliver of the Mark Twain National Forest, regarding the disposition of your appeal. The ARO's review focused on the decision documentation developed by the Responsible Official, District Ranger Gloria Chrismer, and the issues in your appeal. The ARO's recommendation is enclosed. This letter constitutes my decision on the appeal and on the specific relief requested.

### **FOREST ACTION BEING APPEALED**

The purpose for this project is to: protect natural resources and enhance wildlife habitat while developing sustainable trail opportunities, close non-designated user-developed trail, satisfy demand for additional OHV trail on the Wayne National Forest, help three counties in the Appalachian Region of Ohio stimulate economic activity based on destination-based outdoor recreation, and treat non-native plant species populations in the project area. It is proposed to add 33 miles of designated OHV trail between the existing Pine Creek and Hanging Rock OHV trail systems on the Ironton Ranger District.

### **APPEAL REVIEWING OFFICER'S RECOMMENDATION**

The ARO found no evidence that the Responsible Official's decision violated law, regulation, or policy. He found the decision responded to comments raised during the analysis process and public comment period and adequately assessed the environmental effects of the selected action.



In addition, he found the issues in your appeal (i.e., the project violates NEPA, the Clean Air Act, the Endangered Species Act, the National Forest Management Act, ignores economics and climate change, among others, were addressed in the decision documentation.) Based on this review, the ARO recommended that District Ranger Gloria Chrismer's Kosmos Decision Notice be affirmed.

## **DECISION**

After careful review of the Project Record and the appeal, I concur with the ARO's analysis and findings regarding your appeal issues. To avoid repetition, I adopt the ARO's rationale as my own, and refer you to his enclosed recommendation letter, dated March 19, 2008 for further details. It is my decision to affirm District Ranger Douglas Oliver's Decision Notice for the Kosmos Project on the Wayne National Forest.

Pursuant to 36 CFR 215.18(c) this decision constitutes the final administrative determination of the Department of Agriculture. This decision may be implemented on, but not before, the 15<sup>th</sup> business day following the date of this letter (36 CFR 215.9(b)).

Sincerely,

/s/

JERRI MARR  
Appeal Deciding Officer  
Acting Forest Supervisor,  
Wayne National Forest

Enclosure

cc: Robert Gianniny, Douglas Oliver, Patricia Rowell



United States  
Department of  
Agriculture

Forest  
Service

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Poplar Bluff Ranger District

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**File Code:** 1570-1

**Date:** March 19, 2008

**Route To:**

**Subject:** Appeal of the Decision Notice for the Kosmos ATV/OHM Trail Addition Project, Ironton Ranger District, Wayne National Forest, Appeal #08-09-14-0029 A215

**To:** Appeal Deciding Officer

This letter constitutes my recommendation for the subject appeal filed by Leigh Haynie, for Heartwood and Buckeye Forest Council, on the Kosmos ATV Trail Addition Project, Ironton Ranger District of the Wayne National Forest (WNF). District Ranger Gloria Chrismer signed this Decision Notice on December 18, 2007. A legal notice of the decision was published on December 19, 2007 in *The Ironton Tribune*.

My review was conducted pursuant to 36 C.F.R. § 215, "Notice, Comment, and Appeal Procedures for National Forest System Projects and Activities." To ensure the analysis and decision are in compliance with applicable laws, regulations, policies, and orders, I have reviewed and considered each of the points raised by the Appellants and the decision documentation submitted by the WNF. My recommendation is based upon review of the Project Record (PR) including but not limited to the scoping letter, public comments, Environmental Assessment (EA), and the Decision Notice (DN).

On February 14, 2008, District Ranger Gloria Chrismer held a telephone conference call with Leigh Haynie representing Heartwood and Buckeye Forest Council. No resolution was reached on this appeal.

### **APPEAL ISSUES:**

**Issue 1(a):** "*This project violates NEPA...*" The Appellant asserts: "...[I]t improperly segments Kosmos and Pine Creek." (NOA, p. 3). "*Instead of the public viewing the cumulative effects of commercial extraction and exploitation to one site-specific area in one document, the Forest Service arbitrarily decides to issue segmented analysis.*" (NOA, p. 3).

**Response:** The National Environmental Policy Act (NEPA), as described in the Council on Environmental Quality's (CEQ) Regulations (40 C.F.R. § 1508.25), describes how scope of a project is determined. If actions are connected, in that they are closely related and automatically trigger other actions which may require environmental impact statements, or cannot proceed unless the actions are taken sequentially or simultaneously, then they should be discussed in the same impact statement. Cumulative actions, which when viewed with other proposed actions have significant impacts and which would not be revealed in cumulative effects analyses presented in individual environmental analyses, should be discussed in the same analysis. 40 C.F.R. § 1508.7 explains that cumulative effects are impacts on the environment which result



from incremental impacts of the action when added to other past, present, and reasonably foreseeable future actions, regardless of what agency or person undertakes such other actions.

The EA clarifies that the Pine Creek Historic Forest Restoration project is proposed north of the Kosmos Trail Addition project area. (EA, Ch. 3, p. 14). These projects are within the Pine Creek watershed, but within different sub-watersheds. (Ibid.). The location and use of existing or proposed off-highway vehicle (OHV) trails is the only similarity as the Kosmos and the Pine Creek projects have very different purposes. (DN, p. 3). Kosmos will “create a safe access into an area with high visitor use, increase visitor contacts, enforce trail use regulations, and educate more of the recreating public about the need to use designated trails and not create illegal trails.” (DN, p. 3). The WNF will accomplish this by providing sustainable motorized recreation access within management areas designated for OHV use that currently have too many user-created OHV trails. (DN, p. 2; EA, Ch. 1, p. 3). Kosmos will also aggressively treat non-native invasive plant species (NNIS) populations in disturbed areas within the project area. (DN, p. 3).

On the other hand, the Pine Creek project will implement management actions which will restore historic species composition and address crown health and longevity. (Pine Creek EA, p. 5). The Pine Creek project “will restore the forest to healthier conditions by: 1) targeting long-lived tree species and creating a condition in the overstory that allows light to penetrate through to the open understory; and 2) removing damaged, stressed, short lived tree species, and species not suited for the site.” (Pine Creek EA, p. 6). This project will be accomplished by using proposed selection harvest, prescribed burning, and road re-construction.

District Ranger Chrismer clearly explained that after some consideration and preliminary analysis it was evident that analyzing the two dissimilar project proposals together would create a complicated array of alternatives and confuse the effects analysis. (DN, p. 3). She stated, “these projects have independent utility and are not interdependent,” these “projects respond to different resource needs and management objectives,” and these “projects are not part of an interconnected whole, but have independent utility.” She, then, decided to separate the project analyses, but instructed the Inter-Disciplinary Team (IDT) to analyze both projects in each cumulative effects analysis. (Ibid.; PR, Doc. 7-9). Therefore, since the projects are not closely related and can proceed independently and in any order, they are not connected. (DN, p. 3).

Additionally, I find that cumulative effects analysis for Kosmos considered the Pine Creek project as a reasonably foreseeable future action. (EA, Ch. 3, pp. 19, 25-28, 31, 38, 48, 50, 56). Therefore, I find the Ranger Chrismer considered and addressed the possibility of combining the Kosmos and Pine Creek projects as explained above. I find the EA and project record has indisputably analyzed this issue as required by NEPA and that she, in analyzing the two projects separately, did not violate NEPA.

**Issue 1(b):** *“The cumulative effects (from past logging and mining and illegally created trails) are “significant” and require an Environmental Impact Statement. The analysis needs to consider the cumulative and site specific effects of trail creation on biodiversity.”* (NOA, p. 3).

**Response:** NEPA requires that Federal agencies follow certain procedures to examine the environmental impact of their proposed actions. If an agency proposes a “major Federal action [that] significantly affect[s] the quality of the human environment,” NEPA requires the agency prepare an EIS that, among other things, details “the environmental impact of the proposed action.” (42 U.S.C. § 4332(C)). An EIS, however, is not required if the agency first prepares an EA providing “sufficient evidence and analysis” that no EIS is necessary because the proposed action will not significantly affect the quality of the human environment. (See 40 C.F.R. § 1508.9). In those circumstances, the agency issues a “Finding of No Significant Impact” (FONSI) rather than preparing an EIS (40 C.F.R. § 1508.13). 40 C.F.R. § 1508.27 ties the need to prepare an EIS to a list of ten “intensity factors” including “Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.”

These regulations require agencies to take a “hard look” at whether a project will have “significant” environmental impacts. These include: beneficial and adverse impacts, the degree to which the proposed action affects public health and safety, the degree to which the action may adversely affect an endangered or threatened species, the degree to which the effects on the quality of the human environment are likely to be highly controversial, the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks, the degree to which the action may establish a precedent for future actions, whether the action results in cumulatively significant impacts, the degree to which the action may adversely affect scientific, cultural, or historical resources, whether the action threatens a violation of Federal, State, or local law, and the unique characteristics of the geographic area such as proximity to park lands or wild/scenic rivers. (40 C.F.R. § 1508.27). If an agency takes a “hard look” and determines that the proposed action has no “significant” environmental impact, an EIS is unnecessary.

Ranger Chrismer determined that implementing Alternative Three to designate or construct 33 miles of OHV trail will not significantly affect the quality of the human environment. (DN, pp. 13-15). Therefore, an environmental impact statement is not necessary. Both context and intensity of the decision were considered. Chapter 1 of the EA describes the framework for this project in the context of national, regional, and Forest level goals and priorities. Although the Appellants are correct that the Forest does provide an important public asset in the terms of opportunities for OHV use, this project is not unique. The effects are predictable. (DN, p. 14). In fact, by better managing an existing use, resource impacts will actually be reduced (i.e., erosion). (DN, p. 4). The decision is limited in scope to the designation and construction of trails in the Kosmos area. (EA, Ch. 1, p. 7). The selected alternative utilizes appropriate segments of an existing road network resulting in no increase to the existing Forest Service road footprint. (EA, Chapter 3, p. 64). Likewise, the decision primarily affects the local area (i.e., counties in the Pine Creek Watershed). (EA, Ch. 3, p. 66). The WNF properly considered all ten criteria for intensity. (Ibid.). For example, this determination was based upon the following findings:

- The project will not adversely affect any unique characteristics of the geographic area...trails in appropriate locations...offer access to scenic areas within the project area...and clos[ing] old roads not suitable for trails...enhancing the visitor's ability to appreciate the history of the area. (DN, p. 13, #3).
- The cumulative effects of the proposed actions have been analyzed with consideration for past [previous 100 years] and foreseeable future activities on adjacent public and private land. (DN, p. 14, #7).
- The actions will not affect any sites listed in or eligible for listing in the National Register of Historic Places, nor will they cause loss or destruction of significant scientific, cultural, or historic resources. (DN, p. 14, #8).
- The actions are not likely to adversely affect endangered, threatened, or sensitive plant or animal species, critical habitat, or unique natural plant communities...The NNIS treatment plan, Project File 5-4, will improve the habitat for many plants by controlling the competition from non-native species. (DN, pp. 14-15, #9).
- None of the actions threaten to lead to violation of federal, state, or local laws imposed for the protection of the environment. This will be ensured by carrying out the proposed actions in a way that is consistent with the standards and guidelines and management requirements established in the Forest Plan (see the EA, Chapter Two). (DN, p. 15, #10).

CEQ regulations implementing NEPA define cumulative effects as the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-federal) or person undertakes such other actions. (40 C.F.R. § 1508.7). The EA describes historical and physiographic context, as well as describing past and present activities, and sets the stage for the project impacts and the cumulative effects discussions. (EA, Ch. 3, pp. 8-14). Past activities occurred in primarily three different activities: road development and the resulting illegal off-road use, mining, and vegetation management. (Ibid.). Table 3-1 summarizes the extent of past activities in the analysis area. (EA, Ch. 3, p. 8). Each cumulative effects analysis boundary was determined according to the effects to that resource.

The WNF then analyzed the cumulative impacts resulting from this project on each resource area. For example, the EA addresses water quality within the Pine Creek watershed by first addressing past water quality impairment caused by historical mining, illegal ORV use, ORV stream crossings, and past reclamation projects. (EA, Ch. 3, pp. 16; PR, Doc. 7-9, pp. 12-15). The Forest Hydrologist then considered foreseeable future activities in the next 10 years, which included prescribed burning and the addition of harvest and burning in the Pine Creek Historic Forest Restoration Project. (EA, Ch. 3, p. 25; PR, Doc. 7-9, p. 23). The WNF also relied on monitoring that was done after past prescribed burning in the Darby Creek and Young's Branch projects, which showed no surface disturbance in riparian areas or adjacent to stream banks, and therefore no effects on water quality or sedimentation. (EA, Ch. 3, p. 25; PR, Doc. 7-9, pp. 15-17). The Forest Hydrologist noted that numerous Forest-wide Standards and Guidelines, and

additional mitigation measures would be used to reduce and/or eliminate negative impacts to the soil and water resources during ground disturbing activities. Based on that information, the Forest Hydrologist concluded that “the cumulative effect of these activities, coupled with prior activities that have occurred in the watershed, should be minimal in view of the fact that most of the previous ground disturbing activities that have been addressed in this report have been reclaimed during the last decade and are having a minimal effect on water quality.” (EA, Ch. 3, p. 26; PR, Doc. 7-9, p. 23).

Additionally, the Botanical BE analyzed the cumulative effects for federally listed plant species and Regional Forester Sensitive Species (RFSS). This report clearly analyzed the past, present, and future activities that could affect NNIS spread and abundance. (PR, Doc. 5-14, pp. 23-25). She noted that any impacts would be mitigated by pre-treating non-native invasive species in the Kosmos trail area and by closing 11 miles of user-developed trails. (PR, Doc. 5-14, pp. 13-14, 16, 22, 27). The direct, indirect and cumulative effects to federally listed plant species and RFSS are addressed extensively in the Botanical BE. (PR, Doc. 5-14, pp. 28-46; PR Tab 1-38.5, p. 1). This analysis allowed the botanist to conclude that:

- No potential cumulative adverse effects to small-whorled pognia or running buffalo clover habitat, or unknown populations, are expected to result from the implement of this Kosmos project because surveys did not find any individuals within the project area, and likewise, no individuals are known from the cumulative effects area. (EA, p. 31; PR, Doc. 5-14, pp. 30, 33).
- Since the project is not likely have any direct or indirect effects to these [RFSS, Semi-open woodland species, Open Woodland, Fire Adapted Species, or Open Habitat Species] species, then this project will not cumulatively affect these species. (PR, Doc. 5-14, pp. 37, 40, 43, 46).
- The project design criteria above should minimize any cumulative impacts of NNIS on native habitat caused by the implementation of the Kosmos project and will not add cumulatively to past, present and reasonably foreseeable future activities with respect to the spread and proliferation of NNIS. (PR, Doc. 5-14, p. 28; EA, p. 42).

The WNF recognizes the Kosmos project area is a highly altered landscape as a result of past land use activities. Much of the original diversity of plant and animal species has been lost by settlement and industrialization. This is a recreation-oriented project developed to address existing concerns in resource conditions and provide sustainable recreation opportunities. No commercial logging, other than some tree removal for trail rights of way, is proposed in this project; therefore there will be no negative impacts to the existing plant and animal communities' biodiversity. A principle component of the action is the closure of user-developed trails and stream crossings. These closures/restoration activities may, over time, actually enhance diversity. (DN, Appendix 2, p. 22).

I find that Ranger Chrismer considered and addressed cumulative effects and correctly followed the NEPA regulations to determine the proper level of analysis required for this project. Therefore, I agree with her determination that “that implementation of Alternative Three...will

not significantly affect the quality of the human environment. Therefore, an environmental impact statement is not necessary.” (DN, p. 13). I find no violation of NEPA and that Appellants’ claim that this project requires an EIS is unsubstantiated.

**Issue 1(c):** *“The challenged analysis states that fragmentation “will very slightly increase” over current levels. Will that very slight increase be significant? At what point can fragmentation no longer increase?”* (NOA, p. 3).

**Response:** The WNF 2006 Land Resource Management Plan (Forest Plan) designated two management areas for OHV across the Forest. The Kosmos project area falls within both the “Historic Forest with OHV” (HFO) and “Diverse Continuous Forest OHV” (DCFO) management areas. (Forest Plan, pp. 3-7 through 3-10; 3-15 through 3-18; EA, Ch. 1, p. 11). Within these management areas, vegetative desired future conditions are described. DCFO desired future condition addresses limits to fragmentation by desiring 2-5% herbaceous, 8% of even aged hardwoods to be <10 years, and 12% of even aged pine to be <10 years. (Forest Plan, p. 3-7). HFO guideline G-HFO-VEG-7, provides that “when crowns begin to close (if there are less than 15% crown openings), use timber harvest to achieve a 20-40% open canopy.” (Forest Plan, p. 3-17). The estimated removal of 24 trees around the trailhead and along 33 miles of trail has a negligible effect on the forest canopy and is well within the OHV management areas Standards and Guidelines.

Not only is the “slight increase” in fragmentation allowed within the Forest Plan Standards and Guidelines, but any effects are “minimized through project design, and the amount of fragmentation is insignificant in the context of the already highly fragmented Kosmos area of the WNF.” (EA, Ch. 1, p. 15). Approximately 75% of the proposed trails will be on existing roads or trails; therefore, “reconstruction of roads into OHV trail will not change the midstory or understory, since the roads already exist.” (Ibid.). Furthermore, of the additional 7 miles of trails to be constructed, the WNF has laid them out to “avoid removal of overstory or mid-story trees (greater than 6” dbh),” with “only approximately (24) trees greater than 6” dbh” to be removed. (Ibid.). Therefore, the forest canopy will remain intact, even where new trails are constructed. Some trees will be removed for constructing trail heads, but most areas have been chosen in areas that are currently open due to previous land use (e.g. parking area, strip mine), or adjacent to an existing opening. (Ibid.). Therefore, forest fragmentation will not significantly increase with the implementation of this project. (EA, Ch. 1, p. 15; DN, p. 7).

Additionally, it is clear that the protection measures for Indiana bat habitat also show that fragmentation from this project will not be significant, nor have an adverse effect on the species. The project incorporates Forest Plan Standards and Guidelines, designed with the best available science, which were established to protect Indiana bat habitat. In addition, the project was designed to minimize removal of overstory (potential roost) trees by placing trails and trailheads in previously disturbed areas, such as along old roadways. (DN, Appendix 2, p. 7). Project-specific surveys have been conducted, and no maternity roost trees are expected to be removed. Design criteria incorporated into the project limit overstory tree removal to the non-maternity season, negating the risk that an occupied roost tree could be felled. (DN, Appendix 2, p. 7).



There is a potential that the new trail construction through an area where trails were previously absent could degrade traditional foraging habitat. However, project activities may also have beneficial effects to Indiana bat foraging habitat by maintaining travel corridors (trails) and improving water sources. (PR, Doc. 5-15, pp. 25, 28-29). Creation of new recreational trails or reconstruction of old roads into trails with canopy cover may increase or improve suitable flight corridors for the Indiana bat, which in turn may increase foraging success and future fitness. (PR, Doc. 5-15, pp. 25, 28-29). This conclusion is based on research and past mist net surveys which showed that Indiana bats use recreational trails as flight corridors while foraging, especially where water sources are located nearby or on the trail itself. (PR, Doc. 5-15, pp. 25, 28-29). Because this project occurs in areas that are already disturbed (parking lots and trails), it is unlikely to result in the loss of a primary maternity roost tree or important secondary roost. (PR, Doc. 5-15, p. 25). The WNF took a hard look at wildlife effects and designed the trail system after taking into account the habitat needs of the Indiana bat and other wildlife. (DN, Appendix 2, p. 7). Thus, construction or reconstruction of trails will retain canopy cover and remove very few trees as described above. (DN, Appendix 2, p. 7). The project will have only a minor effect on forest cover. (Ibid.). Therefore, I find that the EA and project record analysis does address fragmentation effects and fragmentation thresholds can be found in the Forest Plan.

**Issue 1(d):** *“In addition, the Forest Service cannot adequately analyze the past effects of the ATV and road building fragmentation because the Forest Service cannot state with certainty how many roads are out there.”* (NOA, p.3)

**Response:** The Travel Management Rule notes in its summary that a full inventory of user-created routes is not necessary; the focus of the rule is to identify routes that should be considered. (PR, Doc. 1-38.2, p. 2; 36 C.F.R. §§ 212, 251, 261, and 295). However, all trail routes have been mapped for accuracy using a Global Positioning System (GPS). (PR, Doc. 1-38.2, p. 2; DN, Appendix 2, p. 61). Additionally, roads and trails to be closed or improved were identified locally. On the ground forest monitoring of OHV trails occurs almost daily as WNF personnel interact with trail users, inspect the trails after storms, or tend to routine maintenance. EA, Appendix 2, is a monitoring report with photographs prepared by the District Engineering Technician who is responsible for supervising all trail maintenance contracts. The District Wildlife Biologist and Botanist and seasonal employees include monitoring in their site specific analysis of existing trail conditions. Water quality monitoring occurs during the making of remediation plans for surface and deep mining-related problems. These monitoring results have contributed to developing the purpose and need and proposed actions for this project. (EA Chapter 2, p. 4). Therefore, I find that Ranger Chrismer had on the ground, accurate data to support the development and selection of the proposal for this project. I find that the EA and project record evidences consideration of past effects, and these effects have been analyzed as required by law. For a full discussion of past effects analysis, see **Response to Issue 1(b).**

**Issue 2(a):** *“This Project violates the Clean Air Act.”* The Appellant asserts, *“The 2005 Rule requires that when designating roads, trails, and areas, the Forest Service shall consider natural and cultural resources, public safety, provision of recreational opportunities, access needs, user conflicts, maintenance and administration needs and availability of resources.”* (NOA, p. 3).

**Response:** The 2005 Planning Rule (36 C.F.R. § 219, January 5, 2005) was invalidated by a court ruling on March 30, 2007. See *Citizens for Better Forestry et al. v. USDA*, 481 F. Supp. 2d 1059 (N.D. Cal. 2007). With the enjoinder of the 2005 planning rule, the agency reverts back to the 2000 Planning Rule (218 C.F.R. § 219, November 9, 2000) and the 2004 Interpretative Rule (36 C.F.R. § 219, September 29, 2004). The 2004 Interpretative Rule (referring to the 2000 Rule, 36 C.F.R. § 219.35(d)) clearly distinguishes that the requirements of the 2000 Rule do not apply to projects implementing Land and Resource Management Plans, such as the Kosmos Project: “Projects implementing land management plans must comply with the transition provisions of § 219.35, but not any other provisions of the 2000 planning rule.”

The change back to the 2000 Planning Rule/2004 Interpretative rule does not result in any modifications to the analysis process or effects portrayed in the Kosmos decision. The WNF was authorized to use the 1982 Planning Rule for its Forest Plan revision, which it did. That the 2005 Planning Rule is now invalidated does not alter the fact that the 1982 Planning Rule is applicable to the WNF Forest Plan revision. In conjunction with these standards, I find that Ranger Chrismer considered the “best available science” in her analysis. She specifically stated, “This project has been developed and reviewed using the best available science, per the Interpretative Rule in 36 C.F.R. § 219.35, Appendix E. See Chapter Four and specialist reports (Project File 5-14, 5-15, 7-9, and 1-38.1 for bibliography of reference utilized in developing this analysis).” (DN, p. 11).

In addition, I find that the WNF considered the listed resources when putting this project together. One of the purposes of this project is to prevent the adverse effects to natural resources from the ever-increasing ATV traffic. (EA, Ch. 1, p. 3; DN, p. 2). In fact, a collection of photographs document the resource damage caused by ATV traffic. (EA, Appendix 2). Cultural Resources have been addressed and the Responsible Official found that this project will not cause loss or destruction of significant scientific, cultural, or historic resources. (DN, p. 14). Completion of this project will address public safety issues, provide recreation opportunities, address access needs, and maintenance and administrative needs. (DN, p. 2). After completing her analysis, Ranger Chrismer concluded:

By designating trails and reducing the number of user-developed trails, we are providing an improved safe access for visitors to the area and reducing the possibility of accidents that can occur from cross country travel. The establishment and maintenance of designated trails will provide access for fire fighting and accident response to assist forest users. The WNF works closely with local law enforcement and fire/rescue agencies and organizations through formal agreements to provide funding for trail law enforcement and to provide equipment for emergency response. Dollars spent in the local communities by OHV users contribute to the taxes raised in the area to help fund these county services. The local ATV club is using proceeds raised during their spring rally to fund the training of new emergency responders for the local volunteer fire departments. Converting non-maintained user trails to maintained designated trails provides a safer riding experience for trail users and for administrative and law enforcement personnel, thus contributing to public health and safety. (DN, p. 13).

I find that Ranger Chrismer addressed all resources areas in making her decision. See also **Response to Issue 2(b)** concerning violations of the Clean Air Act.

**Issue 2(b)**: The Appellant contends, “*Enlarging the OHV trails will exacerbate the problems with PM 2.5. See Attachment 1, ‘Assessing the Ecological Impacts of ATV trail construction and use on public lands’ from the Minnesota Department of Natural Resources.*” (NOA, p. 4).

**Response**: The Clean Air Act, which was last amended in 1990, requires Environmental Protection Agency (EPA) to set National Ambient Air Quality Standards (40 C.F.R § 50) for pollutants considered harmful to public health and the environment. One of the six principal pollutants, or "criteria" pollutants is Particulate Matter (PM) 2.5. The EPA lists Scioto and Lawrence County, Ohio as PM 2.5 non-attainment locations in the Green Book, <http://www.epa.gov/oar/oaqps/greenbk/>.

The Project Records contains a detailed report on Air Quality Emissions which specifically discusses PM 2.5 emissions. (PR, Doc. 1-38.1). This analysis goes into great detail regarding the production of pollutants from ATVs, and specifically addresses commenter concerns regarding PM 2.5. (PR, Doc. 1-38.1, p. 3). This report provides a site specific evaluation that looked at the number of permits issued for off-road vehicle use on the Wayne NF, the estimated number of visits to all forest trails by each permit holder, the estimated miles ridden per visit and the estimated cumulative effect on emissions by the proposed trail addition. (PR, Doc. 1-38.1). Based on the assumptions, the calculated PM 2.5 emissions from vehicles with existing permits on the trails is 0.62 tons. It was estimated that 36% of the total miles would be in Ironton, so the total base PM 2.5 emission would be 0.22 tons. An additional 39% increase would occur with the proposed trail system, which would bring the total PM 2.5 emissions to 0.239 tons. An additional table was included in this report, illustrating a comparison of pollutant in the first year after trail construction in Lawrence County with additional pollutants produced by the Kosmos trail addition. The annual ATV contribution to county totals regarding PM 2.5 would be 0.029%. The Air Quality Emission Report concluded that, “Compared to current emission levels from ATVs (as stated in the calculations above and in the table), the potential air impacts as expressed in tons and as a percent of total emissions in Lawrence County resulting from ATV exhaust would be inconsequential under Alternative Three.” (PR, Doc. 1-38.1, p. 8).

The draft Minnesota DNR paper, “Assessing the ecological impacts of ATV trail construction and use on public lands: factors to consider and a review of the literature,” was addressed in the record. The authors segmented their discussion into three different types of impact; impacts of the physical trail, impacts associated with use, and impacts from spur trails. A comprehensive review was completed for this paper that compared these three impacts to the proposed project. (PR, Doc. 1-38.2). The WNF review of that paper noted that some of the impacts described in the paper were examined in the BE for this project. (PR, Doc. 1-38.2). This paper was also distinguished from the current project as few, if any, overstory canopy trees are being removed during ATV trail construction. (PR, Doc. 1-38.2). The Kosmos project was further distinguished from the paper in that it does not enter any roadless areas and uses an existing road system that

has been in place in excess of 100 years. (PR, Doc. 1-38.2). This review is also used throughout the project's analysis.

Considering the information and analysis completed on PM 2.5 emissions, the review of the Department of Natural Resources paper, and the use of the best science available, I find no violation of the Clean Air Act as it relates to particulate matter and that Ranger Chrismer adequately addressed and analyzed air quality. (DN, p. 15).

**Issue 3(a):** *“This Project violates the Clean Water Act.”* The Appellant claims: *“This project will result in more roads and more use in an area that has impaired waters due to sediment and surface mine run-off. See Attachment 2, Sack, Dorothy. “Sediment Flux and Compaction Trends on Off-Road Vehicle (ORV) and Other Trails in an Appalachian Forest Setting.” (NOA, p. 4).*

**Response:** The Clean Water Act (CWA) established the basic structure for regulating discharges of pollutants into the waters of the United States. It gives EPA the authority to implement pollution control programs such as setting wastewater standards for industry, and requirements to set water quality standards for all contaminants in surface waters. The CWA made it unlawful for any person to discharge any pollutant from a point source into navigable waters, unless a permit was obtained under its provisions. It also recognized the need for planning to address the critical problems posed by nonpoint source pollution.

Section 303(d) of the CWA requires each State to develop a Total Maximum Daily Load (TMDL) priority list (also known as the 303(d) list) that identifies the waters of the state that are currently threatened or impaired. (PR, Doc. 7-09, pp. 11-12). The 1996 Ohio Water Resource Inventory (CWA Section 305(b) report) designates all water bodies within the Pine Creek watershed as aquatic life warmwater habitat. An 18.6-mile reach of Pine Creek (Hales Creek to Little Pine) is listed as threatened on the 303(d) list. (PR, Doc. 7-09, pp. 11-12). However, a decade of abandoned mine land restoration efforts, soil and water and reforestation projects, and natural forest regeneration have begun to neutralize the effects of previous soil and water impacts. Given that the Pine Creek watershed has only one segment listed on OEPA's 303(d) list for low pH and organic enrichment, continued soil and water restoration efforts by the WNF and partners may result in a de-listing of this segment when the OEPA does their next assessment. (PR, Doc. 7-09, pp. 11-12).

Contrary to what the Appellants state, the preferred alternative for this project will not have a net increase in the amount of roads created. An estimated 26 miles of classified and unclassified roads will be re-constructed and have their designated use changed; in addition approximately 13 miles of user-developed trails will be closed. (DN, p. 4). Most of the trails will be put on existing road, with only an estimated 7 miles of new ATV connector trails that are expected to be created. (DN, p. 4). The closing of old roads and illegal trails will most certainly reduce sediment to streams. (DN, p. 7).

Additionally, the report prepared by Dorothy Sack, reported that most impacts of off-highway vehicles on soil resources are based on studies in arid and sand dune environments (U.S. General Accounting Office 1995), which would not be applicable to this project area. In addition, the

report failed to report any observations on which the analyses were made when conducting the study on the WNF. For example, no data is presented regarding soil displacement or compaction. (DN, Appendix 2, p. 53). Whereas, the WNF's Forest Hydrologist did an extensive analysis on water impacts. (PR, Doc. 7-09). In her report, she examined the effects of past activities in the project area, but also noted how past reclamation/restoration efforts have reduced sediment transport and improved overall watershed conditions. (PR, Doc. 7-09, p. 15). The beneficial effect of other projects has been verified by "personal observations from over a ten year period of working in ORV areas where stream crossings exist, user-developed trails create an environment where excessive amounts of sediment is transported into streams and riparian vegetation is destroyed." (PR, Doc. 7-09, p. 16). Site specific visits were made to determine the effectiveness of mitigation measures and design criteria on controlling sediment. Based on her observations, the WNF's actions were effective regarding water quality. (PR, doc. 7-09, pp. 15-17).

Based on the aforementioned, the Hydrologist was able to conclude that, "the proposed project will have a net positive result in improving overall watershed condition, while providing more and safe recreational opportunities to the public," provided that Forest-wide Standards and Guidelines and additional mitigation measures used to reduce and/or eliminate negative impacts to the soil and water resources during ground disturbing activities are used. (PR, Doc. 7-09, p. 23). She also noted that, "Given the harmful effects of user-developed trails and other impacts to soil and water resources that have been discussed in this report, and which are predicted to continue to increase over the next 10 years or more, the long-term impacts of implementing the proposed project will have a net positive result in reducing and/or eliminating the adverse impacts that are currently affecting the soil and water resources in the Pine Creek Watershed." (PR, Doc. 7-09, p. 23).

Therefore, I find that the Appellants' claims are not supported, and that this project does not violate the CWA, but will actually have positive impacts on water quality in the project area. (DN, p. 15).

**Issue 3(b):** *"Best Management Practices do not ensure that the minimum level of protection will be met."* (NOA, p. 4). *"Best management practices throughout the Ironton ORV trail system are improperly Designed."* (NOA, p. 4). *"... [B]est management practices are not maintained."* (NOA, p. 4).

**Response:** The State of Ohio recommends a variety of Best Management Practices (BMPs) to protect water and other resources. While not required on National Forest lands, the BMPs are embedded in the Forest Plan Standards and Guidelines. (DN, Appendix 2, p. 53; PR, Doc. 7-07). The WNF Forest Plan provides guidance on the protection of natural resources through the use of Standards and Guidelines. Forest Plan Standards set limits for management activities. These practices are generally not retroactive in nature. In other words, they do not require the Forest to go back and bring all possible user-created and old roads up to standards. These limitations are designed to help the Forest attain desired conditions and fulfill objectives for all future project activity. Standards also ensure compliance with laws, regulations, executive orders, and policy direction. The Forest Plan also states, "Although standards and guidelines do not completely

eliminate water quality and riparian impacts, they would reduce impacts to acceptable levels. Standards and Guidelines provide a level of protection that the States and U.S. Environmental Protection Agency have judged sufficient to meet the goals of the Clean Water Act.” (Forest Plan, FEIS, p. 3-18)

The Hydrology Report identifies the applicable Standards and Guidelines that are incorporated as mitigation measures into this project. (PR, Doc. 7-09, p. 18). Additional mitigation measures are included in the same report. (PR, Doc. 7-09, p. 20). Previous water quality monitoring (visual observations, personal communication with recreation Forest Service employees, and site specific visits) of implemented Standards and Guidelines indicate that they are effective in significantly minimizing and/or potentially eliminating soil and water impacts. (DN, Appendix 2, pp. 52-53). The Forest Hydrologist also noted that there are inspection reports from 2004-2006 that document that the BMPs, that were put in place during the implementation phase of these projects, were effective in reducing and/or eliminating soil erosion and transport. (PR, Doc. 7-09, p. 17).

In addition, the WNF is aware that monitoring of the OHV trails is critical to ensuring that the trail is maintained. This monitoring occurs on an almost daily basis during the OHV season as technicians ride the trails to interact with users, attend to routine maintenance, and inspect the trails after storms. A trail monitoring report provides excellent examples and photographs depicting before and after shots regarding the maintenance of the OHV trails. (PR, Doc. 4-11; PR, Doc. 7-8; EA, Ch. 1, p. 4; EA, Appendix 2). Additionally, the “District Wildlife Biologist and Botanist and seasonal employees include monitoring in their site specific analysis of existing trail conditions. Water quality monitoring occurs during the making of remediation plans for surface and deep mining-related problems. These monitoring results have contributed to developing the purpose and need and proposed actions for this project.” (EA, Ch. 1, p. 4). The monitoring results indicate that on all 3 projects there was no evidence of erosion, windthrow, or impact to water quality. (PR, Doc. 7-09, p. 17). Therefore, I find the Responsible Official’s analysis that BMPs, represented by Standards and Guidelines in the Plan, ensure protection of resources is supported by the EA and Project Record.

**Issue 3(c):** *“Each of the ditches, failed berms, or any discrete conveyances of sediment to waters of the United States is a point source subject to regulation under the Clean Water Act.”* (NOA, p. 4).

**Response:** I do not disagree with the Appellants on the regulatory definition, per 40 C.F.R. § 122.2, of discharge from a pollutant from a point source; however the perception that this project is “collecting or channeling surface runoff,” which by definition is point source, is incorrect. As stated above, this project will close an estimated 13 miles of user-developed trails, and will reconstruct and change the designation of an estimated 26 miles of classified and unclassified roads. It will not be “collecting or channeling surface runoff,” therefore it is not considered point source pollution. Non-point source pollution is not regulated directly by the CWA. In fact, as addressed earlier, it is felt that the reconstruction of these trails and the closing of the user-made trails there will be a net positive result in the overall watershed condition.

**Issue 3(d):** *“Sections 301 and 404 of the Clean Water Act require a permit from the Corps of Engineers prior to the discharge of dredged or fill materials into waters of the United States.”* (NOA, p. 4).

**Response:** It should be noted that this concern was not expressed during the official comment period. Consequently, Ranger Chrismer lacked the opportunity to provide information as part of the NEPA process. Regardless, no dredging or filling is required in this project, hence Section 301 and 404 of the CWA do not apply.

**Issue 3(e):** *“Although activities “undertaken on forestland for the production and harvesting of timber products” are generally exempted from the Sedimentation Pollution Control Act, the Forest Service’s operation and maintenance of the Kosmos ORV trail system is unrelated to any silvicultural purpose or program.”* (NOA, p. 5).

**Response:** It should be noted that this concern was also not expressed during the official comment period denying Ranger Chrismer of the ability to provide information as part of the NEPA process. However, this project is not “a point source” as defined by the CWA and has been furthered explained in the language above. Appellants point to no information or scientific data ignored or overlooked by the WNF. My review of the Record indicates that the WNF considered all the relevant factors and properly analyzed water quality issues associated with the project in the context of proven mitigation measures. Appellants do not provide any evidence that the project will exacerbate any existing water quality condition, but simply presumes that it will adversely affect water quality. After reviewing field data, site specific analysis, and comprehensive mitigation, I conclude that Ranger Chrismer properly found that this project will not adversely affect water quality.

**Issue 4(a):** *“This project violates the Endangered Species Act.”* The Appellant claims: *“This project will jeopardize the Indiana bat. This project does not do anything to recover the Indiana bat. The Forest Service states that it has relied on the best available science, but it fails to identify what that is.”* (NOA, p. 5).

**Response:** The following are requirements of the Endangered Species Act (ESA) (16 U.S.C., Title 16, Section 1536):

(a) Federal agency actions and consultations

1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

Concerning the fulfillment of obligations related to Section 7 consultation, the PR includes the correspondence requesting project review by the US Fish and Wildlife Service (USFWS) and their concurrence following their review of likely impacts of the proposed project to federally threatened and endangered species. (PR, Doc. 5-15; PR, Doc. 5-18, pp. 1-3). The concurrence letter states: "It is the Service's biological opinion that this project is not likely to jeopardize the continued existence of the Indiana bat... **This fulfills your Section 7(a)(2) requirements for this action...**(emphasis added)." (PR, Doc. 5-18, p. 3). Ranger Chrismer stated that the USFWS "concurred that this project followed the procedure for consultation and is in compliance with Section 7 of the Endangered Species Act (Project File 5-14, 15, and 18)." (DN, p. 15).

Not only has the WNF complied with the ESA by consulting with the USFWS, but they have also provided a detailed analysis regarding the Indiana bat. The Forest Plan provides Standard and Guidelines intended to aid in the conservation of the Indiana bat. (Forest Plan, p. 2-19). Furthermore, the Conservation Plan for Federally Listed Species provides Standard and Guidelines intended to aid in the conservation of the Indiana bat. (Forest Plan FEIS, Appendix D, pp. D6-D12). The Conservation Plan explicitly details the requirements of the Forest to contribute to recovery and conservation of this species. The project area falls within the Historic Forest with OHV and Diverse Continuous Forest with OHV areas. The desired future condition of the forest within these management areas is described within the Forest Plan. (Forest Plan, p. 3-16). It states that "A variety of wildlife is present, but habitat conditions are especially favorable for species dependent on large oak and hickory trees and a near-continuous canopy. The open nature of the forest provides suitable foraging habitat for the Indiana bat, while the hard mast produced by the oak and hickories benefits many mammals and birds." (Forest Plan, p. 3-16).

The PR contains an analysis of the effects to the Indiana bat and included those findings within the Wildlife BE, which is cited in the DN. (PR, Doc. 5-15; DN, p. 6). These findings were also recorded with the EA. (Ch. 3, pp. 42-63). The Wildlife BE incorporates design criteria that are based on Forest Plan Standards and Guidelines. (PR, Doc. 5-15, pp. 2, 7-9; EA, Ch. 2, pp. 2-12, 2-19 to 2-20). The Wildlife BE presents a summary of the likely outcome of this proposed action and concludes that by designating new trails more than a quarter mile away from hibernacula and fall swarming sites and by closing roads that potential disturbance of Indiana bat winter habitat will be minimized. The Wildlife BE also states that due to reduced human noise from the reduction of trails in the area this project will have beneficial effects for the Indiana bat.



(PR, Doc. 5-15, pp. 28-29). This project clearly demonstrates that the intended outcome of the proposed project is the achievement and maintenance of habitat conditions that are suitable for the Indiana bat. In fact, the Wildlife BE documented that selecting Alternative 1 (the no action alternative) is likely to adversely affect the Indiana bat. (PR, Doc. 5-15, p. 24). While, the selected alternative has many positive effects on the Indiana bat:

- By designating all new trails more than one-quarter mile from the hibernacula and fall swarming sites, and by closing illegal trails where they intersect the newly designated trails, potential for human disturbance at Indiana bat winter habitat will be minimized. (PR, Doc. 5-15, p. 28).
- Because illegal OHV use would be minimized or eliminated on an additional 2.1 miles of old roads, and because 3.2 fewer miles of existing roads would be designated as trails, less Indiana bat summer roosting habitat would be subject to the noise and disturbance of OHV traffic. (PR, Doc. 5-15, pp. 28-29).
- However, project activities may also have beneficial effects to Indiana bat foraging habitat by maintaining travel corridors (trails) and improving water sources. Creation of new recreational trails or reconstruction of old roads into trails with canopy cover may increase or improve suitable flight corridors for the Indiana bat, which in turn may increase foraging success and future fitness. (PR, Doc. 5-15, p. 25).
- By placing the new waterholes near the trails, which Indiana bats use as flyways, Indiana bat foraging habitat and drinking water availability will be improved. (PR, Doc. 5-15, p. 26).
- Removal of some trees, particularly along trails, or during the expansion of the Wolcott trailhead, may increase solar exposure to other suitable roost trees. (PR, Doc. 5-15, p. 29).

Additionally, there are various Standards and Guidelines (SFW-TES-2, and GFW-TES-3) and design criteria that are in place to protect Indiana bat winter habitat, hibernating Indiana bats, and suitable Indiana bat roost trees. (PR, Doc. 5-15, 29).

Ranger Chrismer stated, “The interdisciplinary team was informed by the best available science and information contained in the record for the development of the revised Forest Plan.” (DN, p. 6). The Wildlife BE states that best available science has been reviewed and incorporated into this analysis, and lists four pages of literature cited and references that were used. (PR, Doc. 5-15, p. 2). Furthermore, the Wildlife BE details the scientific research used in making the recommendations by the IDT and ultimately the decision by Ranger Chrismer. (PR, Doc. 5-15, pp. 15-29). I find that this project does take actions that will benefit and recover the Indiana bat and that the forest has relied on the best available science. As such, I find Appellants’ claims are not supported by my review of the documents.

**Issue 4(b):** *“The Wayne facilitates and creates the very summer habitat conditions that doom the Indiana bat.”*

**Response:** The WNF described in detail the status of the Indiana bat and its habitat. (Forest Plan, Appendix F1, Biological Assessment, pp. 19-78). The information presented in this document provides the most current information available related to the distribution and habitat preferences of the Indiana bat on the WNF. (Forest Plan, Appendix F1, Biological Assessment). Additionally, the Wildlife BE states that potential loss of suitable roost trees could occur from the proposed recreation activities and that direct impacts to Indiana bats would be expected to occur if an occupied roost tree is inadvertently removed during the summer. However, because design criteria have been incorporated into the alternatives, specifically not removing trees between April 15<sup>th</sup> and September 15<sup>th</sup>, no direct effects are expected to occur. (PR, Doc. 5-15, p. 29). The Wildlife Biologist stated:

The proposed activities are linear (trails) and small in size (parking lot), and are taking place within a landscape which is heavily forested. For these reasons, and because the majority of proposed activities are taking place on previously disturbed areas, this project is unlikely to result in the loss of a primary maternity roost tree or important secondary roost. The potential beneficial effects of this project, including improved flyways and water sources, help offset, in the long-term, any potential population level adverse effects due to loss of potential roost trees, reduction in traditional foraging areas, and disturbance due to OHV noise. (PR, Doc. 5-15, pp-24-28).

The USFWS agreed with the WNF on their assessment and stated that it was assumed that Indiana bats use the area for roosting and foraging and that “great flexibility was used during project development to avoid removal of all potential roost trees.” In addition, the USFWS noted that whenever possible, trails were located along existing road beds and old existing trails so that trees greater than 6” dbh would not be removed. Also, new trails proposed for construction were laid out to avoid removal of large trees (dbh > 6”). (PR, Doc. 5-18, p. 2). In conclusion, I find that Ranger Chrismer complied with all relevant aspects of the ESA and associated regulations.

**Issue 5(a):** *“This project violates the National Forest Management Act.”* The Appellant contends: *“Heartwood challenges the Forest Service’s failure to conduct a site specific analysis of how the past, present, and reasonably foreseeable future logging, opening maintenance, road building and maintenance, and other activities which can fragment the forest, is going to affect any and all large unfragmented forest blocks which may be present in the project area.”* (NOA, p. 8).

**Response:** The National Forest Management Act of 1976 (NFMA) directs preparation of rules for the development of Forest Plans under the Forest and Rangeland Renewable Resources Planning Act of 1974. These rules are promulgated as the various planning rules published in the Federal Register under 36 C.F.R. § 219. While these rules do not address project-level forest fragmentation or site-specific analysis per se, forest fragmentation is addressed in the Forest Plan by means of describing the vegetative desired future condition (DFC) by management area, some specific standards and guidelines, and then the effect of this DFC on species is evaluated in the

Final Biological Assessment found in Appendix F1, Final Environmental Impact Statement. A site specific analysis then addressed species within the project area in the EA as described in the supporting Wildlife and Botany BEs.

This trail relocation and road closure project complies with NFMA as it implements the Forest Plan, developed under the 1982 Planning Rule. The Rule, Forest Service directives, the Forest Plan, and the Kosmos EA assesses present and anticipated use, demand, and supply of renewable resources. The project promotes a sound technical and ecological base for effective management. The project allows for meeting the requirements of our people in perpetuity. The project is a plan to provide for multiple uses of services in coordination of outdoor recreation, range, timber, watershed, wildlife and fish. The project was prepared by an IDT. The project considers the economic and environmental aspects, provides for a diversity of plant and animal communities, and will not produce substantial and permanent impairment of the productivity of the land.

An example of the site specific effects analysis for a species that could be affected (Indiana bat) by the proposed activity can be found in the Wildlife BE. (PR, Doc. 5-15). The analysis finds forest-wide Standards and Guidelines are in place to avoid impacts to Indiana bat hibernacula and swarming sites. By designating all new trails more than one-quarter mile from the hibernacula and fall swarming sites, and by closing illegal trails where they intersect the newly designated trails, potential for human disturbance at Indiana bat winter habitat will be minimized. The Forest took a hard look at wildlife effects and designed the trail system after taking into account the habitat needs of the Indiana bat and other wildlife. Thus, construction or reconstruction of trails will retain canopy cover and remove very few trees as described above. The project will have only a minor effect on forest cover. (DN, Appendix 2, p. 7). Table 3-5, EA (pp. 45-47) documents consideration of site specific past and future activities for affecting wildlife in the project area. These considerations include logging in the past 20 years and projected future vegetation management activities for the subsequent 20 years. Data from past projects was gathered from discussions with Ironton district employees that have each worked on the district for over 30 years, from timber sale records, and from previous Wildlife BEs, and data for current and future projects was gathered from the current WNF Schedule of Proposed Actions (SOPA), and from the WNF Forest Plan.

See also **Response to Issue 1(b)** for discussion on site specific analysis regarding analysis of past, present, and reasonably foreseeable actions. Given the above, I find excellent consideration of past, present, and reasonably foreseeable effects were considered. In conclusion, I find that Ranger Chrismer did not violate any law, regulation, or policy.

**Issue 5(b):** *“The analysis needs to disclose the impacts to the plants and animals currently living in the project area.”* (NOA, p. 8).

**Response:** Impact to plants and animals in the project area are addressed in the Botany and Wildlife BEs (PR, Doc. 5-15 & Doc. 5-14) and in the EA. The effects are identified for two federally listed plant species and the 22 Regional Forester sensitive species (RFSS) that have habitat within the project area. The effects are identified for five federally listed animal species known to occur on or near the WNF and the 21 Regional Forester sensitive animal species

known to occur within the WNF. It is because of the finding of these potential impacts to Indiana bat that alternative three was developed.

The BE and EA disclose potential impacts to plant and animals in the project area. The greatest detail is carried forward on those plants or animals that may be negatively impacted. For two Threatened or Endangered plant species, the EA discloses that new trails through previously undisturbed forest may affect habitat, but are not likely to adversely affect small whorled pogonia or running buffalo clover if non-native invasive species (NNIS) are treated. No potential cumulative adverse effects to small-whorled pogonia or running buffalo clover habitat, or unknown populations are expected to result from the implementation of the Kosmos project because surveys did not find any individuals within the project area. For the 22 plant species on the RFSS list, eleven may have suitable habitat in the project area. Of the 22 plant species, only Butternut and striped gentian were found in the project area. (PR, Doc. 5-14).

All five federally-listed animal species were considered during preparation of the Wildlife BE. Only the species with suitable habitat present at the site or which could potentially be affected by the proposed action will be addressed in the EA. To date, only the Indiana bat has been documented as a resident animal species on the WNF. Potential environmental consequences of recreation activities include loss of undetected roost trees, alteration of foraging habitat, and disturbance from noise/human presence to the Indiana bat is why alternative three was developed. (PR, Doc. 5-15). I find the Responsible Official has disclosed impacts to plants and animals appropriately.

**Issue 5(c):** *“The Forest Service needs to develop alternatives and mitigation measures to minimize the death and destruction the roadbuilding causes.” (NOA, p. 8).*

**Response:** The modified proposed Alternative 3 reconstructs 19 miles of classified roads and 7 miles of unclassified road as trail, but does not build any new roads. No road construction will occur in this project. Four alternatives developed provide a range of trail construction, trailhead construction, and rehabilitation of user-developed trails. (EA, Ch. 2). Under Alternatives 1 and 4, no trail or trailhead construction would occur, while varying amounts would occur in Alternatives 2 and 3. Applicable Forest Plan Standards and Guidelines are incorporated into all the alternatives to protect resources during construction of trails and trailheads, and rehabilitation of user-developed trails. (EA, Ch. 2, pp. 2-11 through 2-15). Development of effective mitigation was a key part of this project. Both mitigation and its efficiency are well documented in the record. (EA, Ch. 3; DN, pp. 7, 8, 12 and 13). The selected alternative adopts mitigation to protect wildlife and avoid possible adverse effects. The range of alternatives is reasonable, given the altered condition of the resources in the project area and the purpose and need. Public input into alternative development influenced the range of alternatives. The comment does not provide any specific information on an alternative that “minimizes the death and destruction” of road building. Again, there is no road building in this Project. The EA did disclose the effects of the No Action alternative in which no new connector trails would be constructed. Therefore, I find the Appellants’ claim has no merit. The Responsible Official has divulged all potential impacts and described appropriate mitigation.

**Issue 5(d):** *“Without any population data, the EA concludes there would be no significant adverse impact on the species, although this is not backed up by any empirical data.”* (NOA, p. 8). *“Before carrying out the project, the Forest Service needs to obtain baseline data for all MIS species, forest interior birds, and reptiles and amphibians.”* (NOA, p. 9).

**Response:** While the law does not require population data be used in evaluating impacts, the WNF puts forth considerable effort in compiling wildlife population information to evaluate trends on the Forest. The WNF does monitor Management Indicator Species (MIS) species and uses this information in its analysis. The 2004 Interpretative Rule (36 C.F.R. § 219, September 29, 2004) specifically addresses use of other tools such as considering habitat in lieu of populations when analyzing effects of projects. See **Response to Issue 8b**.

There is no provision in law or policy that requires population trend information be disclosed at a variety of specified geographic levels. My review of the Record indicates the WNF put forth considerable effort in compiling wildlife population information to evaluate Forest trends including monitoring of MIS. As part of the Forest Plan revision, eight bird species were selected as MIS. (Forest Plan, Appendix C). These species can be effectively and efficiently monitored, and in conjunction with other Management Indicator Habitats, used as indicators of management programs.

Forest Plan Monitoring Reports summarize the strategies for collecting population trend information. (Fiscal Year 2006 Monitoring and Evaluation Report, pp. 10-14). In brief, the Forest relies on ruffed grouse drumming surveys and breeding bird surveys conducted every two years. This data is displayed at two spatial scales, regional and Forest-wide. Information is on file from 1966 to 2005. The most recent monitoring results are found in Tables 2-1 and 2-2 of that same report. The Kosmos Project Record also documents the effects of OHV activities on these MIS species and habitats. (PR, Doc. 5-17). Analysis indicates that the impacts will vary depending on the species in question. This information is summarized in the EA. (Chapter 3, pp. 63-64).

The Appellants further claim that analysis for other wildlife species is also not backed up with “any empirical data.” This statement is again incorrect. For example, the Wildlife Biologist described the Indiana bat survey efforts that were designed to assess the species distribution. (Wildlife BE, p. 16, 36-37; EA, Ch. 3, pp. 42-43; DN, Appendix 2, pp. 15-16). Surveys were also done for the following species: black bear, bobcat, cerulean warbler, henslow’s sparrow, timber rattlesnake, green salamander, blanchard’s cricket frog, four-toed salamander, mud salamander, round hickorynut, and little spectaclecase. (Wildlife BE, pp. 43, 46, 49, 52, 55, 58).

Considerable field work was undertaken for this project, as well as review of scientific literature and existing monitoring reports. (DN, Appendix 2, p. 16). I find the Appellants’ claims are not supported by my review of the Record. Site specific surveys were conducted for both plants and animals. This information was used to disclose potential impacts of the project. The Appellants’ claim is not supported by my review of the record.

**Issue 5(e):** *“The Forest Service will negatively affect the water and soil and wildlife resources of the Wayne.”* [Appellant references articles on ATV use on the Wayne] (NOA, p. 9).

**Response:** See **Response to Issue 5(b) and Issue 3**. Mitigation measures to protect soil, water, air, wildlife, plants and other affected resources are included in the EA. Efficiency of each mitigation measure has been carefully considered as part of the project analysis. Monitoring will ensure that effects are as anticipated. The potential environmental effects of the project on soil, water, and wildlife are evaluated extensively in the EA and Wildlife and Botanical BEs. (EA, Ch. 3, pp. 15-25, 29-64; PR, Doc. 5-14 & 5-15). The programmatic analysis in the FEIS for the Forest Plan was also considered. The project is expected to improve wildlife habitat by providing properly located, constructed, and maintained trails for sustainable recreation. By closing user-developed trails, the project protects soil water and wildlife resources, and allows healing of past effects from unmanaged use. Over time, the project will allow ecological function and integrity in the project area to be improved.

The overall effects on soil and water of this project are summarized as:

Upon considering the best science available, Forest-wide Standards and Guidelines, and additional mitigation measures used to reduce or eliminate negative impacts to the soil and water resources during ground disturbing activities, the proposed project will have a net positive result in improving overall watershed condition, while providing more and safe recreational opportunities to the public. There will be some short-term negative effects from project activities when heavy equipment causes new compaction or sediment enters a stream during a construction activity, but a net positive impact will result from project implementation.

Given the harmful effects of user-developed trails and other impacts to soil and water resources that have been discussed in this report, and which are predicted to continue to increase over the next 10 years or more, the long-term impacts of implementing the proposed project will have a net positive result in reducing and/or eliminating the adverse impacts that are currently affecting the soil and water resources in the Pine Creek Watershed. The cumulative effect of these activities, coupled with prior activities that have occurred in the watershed, should be minimal in view of the fact that most of the previous ground disturbing activities that have been addressed in this report have been reclaimed during the last decade and are having a minimal effect on water quality. (EA, Ch. 3, p. 26).

Impacts to wildlife are addressed in terms of impacts to threatened and endangered species (TES) and MIS species in the project area. (EA, Ch. 3, pp. 52-64). Indiana bat is the TES species known to occur in the proposed action area and the effects to it were described as:

The proposed action is in compliance with forest-wide standards and guidelines that were designed to protect Indiana bat winter habitat. Therefore, anticipated effects from the proposed project are similar to those anticipated in the programmatic BO for recreation projects that incorporate all applicable Plan

standards and guidelines (S&G) into the proposed action. As the impacts from these activities are essentially small, and potential negative impacts, such as loss of suitable roost trees and noise disturbance at roost sites, are offset by potential beneficial impacts, such as maintenance of flyways and improvement of water sources, they would have little or no incremental effect when combined with the impacts of other past, present, and reasonably foreseeable future activities. Therefore, implementation of Alternative 3 is not expected to result in any appreciable increase in cumulative loss or long-term alteration of Indiana bat habitat. (EA, Ch. 3, p. 61; PR, Doc. 5-15, p. 29)

Potentially affected RFSS are also addressed. (PR, Doc. 5-15, pp. 40-43). Like other wildlife species, some species will benefit from the proposed action, others have no effect, still others have a negative effect. This is covered in great detail in the Wildlife BE. (PR, Doc. 15-5, pp. 42-64)).

The same can be said for MIS. All of the alternatives in the Kosmos project, including “no-action,” would have beneficial impacts on some MIS and mixed or negative impacts on other MIS. Different species have different habitat requirements, and there is no “one size fits all” type of management that can meet the needs of all species at the same time on the same piece of land. The goal is to provide a variety of habitats, in space and time, which will support viable populations of a variety of species.” (EA, Ch. 3, p. 64).

Given the above, I find excellent consideration of the negative effects on water, soil, and wildlife. The NFMA has not been violated.

**Issue 6:** “**This project ignores economics.**” The Appellant asserts, “Federal taxpayers are being asked to pay more than a quarter of a million dollars for ORV trails that will lead to increased user-created trails, increased non-native invasive species, and negative effects..” (NOA, p. 9). The project did not consider the “value of a recreation based economy over an extraction-based economy.” (NOA, pp. 10-11).

**Response:** The NFMA, Forest Rangeland Renewable Resources Planning Act, and the NEPA do not mandate any particular economic analysis techniques. “For purposes of complying with the NEPA, the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations.” (40 C.F.R. § 1502.23). Forest Service internal policy and guidance manuals provide direction on economic analysis. The Forest Service Manual (FSM) states, “The responsible line officer determines the scope, appropriate level, and complexity of economic and social analysis needed.” (FSM 1970.6). The Responsible Official (i.e., Ranger Chrismer) clearly has considerable discretion in determining the appropriate level and type of economic analysis required for the project decision.

To the extent that NEPA requires a type of economic analysis, the WNF included it in the EA. There is an in-depth analysis of outdoor recreation and the economy, including a comparison or projected economic activity associated with each alternative. (EA, Ch. 3, pp. 65-67).

Specifically, the WNF used site-specific visitor surveys (e.g., 2003 National Visitor Use Monitoring Survey (Stynes and White 2005; Outdoor Recreation on the WNF, Warren Kriesel; 1996 WNF Economic Impacts Study)) to project economic benefits in terms of dollars to the local economy. As with any modeling, assumptions could influence results. The analysis detailed these variables. The selected alternative could result in an increase of \$511,019 to the local economy.

The Appellants are incorrect in their statement that this project will cause water, soil, and air degradation. Serious erosion is already occurring in the project area through improperly designed trails. The Kosmos project addresses these conditions by “designating and reconstructing suitable trail routes, barricading non-designated routes, and closing, hardening or bridging several streams in the project area.” (DN, p. 7). Likewise, analysis indicates that the control of NNIS will be more effective as a result of this project. (Ibid).

The Appellants’ statement that the “project ignores economics” is simply untrue. Clearly the analysis of the economic benefits of this project and the discussion on the need to support the local economy of Lawrence County tells a different story. (EA, p. 5; DN, p. 12). The potential for economic development from outdoor recreation and tourism in Lawrence County is partially based on the concentration of tourism-oriented resources on the WNF located within the County. I find that Ranger Chrismer adequately addressed economic issues in the Kosmos EA.

**Issue 7(a):** “*This project ignores climate change.*” The Appellant claims, “*For the Forest Service to propose a project without analyzing the amount of carbon that will be produced from new ORV trails violates NEPA.*” (NOA, p. 11).

**Response:** The Global Climate Change Prevention Act (GCCPA) amended the Resources Planning Act (RPA) to require the Secretary of Agriculture to consider the potential effects of global climate change on the condition of the renewable resources on the forests and rangelands of the United States, and to analyze opportunities to mitigate the buildup of atmospheric carbon dioxide and reduce the risk of global climate change. However, the statute does not require the Secretary to consider global climate change in a quantitative, monetary analysis in every site-specific decision as the Appellant desires, but instead gives the Secretary the discretion to consider this issue as appropriate. The agency analyzed the global climate change issue in the 1990 RPA Program. There is no legal requirement in the GCCPA to analyze global climate change in this site-specific project EA.

The Appellants raised this same issue in Heartwood’s appeal of the Record of Decision for the 2006 Forest Plan Revision. The 2006 appeal decision found no violation of NEPA or its regulations in regard to carbon storage and related effects. (WNF Revised LRMP Appeal Decision dated Nov 15, 2007 Attachment 1, p. 2). The appeal decision cited to the thorough air quality effects discussion contained in the FEIS for the Forest Plan, which concluded that any proposed activities would have effects too small to measure on global or regional trends and would not have significant effects on local air quality. (Forest Plan FEIS, CH. 3, pp. 3-29 through 3-31). The WNF also conducted an extensive air quality analysis for this project. For a complete discussion on impacts to air quality, please see **Response to Issue 2(b)**. Therefore, I



find that Ranger Chrismer violated no law, regulation, or policy as it relates to climate change and carbon.

**Issue 7(b):** *The Forest Service [Forest Plan] has violated NFMA in that it fails to consider the best way the Wayne National Forest can meet the needs of the American people in light of climate change.* (NOA, p. 11).

**Response:** Appellants challenge the 2006 Forest Plan. In regards to the Appellants' assertion that the Forest Service has violated NFMA, please refer to **Response to Issue 7(a)**. The 2006 appeal decision found no violation of NFMA or its regulations in regards to climate change. The Multiple Use Sustained Yield Act (MUSYA) (16 U.S.C. Sec. 528) defines multiple use as "the management of all the various renewable surface resources of the National Forests so that they utilized in the combination that will best meet the needs of the American people." Therefore I find that Ranger Chrismer violated no law, regulation, or policy as it relates to needs of the American people and climate change.

**Issue 7(c):** *"The Forest Plan violates NEPA because there is no alternative that specifically addresses climate change."* (NOA, p. 11).

**Response:** See **Response to Issue 7(a)**. Again, Appellants are challenging the 2006 Forest Plan. While beyond the scope of the EA, it is worth noting that the WNF did not receive such a suggestion on the draft Environmental Impact Statement for the Forest Plan to develop such an alternative. The NEPA requires that a broad range of reasonable alternatives be considered, but does not mandate that any particular alternative be selected. An agency's discussion of alternatives must be bounded by some notion of feasibility. There is no requirement to consider alternatives that are impractical or infeasible. Guidance from the CEQ (46 Fed. Reg. 18026 (1981)) and many courts have stated that the range of alternatives is bounded by the purpose of the proposed action. NEPA does not require agencies to consider alternatives that are inconsistent with the basic policy objectives for the management of the area, nor is there any requirement in NEPA that an environmental impact statement discuss a minimum number of alternatives. The Forest Service is required to set forth only those alternatives necessary to make a reasoned choice. (Forest Plan, Response to Comments Appendix to Final Environmental Impact Statement, p. RTC-28). The Forest Plan evaluated alternatives based on its purpose and need. I find no violation of NEPA for not developing an alternative that specifically addresses climate change as Appellants demand.

**Issue 7(d):** *"The Forest Plan violates NEPA because it and the FEIS for the Plan fail to analyze the beneficial effects of closing the forest to OHV use to people and people's environment as the climate changes."* (NOA, p. 11).

**Response:** See **Response to Issue 7(a)**. The Appellants are once again challenging the 2006 Forest Plan. While beyond the scope the EA, the Forest Plan does point out that recreational OHV use is one of the purposes for which National Forests are administered under the MUSYA.

Use of off-highway vehicles on the WNF has been a controversial, complex, and evolving issue for at least a decade. (Forest Plan, Response to Comments Appendix to Final Environmental Impact Statement, p. RTC-180). Executive Order 11644, NFMA regulations, the new travel management rule and other applicable federal laws provide a complex legal framework governing this form of recreational use on National Forests. In developing the Final EIS for the Forest Plan, the Responsible Official reviewed these legal requirements and analyzed the OHV comments on the DEIS and Proposed Revised Forest Plan in accordance with this direction. Outdoor recreation, including recreational OHV use, as one of the purposes for which National Forests are administered under the MUSYA. The 1988 Forest Plan (as amended) prohibited OHV use cross-country and off-designated roads and trails. This is often referred to as “closed unless posted open.” Use of OHV on designated roads and trails has been carefully monitored since the 1988 Plan was first adopted. A considerable amount of field data and observation was used in plan revision. Although OHV use is a legal recreational use of the National Forest, it must be conducted in a proper place and manner. In order to protect other resources, OHV use requires intensive management. It is not appropriate (for resource protection reasons) to allow OHV access on some parts of the Forest. Field visits and collaboration with other recreation experts (both within and outside the Forest Service) resulted in an extensive body of knowledge on OHV use and effects on the WNF. Field data and observation confirm that adverse effects (soil, water, wildlife) may arise from OHV use on the Forest. This work presents a detailed picture of Forest-wide consequences of OHV use. Neither NEPA nor NFMA prescribe any particular methodology to evaluate OHV use of a National Forest. The Responsible Official has chosen to depend upon monitoring and work with other resource experts to guide development of the revised plan. Sufficient resource inventory and condition information was available to allow for a fully informed decision. (Forest Plan, Response to Comments Appendix to Final Environmental Impact Statement, p. RTC-180).

The revised plan was developed collaboratively. An alternative that would exclude OHVs from the Forest entirely (FEIS, Ch. 2, Alternatives Eliminated from Detailed Study) was considered. Best available information and scientific opinion with regard to trail design and mitigation of environmental effects was sought out. Evaluation of the programmatic environmental effects was key to determining the best course for the future. The public was asked for its views on where OHV trails should be located (if any). The 2006 Forest Plan (or “revised plan”) strives for balance on this contentious issue. Public participation helped shape the alternatives and the decision. It is recognized that it is impossible to simultaneously please those that wish to eliminate OHVs and those groups and individuals that wish to expand access, and the Responsible Official has, instead, forged a science-based compromise. Interested parties have participated in Forest Service collaboration, but it is recognized that consensus on an issue where the public is so highly polarized is not likely to occur. (Forest Plan, Response to Comments Appendix to Final Environmental Impact Statement, p. RTC-180).

I find the Responsible Official was not required by NEPA to analyze benefits of excluding multiple-use of area and he did consider the alternative to exclude OHVs from the Forest.

**Issue 7(e):** *“The Kosmos OHV expansion violates NEPA because it fails to analyze the beneficial effects of standing forests to people and people’s environment as the climate changes and the beneficial effects of fewer OHVs in the Wayne.”* (NOA, p. 11).

**Response:** For a discussion on climate change, please see **Response to Issue 7(a)**. There is no requirement for the agency to consider a separate global climate change alternative in a quantitative analysis in every site-specific decision. Appellants seek fewer OHVs on the WNF. However, I believe that the WNF analyzed an adequate range of alternatives that accomplished the specified purpose and need of the project. The project is designed to protect natural resources while developing trail opportunities, close non-designated user-developed trails, and satisfy OHV demand on the WNF. (EA, Ch. 1, p. 2). Ranger Chrismer realized that opposition to motorized recreation use exists on the WNF, but she also recognized that motorized recreation use is allowed under MUSA. (DN, p. 6). She also noted that the current practice of ORV riding on non-designated trails and across streams would continue resulting in soil and water resource damage. Trail improvement projects such as the Kosmos trail addition project, have an opportunity to limit resource damage by reducing illegal use, use of a well-designed OHV trail, and improving wildlife habitat.

The past restoration and reclamation projects, as discussed earlier, have had a net positive impact on overall watershed condition. Monitoring of these projects demonstrates the effectiveness of implementing Forest-wide Standards and Guidelines and additional mitigation measures to minimize and/or potentially eliminate soil and water impacts. Under the no-action alternative, no new trails or roads would be constructed, re-classified, closed, or improved. The current practice of ORV riding on non-designated trails and across streams would continue. Erosion from this illegal use will result in soil and water resource damage. Over the next 10 years, the cumulative impacts to soil and water resources will continue to increase considerably, resulting in potentially severe impacts to the soil and water resources. (PR, Doc. 7-9).

I find a sufficient breadth of alternatives was considered. Specific alternatives to evaluate closing the forest to all use were considered at the forest plan level and a rationale for not completely analyzing was provided. No quantitative analysis of the effects of standing forest is appropriate for this proposed recreation trails project. I find no violations of NEPA or NFMA.

**Issue 8(a):** *“This project shortchanges wildlife.”* The Appellant contends, *“At least one study shows that the creation of artificial water holes may not do anything for Indiana bats.”* (NOA, p. 11).

**Response:** The Forest Plan Biological Assessment (BA) lists management activities that may benefit the Indiana bat and its habitat ((Forest Plan FEIS, Appendix F1, pp. F1-19 through F1-79). Specifically, “Construction of waterholes, ponds, and lakes and restorations of wetlands creates drinking water sources for Indiana bats as well as habitat for insect breeding, its food source.” (Forest Plan FEIS, Appendix F1, p. F1-48). Additionally, the Forest Plan Standards and Guidelines state that the forest is to “Provide water sources that promote aquatic insect production and provide drinking sources for Indian bats along suitable flight paths, especially in upland areas, and off/away from recreation sites, and designated trails and roads.” (Forest Plan,

Ch. 2, p.2-21). With respect to creation of water holes, the Wildlife BE demonstrates that the wildlife biologist certainly considered their creation upon the landscape and as well as the benefits to the Indiana bat and implemented mitigation measures that tiered to the Forest Plan Standards and Guidelines. (PR, Doc. 5-15, pp. 7-8). Specifically GFW-WLF-16 (Forest Plan, Ch. 2, p. 2-18) includes language on the design, construction, and maintenance of waterholes and ephemeral wetlands. This standard/guideline states that: Design, construction, and maintenance of waterholes and ephemeral wetlands should consider the following:

Size may vary, but should generally be 0.1 to 0.25 acres in size.

Locate where the watershed ratio does not exceed 5:1 (generally on ridges or upper slopes). The slope of the fill should be 5:1 on both the water and the back sides. After settling, freeboard should be approximately 6 inches above a seeded or sodded spillway.

Portions of waterholes should have a minimum depth of at least 3 feet to maintain some permanent water during dry periods of the year; 12 inch depth for ephemeral wetlands.

The Wildlife BE further states that implementation of the proposed alternative will provide additional and improved water sources. (PR, Doc. 5-15, p. 29). These new waterholes will be a mixture of ephemeral and permanent waterholes and will be constructed in accordance with Forest Plan Standard and Guideline GFW-WLF-16. Additionally, these waterholes will replace and/or enhance existing road ruts at a 2:1 ratio. (PR, Doc. 5-15, p. 11). This will provide more permanent water sources for the Indiana bat for longer periods of time during the drier times of the year.

The WNF has research and analysis to support its position that creating water holes will benefit the Indiana bat. Therefore I find that adherence to Standards and Guidelines, and adoption of additional, project specific, mitigation measures, demonstrate, unequivocally, the effort to maximize beneficial impacts to the Indiana bat.

**Issue 8(b):** *“The Forest Service’s use of habitat as a proxy for population violates the NFMA.”* (NOA, p. 12).

**Response:** See **Response to Issue 5(d)** for discussion of MIS. As previously discussed, the 2004 Interpretative Rule requires use of best available science in implementing land management plans. The interpretative rule states that “other tools often can be useful and more appropriate in predicting the effects of projects that implement a land management plan, such as examining the effect of proposed activities of the habitat of the specific species...” See **Response to Issue 2(a)** for discussion on the 2004 Interpretative Rule and **Response to Issue 4(a)**, for discussion of best available science. Based on the previous analysis, I find that Ranger Chrismer documented use of best available science, citing numerous references in the EA and project record, and recorded this finding in the DN. I find no violation of the NFMA, as she included MIS species in the analysis.

**Issue 8(c):** *“There is no indication that the USFS consulted current or accurate field studies to arrive at any of the numbers for the Indiana bat, and there is no identification of the methodology used in determining what constitutes suitable habitat.”* (NOA, p. 12).

**Response:** The WNF conducted project specific surveys for Indiana bat. During the summer of 2006, summer surveys were conducted in two locations in the project area and two locations in the Pine Creek area immediately north of the Kosmos area. (PR, Doc. 5-15, p. 16). Each location was netted for one night, and two nets were set each night for a total of eight net nights. No Indiana bats were caught during these summer surveys. Summer netting had been done in and near the Kosmos area in previous summers as well. (Ibid.). Additional survey data for the WNF at summer mist net sites, summer roost trees as well as at fall swarming areas and winter hibernacula are attached in Wildlife BE, Appendix C, pp. 38 and 39. Furthermore, the Forest Plan BA cites monitoring and inventorying efforts associated with the action area of WNF from 1979 through 2005. (Forest Plan FEIS, Appendix F1, pp. F1-29 through F1-32)

Appellants further assert the Forest Service did not identify the methodology used in determining what constitutes suitable habitat. The suitability of available habitats and the likely project occurrence for federally endangered and threatened species of wildlife that might occur within the WNF and the project area were considered in this assessment of habitat suitability. The Forest Plan BA clearly defines habitat parameters for both summer and winter habitat for the Indiana bat. (Forest Plan FEIS, Appendix F1, pp. F1-32 through F1-40). Four winter habitat, limestone mine sites have been found to be active and verified through surveys during winter. This information is backed up with survey data included in the Kosmos Wildlife BE Appendix C, pp. 38 and 39. For summer habitat, numbers of recorded occurrences as well as habitat variables where the captures took place indicate that these areas are suitable for Indiana bats. Additionally, several publications including Romme et al. 1995 and Britzke et al. 2003 included information on suitable habitat associated with captured Indiana bats. The EA further stated regarding distribution and habitat for the Indiana bat:

Indiana bats use upland and riparian forests for roosting, maternity sites, and foraging activities during the summer. They roost underneath loose bark of snags and exfoliating bark of live trees, and in cavities, splits and crevices of damaged or dead trees and in hollow limbs and boles. Indiana bat summer roost trees have been documented as small as 3.1" dbh. However, most females have been found on trees greater than 8.7" dbh, with an approximate mean dbh of 15.7" for primary roost trees (USFWS 1999). Foraging Indiana bats have been documented flying in and around forest canopies that have open understories, and along forest edges and over ponds (Rommé et al. 1995). Prey consists of flying insects, both aquatic and terrestrial, depending on the environment in which they are foraging (Rommé et al. 1995). (EA, Ch. 3, pp. 43-44)

I found documentation in the EA and Wildlife BE adequately addressed the Appellants' issues in regard to current field studies and what constitutes suitable habitat for the Indiana bat.

**Issue 8(d):** *“Furthermore, the Forest Service and the Fish and Wildlife Service both parrot the language that ecological relationships between Indiana bat [insert species – could be Cerulean warbler, etc.] and summer habitat are largely unknown and/or the use of habitat per seasonality and topography is currently unknown in [fill in the blank].”* (NOA, p 12).

**Response:** It should be noted that this concern was not expressed during the official comment period. Consequently, the Responsible Official lacked the opportunity to provide information as part of the NEPA process. Regardless, Indiana bat summer habitat characteristics and use are addressed programmatically within the Forest Plan BA (Forest Plan FEIS, Appendix F1) and in the Biological Opinion from the USFWS (Forest Plan FEIS, Appendix F2).

Programmatically, the Forest Plan BA cites numerous publications documenting Indiana bats use of summer roosting, foraging and nesting habitat including discussions on roost tree selection foraging (including species composition and size) travel corridors as well as the importance of waterholes for drinking and feeding (Romme at al. 1995, USFWS 1999, Keiser and Elliot 1996). Furthermore, the Forest Plan BO thoroughly documents the known variables of Indiana bat summer roosting and foraging habitat. These variables include roost tree selection characteristics as well as maternity colony site characteristics and foraging habitat variables that are known through monitoring and scientific studies conducted throughout the species range.

I find that the Appellants’ claims are not substantiated given the body of evidence on Indiana bat summer roosting and foraging habitat for both males and females, as well as the numerous scientific studies and published literature that says the ecological relationships between the Indiana bat and its summer habitat are largely known and that use of seasonality and topography is known.

**Issue 8(e):** *“Additionally Forest Service and Fish and Wildlife Service biologists admit that the Forest Service has insufficient data and knowledge regarding (1) the population of the Indiana bat, and (2) the quantity and quality of habitat preferred by the Indiana bat to justify using habitat as a proxy for population.”* (NOA, p 12).

**Response:** It should be noted that this concern was not expressed during the official comment period. Consequently, the Responsible Official lacked the opportunity to provide information as part of the NEPA process. Regardless, I find that both the Forest Service and USFWS Biologists have sufficient data and knowledge regarding the population of the Indiana bat. See **Response to Issue 8(c)**. There is specific information on the status of the Indiana bat including survey estimates dating back to the 1960s. Specifically, the Biological Opinion (Forest Plan FEIS Appendix F2, pp. 25 and 26) shows that the Indiana bat declined from 883,300 bats in 1960 to 382,300 bats in 2000/2001. While these numbers do show a decline of Indiana bat, the decline was not evenly distributed across the winter range. The Forest Plan BO further states that the southern portion of the range decreased an estimated 80% in the 40 years observed, with the largest declines in Kentucky and Missouri hibernacula. In contrast, the population in the northern Midwest and Northeast increased by 30%. Additionally, the Forest Plan BA, while reflecting these numbers of Indiana bat from the USFWS, reports numbers for Indiana bat within the action area of the WNF. (Forest Plan FEIS, Appendix F1, p. F1-27). It specifically stated

that “Since 1990, the Ohio winter population has remained stable to slightly increasing. However, Indiana bats within the Priority III hibernaculum on the WNF increased from about 150 individuals in 1999, to an estimated 200 individuals in 2003, to an estimated 333 individuals in 2005 (Schultes, 2003; 2005).” (Ibid.). The Wildlife BE further provides survey efforts for the Indiana bat within the WNF from 1979 through 2007, as well documented occurrences in summer net sites, fall swarming areas and summer roost trees. (PR, Doc. 5-15 pp. 36-39). Regarding the issue of the Forest Service and Fish and Wildlife Biologists admitting that the Forest Service has insufficient data and knowledge regarding the quantity and quality of habitat preferred by the Indiana bat to justify using habitat as a proxy for population please see **Response to Issue 8(b)**.

There is sufficient data and knowledge regarding both the population and the quantity and quality of the Indiana bat. Therefore, I find the Appellants’ claims are unfounded.

**Issue 9:** *“This project has unrealistic mitigation measures.”* The Appellant asserts, *“The Forest Service fails to identify what funds are being allocated by local law enforcement to enforce trail restrictions or who these volunteers are and what kind of supervision will be entailed. The Forest Service uses vague terms such as “most riders are cooperative” and posits that the Forest Service “has developed an approach” to addressing those uncooperative riders. Vague, conclusory statements do not satisfy NEPA.”* (NOA, p. 12).

**Response:** This project is in compliance with the NEPA, as it does not require that funds be identified to provide for enforcement. However, the WNF recognizes the Forest Service, State and local law enforcement and user groups will play a critical role in ensuring success of closing poorly located user-developed trails and requiring OHV use on designated trail system. The cooperative relationships with these entities will provide mutual support across jurisdictional boundaries to improve enforcement and prohibitions pertaining to motorized trail use. (DN, Appendix 2, p. 42). Ranger Chrismer even noted her own similar concerns with this project. The purpose of this project is to address illegal OHV use, as a result of the current lack of legal trails and public education. She stated:

It may be difficult to reduce illegal riding in the project area to zero, however, with public education, maps, and a well designed trail system, the establishment of new user-developed trails in the area is anticipated to decrease. If monitoring indicates that this is not the case, further management action may be necessary...Experience on the Wayne and other public land “has shown that law enforcement and public education are key to regulating OHV use...It will take time to implement the project and see improvements; healing will not occur overnight. (DN, p. 7).

With the designation of trails with proper design and maintenance, this will reduce illegal use. The use of volunteers and agency employees to patrol the trails areas will provide a safe, legal and monitored location for riding. (DN, Appendix 2, p. 42). The WNF believes that the use of physical barriers in conjunction with proper trail design and engineering, routine patrols and

enforcement, and an ongoing rider education program will effectively minimize illegal trail use. (DN, Appendix 2, p. 42).

The Forest Service manages the National Forests for multiple uses, including motorized recreation. The revised Forest Plan analyzed opportunities for allowing OHV recreation on the Forest at the programmatic level, including public input. The Forest works closely with partners to improve enforcement of restrictions and prohibitions pertaining to motorized trail use. The WNF monitors visitor use and allocates funding accordingly. Funding for trail maintenance is an important part of the annual budget. The Forest uses volunteer contributions, fee use and state grants to leverage allocated funds. This investment allows the Forest to protect resources and meet the demand for a predominant recreation activity on the WNF. (DN, Appendix 2, p. 6).

Dollars spent in the local communities by OHV users contribute to the taxes raised in the area to help fund these county services. The local ATV club is using proceeds raised during their spring rally to fund the training of new emergency responders for the local volunteer fire departments. Converting non-maintained user trails to maintained designated trails provides a safer riding experience for trail users and for administrative and law enforcement personnel, thus contributing to public health and safety. (DN, p. 13). The WNF's management is adaptive and noted that they continually monitor our trails to find problem areas and use maintenance contracts, visitor contacts, and signage to fix resource problems. (PR, Doc. 4-11).

See also **Response to Issue 11(b)**. Therefore, I find that the Responsible Official is compliant with the NEPA. NEPA does not guarantee levels of funding.

**Issue 10:** *“This project violates the National Historic Preservation Act.”* The Appellant claims, “... [W]ithout proper consultation with Indian tribes and other consulting parties as well as consultation with the Ohio SHPO that is guided by a Programmatic Agreement this project will violate NHPA.” (NOA, p. 13).

**Response:** The project area was site-specifically reviewed by a qualified Forest Archaeologist. Report findings were sent to the State Historic Preservation Office (SHPO) as required under Section 106 of the NHPA and no comments were received. (PR, Doc. 6-08). Relevant documents were also sent to seven indigenous Tribes for review; no comments were received, thus further completing the 106 Process. (PR, Docs. 6-9, 6-10, & 6-11). The Appellants’ assertion that there is no documentation on required consultation is clearly unfounded. The NHPA does not require programmatic agreements, but rather is an optional way for a federal agency to implement Section 106. The WNF completed site specific consultation with the State of Ohio as required by law.

**Issue 11(a):** *“This project violates the regulations implementing National Forest Management Act.”* The Appellant claims, *“This project cannot go forward under the 2005 regulations. Only birds made the cut for Management Indicator Species. Amphibians and fish, that were ostensibly monitored under the current plan, have been dropped. FEIS, Appendix E-25.”* (NOA, p 13). *“The Forest Service has indeed selected a list of MIS, but they do not meet*



*the requirements of the regulations.*” (NOA, p. 13). “[N]o animals were chosen.” (NOA, p. 13). “*There are no bats, no salamanders, no snakes, no frogs, no fish.*” (NOA, p. 13).

**Response:** For discussion on the 2005 Planning Rule being enjoined, please see **Response to Issue 2(a)**. For a discussion on the rationale for selecting MIS, please see **Response to Issue 5(d)**. The Forest Plan was developed under the 1982 Planning Regulations, under authority provided in the transition language of the November 9, 2000 Rule (36 C.F.R. § 219.35), the January 10, 2001 Interpretative Rule (36 C.F.R. § 219) which extended the option, and the January 5, 2005 (36 C.F.R. § 219.14) which continued to allow plans initiated under the 1982 Rule to be completed under the 1982 Rule provisions. The 1982 Rule (36 C.F.R. § 219.19(a)) requires establishment and monitoring of management indicator species, but does not specify a minimum number or representation of specific groups of animals, such as bats, snakes, or salamanders.

The change back to the 2000/2004 interpretative rules does not result in any modifications to the analysis process or effects portrayed in the Revised WNF Forest Plan or in the Kosmos Project. That the 2005 Planning Rule is now invalidated does not alter the fact that the 1982 Planning Rule is applicable to the WNF Forest Plan revision. These comments raise issues concerning development of the programmatic Plan. Similar issues regarding MIS selection were raised in administrative appeals to the revised Wayne Forest Plan. The Chief of the Forest Service reviewed the extensive planning record and upheld the MIS selection, recognizing that the Forest has considerable discretion in identifying MIS under NFMA. There is no requirement to provide reasons for non-selection, or to select any particular species or guild of species as management indicators. The WNF selected two habitats, seven terrestrial bird species, and one habitat/terrestrial species combination as MIS. (LRMP, p. 2-16; LRMP Appendix C, pp. C-3 to C-4). The Forest followed a well-documented process for selection of MIS and stated the reasons for selection of each. (LRMP, p. 2-16; LRMP Appendix C, pp. C-1 to C4; FEIS, pp. 3-38 to 3-153; FEIS Appendix E, pp. E-21 to E-25). Revised LRMP monitoring requirements for MIS and aquatic resources (pp. 4-7 to 4-8) are adequate and comply with 36 CFR 219.19 (a)(6) and also 36 CFR 219.12(k). (See Chief’s Decision on WNF Plan Appeal, November 15, 2006).

Selection of MIS at the programmatic Forest Plan level of decision making is an issue beyond the scope of this site specific environmental analysis. NFMA does not specify particular species or habitat types be monitored, but allows considerable discretion for Forest level managers to make the selection of MIS based on experience, knowledge of field conditions, and other local factors. The planning record contains detailed information concerning MIS and their selection at the programmatic level. MIS were developed in accordance with 36 C.F.R. § 219.19(a)(1) (1982) which requires that certain vertebrate or invertebrate species present in the area shall be identified and selected as MIS and the reasons for their selection be stated. (Forest Plan FEIS, Appendix E, pp. E-20 to E-21; Response to Comments Appendix to Final Environmental Impact Statement, p. RTC-98 through RTC-101 & RTC-194 through RTC-195). Table E-6 and E-7 list the species selected and the rationale for their selection or non-selection. (Forest Plan, FEIS, Appendix E, pp. E-23 through E-25). The Record of Decision (ROD) states that MIS are just one part of the overall monitoring effort and that species not designated as MIS may still be monitored. (Forest Plan, ROD, p. 32). Individual aquatic species were not used as MIS since fish community indices are used rather than single species to assess impacts to aquatic habitat

quality. The Louisiana waterthrush was selected as an MIS surrogate for aquatic species since it is dependant on healthy aquatic systems for its food source. Fish communities are being monitored through a Forest-wide long-term aquatic monitoring program. (Forest Plan, Chapter 4, Monitoring Question 3.1b). As the Chief noted, MIS were adequately selected and documented in the Forest Plan. I find this project does not violate the NFMA as the Appellants claim.

**Issue 11(b):** *“What guarantees does the deciding officer have that funding is adequate to complete any required monitoring and evaluation prior to authorizing a site-specific action as required by 36 C.F.R. 219.11(b)(2001)?”* (NOA, p. 14).

**Response:** See also **Response to Issue 9(b)**. The Forest Service manages the National Forests for multiple uses, including motorized recreation pursuant to the MUSYA and NFMA. MUSYA defines multiple use as “the management of all renewable surface resources of the National Forests so that they can be utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources.” (16 U.S.C 531(a)). Multiple use includes outdoor recreation, range, timber, watershed wildlife and fish. (16 U.S.C. 531(a)). The revised Forest Plan analyzed opportunities for allowing OHV recreation on the Forest at the programmatic level, including much public input. The Forest Service has determined that OHV recreation is a legitimate use of National Forest land. While there are no guarantees for available funding. Congress allocates money to the Forest Service year-to-year. The WNF carefully monitors our visitor use and generally allocates funding where it believes the greatest need is. The WNF works with partners and leverages user fees with annual trail appropriations and state grants. In 2008, the Forest will increase user fees. Some of the monies generated from these fees will be used to fund trail maintenance. Therefore, I find the project analysis is compliance with the NFMA. The NFMA does not guarantee levels of funding.

**Issue 11(c):** *“Because there is no best available science that supports the increase of ATV/OHV trails in a national forest, this project is in violation of the 2000 regulations.”* (NOA, p. 14).

**Response:** The EA and specialists’ reports cite numerous publications about the increased demand for OHV use and the effects of OHV use on the environment. This information was critical in establishing a framework for the project’s purpose and need, and in evaluating the effects of the proposed activities. The IDT and Ranger Chrismer clearly used this data in their analysis and documented this by stating, “This project has been developed and reviewed using the best available science, per the Interpretive Rule in 36 CFR 219.35, Appendix E. See Chapter Four and specialist reports (Project File 5-14, 5-15, 7-9, and 1-38.1 for the bibliography of references utilized in developing this analysis).” (DN, p. 11). Ranger Chrismer further stated:

We have ample evidence of the need for increased OHV trail mileage based on national statistics as collected by Cordell (Cordell et al 2001), by the increase in vehicle registrations as reported by Karas (Karas 2004), and public scoping for both the 2006 Forest Plan and the 2006 proposed recreational fee increase. The suitability of southern Lawrence County and the designated Historic Forest and

Diverse Continuous Forest with OHV management areas are featured in the Lawrence County Enhancement Study (Edwards and Kelcey 2005). The increasing demand for off-road vehicle trails is documented in Chapter One of the EA and in supporting documents in the project file (Chapter One pgs 3-4, Project File 4-5, Edwards and Kelcey 2005, USDA FS 2003, 9-3 through 9-7). (DN, p. 4).

I find that based on the research relied upon by Ranger Chrismer, as provided by the Inter-Disciplinary Team, that the best available science was used for this project and it does not violate the National Forest Management Act.

**Issue 12:** *“Failure to provide the Biological Evaluation to the public violates NEPA and ESA.”* The Appellant claims, *“The Forest Service’s failure to provide this to the public indicates the Forest Service’s blatant disregard for the public’s right to know.”* (NOA, p. 14).

**Response:** Appellant states the Forest Service failed to provide the BE to the public. However, the BE for this project is a public document that is available upon request. In fact, in a letter to the public releasing the predecisional EA on June 1, 2007, Ranger Chrismer clearly stated, that “additional materials including appendices and maps are available for viewing or downloading from the WNF website at <http://www.fs.fed.us/r9/wayne>. We will also mail additional materials upon request. Please call John Brown at (740)534-6500. Ask for the Kosmos ATV/OHM Trail Addition Project.” (PR, Doc. 1-05). The legal notice printed within *The Ironton Tribune* (dated Tuesday June 5, 2007) additionally stated that anyone may call to discuss the project (and give a contact number) and that a copy of the scoping notice, the pre-decisional environmental assessment, additional maps and appendices are available as well and it gave the address to the WNF website. (PR, Doc. 1-06). The Appellants were well aware of the procedure for obtaining these documents and did not. I find that the BE was available to the Appellants, had they requested it. I find no violation of NEPA and ESA.

**Issue 13:** The Appellant, in a supplement to their appeal (01/31/2008) state, *“The District Ranger had an obligation under the Appeals Reform Act and the National Environmental Policy Act to re-open the 30-day comment period. Withdrawing the DN/FONSI and issuing a new DN/FONSI without an opportunity for new comment violates NEPA.”*

**Response:** Forest Service policy directs all Responsible Officials to “ensure that an appropriate level of scoping and environmental analysis and documentation occurs” for all NEPA proposed actions (FSH 1909.15 Chapter 10.41). However, it gives considerable latitude to the line officer to determine what the appropriate extent of NEPA documentation and public involvement should be for each project. “The Responsible Official shall... [P]rovide notice of the opportunity to comment on a proposed action”, and then “[i]dentify all ... comments.” 36 C.F.R. § 215.5(a). The purpose of public involvement is to identify any potentially significant issues and what, if any, concerns the public has regarding the proposal, and then conduct the environmental analysis accordingly. The likelihood of significant effects is the determining factor. The goal is sound and defensible land management decisions.

In the case of the Kosmos Project, the public was initially informed of this proposal in October 2005 through the WNF's Schedule of Proposed Actions. (DN, p. 12). Subsequently, Ranger Chrismer sent the Proposed Action in a scoping/comment letter in October 2006 to 150 individuals or groups. (DN, p.12; EA, Ch. 1, p. 14). A pre-decisional EA was then sent to all who responded to the initial scoping for the formal 30-day Notice and Comment period during June and July 2007. Over 80 responses were received. A legal notice of the Proposed Action was also published on June 5, 2007 in *The Ironton Tribune*, the official newspaper of record. (PR, 1-06). The Project Record includes a copy of the comments received from the Appellants, dated June 28, 2007. Based on these public comments and additional work by the IDT, Ranger Chrismer issued a DN on August 29, 2007. However, due to a need for further consultation with Native Americans, she withdrew her decision on November 30, 2007. A new DN was issued on December 18, 2007. The original decision to designate/construct OHV trail was unchanged. No additional comments were received from Indian tribes (see **Response to Issue 10**). The WNF conducted no new analysis. Ranger Chrismer stated, "No additions have been made to the analysis which would indicate further public review, as this decision has been made on substantially the same project file." (DN, p. 2).

The Appellants contend that the public should have been offered an opportunity to comment on the new decision for an additional 30-day period. I do not concur. The Proposed Action has remained exactly the same. The analysis on which the Decision is based is exactly the same. There is no requirement under the APA or NEPA that requires a new 30-day comment period for the new DN. The regulations require only that "the Responsible Official shall... [p]rovide notice of the opportunity to comment on a proposed action." That was accomplished with the June 2007 comment period. A second comment period is not required. I find no violation of NEPA as the Appellants claim.

### **RECOMMENDATION:**

After reviewing the Project Record for the Kosmos ATV/OHM Trail Addition Decision, and considering the issues raised by the Appellant, I recommend District Ranger Gloria Chrismer's Decision Notice of December 18, 2007, be affirmed.

/s/ Douglas F. Oliver  
DOUGLAS F. OLIVER  
District Ranger  
Appeal Deciding Officer

cc: Patricia Rowell  
Shannon Swaziek