

**U.S. HOUSE OF REPRESENTATIVES JOINT HEARING
OF THE NATURAL RESOURCES COMMITTEE, SUBCOMMITTEE ON ENERGY
AND MINERAL RESOURCES, AND THE AGRICULTURE COMMITTEE,
SUBCOMMITTEE ON CONSERVATION, ENERGY AND FORESTRY**

JULY 8, 2011

**STATEMENT OF CRAIG L. MAYER, GENERAL COUNSEL,
PENNSYLVANIA GENERAL ENERGY COMPANY L.L.C.**

I. Background and Introduction

1. Since 2004, I have been the chief legal counsel for Pennsylvania General Energy Company L.L.C (“PGE”), which is headquartered in Warren, Pennsylvania. I also serve as a Secretary of the Pennsylvania Independent Oil and Gas Association (“PIOGA”). PGE is a member of PIOGA. PGE has approximately 150 employees and is engaged in oil and gas exploration and production, primarily in Pennsylvania, and it currently produces oil and gas from over 850 wells in the Allegheny National Forest (“ANF”) that have been developed over the past 25 years in an oil and gas field that was first discovered shortly after the Civil War. PGE owns approximately 40,000 acres of oil and gas lands in the ANF, and substantial oil and gas acreage elsewhere.

2. By way of personal background, I obtained a Juris Doctor degree from Duquesne University Law School in 1974, and am a graduate of the Pennsylvania State University (1968). From 1968 to 1992, I served in the U.S. Marine Corps in various command and staff postings, and I was honorably discharged with the rank of Lt. Colonel. As a civilian from 2000 to 2002, I served in association with seconded State Department personnel in Egypt and Israel as an International Observer and Team Leader with the U.S. Observer Unit of the Multi-National Force and Observers (“MFO”). The MFO monitors Egyptian and Israeli compliance with the Camp David Peace Treaty Accords.

3. The ANF encompasses approximately 513,000 acres which cover major parts of four counties in northwestern Pennsylvania, *i.e.*, Elk, Forest, Warren and McKean Counties. Notably, 93% of the ANF lands are underlain by private severed oil and gas mineral estates. When the ANF lands were acquired by the federal government in the 1920s and 1930s, the Forest Service purposely did not acquire the private oil and gas estates. In fact, under Section 9 of the 1911 Weeks Act, 16 U.S.C. § 518, before the United States could even purchase surface lands that had been severed from oil and gas estates before the time of the United States purchase, both the Secretary of Agriculture and the National Forest Reservation Commission had to find that such estates “*from their nature*” would “*in no manner interfere*” with the use of the land for the purposes of the Act. The Forest Service viewed oil and gas production as not in conflict with forestry management purposes, and that view continued until recently.

4. The ANF region is the birthplace of the oil and gas industry in Pennsylvania, the United States, and the world. The first oil well in the world, the Drake Well, was drilled in 1859, about 15 miles from the current southwestern ANF boundary. Oil and gas production has occurred in this region for well over a century, including on the ANF lands. It is a vital part of the culture of the communities in the region and our economic base. For example, PIOGA estimates that annually approximately 25% of the oil produced in Pennsylvania comes from estates within the ANF. There are approximately 60 producers and, at least, an equal number of supporting businesses who rely on natural resource development within the ANF, these groups being composed almost exclusively of individuals, families, and small companies. Traditionally, the U.S. Forest Service respected multiple use of the ANF and cooperated with oil and gas producers. This all changed beginning in 2007 and particularly so in early 2009, as I will describe. For the past few years, the people, municipalities and small businesses of northwestern Pennsylvania have been in a battle with the U.S. Forest Service for their livelihoods and economic survival. That battle is unfortunately ongoing.

II. The U.S. Forest Service's 2009 Effort to Shut-Down Drilling and Economic Activity in the ANF

5. At the height of the most severe national recession since the 1930s, the U.S. Forest Service incredibly agreed behind closed doors in a “sweetheart” Settlement Agreement with the Sierra Club and other activist groups to *shut-down* new drilling across the entire 513,000-acre ANF. I am keenly familiar with the 2009 Settlement Agreement between the U.S. Forest Service and the Sierra Club, filed on April 9, 2009 in the case of *Forest Service Employees for Environmental Ethics (“FSEEE”) and the Sierra Club et al. v. U.S. Forest Service*, No. 1:08-cv-323-SJM (W.D. Pa.). PIOGA’s predecessor association and the Allegheny Forest Alliance (“AFA”), a group of municipalities and school districts, were intervenors in the case, but had no knowledge of the terms of this harmful Settlement Agreement until the day it was filed in court, despite our prior requests made through our legal counsel to participate in settlement discussions. A Statement by ANF Supervisor Leanne Marten on April 10, 2009 (“Marten Statement”) implemented the Settlement Agreement. *Fortunately, as I explain later, on December 15, 2009, a federal judge granted a preliminary injunction to block the Settlement Agreement, and save our region from economic ruin.*

6. The 2009 Settlement Agreement adopted without any public input, particularly from elected officials of the ANF region, radically changed the legal regime applicable to oil and gas exploration and development activities in the ANF, by subjecting the Forest Service’s issuances of “Notices to Proceed” for oil and gas wells to burdensome compliance with the National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (“NEPA”). Section 102(2)(C) of NEPA requires federal agencies to prepare an Environmental Impact Statement before carrying out “major Federal actions significantly affecting the quality of the human environment.” Under the Settlement Agreement, the Forest Service sought to bind itself to apply NEPA to each individual Notice to Proceed, which had previously been a mere notice of the conclusion of a *60-day consultation process*, not a federal permit document.

3. A 1991 U.S. Congressional hearing fortunately documented the past cooperative practices of the U.S. Forest Service regarding oil and gas activities in the ANF, which viewed NEPA as inapplicable to the exercise of private mineral estates. In the 1991 House Oversight

Hearing, Subcommittee Chairman Kostmayer reviewed the Forest Service's practices regarding ANF mineral development. *See Oil and Gas Operations in the Allegheny National Forest, Northwestern Pennsylvania, Oversight Hearing Before the Subcomm. on Energy of the House Comm. on Interior and Insular Affairs*, 102d Cong., 1st Sess. (1991), at 1-6 ("1991 Oversight Hearing"). At the hearing, the Forest Service stressed its limited legal authority as a matter of property law, agency practice, and a 1980 federal court ruling in *United States v. Minard Run Oil Co.*, No. 80-129, 1980 LEXIS 9570 (W.D.Pa. Dec. 16, 1980). 1991 Oversight Hearing at 50-128, 138-255. For example, former ANF Forest Supervisor Wright's written statement said that:

Our land management decisions cannot preclude the ability of private mineral owners to make reasonable use of the surface for mineral exploration and development activities, since such rights are defined by the private mineral deed and public law. Our challenge is to protect the rights of the Federal Government, while respecting private mineral rights, and ensuring that private mineral owners and operators take reasonable and prudent measures to prevent unnecessary disturbance to the surface....

1991 Oversight Hearing at 54-55 (emphasis added). He added: "*We do not give people permission to drill. That is their right. It is not a Federal action.... We review the plan and negotiate a plan with them. We do not approve a plan....*" 1991 Oversight Hearing at 75-79, 113 (emphasis added).

4. The 1991 Oversight Hearing record on the ANF provided an official summary of a U.S. Agriculture Department Office of General Counsel opinion, dated October 1991, concluding that NEPA does not apply to exercise of "outstanding" mineral rights:

[W]e do not find that exercise of such rights on National Forest land in Pennsylvania to be a federal action for NEPA purposes. This is so, in part, because Forest Service approval is not a legal condition precedent to the exercise of such rights under either state law, current federal law or regulation, or Forest Service Policy. See for example FSM 2832.

The question of whether the right can be exercised, and the ability to deny that right, is simply not left to the surface owner under Pennsylvania law! A "reasonable use" standard does govern the exercise of such rights, but it also recognizes the limited role of the surface owner in the process. In other words, if the exercise of such rights extends beyond what is reasonable, as was the situation some years ago in the instance of Minard Run, then your recourse is to move to protect your rights as surface owner, to reach a reasonable accommodation so that each may enjoy their respective rights.... That practice does not elevate your involvement to a federal action for NEPA purposes."

1991 Oversight Hearing at 192-93 (emphasis added). This was the way things worked for decades on a cooperative basis in the ANF, and on the other 22 million acres of land of National Forests with private mineral estates acquired under the 1911 Weeks Act, 16 U.S.C. § 518.

5. The 2009 Settlement Agreement sought to change entirely the governing legal regime and practices without any corresponding change in the applicable law and regulations. This is confirmed by the Statement from Forest Supervisor Leanne Marten, dated April 10, 2009, which declares that *“All remaining pending, and all future, oil and gas proposals on the Allegheny National Forest will be processed after the appropriate level of environmental analysis has been conducted under NEPA.”* Forest Service officials publicly confirmed that new oil and gas drilling activities could not be carried out *until a full Forest-wide EIS under NEPA is completed* and a Notice to Proceed is issued. *Of course, we understood that a forest-wide EIS would be a multi-year process, likely taking at least four to five years, and more before appeals were resolved.*

6. Accordingly, the Settlement Agreement imposed a *de facto* drilling ban in 2009 on future oil and gas exploration and development across the entire 513,000-acre ANF for years into the future. The U.S. Forest Service sought to enforce the drilling ban with a heavy hand. Within two weeks of announcing the Settlement Agreement, it created what was called an “Allegheny Oil and Gas Strike Team” and issued unlawful “requests” for information from oil and gas operators and imposed processing delays if they did not respond. In early 2009, shortly after the FSEEE case was commenced, the Forest Service charged at least one individual officer of an oil and gas company with a misdemeanor, a case the government never ultimately pursued. As a former military and federal prosecutor, and being well versed in the applicable law, this misdemeanor matter appeared to me to be a deliberate abuse of Forest Service petty offense enforcement authority. It was perfectly clear from the fact situation that there was no basis upon which to allege a criminal offense. To protect PIOGA members from the abuse of the criminal process, I took the measure of preparing a legal memorandum strongly objecting to this behavior and sent it to both the US Attorney’s Office and the Pennsylvania Attorney General’s Office. Sadly, in the past four years, employees and owners of oil and gas businesses have been threatened by the Forest Service with criminal prosecution if they proceeded with their ordinary business activities in the ANF. To my knowledge, the Forest Service threatened at least four individuals. It was particularly troubling for me to learn of Armed Forest Service personnel confronting citizens, prominent leaders in our communities, engaged in lawful oil and gas development activities and directing them to cease, or face arrest.

7. Notably, the April 10, 2009 Statement by Forest Supervisor Marten admitted the severe adverse economic impact which the Settlement Agreement would have on the local communities surrounding the ANF. The Marten Statement (at p. 1) stated in part as follows: *“we acknowledge the impact this will have on families and businesses, especially at a time when our nation is facing such a difficult economic downturn.”* The Marten Statement (at p. 1) makes the following additional points: *“There is no easy explanation of why this is occurring. . . . For some, this impact may be short-term and for others it may be a lifetime.”*

8. I firmly believe the 2009 Settlement Agreement was punitive, even retaliatory, in nature. If it remained in force, it would have had an irrevocable, profound, massive, and devastating adverse impact on oil and gas production activity in the ANF and upon the economy, communities, and people of the surrounding region dependant on this development activity. Fortunately, a federal court intervened in late 2009 and blocked the unlawful drilling ban, as I will now explain.

III. The December 15, 2009 Judicial Relief Granted by Federal Judge Sean McLaughlin

9. On December 15, 2009, a federal judge in western Pennsylvania, the Honorable Sean J. McLaughlin, granted a preliminary injunction against the U.S. Forest Service and the Sierra Club, barring the implementation of the 2009 Settlement Agreement. *See Minard Run Oil Co. and Pennsylvania Oil and Gas Association. v. U.S. Forest Service, et al.*, 2009 WL 4937785 (W.D. Pa. 2009). Judge McLaughlin wrote a detailed opinion finding that the Settlement Agreement was likely contrary to law, contrary to the Forest Service's past practices, and causing irreparable harm to oil and gas businesses in the ANF region. He issued his ruling following a three-day evidentiary hearing where he heard testimony from approximately 15 witnesses, including PGE's President Douglas Kuntz, all subject to cross-examination.

10. Judge McLaughlin's opinion concluded that the "*Forest Service does not possess the regulatory authority that it asserts relative to the processing of oil and gas drilling proposals.*" He added that consequently, "*its involvement in the approval process does not constitute a major federal action requiring NEPA compliance.*" Judge McLaughlin found that the "*continued denial of access to privately held property rights and the irreparable harm flowing therefrom if the injunction is denied, imposes a far more significant hardship on . . . [the oil and gas companies] than would a return to the status quo on the Forest Service.*" Judge McLaughlin also stated that there was a "*clear public interest in preventing unreasonable interference with private property rights.*" Accordingly, he granted a preliminary injunction, barring implementation of the Settlement Agreement and directed an immediate return to prior practices which had been the status quo.

11. We are very grateful for the judicial relief provided by Judge McLaughlin, but the U.S. Forest Service still resisted and moved for reconsideration of his ruling, which he denied on March 9, 2010, following an additional hearing in his court. Not content with adhering to the Judge's preliminary injunction ruling, both the U.S. Forest Service and the Sierra Club appealed the preliminary injunction order to the U.S. Court of Appeals for the Third Circuit, which heard argument on the appeal sitting in Philadelphia in late January, 2011. Fortunately, the judicial relief provided by Judge McLaughlin has remained in force while that appeal is pending, and we expect a ruling any time now.

IV. Forest Service Actions in 2007 and 2008 Leading up to the Settlement Agreement

12. Sometime between publication of ANF's draft revised Forest Plan in 2006 and approval of the final plan in March 2007 the Forest Service attempted to insert a regulatory scheme into its Forest Plan. This was done under the guise of modifying planning "standards" and "guidelines," that included, among other things, a new and unprecedented federal permit requirement for regulating the conduct of privately owned and state regulated oil and gas development. PIOGA and many of its individual members promptly appealed this action through administrative channels. As the regulatory scheme was clearly added to the Plan secretly and concealed from the public the Forest Service was forced to acknowledge that it had acted illegally. To remedy its failings it issued an Appeal decision in February 2008 that suspended application of the scheme until public notice and comment requirements were satisfied and the Forest Service's authority for imposing a new layer of regulations in the first place was "clarified." As the PIOGA objected to approval and imposition of a federal regulatory scheme in

the first instance, and the Forest Service appeal decision formally approved the regulatory scheme, it was no comfort to learn that all the Forest Service's was going to do was paper-over its illegal conduct by providing a meaningless public comment period and giving itself the opportunity to clean-up (*i.e.*, "clarify") language found in the Plan that was inconsistent with its new found regulatory authority. PIOGA challenged this conduct in the case of *Pennsylvania Oil and Gas Association v. U.S. Forest Service*, No. 1:08-cv-162- SJM (W.D. Pa.). That case has been stayed pending issuance of the Third Circuit decision noted above.

13. While directing itself to suspend application of its regulatory scheme on the ANF the Forest Service was still committed to impeding private oil and gas development. On March 28, 2008, and within six weeks of the Appeal decision Forest Supervisor Marten, repudiating over 85 years of practice and legal precedent, issued a letter decision prohibiting oil, gas, and mineral owners from using certain "mineral materials" found on their private mineral estates. Remarkable in its denouncement it proclaimed that "*It has come to my attention that the application of the laws, regulations, and policies governing the disposal of mineral materials off of National Forest System lands have not been appropriately applied on the Allegheny National Forest.*" It then proceeded, by reference to a long-existent Forest Service regulation that applies only to a certain category of federally owned minerals, to claim ownership of all minerals in that same category that were, as well, found on privately owned mineral estates. This was done regardless of what deeds or state property laws prescribed to the contrary. Effectively, the Forest Service attempted to confiscate as many as 483,000 acres of certain privately owned minerals with nothing more than a bureaucratic edict. The purpose of the edict was to prevent mineral owners from using stone for the surfacing of oil and gas roads and well pads.

14. In the fall of 2008 When PGE advised Forest Supervisor Marten that it was going to explore for and take sandstone and shale on lands for those purposes and where PGE had been conveyed the named minerals PGE was invited to file a "claim" under the federal Quiet Title Act. In 2008, when one mineral owner indeed did file an action under the Quiet Title Act regarding stone ownership, the Forest Service promptly invoked the twelve year (12) statute of limitations that accompanies the Act and asserted that it had somehow managed to have notified the owner of its claim to the stone over 12 years before the mineral owner filed suit. As a consequence, certainly not lost on the Forest Service, if the District Court concludes that the statute of limitations applies and has run, the mineral owner could not maintain a claim and would forfeit his mineral rights. This would be so even if it was perfectly clear from the deeds and Pennsylvania law that the mineral owner owned the stone. I am confident that this legal ruse was not one of the methods of land acquisition to which the state of Pennsylvania consented when it authorized the United States to acquire private lands from its citizens. The case I referred to is *PAPCO v. U.S. Forest Service*, No. 1:08-cv-253-MBC (W.D. Pa). The District Court decision in that case is pending.

15. While the ANF was adjusting to the suspension of its regulatory scheme the processing time for Forest Service responses to drilling notifications was showing little improvement from what producers had experienced in 2007. Following the approval of the Forest Plan in March 2007 processing response times had quickly expanded from 60 days or less to five and six months. In short, even with the suspension, there was continued resistance and opposition to accommodating oil and gas development. In the lead-up to the filing of the FSEEE case this found expression in an internal Forest Service e-mail dated October 8, 2008 where

Forest Service Officers were considering, among other things, notifying “recreational stakeholders” of oil and gas developments that the ANF objected to such that it might result in a suit against the Forest Service “*based upon a failure to perform NEPA analysis.*” Within six weeks, such a suit just happened to materialize when the FSEEE filed against the Forest Service on November 20, 2008.

V. Continued and Increasing U.S. Forest Service Slow-Down of Processing Drilling Proposals and new Obstructions

16. Judge McLaughlin’s opinion of December 15, 2009 found that *60 days* was the traditional timeframe allowed for the Forest Service to process well drilling proposals and consult with operators about desired surface mitigation measures. Since shortly after the entering of the Court’s preliminary injunction in December 2009, the Forest Service has provided me (in response to FOIA requests) with bi-weekly or monthly reports showing statistics related to the processing of private oil and gas development (“OGD”) notifications on the ANF. We have tabulated the data to calculate the time it is taking for the ANF to process the OGD notifications that the ANF has received since the issuance of the court’s injunction on December 15, 2009. The statistics show that on average it is now taking *over seven months* for the ANF to process or deal with notifications before it issues a “Notice to Proceed,” and that *since July 15, 2010 the processing time has expanded from four months to the current seven months.*

17. Simply put, these continuing and increasing delays by the U.S. Forest Service are excessive and not consistent with past procedures and the 60-day timeframe that was previously adhered to by the ANF. *Apparently, the timely processing of drilling proposals to enable job creating activity is not a priority with this U.S. Forest Service, even when a federal court order directs that this be done.*

VI. The U.S. Forest Service Rulemaking Effort

18. Beyond this, the Forest Service has been seeking ways through a rulemaking process to evade the Judge McLaughlin’s ruling which granted critically needed relief to us. Specifically, they have initiated a rulemaking process which would seek to grant themselves regulatory authority which the Judge has found they lacked. The Forest Service first started this process back in December 2008 with the initiation of an Advance Notice of Proposed Rulemaking in the *Federal Register*. See 73 *Fed. Reg.* 79,424 (Dec. 29, 2008) (re “Management of National Forest System Surface Resources with Privately Held Mineral Estates”). That notice and comment rulemaking would specifically address the ANF, and other National Forests. Any such rulemaking would have to comply with the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, and other procedural and substantive requirements, such as the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.*, which requires federal agencies to assess the adverse economic impacts of their actions on small businesses, and the Paperwork Reduction Act, 44 U.S.C. § 3501, *et seq.*, which aims to minimize paperwork burdens on those who must respond to federal government requests for information. By seeking to adopt a new command and control regulatory approval process and impose burdensome NEPA review requirements, the Forest Service is effectively seeking to evade the ruling of the federal court.

19. By way of a FOIA request we obtained a copy of the Forest Service's internal Regulatory Review Workplan that was used as justification for issuance of the "Non-Significant" designation that accompanied the December 29, 2008 Advance Notice of Proposed Rulemaking. The entire Workplan consists of a five page form with fill-in the blank and check the box styled entries or statements. It has no supporting documentation. After a careful review, on January 5, 2011, PIOGA requested the USDA Office of Inspector General to investigate the preparation of this document as it appeared to contain false statements. I understand that that investigation is now in progress.

20. As recently as the fall of 2010 in the *Unified Agenda of Federal Regulatory Actions*, the Forest Service identified this private mineral estate rulemaking as still proceeding, and incredibly claimed that it would not cause adverse economic impacts on small business entities. We have obtained through FOIA requests a copy of a Forest Service summary of the rulemaking that was underway as of early 2011 when the Forest Service was consulting with hundreds of Native American tribes about the rulemaking. A copy of that U.S. Forest Service summary, dated February 9, 2011, along with U.S. Forest Service letters dated January 27, 2011 and March 21, 2011, are attached to this testimony and establish that draft proposed rules have been in existence since at least January 27, 2011. Yet, the Forest Service has not consulted with the Congress, the Commonwealth of Pennsylvania, and PIOGA, about the rulemaking.

21. At the April 5, 2011 hearing of the House Sub-committee on Energy and Natural Resources Congressman Thompson asked a testifying Forest Service Official, the Director of Minerals and Geology Management, the status of the regulation that the Forest Service was drafting about private mineral estates. Remarkably and dishearteningly, the witness denied that there was a draft of the proposed rules.

22. As the Forest Service summary dated February 9, 2011, reveals, the draft rulemaking would seek to impose the NEPA process on the exercise of private mineral estates in National Forest lands, something which the federal court has declared unlawful. Furthermore, this rulemaking would apply to mineral estates nationwide, not merely in Pennsylvania, and would impose widespread multi-year prohibitions on oil and gas activity while costly NEPA studies were prepared. This would include National Forests with prospective oil and gas interest in the States of Pennsylvania, Ohio, West Virginia, Virginia, Kentucky, Tennessee, Louisiana, Texas, Indiana, Michigan, and North Dakota, among others.

23. The Governor of Pennsylvania, Tom Corbett, has recently expressed his strong concerns about this U.S. Forest Service rulemaking in a letter dated June 14, 2011 to the Chief of the U.S. Forest Service, and a copy of that letter is attached to my testimony. In addition, Pennsylvania State Senator Mary Jo White, who is Chair of the Pennsylvania Senate Environmental Resources and Energy Committee, has expressed her strong concern about this rulemaking to Secretary of Agriculture Vilsack and Forest Service Chief Tidwell in a letter dated March 31, 2011, a copy of which is attached to this testimony as well.

24. Finally, in closing, I would be remiss if I didn't refer the Sub-committees to language penned 100 years ago that speaks loudly and clearly to us today. On April 15, 1910 in what would be the last in a decade-long line of proposed forest reserve bills and Congressional reports leading up to the passage of the Weeks Act the House Committee on Agriculture issued a

warning and as we know now - a prophecy. Following brief descriptions of each of the 15 sections of the act the Committee noted: *“It will be observed from this review of the provisions of the bill that the interests of the people are carefully safeguarded at every point beyond any possibility of invasion, except by collusion of highest officials of the legislative, executive, and administrative branches of the Government.”* House Report # 1036, Committee on Agriculture, April 15, 1910, to accompany HR 11798 , at page 2.

On behalf of PGE and PIOGA and in furtherance of seeing that the interests of the people of Pennsylvania are not further invaded, I thank the members of the subcommittees here today for your interest and help on these issues which are of vital importance to northwestern Pennsylvania, and many other regions of our nation.

Craig L. Mayer

Attachments:

1. Forest Service Proposed Rulemaking Summary, dated February 9, 2011
2. Pennsylvania Governor Tom Corbett Letter to U.S. Forest Service Chief Tidwell, dated June 14, 2011
3. Pennsylvania Senator Mary Jo White Letter to USDA Secretary Vilsack and U.S. Forest Service Chief Tidwell, dated March 31, 2011

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