No. 18-1144

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

COWPASTURE RIVER PRESERVATION ASSOCIATION, *et al.*,
Petitioners,

v.

FOREST SERVICE, *et al.*,
Respondents,

and

ATLANTIC COAST PIPELINE, LLC
Intervenor.

On Petition for Review

PETITIONERS' OPENING BRIEF

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

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No. 18-1144 Caption: Cowpasture River Preservation Ass'n, et. al. v. U.S. Forest Service

Pursuant to FRAP 26.1 and Local Rule 26.1,

Cowpasture River Preservation Association
(name of party/amicus)

who is Petitioner, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ J. Patrick Hunter Date: 2/8/2018

Counsel for: Cowpasture River Pres. Ass'n.

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I certify that on 2/8/2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ J. Patrick Hunter
(signature)

2/8/2018
(date)

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No. 18-1144 Caption: Cowpasture River Preservation Ass'n, et. al. v. U.S. Forest Service

Pursuant to FRAP 26.1 and Local Rule 26.1,

Highlanders for Responsible Development
(name of party/amicus)

who is Petitioner, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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Signature: /s/ J. Patrick Hunter Date: 2/8/2018

Counsel for: Highlanders for Responsible Dev.

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No. 18-1144 Caption: Cowpasture River Preservation Ass'n, et. al. v. U.S. Forest Service

Pursuant to FRAP 26.1 and Local Rule 26.1,

Shenandoah Valley Battlefields Foundation
(name of party/amicus)

who is Petitioner, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ J. Patrick Hunter Date: 2/8/2018

Counsel for: Shenandoah Valley Battlefields Foun

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No. 18-1144 Caption: Cowpasture River Preservation Ass'n, et. al. v. U.S. Forest Service

Pursuant to FRAP 26.1 and Local Rule 26.1,

Shenandoah Valley Network
(name of party/amicus)

who is Petitioner, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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Signature: /s/ J. Patrick Hunter Date: 2/8/2018

Counsel for: Shenandoah Valley Network

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/s/ J. Patrick Hunter (signature) 2/8/2018 (date)

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No. 18-1144 Caption: Cowpasture River Preservation Ass'n, et. al. v. U.S. Forest Service

Pursuant to FRAP 26.1 and Local Rule 26.1,

Virginia Wilderness Committee
(name of party/amicus)

who is Petitioner, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ J. Patrick Hunter Date: 2/8/2018

Counsel for: Virginia Wilderness Committee

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No. 18-1144 Caption: Cowpasture River Preserv Assn v. Forest Service

Pursuant to FRAP 26.1 and Local Rule 26.1,

Sierra Club
(name of party/amicus)

who is Petitioner, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ Nathan Matthews Date: 2/7/2018

Counsel for: Sierra Club

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s/ Nathan Matthews 2/7/2018
(signature) (date)

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Wild Virginia, Inc.
(name of party/amicus)

who is Petitioner, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Signature: s/ Nathan Matthews Date: 2/7/2018

Counsel for: Wild Virginia, Inc.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

Cowpasture River Preservation Association, Highlanders for Responsible Development, Shenandoah Valley Battlefields Foundation, Shenandoah Valley Network, Sierra Club, Virginia Wilderness Committee, and Wild Virginia (collectively "conservation groups") challenge the Forest Service's authorization of the Atlantic Coast Pipeline (the "pipeline" or "ACP"), a proposed 600-mile gas pipeline from West Virginia to North Carolina. The Forest Service authorized the project developer ("Atlantic") to clearcut and trench through 21 miles of the George Washington and Monongahela National Forests. Atlantic will blast and flatten ridgelines for construction. In the mountainous terrain of the National Forests, construction will cause massive erosion, increase landslide risks, and degrade streams.

The Forest Service repeatedly warned Atlantic that the project violated laws that protect National Forests. But in 2017, the agency reversed course. Atlantic could not meet standards for water quality, soil, and rare species, so the agency amended its forest plans to exempt Atlantic from them. Those amendments are at odds with standards in the agency's forest planning regulation, so it ignored the rule. Although its forest plans prohibit pipelines if off-forest routes are available, the Forest Service abandoned its insistence that other routes be studied. When the Park Service warned Atlantic that the Mineral Leasing Act did not authorize a

right-of-way across the Appalachian National Scenic Trail ("AT"), the Forest Service issued one, citing the same law. Despite previously insisting on concrete plans to prevent landslides and erosion, the Forest Service abandoned those concerns. The agency's unreasoned reversal is the very picture of capricious decisionmaking.

JURISDICTIONAL STATEMENT

Conservation groups seek review of the Special Use Permit ("SUP") and Record of Decision ("ROD") issued by Forest Service, authorizing construction of the ACP through the George Washington National Forest ("GWNF") and Monongahela National Forest ("MNF") and allowing it to bypass standards designed to protect natural resources on each forest.

The SUP and ROD are final agency actions, reviewable under the Administrative Procedure Act ("APA"). 5 U.S.C. §§ 701–706. The Natural Gas Act gives this Court "original and exclusive jurisdiction over any civil action" challenging certain agency authorizations of a gas pipeline. 15 U.S.C. § 717r(d)(1).

This petition is timely. Congress provides a six-year statute of limitations for claims, like this one, "against the United States." *See* 28 U.S.C. § 2401(a); *see also Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180 (4th Cir.

1999) (applying six-year limitation to APA).[1] Conservation groups filed this action on February 5, 2018, within two weeks of the SUP issuance (January 23, 2018) and within three months of the ROD (November 17, 2017). Petition for Rev., Ex. A. (Case No. 18-1144, ECF No. 4-1).

Conservation groups have standing because their members have standing "to sue in their own right." *Friends of the Earth v. Laidlaw Envtl. Serv. (TOC), Inc.*, 528 U.S. 167, 181 (2000). In the context of environmental litigation, "standing requirements are not onerous." *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 517 (4th Cir. 2003).

Conservation groups' members possess standing because they have: "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable decision." *Hill v. Coggins*, 867 F.3d 499, 505 (4th Cir. 2017) (internal quotations omitted). Conservation groups submit declarations[2] from their members satisfying each of these requirements.

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[1] The Natural Gas Act does not provide a statute of limitations for this action. Conservation groups are subject to the six-year statute of limitations for the APA or the default four-year limitations under 28 U.S.C. § 1658.

[2] In the absence of record citations, conservation groups cite directly to the declarations, submitted as addenda to this brief.

Conservation organizations demonstrate injury in fact when their members "aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." *Friends of the Earth*, 528 U.S. at 183 (internal quotations omitted). Injury in fact is satisfied by harm to "aesthetic interest in the observation of animals," *Hill*, 867 F.3d at 505, and "recreational interests." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 156–57 (4th Cir. 2000).

The pipeline will cross areas in the National Forests that conservation groups' members regularly use and enjoy for outdoor recreation, scenery, hiking, and camping. For example, Lynn Cameron has visited the GWNF for more than thirty years, brought youth groups to the forest, and maintains trails on Shenandoah Mountain. Cameron Decl. ¶¶ 7, 18. She regularly visits areas impacted by the project including Brown's Pond, Braley Pond, and Ramsey's Draft. *Id*. ¶¶ 13–14, 17, 19. Rick Webb and Gary Robinson both fish pristine brook trout streams that will be muddied by erosion from the pipeline. Webb Decl. ¶ 15; Gary Robinson Decl. ¶¶ 21–24; Sligh Decl. ¶ 9. Rick Lambert routinely travels to areas impacted by the pipeline to view rare wildlife. Lambert Decl. ¶¶ 9, 14. David Sligh, Allen Johnson, and John Hutchinson regularly hike in affected portions of the GWNF and MNF. Sligh Decl. ¶ 7; Johnson Decl. ¶ 9; Hutchinson Decl. ¶ 11. Additionally, John Cowden and Mary and John Wilson operate businesses that

depend on outdoor recreation, scenery, and water quality in Bath and Augusta Counties. Cowden Decl. ¶¶ 3, 11–14; Mary Wilson Decl. ¶¶ 1, 24–27.

Conservation groups' members have specific plans to continue their activities in the future. Lambert Decl. ¶ 9; John Wilson Decl. ¶ 16; Sligh Decl. ¶ 7; Johnson Decl. ¶ 9. Their enjoyment will be diminished by the pipeline's detrimental impacts to recreation areas, scenery, water quality, and rare wildlife. Webb Decl. ¶ 15; Gary Robinson Decl. ¶ 29; John Wilson Decl. ¶ 12–17; Johnson Decl. ¶ 10. Construction will impair areas the declarants visit, including Brown's Pond. Cameron Decl. ¶ 13–14; Federal Energy Regulatory Commission ("FERC"), Final Environmental Impact Statement ("FEIS") [JA1829].

These injuries are "fairly traceable" to the Forest Service because its decision will "cause[] or contribute[] to the kinds of injuries alleged by the [petitioners]." *Natural Res. Def. Council, Inc. v. Watkins*, 954 F.2d 974, 980 (4th Cir. 1992) (internal quotations omitted). This is true even though other agencies must also approve the pipeline. *Id.* at 980. All that is required is a "genuine nexus" between the agency's illegal conduct and the injuries. *Gaston Copper Recycling Corp.*, 204 F.3d at 161. For the same reason, vacatur of the agency's unlawful decision will redress conservation groups' injuries. *See, e.g.*, Sligh Decl. ¶ 10; Johnson Decl. ¶ 12; Jeanette Robinson Decl. ¶ 15. These facts also demonstrate that conservation groups' claims "fall within the zone of interests

protected by the law invoked" in this Petition. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. ___,134 S. Ct. 1377, 1386 (2014) (internal quotations omitted).

STATEMENT OF ISSUES

1. Did the Forest Service ignore the mandatory standards of its 2012 forest planning rule and the National Forest Management Act ("NFMA") when amending forest plans to exempt the ACP from plan requirements?
2. Did the Forest Service unlawfully bypass public participation requirements in amending forest plans?
3. Did the Forest Service constrain its analysis of alternatives, in violation of the National Environmental Policy Act ("NEPA"), and fail to choose available off-forest routes, in violation of its forest plans and NFMA?
4. Did the Forest Service exceed statutory authority by issuing a special use permit allowing the ACP to cross the AT, a unit of the National Park System?
5. Did the Forest Service fail to analyze and disclose increased landslide risks, erosion, and degradation of water quality in violation of NEPA?
6. Did the Forest Service violate NEPA by discounting and dismissing impacts in reliance on unidentified and unassessed mitigation measures it knew were speculative?

STATEMENT OF THE CASE

Conservation groups challenge Forest Service decisions allowing construction and operation of the pipeline through the GWNF and MNF. The Forest Service is one of several agencies that must approve the pipeline before it can proceed. The Forest Service is charged by Congress with managing national forests in perpetuity "for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." 16 U.S.C. § 528.

FERC issued its Order Issuing Certificates (hereinafter "FERC Certificate") for the pipeline under the Natural Gas Act on Oct. 13, 2017. [JA0690]. Conservation groups have requested that FERC rehear that order. FERC recognizes that the project also requires independent approvals from other agencies, including the Forest Service. *See, e.g.*, FEIS, [JA1505–12]. In related cases, several of the petitioners here separately challenged ACP approvals issued by the Virginia Department of Environmental Quality, Fish and Wildlife Service and the National Park Service ("NPS"). (Cases No. 18-1077, 18-1082, 18-1083). This Court vacated the Fish and Wildlife Service's incidental take statement under the Endangered Species Act on May 15, 2018. (Case No. 18-1082, ECF No. 82).

A. Procedural History

In September 2015 Atlantic filed an application with FERC to construct, own, and operate the pipeline. [JA-3396]. In November 2015 Atlantic applied for

a special use permit to construct and operate the pipeline across the MNF and GWNF. *Id.* Atlantic filed an amended application in June 2016. *Id*. Knowing its project might not be able to meet the protective standards in the relevant forest plans, Atlantic asked the agency to waive those standards. [JA3395].

The Forest Service's approval for the pipeline is a major federal action requiring review under NEPA, 42 U.S.C. § 4332 *et seq*. FERC served as the "lead agency" for coordinated NEPA review. FEIS, [JA1464]. On July 21, 2017, FERC issued the FEIS for the pipeline. [JA1436]. That same day, the Forest Service released a draft Record of Decision proposing to adopt the FEIS, grant the Special Use Permit, and exempt Atlantic from several forest plan standards. [JA1368]. On September 5, 2017, conservation groups exhausted administrative remedies by filing objections to that proposed decision. [JA0944, JA1031, JA1190]. The Forest Service responded on October 27, 2017, and issued its final "Record of Decision" on November 17, 2017. [JA0672, JA0001]. The related Special Use Permit issued on January 23, 2018. [JA3570]. Conservation groups filed this challenge on February 5, 2018.

B. Statement of Facts

1. Pipeline Impacts

The ACP is a 600-mile natural gas pipeline under construction from West Virginia to North Carolina. FERC Certificate, [JA0690]. Construction requires

clearcutting a 125-foot right-of-way for most of that distance to bury the 3.5-foot diameter pipeline several feet below ground, directly impacting 11,775 acres of land. FEIS, [JA1515].

Twenty-one miles of the approved pipeline route cross National Forests. ROD, [JA0009–10]. In addition to the right-of-way, construction and operation of the pipeline will require temporary workspaces, permanent access roads, and other direct occupancy of National Forest lands. *Id.*

The portions of the MNF and GWNF crossed by the pipeline are characterized by steep slopes (exceeding 100%),[3] soils with high potential for erosion[4] and low potential for revegetation,[5] high rainfall,[6] and sensitive "karst" terrain, areas with soluble bedrock prone to erosion, caves, and instability.[7] The majority of the route through the National Forest crosses lands with "high incidence of and high susceptibility to landslides" FEIS, [JA1604, JA1611]. The project will require 57 water body crossings within the National Forests. FEIS, [JA1659].

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[3] FEIS, [JA1605, JA1611, JA1629].

[4] FEIS, [JA1620].

[5] FEIS, [JA1625].

[6] FEIS, [JA1807]

[7] ROD, [JA0023]; FEIS, [JA1575, JA1610, JA1615]

To construct the pipeline, Atlantic will clear the 125-foot construction right-of-way of all trees and vegetation. FEIS, [JA1522]. Atlantic will then grade the right-of-way, "extensive[ly]" on uneven terrain and steep and side slopes. *Id.* The pipeline path follows mountain ridges along 82% of its route in the MNF and 65% of its route through the GWNF. FEIS, [JA1468]. Atlantic will blast steep ridgetops down by as much as 20 feet to make flat work areas. FEIS, [JA1613]. Atlantic will then dig or blast the pipeline trench, typically to a depth of 8 feet. FEIS, [JA1523]. This will displace massive amounts of soil. For example, one 2,900-foot segment across Cloverlick Mountain in West Virginia will displace nearly 25,000 cubic yards of soil. FEIS, [JA1608].

These activities will increase erosion and deposition of sediment into waterways. FEIS, [JA1630]. The FEIS concludes that, even under the optimistic assumption that Atlantic will be able to reduce potential sediment delivery by 96 percent, the project will increase erosion from disturbed areas by 200 to 800 percent in the first year, causing the loss of 2 to 8 tons of soil per acre. [JA1717]; *but see* Forest Service Comments on Draft Biological Evaluation ("BE Comments"), [JA2357] (explaining that assumption of 96 percent mitigation effectiveness is implausible). The pipeline also risks causing landslides "during the construction period and in the decades of operation and maintenance." FEIS, [JA1595].

Construction of the pipeline will have numerous additional impacts. Grading and permanent clearing of the operational right-of-way along ridgetops will have substantial impacts on scenery. FEIS, [JA1740]. The project will also cause "short-term to permanent impacts on wildlife resources," including "displacement of wildlife and direct mortality…." FEIS, [JA1682–83]. "[P]opulations of some species would return to preconstruction levels only when and if suitable habitat is restore[d]," which will take "up to 50 years or longer." *Id*.

Atlantic will be forced to use specialized construction techniques in some areas, including some stream crossings and the AT.[8] To cross the AT, Atlantic proposes to use a horizontal directional drill technique to carve a mile-long, 3.5-foot diameter bore hole for the pipeline. FEIS, [JA1469]. That project will require more than a year of around-the-clock operations with heavy construction equipment operating continuously. ROD, [JA0044]; FEIS, [JA1793, JA1811].

[8] Referred to in the record as, interchangeably, "Appalachian Trail," "Appalachian National Scenic Trail," "ANST," and "AT."

2. Administrative process

Given these impacts, unsurprisingly the Forest Service found many of the proposed actions and impacts inconsistent with thirteen binding standards under its respective forest plans related to soils, water quality, and rare species. ROD, [JA0016–18, JA0027, JA0036–37].

Activities on National Forests must be consistent with forest plans. 16 U.S.C. § 1604(i). To allow the pipeline to proceed, the Forest Service agreed to amend its forest plans. The stated "purpose of the amendments" was to change plan standards because "the ACP project would not be consistent with some Forest Plan standards related to soil, riparian, [and] threatened and endangered species…." ROD, [JA0031]. In June of 2017, the Forest Service published notice that the amendments were "likely to be directly related" to substantive requirements in its 2012 Planning Rule related to soils, water resources and riparian areas, among others. Notice of Updated Information, 82 Fed. Reg. 25,756 (June 5, 2017). But in July, the Forest Service reversed course, announcing that the proposed amendments for the pipeline were not "directly related" to requirements of the 2012 Planning Rule, but merely "relevant" to them. *See, e.g.*, ROD, [JA0039]. As a result, the Forest Service did not apply the substantive provisions of the 2012 Rule to the amendments it adopted for the pipeline. Indeed,

those amended standards were not measured against any protective requirements whatsoever.

In its final decision, the Forest Service considered only two alternatives in detail: the "proposed action" (ACP's preferred route) and "no action." ROD, [JA0049]. For all other route alternatives, the Forest Service concluded that "major pipeline route alternatives and variations do not offer a significant environmental advantage" because they would lengthen the route. ROD, [JA0048]. That was a reversal from its earlier insistence that off-forest routes must be studied because "[m]iles of line do not necessarily equate to severity of the environmental impact," rather "[t]he nature of the resources to be impacted needs to be considered," including "comparative information on impacts …." [JA2451, JA2453].

According to Forest Service staff, the "real reason" off-forest alternatives were rejected was "avoiding crossing the Appalachian National Scenic Trail on NPS lands." [JA3482]. The National Park Service had informed Atlantic that it would not grant a right-of-way across the AT because the Mineral Leasing Act provides no authority to cross a unit of the National Park System. FEIS, [JA1541]. The Forest Service's FEIS acknowledges that the Park Service considers the entire Trail corridor to be a part of the AT park unit, including where the Trail crosses the National Forest. [JA1794]. Nonetheless, the Forest Service granted Atlantic a

right-of-way across the AT, relying on the same statute NPS understood to deny such authority for the same park unit. [JA3571].

Agency documents confirm these reversals were driven by political priorities rather than substantive changes to the project or the agency's analysis. On November 9, 2016, Atlantic representatives met with the Undersecretary of Natural Resources and Environment for the Department of Agriculture, and the next day sent an email confirming a timeline for the Forest Service's decisions and "the appropriate point of contact within the new Administration." Email from Leslie Hartz to Robert Bonnie, [JA3323–24]. On December 12, Atlantic sent Forest Service leadership a "Forest Service timeline" for the agency's decisionmaking related to the ACP. Email from Leslie Hartz to Clyde Thompson [JA3256]. On December 27, 2016, prior to publication of even the *draft* Environmental Impact Statement, an Associate Deputy Chief of the Forest Service emailed the Forester for the Eastern Region informing her that "Dominion's intent is to have our Draft ROD published with the FERC FEIS. Draft decision would be based on the present pipeline alignment. I would anticipate that direction to be coming our way

in as early as end of January." Email from Glenn Casamassa to Katherine Atkinson (Dec. 27, 2016) [JA3691]. [9]

SUMMARY OF THE ARGUMENT

I. THE FOREST SERVICE'S AMENDMENTS TO LAND MANAGEMENT PLANS FOR THE ATLANTIC COAST PIPELINE UNLAWFULLY BYPASSED THE NATIONAL FOREST MANAGEMENT ACT

The Forest Service amended its forest plans to exempt Atlantic from environmental standards it could not meet related to soils, water quality, and rare species. In doing so, the Forest Service ignored the requirements of its own forest planning regulation, which sets minimum standards for forest plans which, in turn, govern all activities on National Forests. 16 U.S.C. § 1604(a).

Under the 2012 Planning Rule, forest plan amendments must comply with the protective standards of the 2012 Rule that are "directly related" to the amendment by virtue of either its "purpose" or "effects." 36 C.F.R. § 219.13(b)(5). Although the stated "purpose" of these forest plan amendments was to exempt Atlantic from "standards related to soil, riparian,[and] threatened and endangered species," the Forest Service refused to apply the 2012 Rule's standards for soil, riparian, and threatened and endangered species to Atlantic. The Forest

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[9] Pursuant to FRAP 16(b) the Forest Service stipulated to add this email to the administrative record. The Forest Service has reserved the right to argue that the email is not part of its decisional record.

ignored the "purpose" test for applying the 2012 Rule completely. The agency gave lip service to the "effects" test, but ignored the substantial adverse effects to soil and water that it had already documented.

In the end, after initially determining that amendments exempting Atlantic from forest plan standards were "likely to be directly related" to the protections of the 2012 Rule, the agency ultimately concluded they were merely "relevant" to them, a hair-splitting distinction that exempted Atlantic from the environmental requirements of the Forest Service's 2012 Rule.

II. THE FOREST SERVICE REFUSED TO STUDY PIPELINE ROUTES THAT AVOID NATIONAL FORESTS IN VIOLATION OF NEPA, NFMA AND ITS OWN FORST PLANS, AND ALLOWED A RIGHT-OF-WAY ACROSS THE APPALACHIAN TRAIL WITHOUT STATUTORY AUTHORITY

Forest Service staff knew that alternative routes could accommodate the pipeline without crossing National Forests and, in 2015, demanded that Atlantic and FERC study those routes. NEPA requires the Forest Service to rigorously explore such reasonable alternatives. And the forest plans for these Forests, mandatory under NFMA, prohibit the agency from authorizing the pipeline if off-forest routes are available.

Atlantic summarily rejected off-forest alternatives for the stated reason that they would lengthen the pipeline. But the Forest Service knew better, objecting that "[m]iles of line do not necessarily equate to severity of the environmental

impact" if they avoid sensitive resources. In 2017, the agency reversed course, however, considering only two options in detail: no action and Atlantic's preferred route through the National Forests.

In the Forest Service's own words, the "real reason" for rejecting off-forest alternatives was Atlantic's determination to route its 600-mile pipeline through a narrow 1.3-mile segment of the AT where it crosses the GWNF. NPS had warned Atlantic it could not authorize a crossing of the AT, a unit of the National Park System along its entire length, because the Mineral Leasing Act denies federal agencies authority for rights-of-way across lands in the National Park System. Although the Forest Service agreed that the AT is a unit of the National Park System, including across the National Forest, the Forest Service granted Atlantic a right-of-way across the AT, relying on the Mineral Leasing Act. As a result, the Forest Service constrained reasonable alternatives in violation of NEPA, 42 U.S.C. § 4332(c)(iii), authorized an avoidable special use of National Forests in violation of its forest plans and NFMA, 16 U.S.C. § 1604(i), and issued a special use permit to cross the AT without statutory authority, 30 U.S.C. § 185(b)(1).

III. THE FOREST SERVICE DISMISSED LANDSLIDE AND EROSION RISKS IN VIOLATION OF NEPA BASED ON VAGUE MITIGATION IT KNEW TO BE IMPLAUSIBLE

The Forest Service's experience with other, smaller pipelines in the area demonstrated that here, construction and operation of the pipeline would inevitably

increase erosion and sedimentation of waterways, and that it would risk causing severe landslides. The ROD concludes that Atlantic will effectively mitigate these risks, such that the pipeline will not have substantial adverse effects on soils or aquatic resources. ROD, [JA0039, JA0043]. This conclusion is arbitrary, because as the Forest Service itself repeatedly recognized, Atlantic failed to specify what mitigation measures it would actually employ, failed to take a hard look at how well mitigation measures would work, and failed to demonstrate that residual, un-mitigatable impacts were insignificant.

ARGUMENT

I. THE AMENDMENTS TO FOREST PLANS FOR THE ATLANTIC COAST PIPELINE UNLAWFULLY BYPASSED REQUIREMENTS OF THE NATIONAL FOREST MANAGEMENT ACT

The pipeline project is inconsistent with thirteen standards adopted by the George Washington and Monongahela National Forest Plans. Rather than reject the proposal or require that it be modified to meet these standards, the Forest Service chose to amend its forest plans to exempt Atlantic from complying with them. To be sure, the agency can amend its forest plans, but only pursuant to the procedures and minimum requirements of its 2012 Planning Rule, which imposes substantive protections for forest resources. A proposed amendment must comply with those substantive protections whenever they are directly related either to the amendment's "purpose" or to its "effects." The Forest Service conspicuously

ignored the "purpose" test and misapplied the "effects" test, and, as a result, failed to apply the minimum requirements of the 2012 Planning Rule. This Forest Service decision, which capriciously exempts Atlantic's project from minimum standards under the rule that protect soil, water, and wildlife on public lands, must be vacated.

A. Standard of Review

The Court reviews plan amendments authorized by the ROD under the APA. A reviewing court "shall hold unlawful and set aside agency action, findings and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A).

An agency's interpretation of its own regulations is entitled to deference unless it is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal quotations omitted). "But *Auer* deference is warranted only when the language of the regulation is ambiguous." *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000). When the language is unambiguous, deferring to the agency's interpretation "permit[s] the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Id.*

The Forest Service's interpretation of the 2012 Planning Rule, as amended, is not entitled to deference because the regulatory language is clear. Even if it

were ambiguous, the Forest Service's interpretation is plainly erroneous and inconsistent with the regulation as described below.

B. The National Forest Management Act

NFMA sets forth substantive and procedural standards that govern management of National Forests. *See, e.g.*, 16 U.S.C. § 1604(g)(3)(E)(i). Congress directed the Forest Service to promulgate regulations implementing those standards, *id*. § 1604(g), which are required to ensure (among other things) the protection of rare species, *id.* § 1604(g)(3)(B) ("provide for the diversity of plant and animal communities") and soil and water quality, *id.* § 1604(g)(3)(E). The Forest Service implements NFMA and these regulations at the local level by "develop[ing]…land and resource management plans for units of the National Forest System." *Id*. § 1604(a). These "forest plans" direct the management of each forest and must be revised periodically to incorporate updated standards. *Id*. § 1604(f)(5).

All activity on a National Forest "**shall be consistent** with the land management plans." *Id*. § 1604(i) (emphasis added). Forest plans must be consistent with the Forest Service's NFMA regulations, and the agency's actions must be consistent with forest plans. The Forest Service can create project-specific exceptions to forest plan requirements through project-specific forest plan amendments. But those amendments are not developed in a vacuum: they too must

comply with NFMA and its implementing regulations. Thus, if a forest plan provides more stringent protections than required by NFMA and its regulations, the Forest Service may amend the plan to relax those standards and allow a specific project to proceed, but only if doing so does not cause protections to fall below the floor set by NFMA and its regulations. Using forest plan amendments to exempt specific projects from minimum requirements of the planning rule and NFMA on an *ad hoc* basis would eviscerate the forest plan consistency requirement – the mechanism Congress used to implement NFMA's mandates at the local level.

1. The 2012 Forest Planning Rule

The Forest Service updated its Forest Planning Rule in 2012 ("2012 Rule"), superseding a 1982 rule and imposing new, substantive requirements for sustainable management of the National Forests. *See* 2012 Forest Planning Rule, 77 Fed. Reg. 21,162 (April 9, 2012). These new requirements apply lessons learned and updated science to the Forest Service's obligations under NFMA, with requirements to "maintain or restore the ecological integrity," "reduce soil erosion and sedimentation," and "maintain or restore . . . water quality," among others. *See e.g.* 36 C.F.R. § 219.8(a). These substantive requirements are the heart of the 2012 Rule. As compared to the superseded 1982 Rule, the 2012 Rule has "fundamental structural and content differences." 2016 Amendment to 2012 Rule,

81 Fed. Reg. 90,723–24 (Dec. 15, 2016). Forest plan content under the 2012 Rule must be informed by the "best available scientific information." 36 C.F.R. § 219.3.

While the forest plans for the GWNF and MNF were developed under the superseded 1982 Rule, the updated standards of the 2012 Rule govern any amendments to them. *See* 36 C.F.R. § 219.17(b)(2) (describing transition period from 1982 to 2012 Rule).

As initially adopted, the 2012 Rule stated only that plan amendments should be "consistent with Forest Service NEPA procedures." 36 C.F.R. § 219.13(b)(3) (2012). This led to "confusion about how responsible officials should apply the substantive requirements for sustainability, diversity, multiple use, and timber set forth in 36 C.F.R. §§ 219.8 through 219.11 when amending 1982 rule plans." Proposed 2016 Amendment to 2012 Rule, 81 Fed. Reg. 70,373, 70,374-75 (Oct. 12, 2016). Some members of the public believed that *all* the substantive provisions of the 2012 Rule must be applied to *every* amendment of a 1982 rule plan. *Id.* at 70,376. Others thought the agency had "discretion to selectively pick and choose which, *if any*, provisions of the rule to apply, allowing the responsible official to avoid 2012 rule requirements" entirely. *Id.* (emphasis added). The agency in 2016 revised the rule "to clarify that neither of these interpretations is correct." *Id.*

2. 2016 Clarifications to the 2012 Rule

The 2016 clarifications struck a balance, updating older forest plans as they were amended to incorporate standards of the new rule. The Forest Service must apply the 2012 Rule's requirements when amending 1982 forest plans whenever those standards are "directly related" to the proposed amendment.

Specifically, when amending forest plans the Forest Service "shall":

> Determine which specific substantive requirement(s) within §§ 219.8 through 219.11 are *directly related* to the plan direction being added, modified, or removed by the amendment and *apply such requirement(s) within the scope and scale of the amendment*.

36 C.F.R. § 219.13(b)(5) (2016) (emphasis added). This rule establishes a two-step process. First, the agency determines which substantive requirements are "directly related," without reference to an amendment's "scope and scale." *Id*. Second, it applies those requirements within the "scope and scale" of the directly-related amendment. *Id*. These requirements apply to all forest plan amendments, including project-specific plan amendments. *Id*.

At the first step, the rule explains that the "directly related" determination turns on either of two tests: 1) "the purpose of the amendment," or 2) "the effects (beneficial or adverse) of the amendment." 36 C.F.R. § 219.13(b)(5)(i). *Either* test is sufficient, standing alone, to require application of the 2012 rule:

> When a specific substantive requirement [of the 2012 Rule] is associated with *either* the purpose for the amendment *or* the effects (beneficial or adverse) of the amendment, the responsible official *must* apply that requirement to the amendment.

81 Fed. Reg. 90,723, 90,731 (emphasis added); *see* ROD, [JA0036] (directly related determination "is based upon the amendment's purpose *or* its effect (beneficial or adverse)") (emphasis added).

The outcome of the "purpose" test depends on "the need to change the plan." 81 Fed. Reg. 90,731. Applying the "effects" test, the "responsible official *must* determine that a specific substantive requirement is directly related when "[1] scoping or NEPA effects analysis for the proposed amendment reveals substantial adverse effects associated with that requirement, *or* [2] when the proposed amendment would substantially lessen protections for a specific resource or use." 36 C.F.R. § 219.13(b)(5)(ii)(A) (emphasis added).

After making the "directly related" determination, the agency applies the 2012 Rule's substantive provisions, which will either show that "the amendment is in compliance with that particular substantive requirement (and thus, need not be changed) or is in conflict with the substantive requirement (*which may necessitate modification of the amendment to meet the substantive requirement*)." ROD, [JA0036] (emphasis added). That is the bottom line: if the agency holds the amendment up to the directly-related requirements of the 2012 Rule, and determines it does not comply, the agency *cannot* amend the plan as proposed.

Here, the Forest Service unlawfully skipped this step by arbitrarily determining that amendments to plan standards regarding protection of soils, riparian resources, and species were not "directly related" to substantive requirements to protect those same resources.

C. The GWNF and MNF Plan Amendments for ACP Are Directly Related to Substantive Provisions of the 2012 Rule

1. The Purposes of the Amendments Are Directly Related to Substantive Provisions of the 2012 Rule

The purposes of the proposed amendments are directly related to substantive provisions of the 2012 Rule. The purpose of a plan amendment is determined by "the need to change the plan." 81 Fed. Reg. 90,723, 90,731. The Forest Service's ROD is clear: the "purpose of the amendments" is to change plan direction because "the ACP project would not be consistent with some Forest Plan standards related to *soil, riparian, threatened and endangered species*…." [JA0031] (emphasis added); *see* FEIS, [JA1757].[10]

The agency's "need to change the plan" – to relax standards for "soils, riparian areas, and threatened and endangered species" – is directly related to the 2012 Rule's requirements that protect soil, riparian areas, and threatened and

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[10] Specifically, the Forest Service amended Plan Standards MNF-SW06, SW07, SW03, and GWNF-FW-5, FW-8, FW-16, FW-17, and 11-003 related to soils and riparian areas; and standard MNF TE07 related to threatened and endangered species. [JA0016–18].

endangered species, including: "soil and soil productivity" (36 C.F.R. § 219.8(a)(2)(ii)); "water resources" (*id.* § 219.8(a)(2)(iv)); "ecological integrity of riparian areas" (*id.* § 219.8(a)(3)(i)); "ecological integrity of terrestrial [ ] ecosystems" (*id.* § 219.8(a)(1)); "appropriate placement and sustainable management of…utility corridors" (*id.* § 219.10(a)(3)); and "recovery of federally listed…species" (*id.* § 219.9(b)).

The examples provided by the Forest Service when amending the 2012 Rule in 2016 make this clear: "[i]f the scope of an amendment to a 1982 plan[[11]] includes changes to plan direction for the *purpose* of…scenery management, then the responsible official *must apply* the 2012 rule requirement about scenic character to the changes being proposed." 81 Fed. Reg. 90,723, 90,725 (emphasis added). Here, because the scope of these amendments to 1982 plans includes changes to plan direction for the purpose of "soil, riparian, [and] threatened and endangered species," then the responsible official *must apply* the 2012 Rule requirements about "soil, riparian, [and] threatened and endangered species" to the changes being proposed.

The agency knows as much. In a December 2016 meeting with Atlantic, the Forest Service explained that if the project could not meet MNF standards related

[11] A plan adopted pursuant to the now-superseded 1982 planning rule.

to soils, such that an amendment to these standards was required, the Forest Service would have to "default back to the standard which talks about maintaining soil productivity," *i.e.*, 36 C.F.R. § 219.8(a)(2)(ii) ("The plan must include plan components…to maintain or restore…soil productivity."). [JA3260].

In June 2017, the Forest Service confirmed that the proposed plan amendments for the pipeline were "likely to be directly related" to substantive provisions of the 2012 Rule, with citation to the same subsections of the rule discussed in its later ROD. *See* 82 Fed. Reg. 25,756; *see also* 36 C.F.R. § 219.13(b)(2) (requiring that public notice identify substantive requirements likely to be directly related to proposed amendment).[12]

Despite these statements, the agency never "defaulted back" and applied the 2012 Rule. Instead, in issuing the final ROD, the Forest Service abandoned its earlier "likely to be directly related" finding, asserting the amendments were "relevant," but not "directly related," to substantive provisions of the 2012 Rule. *See, e.g.*, ROD, [JA0039]. The agency's attempt to split hairs accomplishes nothing. Forest Service regulations do not distinguish between "related" and

[12] The substantive provision related to threatened and endangered species was not disclosed in the June 2017 Federal Register notice as discussed below.

"relevant" substantive provisions. Nor does ordinary usage: "relevance" denotes a "significant and demonstrable bearing on" something, *i.e.*, a direct relationship.[13]

The 2012 Rule obligates the Forest Service to apply its substantive provisions based on the *purpose* of the proposed amendments. The purpose of these amendments was to weaken plan standards about "soil, riparian, [and] threatened and endangered species," subjects directly addressed by the 2012 Rule. The Forest Service abdicated that responsibility. Knowing that the purposes of the amendments were directly related to substantive provisions of the 2012 Rule, and that applying those substantive provisions may "necessitate modification of the amendment to meet the substantive requirement," the agency simply *omitted* the "purpose" test from its analysis. *Compare* [JA3260] *with* [JA0036, JA0688]. The 2012 Rule, as amended in 2016, prohibits that approach. For that reason alone, the Court should vacate and remand the agency decision for proper application of the 2012 Rule's substantive provisions to determine if Atlantic can meet them.

2. The Adverse Effects Authorized by the Amendments Also Directly Relate to Substantive Provisions of the 2012 Rule

A plan amendment also may be "directly related" to the 2012 Rule based on the "effects (beneficial or adverse) of the amendment." 36 C.F.R. §

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[13] *Compare* Merriam-Webster Dictionary, Definition of Relevant, https://www.merriam-webster.com/dictionary/relevant *with* Definition of Related, https://www.merriam-webster.com/dictionary/related (last visited June 10, 2018).

219.13(b)(5)(i). The Forest Service must find a substantive requirement of the 2012 Rule "directly related" if, as is the case here, NEPA effects analysis shows substantial adverse effects associated with that requirement. *Id.* § 219.13(b)(5)(ii)(A).

The Forest Service amended multiple plan standards related to soils and riparian habitat to allow the ACP to exceed forest plan limits. ROD, [JA0037–43]. The agency's NEPA analysis confirms that relaxing these standards will cause substantial adverse effects. For example, on the MNF and GWNF, the ACP will cause 2 to 8 tons *per acre* of soil to erode away during *the first year* of construction – a 200 to 800 percent increase over baseline. FEIS, [JA1717]. Per the agency, this constitutes "a substantial increase in soil erosion." *Id*. The Court's analysis can stop there. Erosion, an "adverse effect" (FEIS, [JA1652]) is expected to "substantial[ly] increase," making it a substantial adverse effect for purposes of the directly related inquiry. The Forest Service must now apply the soil sustainability standards of the 2012 Rule to the directly related amendments. *See* 36 C.F.R. § 219.8(a)(2)(ii).

The Forest Service cannot escape that conclusion by pointing to promised mitigation. Substantial adverse effects – mitigated or not – trigger application of the 2012 Rule. *See* 36 C.F.R. § 219.13(b)(5)(ii)(A). The Forest Service asserts that application of the 2012 Rule is excused because with mitigation, the

amendments for Atlantic "will not cause substantial *long-term* adverse effects" to soils and other resources. *See, e.g.*, ROD, [JA0039] (emphasis added). First, the rule is triggered by *any* substantial adverse effects, whether long-term or short. Second, that assertion directly contradicts analysis in the FEIS: "Construction activities along the right of-way [on National Forest lands] may adversely affect soil resources with both temporary and *permanent impacts even if mitigation is applied*." [JA1653] (emphasis added). Moreover, the FEIS's sobering analysis actually *underestimates* the extent of the adverse effects, because it makes the assumption, deemed implausible by Forest Service staff, that mitigation measures will prevent 96 percent of potential erosion and sedimentation. *Infra* pages 54-59.

Finally, even wholly "beneficial" effects of a plan amendment can give rise to a "direct[] relat[ionship]" under the "effects" test. 36 C.F.R. § 219.13(b)(5)(i). If *beneficial* effects can be "directly related," so too can effects that are somewhat less adverse because of mitigation.

D. The Forest Service's Interpretation Leaves an Impermissible Regulatory Gap

The agency's application of the 2012 Rule creates an impermissible gap where *neither* the 1982 nor 2012 regulations apply, a result the 2016 amendment foreclosed. *See* 81 Fed. Reg. 90,723, 90,726 ("Nor does the 2012 rule give responsible officials discretion to . . . avoid both 1982 and 2012 rule requirements (§ 219.17(b)(2)).."). Forest plans must be amended according to NFMA and its

implementing regulations. 16 U.S.C. § 1604(g). The 1982 rule has been superseded and can no longer be used to amend forest plans. *See* 36 C.F.R. § 219.17(b)(2). Yet here the Forest Service has determined that the 2012 Rule "need not be applied" either. *See, e.g.*, ROD, 33 [JA0039].The Forest Service's interpretation leaves it in the unlawful position of rewriting its forest plans with *no* applicable substantive regulations ensuring NFMA compliance.

E. The Forest Service Bypassed Public Participation Requirements in Amending Forest Plans

When amending forest plans, the agency must "provide opportunities for public participation as required in § 219.4." 36 C.F.R. § 219.13(b)(2). That includes opportunities for "commenting on the proposal and the disclosure of its environmental impacts in accompanying [NEPA] documents," as well as "opportunity to comment on the proposed amendment" itself. 36 C.F.R. §§ 219.4(a), 219.5(a)(2)(ii). "For an amendment that applies only to one project or activity for which a draft EIS is prepared," as is the case here, "the comment period is at least 45 days." 36 C.F.R. § 219.16(a)(2). In violation of those requirements, the Forest Service provided *no* opportunity for public comment for four of the amended forest plan standards.

The Forest Service disclosed for the first time its intention to amend MNF Plan Standard TE07 (related to threatened and endangered species) in its July 2017 FEIS and Draft ROD. FEIS, [JA1761]; Draft ROD, [JA1383]. Neither of those

documents allowed an opportunity for public comment. The Forest Service admits in its "Response to Objections" that the amendment "was not identified" in its draft EIS but asserts that "it was reasonable for standard TE07 to be identified in the FEIS and the Draft ROD" because "biological surveys were not completed until after publication of the DEIS." [JA0688–89]. This explains why the Forest Service had not previously proposed this amendment. But it does not create an exception to the requirement for public comment once the need for the amendment was identified. The Forest Service was required by the 2012 Rule to delay its decision and take public comment. Instead, it skipped over that requirement in order to meet Atlantic's timeline.

Worse, although the July 2017 draft ROD proposed amending TE07, the Forest Service did not fully disclose the reason for this amendment until November 2017, in its *final* ROD. The Draft ROD indicates the amendment was needed due to northern long-eared bat concerns, [JA1383], but the Final ROD discloses the amendment was also necessary because of small whorled pogonia. [JA0017]. The public was denied its NFMA-mandated opportunity to comment on the agency's proposal.

Amendments to three other plan standards – MNF SW03, and GMNF FW-8 and 11-003 – were also not disclosed until the final EIS. [JA0012]. The public was likewise denied any opportunity to comment on those amendments. The

Forest Service suggests that problem was cured by publishing in the Federal Register notice that the agency intended to amend those standards. *Id.* (citing 82 Fed. Reg. 25,756). First, the agency is incorrect – SW03 is not included in the Federal Register notice. *See* 82 Fed. Reg. 25,756. Second, the rule requires notice *so that the public can comment*, an opportunity the agency denied here. The Court should vacate and remand the Forest Service's ROD with instructions to provide for public comment as required by NFMA.

II. THE FOREST SERVICE REFUSED TO CONSIDER ALTERNATIVE PIPELINE ROUTES THAT WOULD AVOID NATIONAL FORESTS

In 2015, Forest Service staff insisted that Atlantic study routes that avoided National Forests. [JA3455]. In 2017, the agency reversed course, considering only one route in detail, Atlantic's preferred route through two National Forests. ROD, [JA0048–49]. The Forest Service preemptively dismissed off-forest routes for the stated reason that they would lengthen the pipeline, contrary to its prior insistence that a longer route would be preferable if it avoided sensitive resources on the forests.

In truth, the Forest Service yielded to Atlantic's refusal to give serious study to any route that avoided National Forests, in order to avoid seeking congressional authorization to cross the AT on land managed by NPS. But the premise of Atlantic's position is wrong; it needs congressional authorization to route a gas pipeline across *any* segment of the AT on federal lands, including National Forests.

As a result, the Forest Service constrained reasonable alternatives in violation of NEPA, authorized an avoidable special use of National Forests in violation of its forest plans and NFMA, and issued a special use permit to cross the AT without statutory authority.

A. Standard of Review

This Court evaluates the Forest Service's compliance with NEPA under the arbitrary and capricious standard. *Supra* page 19. The Court evaluates the Forest Service's interpretation of the Mineral Leasing Act under the two-step framework of *Chevron*. *See, e.g.*, *Mejia v. Sessions*, 866 F.3d 573, 583 (4th Cir. 2017). First, the Court "examine[s] the statute's plain language; if Congress has spoken clearly on the precise question at issue, the statutory language controls" without "according any weight to the agency's position." *Ojo v. Lynch*, 813 F.3d 533, 538–39 (4th Cir. 2016) (internal quotations omitted). That examination applies "traditional rules of statutory construction, by consider[ing] the overall statutory scheme, legislative history, the history of evolving congressional regulation in the area, and other relevant statutes." *Mejia*, 866 F.3d at 583 (alteration in original) (internal quotations omitted).

Deference under *Chevron* "is not due unless a 'court, employing traditional tools of statutory construction,' is left with an unresolved ambiguity." *Epic Sys. Corp. v. Lewis*, -- S.Ct.--, No. 16-285, 2018 WL 2292444, at *14 (U.S. May 21,

2018). If, having exhausted the tools of statutory interpretation, the court finds the statute "silent or ambiguous," it asks under step two of *Chevron* whether the agency's reasoning is "arbitrary, capricious, or manifestly contrary to the statute." *Mejia*, 866 F.3d at 583.

B. NEPA Requires the Forest Service To Study Off-Forest Alternatives and Forest Plans Require It to Choose Them When Available

NEPA requires the Forest Service to consider "alternatives to the proposed action." 42 U.S.C. § 4332(c)(iii). Consideration of alternatives "is the heart of the environmental impact statement." 40 C.F.R. § 1502.14. The agency must "[r]igorously explore and objectively evaluate all reasonable alternatives…." 40 C.F.R. § 1502.14(a); *see Mt. Lookout-Mt. Nebo Prop. Prot. Ass'n v. FERC*, 143 F.3d 165, 172 (4th Cir. 1998) (rigor of alternatives analysis heightened when agency prepares EIS). Those alternatives must be "[d]evote[d] substantial treatment" so "reviewers may evaluate their comparative merits." 40 C.F.R. § 1502.14(b).

An agency violates NEPA by "failing to examine a viable and reasonable alternative to the proposed project, and by not providing an adequate justification for its omission." *See Ala. Conservation Council v. Fed. Highway Admin.*, 649 F.3d 1050, 1059 (9th Cir. 2011); *see also Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1288 (1st Cir. 1996) (agency must "provide a factual basis for its refusal to consider, in general, the possibility of alternatives").

The governing forest plans for these forests require even more: not only must the agency *consider* alternatives that avoid forest land, it must *choose* them if they are available. The GWNF forest plan allows "special uses" like the ACP only if they are "[l]imit[ed] to needs that cannot be reasonably met on non-NFS lands or that enhance programs and activities." [JA4068]. The MNF forest plan allows consideration of "special uses of NFS lands—such as…utility corridors" only if they "cannot be accommodated off the National Forest." [JA4069]. These plan standards were not amended, and they are still applicable and binding on the Forest Service. *See* 16 U.S.C. § 1604(i).

Moreover, the agency's NFMA-implementing regulations "require" it to reject any proposed special uses that are not "in the public interest." 36 C.F.R. § 251.54(e)(5)(ii). The Forest Service Manual is clear: special uses are in the public interest only when they "cannot reasonably be accommodated off of National Forest System Lands," which requires more than showing that a forest route "affords the applicant a lower cost or less restrictive location." *See* Forest Service Manual 2703.2 (attached in Addendum).

C. The Forest Service Refused To Study Off-Forest Alternatives

In its final Decision, the Forest Service weighed only two alternatives: the "proposed action" (Atlantic's preferred route) and "no action." ROD, [JA0049]. For all other options, it stated only that "major pipeline route alternatives and

variations do not offer a significant environmental advantage." ROD, [JA0048]. But the Forest Service knew that statement was pure speculation as applied to off-forest alternatives.

As part of its application to FERC, Atlantic submitted reports discussing various route options in general terms. That report named only two route alternatives that would have completely avoided crossing National Forests.[14] [JA3455]. The FEIS adopted by the Forest Service preemptively dismissed those options without study because they would have lengthened the pipeline. The FEIS *assumed* that "as the length of a pipeline route is increased, the amount of environmental impacts on various resources are concurrently increased." FEIS, [JA1542]. But the FEIS conceded that "ground resource surveys have not been conducted" for those alternatives and that "a shorter pipeline could conceptually have significantly greater qualitative impacts on sensitive resources than a longer route, which would make the longer route preferable." *Id*. Without collecting information to determine whether that was true, the FEIS concluded that "as currently analyzed," meaning without data, it would "not recommend" either off-forest alternative. *Id*.

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[14] Atlantic also named two shorter alternatives that reduced National Forest miles but still crossed the AT on national forest land at Atlantic's preferred location. [JA3463, JA3466, JA3472].

The Forest Service *knew* this was wrong. National forests are home to unique values—rare habitats, recreation opportunity, and scenic integrity—that cannot be reduced to a linear calculation and compared to the broader, unprotected landscape. In official comments on the Draft EIS, the Forest Service objected that "[m]iles of line do not necessarily equate to severity of the environmental impact," rather "[t]he nature of the resources to be impacted needs to be considered" including "comparative information on impacts…." [JA2452]. Because "[n]o analysis of a National Forest Avoidance Alternative ha[d] been conducted," the Forest Service warned it "cannot support the recommendation that the National Forest Avoidance Alternative be dropped from consideration." [JA2454]. But no additional analysis or changes were made in response to the Forest Service's comments.

In September 2017 the Forest Service reversed course. The analysis of non-forest alternatives in the Draft EIS was unchanged in the Final EIS. *Compare* FEIS, [JA151–42] *to* DEIS, [JA3207–08]. Nonetheless, the Forest Service abandoned its objections and adopted Atlantic's position that longer, off-forest alternatives need not be studied in detail based on the untested assumption that they "do not offer a significant environmental advantage." ROD, [JA0048]. In response to the conservation groups' objections to its draft ROD, the Forest

Service toed the line that "as a general matter, environmental impacts increase as the length of a pipeline route increases." [JA0676].

NEPA does not allow the Forest Service to accept Atlantic's and FERC's assertions blindly. As a cooperating agency, the Forest Service must "independently review the [lead agency's] work and conclude that [its] own comments and suggestions have been satisfied." *Sierra Club v. FERC*, 827 F.3d 36, 41–42 (D.C. Cir. 2016).[15] Furthermore, the Forest Service must "independently evaluate the information submitted and shall be responsible for its accuracy." 40 C.F.R. § 1506.5(a). Nor can the Forest Service reject a reasonable alternative based on mere speculation. *See Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1165 (10th Cir. 2002), *as modified on reh'g*, 319 F.3d 1207 (10th Cir. 2003) (error to reject alternative based on "pure speculation" that it would cost more, where costs were not studied).

Even if Atlantic had substantiated its assumption that off-forest alternatives increased environmental impacts somewhat, that is not the test under the governing forest plans. The Forest Service *must* select an alternative route that avoids the

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[15] NEPA guidelines state that "if the cooperating agency determines that the EIS is wrong or inadequate, it must prepare a supplement to the EIS." Forty Most Asked Questions Concerning CEQ's NEPA Regulations, 46 Fed. Reg. 18,026 (March 23, 1981).

GWNF unless the need for the project "cannot be reasonably met" off the forest. [JA4068]. A route that avoids the MNF must be selected unless the need for the project "cannot be accommodated" elsewhere. [JA4069]. Under the forest plans, the test is not whether an off-forest route would have more impacts, but whether those impacts are so great as to be *unreasonable*. Without making that determination, the Forest Service cannot eliminate them as viable options it is required to select.

The Forest Service's refusal to study off-forest alternatives based on assertions it *knew* were speculative violates NEPA, governing forest plans, and NFMA.

D. The Forest Service's Erroneous Interpretation of the Mineral Leasing Act Artificially Constrained Off-forest Alternatives

The unsupported assertions in the final EIS about the environmental impacts of off-forest alternatives were pretext. In the Forest Service's words, the "real reason" off-forest routes were dismissed was Atlantic's erroneous theory that a National Forest route allowed it to cross the AT without congressional authorization.

NPS informed Atlantic that it could not grant a right-of-way across the Appalachian Trail, a unit of the National Park System, because "[t]he legislative history of the 1973 amendments to the Mineral Leasing Act ("MLA") demonstrate that Congress clearly intended that National Park System units be exempt from a

general grant of authority to issue oil and gas pipeline rights-of-way." NPS Comments on NOI to Prepare EIS (April 28, 2015).[16] Recognizing it would need congressional authorization to cross the AT, Atlantic protested that "there is no evidence to suggest that legislation could be enacted … to meet the Projects' purpose and need," which Atlantic asserted meant meeting "[t]he Projects' in service date of November 2018…." [JA3436].[17]

Nevertheless, rather than seek congressional authorization or avoid crossing the AT on federal land, Atlantic avoided the NPS. Asserting that the MLA gave the Forest Service broader authority than NPS enjoyed *under the same statute*, Atlantic constrained its routing alternatives to consider only "locations where the ANST was located on lands acquired and administered by the FS, which significantly constrained the pipeline route and *severely limits opportunities for avoiding and/or minimizing the use of NFS lands*." FEIS, [JA1542] (emphasis added).

According to Atlantic's routing discussion, the pipeline "must cross" a specific "1.3 mile section of USFS lands" because "[t]his is the only potential

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[16] Pursuant to FRAP 16(b) the Forest Service stipulated to add this comment letter to the administrative record.

[17] In fact, a specific project completion date is *not* part of the stated purpose and need for the project. FEIS, [JA1482]. Moreover, if Atlantic's purpose is defined by that in-service date, it is now clear it will not meet it. Any alternatives it dismissed based on that objective should be reconsidered.

location in the Project region where the Appalachian Trail is not on NPS-administered land" and is otherwise accessible. [JA3458]. In response to that report, the Forest Service objected that the only off-forest routes named by Atlantic had been improperly dismissed without study, because avoiding the National Forest lands *and* crossing the Appalachian Trail on NPS lands "cause[d] all potential alternative routes north of the proposed route to extend at least 81 miles." [JA3457]. Atlantic responded to these concerns by naming, but not studying, two more options that did not completely avoid National Forest land, but only "minimized the crossing …*given the optimum point for crossing the Appalachian National Scenic Trail*" on National Forest lands. [JA3430] (emphasis added).

The Forest Service understood that neither Atlantic nor FERC ever studied off-forest alternatives. In official comments on Atlantic's application, the Forest Service objected that Atlantic discussed its preferred route without "highlight[ing] *the real reason* that it was selected – avoiding crossing the Appalachian National Scenic Trail on NPS lands." [JA3482] (emphasis added). The Forest Service insisted that "[t]he proposed location for crossing the [AT] need[s] to be based on sound resource and compelling public interest determinations" and Atlantic should "not base all of the routing decisions for the [AT] crossing on project timeline issues with getting Congressional approval." [JA3480]. At that time, the Forest Service understood that "[t]imeframes" for congressional action "should not be a

factor in identifying a preferred route; avoidance and minimization of…impacts should be the major factor in identifying a preferred route." [JA3483]. Accordingly, the Forest Service insisted that "[a] thorough analysis needs to be conducted to identify a preferred crossing that reduces visual and noise impacts to the Trail, regardless of land ownership," *id.*, a position it reiterated in later comments on the draft EIS for the project. [JA2454].

In its final ROD, however, the Forest Service abandoned its unanswered concerns and accepted Atlantic's rationale. In response to conservation groups' administrative objections that the agency failed to "demonstrate that the pipeline 'cannot be accommodated' off of national forest lands," [JA1072], the Forest Service explained that "[a] significant factor in siting the ACP was the location at which the pipeline would cross the ANST." ROD, [JA0034]. But, as the agency itself previously argued, that is not a sound basis under NEPA for refusing to study alternatives that may well be environmentally preferable. 40 C.F.R. § 1502.14(c) (EIS must "include reasonable alternatives not within the jurisdiction of the lead agency").

More to the point, as discussed below, congressional action is required to authorize the ACP to cross the AT on federal land managed by *any* federal agency, including the Forest Service. The Forest Service cannot reject one alternative (crossing the AT on NPS-managed land) as speculative because it would require

congressional action while embracing another (crossing the AT on Forest Service-managed land) that is equally speculative. *See Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 814 (9th Cir. 1999) (court "troubled by this selective willingness to rely upon the availability of funding sources beyond the Forest Service's direct control" for preferred alternative while rejecting other alternatives because of uncertain funding).

E. The Mineral Leasing Act Does Not Authorize Any Federal Agency to Issue A Gas Pipeline Right-of-Way Across the Appalachian Trail

Underlying the Forest Service's rejection of reasonable alternatives is the assertion that the MLA empowers the Forest Service to authorize a crossing of the AT, authority the Park Service acknowledges it lacks. That premise is wrong.

The MLA empowers the "head of any . . . agency" to grant gas pipeline rights-of-way across "Federal Lands." 30 U.S.C. § 185(b)(1). "Federal Lands" include "all lands owned by the United States" *except* "lands in the National Park System." *Id*. Critically, the MLA does not distinguish between federal agencies; rather it denies authority to *any* "agency" to allow gas pipelines across "lands in the National Park System." *Id*. Notwithstanding the safeguards in that statute for protecting the environment, Congress reserved to itself sole authority to decide whether and under what conditions a gas pipeline may cross a unit of the National Park System.

The entire AT, including the segment across the GWNF, is "land in the National Park System." Congress assembled the AT from private land and lands managed by state and federal agencies, which were entrusted with day-to-day management of trail segments on their land. But Congress charged *one* agency with overall administration of each National Scenic Trail. Congress decided that "[t]he Appalachian Trail *shall be administered…by the Secretary of the Interior*," who has delegated that duty to NPS. 16 U.S.C. § 1244(a)(1) (emphasis added). By definition, lands in the National Park System include "any area of land and water *administered by the Secretary* [of Interior]" through NPS. 54 U.S.C. § 100501 (emphasis added).

The Forest Service knows that the *entire* Appalachian Trail, including the segment crossing the GWNF, is land within the National Park System. The draft EIS incorrectly asserted that "FS-acquired lands…are not considered to be a part of the ANST as a unit of the National Park System." [JA3186]. NPS objected, clarifying that "[t]he ANST is one of three national trails administered by the NPS that are considered to be units of the National Park System…. The NPS administers the entire ANST and as such considers *the entire Trail corridor* to be a part of the ANST park unit." [JA1849] (emphasis added). The final EIS concedes that "the NPS is also the lead federal agency for the administration of *the entire*

ANST; and the ANST … is a 'unit' of the national park system." [JA1794] (emphasis added).

Although the Forest Service recognizes that the Appalachian Trail segment on the GWNF is a unit of the National Park System, the Forest Service cited the MLA as authority to authorize a pipeline crossing of the AT. SUP, [JA3571]. According to the FEIS, "[t]he ANST is a unit of the National Park system; *however*, the lands acquired and administered by the FS for the ANST are NFS lands and subject exclusively to FS regulations and management authority." [JA1489] (emphasis added).

That distinction makes no difference; the Forest Service "management authority" referenced by the FEIS is the MLA, which denies *any* federal agency authority to grant gas pipeline rights-of-way across units of the National Park System. For purposes of the pipeline, it is irrelevant whether the statutory authority of NPS or the Forest Service governs, because gas pipeline rights-of-way are governed by the MLA in either case. The MLA is Congress' definitive policy statement on rights-of-way issued by any "agency" for gas pipelines. No rights-of-

way for gas pipelines may be granted "except under and subject to the provisions, limitations, and conditions of" that statute.[18] 30 U.S.C. § 185(q).

Because the MLA, the *only* pipeline right-of-way authority available to the Forest Service, denies that authority for "lands in the National Park System" like the AT, the Forest Service lacked statutory authority to grant a right-of-way to pipeline for a gas pipeline to cross the AT.

III. THE FEIS FAILED TO TAKE A HARD LOOK AT LANDSLIDE RISKS AND EROSION IMPACTS, AS THE FOREST SERVICE ITSELF RECOGNIZED

The mountainous landscapes of the MNF and GWNF are extraordinarily susceptible to landslides and erosion, because of steep slopes, highly erosive soil, and abundant rainfall. *Supra* 9–11. Pipeline construction aggravates all those risks by digging and blasting a continuous trench up, down, and across unstable mountain slopes. *Id.* The Forest Service's final ROD and FEIS concluded that construction of the pipeline will not significantly affect soils, landslides, or water quality because Atlantic will mitigate those impacts. ROD, [JA0039, JA0043]. But by the Forest Service's own admission, the FEIS fails to support this conclusion: "the FS believes sedimentation effects on water resources are unknown." FEIS, [JA1663]. Neither the FEIS nor the ROD explain how Atlantic

[18] Rights-of-way across National Forests for all *other* purposes are governed by the Federal Lands Management Policy Act, which denies authority for the gas pipelines. 43 U.S.C. § 1761(a)(2).

would mitigate these risks, take a hard look at whether mitigation will work, or demonstrate that inevitable impacts will not undermine species and their habitat. Ultimately, the agency abandoned its own unaddressed concerns and unanswered questions to approve the project. NEPA requires more; at the very least the agency must disclose impacts and concrete plans to mitigate them – information it previously demanded as necessary – to make an informed decision.

A. Standard of Review

In reviewing the Forest Service ROD and SUP under the APA, a court "shall hold unlawful and set aside agency action, findings and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). Deference is only due when the agency can "articulate a satisfactory explanation for its action that demonstrates a rational connection between the facts found and the choice made." *Dow AgroSciences LLC v. Nat'l Marine Fisheries Serv.*, 707 F.3d 462, 471 (4th Cir. 2013) (internal quotations and alterations omitted).

"A court examining the sufficiency of an agency's environmental analysis under NEPA must determine whether the agency has taken a 'hard look' at an action's environmental impacts, which, at the least, encompasses a thorough investigation into the environmental impacts of an agency's action and a candid acknowledgment of the risks that those impacts entail." *Nat'l Audubon Soc'y v.*

Dep't of Navy, 422 F.3d 174, 185 (4th Cir. 2005). The Court must "ensure that the agency has examined the relevant data and articulated a satisfactory explanation for its action." *Defenders of Wildlife v. N.C. Dep't of Transp.*, 762 F.3d 374, 396 (4th Cir. 2014).

This "hard look" requires consideration of "steps that can be taken to mitigate adverse environmental consequences," *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351-52 (1989), which "ordinarily obligates agencies to do more than simply list possible mitigation measures." *Webster v. U.S. Dep't of Agric.*, 685 F.3d 411, 431(4th Cir. 2012); *see also* 40 C.F.R. §§ 1502.14(f), 1502.16(h). It requires "assessment of whether the proposed mitigation measures can be effective." *S. Fork Band Council of W. Shoshone of Nevada v. U.S. Dep't of Interior*, 588 F.3d 718, 727 (9th Cir. 2009). NEPA requires "particular care" "when the environment that may be damaged is one that Congress has specially designated for federal protection" such as national forests. *Nat'l Audubon Soc'y*, 422 F.3d at 186–87.

B. The Forest Service Failed to Take a Hard Look at the Risk of Landslides or Necessary Mitigation

Atlantic failed to provide site-specific designs the Forest Service concluded were essential to evaluating and minimizing landslide risks. The agency's last-minute reversal, approving the pipeline without that information, was capricious.

In an early letter, the Forest Service recognized that landslides were a substantial risk because of "steep slopes, presence of headwater streams, geologic formations with high slippage potential, highly erodible soils, and the presence of high-value natural resources downslope of high hazard areas." [JA3379]. Because "[s]imilar hazards on other smaller pipeline projects in the central Appalachians have led to slope failures, erosion and sedimentation incidents, and damage to aquatic resources," the Forest Service was "concerned that crossing such challenging terrain with a much larger pipeline could present a high risk of failures that lead to resource damage." *Id.*

Throughout review of the proposal, Atlantic asserted that it would prevent landslides with its "best in class" ("BIC") slope stabilization and erosion control program – but never explained how. *Id.*; FEIS, [JA1596]. Theoretically, the BIC program "would develop standard mitigation designs" that could be applied in different "categories" of slopes. [JA1597].

To quote the Forest Service, "the challenge" with the BIC approach was "documenting how effective the controls are to determine the likelihood of something not working so the agency can make a determination of effect." Meeting Notes, [JA3320]. To enable that analysis, the Forest Service asked in October 2016 that Atlantic provide "site specific stabilization designs" for ten representative locations "that appear to present a high risk for slope failure,

slippage, and erosion/sedimentation." [JA3379]. On at least six further occasions, the Forest Service reiterated that it could not evaluate landslide risks or the likely efficacy of mitigation without all ten of these site-specific designs. [JA2938–39] (Feb. 17, 2017 meeting), [JA2514–17] (Mar. 24, 2017 meeting), [JA2304] (May 14, 2017 letter, referencing three other calls).

The Forest Service underscored that it required "actual information, including specs on the actual controls and protocol on how they will be installed" at particular high-risk sites. Feb. 2017 Meeting Notes, [JA2939]. "[S]ite-specific designs…based on a thorough evaluation of field conditions and information gathered from surveys" were necessary to evaluate potential problems. May 2017 Letter, [JA2305]. From the Forest Service's perspective, without site-specific data, the BIC program provided for nothing more than "selecting from a basket of controls while in the field," an "approach" that "the agency is not comfortable with." Feb. 2017 Meeting Notes, [JA2939]; *see also* [JA2514] (Forest Service staff describing BIC program as "a cookbook with generalities"); [JA1360] (Atlantic describing BIC as a "set of tools" to choose from). According to the MNF Forest Supervisor, site-specific information was needed "to demonstrate that we can actually permit a pipeline on these slopes and have a reasonable chance of keeping the pipeline on the mountain and keep the mountain on the mountain."

Email from Clyde Thompson to Glenn Casamassa (Dec. 20, 2016) [JA3694].[19] Supervisor Thompson was "not optimistic" that this was possible. *Id.* As of December 2016, Atlantic was "gathering information…to prove that their [BIC] program will work in these areas." *Id.*

But Atlantic never provided the information requested by the Forest Service. Instead, the Forest Service abruptly abandoned its position that all ten site-specific designs were essential, and the FEIS was issued in July 2017 with designs for only two of the ten requested sites. [JA1608]. The Forest Service issued a single-page letter stating, without explanation, that the limited information provided by Atlantic was now "adequate for the purposes of disclosing the environmental effects associated with the proposed construction of the Atlantic Coast Pipeline on steep slope sites on the [MNF] and [GWNF]." [JA1881];[20] *see also* [JA1884] (internal email regarding drafting of this letter, stating Forest Service staff were "having problems with the word 'adequate'" and requesting discussion of "alternative wording.") .

This last-minute acquiescence to Atlantic, following prolonged demands for additional data, falls well short of NEPA's hard look requirement. Even the FEIS

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[19] *See* note 9, *supra*.

[20] This letter does not, however, claim that Atlantic actually provided the information that the Forest Service had requested.

concedes that "slope instability/landslide risk reduction measures *have not been completed or have not been adopted*." [JA1615] (emphasis added). More broadly, the FEIS does not evaluate the effectiveness of measures to stabilize slopes and prevent landslides. *Id.* Instead, it summarily concludes that "the routing of ACP and the slope stability design and construction practices would reduce, but not eliminate, the slope stability hazards." [JA1637]. The "likelihood and magnitude" of those hazards, such as slides, will turn, in part, on "slope instability/landslide risk reduction measures [that] have not been completed or have not been adopted." FEIS, [JA1642]. The analysis was so incomplete that "Atlantic and DETI [were] currently working to provide documentation of the *likelihood* that their proposed design features and mitigation measures would *minimize* the risk of landslides in the project area" at all. FEIS, [JA1643] (emphasis added).[21]

[21] The Forest Service's decision must be based on information disclosed in the EIS. *See Dubois*, 102 F.3d at 1289; *Kentucky ex rel. Beshear v. Alexander*, 655 F.2d 714, 718–19 (6th Cir. 1981); *see also* [JA2316] (Forest Service noting this requirement). But the information provided *after* the FEIS still misses the mark. Atlantic provided three additional designs, but the Forest Service criticized them as unresponsive to its "request [for] more site specific sediment and erosion control plan measures. We were told a best in class program was established. Where is that information? This appendix is still just the basics with limited details." [JA0849, JA0862]. The Forest Service's final ROD recognizes that, as of that time, analysis of slopes and development of site-specific designs still had not been completed. [JA0033].

Building a pipeline through these national forests creates a tremendous risk of landslides. The FEIS fails to provide information that Forest Service staff repeatedly confirmed was essential, and more broadly acknowledges that it is unknown what mitigation steps will be taken, or (consequently) how well mitigation will work. This falls far short of a hard look. *See S. Fork Band Council*, 588 F.3d at 727; *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1381 (9th Cir. 1998). Without this analysis, the FEIS also fails to support the Forest Service's conclusion that modifying the forest plans to allow the project to proceed will not result in substantial adverse effects on soil and riparian resources as a result of increased landslides. [JA0039, JA0043]. *See supra* at Section I(C)(2).

C. The Forest Service Dismissed Erosion and Water Quality Impacts Based on Vague Assurances of Mitigation It Knew Were Unreliable

Even if Atlantic manages to completely avoid major landslides, clearing and excavating for the pipeline will cause extensive erosion and deposit substantial sediment to streams and rivers. FEIS, [JA1708]; *supra* page 10-11. The Forest Service's approval for the pipeline concluded that because of "mitigation measures, impacts on groundwater and surface waters will be effectively minimized or mitigated." ROD, [JA0025]. But the FEIS failed to take a hard look at those impacts and provides no support for the Forest Service's assertion that

mitigation will avert substantial impacts to soils and water quality. ROD, [JA0039, JA0043].

At the time the FEIS and ROD were issued, Atlantic's erosion mitigation plan, the basis for the agency's assurances, had not been determined and the Forest Service did not know what measures would be required. [JA1659]. The FEIS concedes that, accordingly, "specific effects are unknown" and "it is unclear if erosion control and rehabilitation measures would meet the standards of the Forest Plan[s]." *Id; see also Robertson*, 490 U.S. at 352 (NEPA requires "reasonably complete discussion of possible mitigation measures" because without them "neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects").

Fundamentally, the Forest Service did not know whether any mitigation techniques could be successful. For example, one of the measures Atlantic alluded to as mitigation for erosion was the use of "water bars" on long slopes "to prevent concentrated flow on the right-of-way." FEIS, [JA1662–63]. However, if adjoining areas cannot "safely receive and convey the concentrated [diverted] flows," [JA1663], water bars can, in the Forest Service's words, "actually do more harm than good." BE Comments, [JA2337]. Site-specific analysis is therefore essential to determining whether Atlantic's proposed use of water bars will mitigate or exacerbate erosion during construction. The FEIS is devoid of that analysis.

Moreover, the assumptions underlying Atlantic's sedimentation analysis were so wildly optimistic they invalidate its conclusions, as the Forest Service recognized. Atlantic asserted that "erosion control devices" (most frequently "water diversion bars and standard silt fence") would "reduce erosion by about 96 percent." Draft BE, [JA2645]. Such a reduction is possible in theory only: Atlantic based its assertion on a computer model and a study of silt fences (not water bars) in a laboratory setting. *Id.* Atlantic assumed that its mitigation measures would "function perfectly throughout their duration," which requires "careful monitoring and maintenance" of erosion control measures. Draft BE, [JA2666].

To the contrary, the Forest Service understood these rosy predictions were implausible in the real world. The Forest Service explained that "[u]se of lab testing and efficiency rates" was inappropriate, and instructed Atlantic to provide "literature references that apply to efficiencies in the field, particularly mountainous terrain in WV and VA." BE Comments, [JA2357]. The Forest Service knew from hard experience; "[r]ecent actual field experience on the GWNF with a gas pipeline replacement showed" that mitigation measures did not perform as Atlantic represented. *Id.* For example, Atlantic saw little benefit to installing more than one mitigation measure at a location, but the Forest Service had observed in practice that "sometimes up to 4 lines of defense were necessary to

contain soil movement off site and into adjacent waterbodies." *Id.*[22] These observations, as contrasted with Atlantic's self-serving predictions, constituted the "best available scientific information" relevant to the project. *See* 36 C.F.R. § 219.3. Applying their forest-specific expertise, Forest Service staff instructed Atlantic to use "more conservative assumptions about containment efficiencies." *Id*.

The Forest Service identified still more major flaws. For example, Atlantic's model had not been validated for slopes of greater than 100%[23] or more than 1000 feet in length, but the pipeline will encounter both conditions. BE Comments, [JA2358]. Additionally, the model relied on cherry-picked, best-case scenario timeframes, assuming work on steep slopes would start in the generally dry month of April. Draft BE, [JA2641] (construction assumed to begin April 1). But nothing in the plan restricts Atlantic to starting in April and erosion is predicted to be worse if construction starts in *any* other month. For example, starting construction in July is "predicted to result in three times as much erosion." [JA2633]. For these and other reasons, the Forest Service concluded that Atlantic's report "likely …

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[22] Atlantic proposes to complete sections along steep (>30%) slopes six times faster than industry practice (two weeks instead of twelve). Draft BE, [JA2642]. The FEIS and sedimentation report provide no discussion of how such hurried work will impact the level of attention and care used in implementing mitigation measures.

[23] A 100% slope equates to a 45-degree angle.

underestimated" erosion and sedimentation from the project. BE Comments, [JA2369].

Finally, even if Atlantic's report's estimates of erosion and sedimentation levels were reasonable, neither that report nor the FEIS provide a hard look at how that level of sedimentation would impact aquatic habitat and wildlife. Atlantic asserts that increases in in-stream sediment levels will be *de minimis*, based on a simplistic calculation dividing the total sediment that will erode into a stream in a year by the volume of water that will flow through the stream in that time. Draft BE, [JA2645]. The Forest Service harshly criticized this approach:

> This entire paragraph has false rationale and needs to be deleted or modified extensively. Erosion and sediment transport to streams cannot be averaged evenly over a year, rather it happens in discrete episodic events. It is not appropriate to minimize impacts by making a comparison of total load evenly spread over time. The point of the load calculation is to address impacts to sensitive aquatic species which are impacted by flow and timing of sediment during these erosion events.

BE Comments, [JA2358]. Atlantic never responded to the agency's concerns by analyzing how in-stream sediment levels would increase in response to "episodic[] … precipitation events." [JA2361].

Nor does the record analyze the threshold beyond which increased sediment will be detrimental to aquatic life. FEIS, [JA1720]. The FEIS criticizes Atlantic's separate report purporting to assess the impacts of increased erosion on aquatic

species as "general, presenting statements with no supporting documentation," and entirely lacking in "correlation or reference" to the erosion and sedimentation analysis. [JA1663].

The Forest Service accordingly rejected Atlantic's contention that the predicted 200 to 800 percent increases in erosion will be "moderate," with "temporary and minimal" impacts, as "unsubstantiated." BE Comments [JA2350–53]. As the FEIS ultimately concedes, "*water resource impacts from sedimentation are largely uncertain*." FEIS, [JA1663] (emphasis added).

Despite these flaws, Atlantic failed to make changes requested by the Forest Service.[24] Instead, the Forest Service yielded and relied on the reports it recognized as deeply flawed to issue Atlantic a SUP and amend its forest plans to accommodate the project. *See* BE Comments, [JA2369–70]. This violated NEPA's hard look requirement and ignored the best available scientific information, as required by NFMA and the 2012 Rule, in order to reach Atlantic's preferred outcome on Atlantic's preferred timeline.

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[24] Atlantic submitted an updated sedimentation report in August 2017, after the FEIS was issued. [JA0903]. This revised report does not correct the flaws the Forest Service identified; for example, the revised report does not reassess erosion in light of real-world conditions. Instead it merely adds language doubling down on its assumption that controls will be implemented perfectly. [JA0908, JA0930].

CONCLUSION

Based on the errors above, conservation groups request that the Court vacate both the ROD and SUP. Under the APA, a reviewing court "shall…hold unlawful and set aside agency action, findings, and conclusions found to be…arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) .Vacatur of the ROD and SUP is the appropriate remedy in this case.

Petitioners respectfully request that oral argument remain calendared for the September session.

Dated: August 7, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that this opening brief complies with the type-volume limitation because it contains 12,936 words.

I further certify that this motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in Times New Roman 14-point font using Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2018, I electronically filed the foregoing Opening Brief on behalf of Petitioners with the Clerk of Court using the CM/ECF System, which will automatically send e-mail notification of such filing to all counsel of record.

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