

No. \_\_\_\_\_

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In the  
**Supreme Court of the United States**

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ATLANTIC COAST PIPELINE, LLC,  
*Petitioner,*

v.

COWPASTURE RIVER PRESERVATION ASSOCIATION;  
HIGHLANDERS FOR RESPONSIBLE DEVELOPMENT;  
SHENANDOAH VALLEY BATTLEFIELDS FOUNDATION;  
SHENANDOAH VALLEY NETWORK; SIERRA CLUB;  
VIRGINIA WILDERNESS COMMITTEE; WILD VIRGINIA,  
*Respondent.*

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**On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Fourth Circuit**

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**PETITION FOR WRIT OF CERTIORARI**

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June 25, 2019

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## QUESTIONS PRESENTED

The Mineral Leasing Act (“MLA”) authorizes federal agencies to grant pipeline rights-of-way over federal lands within their jurisdiction. Exercising that authority, the U.S. Forest Service granted Atlantic Coast Pipeline a right-of-way to cross small portions of the George Washington National Forest, including a 0.1-mile stretch that is approximately 700 feet beneath, and without surface impacts to, the Appalachian National Scenic Trail. While more than 50 pipelines presently cross under that footpath pursuant to similar rights-of-way, the Fourth Circuit concluded in the decision below that the Forest Service—indeed, *every* federal agency—lacks the power to grant rights-of-way to cross beneath the Trail pursuant to the MLA, rendering the footpath a 2,200-mile barrier separating resource-rich areas to its west from consumers to its east. The court reached that result by deeming more than 1,000 miles of land traversed by the Trail under the control of various federal, state and private entities instead to be considered lands in the National Park System, which, unlike other federal lands, are not subject to rights-of-way under the MLA. In doing so, the court not only rejected the federal government’s long-settled views, but has called into question dozens of existing rights-of-way under the Trail and upset petitioner’s massive investments in a pipeline designed to get natural gas to Virginia and North Carolina for the benefit of millions of people.

The question presented is:

Whether the Forest Service has the authority under the MLA and National Trails System Act to

grant rights-of-way through national forest lands that the Appalachian Trail traverses.

### **PARTIES TO THE PROCEEDING**

Petitioner is Atlantic Coast Pipeline, LLC (“Atlantic”). It was intervenor-respondent in the court of appeals.

Cowpasture River Preservation Association, Highlanders for Responsible Development, Shenandoah Valley Battlefields Foundation, Shenandoah Valley Network, Sierra Club, Virginia Wilderness Committee, and Wild Virginia are respondents before this Court and were petitioners in the court of appeals.

The Forest Service, an agency of the U.S. Department of the Agriculture; Kathleen Atkinson, in her official capacity as Regional Forester of the Eastern Region; and Ken Arney, in his official capacity as Acting Regional Forester of the Southern Region, are also parties to the proceeding.

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to this Court's Rule 29.6, petitioner states as follows:

Dominion Energy, Inc. owns more than 10% of Atlantic Coast Pipeline, LLC's stock. Duke Energy ACP, LLC and Piedmont ACP Company, LLC, subsidiaries of Duke Energy Corporation, also own more than 10% of Atlantic Coast Pipeline, LLC's stock. No other company owns 10% or more of Atlantic Coast Pipeline, LLC.

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## **PETITION FOR WRIT OF CERTIORARI**

After an arduous three-year process, involving extensive regulatory reviews and intensive due diligence, petitioner secured the necessary approvals and permits to construct a 600-mile pipeline that will bring natural gas—and substantial tax revenues and hundreds of millions of dollars in annual savings along with it—from resource-rich West Virginia and Pennsylvania to consumers in Virginia and North Carolina. That approval process involved scrutiny by more than a dozen state and federal agencies, including the U.S. Forest Service, the Federal Energy Regulatory Commission, and the National Park Service. Each agency considered issues within its own jurisdiction and approved the pipeline, both with the knowledge that it would be constructed via a horizontal drill approximately 700 feet under a 0.1-mile segment of the Appalachian National Scenic Trail on National Forest System land and with the understanding that approval authority for that right-of-way rested with the Forest Service. The Forest Service's decision to grant that right-of-way was hardly unprecedented; some 50-plus pipelines already cross under the Trail, including on Forest Service land, hidden from the view of those enjoying the scenery on the footpath above.

Several environmental groups challenged the pipeline on numerous grounds, including the novel theory that the Forest Service lacked statutory authority to grant a right-of-way because the entire Trail and the land underneath is National Park System land under the exclusive authority of the National Park Service. Because the MLA does not

authorize any federal agency to grant pipeline rights-of-way across National Park System land, the import of this theory was not that the *wrong* federal agency had granted the right-of-way under the Trail, but that *no* agency had that power.

While both the Forest Service and the Park Service have long rejected that reading and had no doubt that approval authority rests with the Forest Service, the Fourth Circuit had other ideas. Indeed, consistent with its handling of other challenges to this pipeline, the Fourth Circuit endorsed nearly all of the environmental groups' challenges, including their novel theory that the Forest Service cannot grant a right-of-way through what the federal government has always understood to be national forest land. While the procedural defects perceived by the court in the approval process can be fixed by further administrative proceedings, the Fourth Circuit's decision deeming the Trail to be land in the National Park Service has far more serious consequences. The decision converts a Trail that is primarily on land owned or operated by private, state, and Forest Service entities into a 2,200-mile Park-Service barrier separating critical natural resources from consumers along the East Coast, given that the federal government disclaims the authority to grant rights-of-way for pipelines through National Park System land without specific Congressional authorization. Accordingly, the decision imperils not just the billions of dollars invested in this pipeline, but future projects that will cross under the Trail, the 50-some pipelines that *already* cross under the Trail that require ongoing regulatory approvals from other state and federal

agencies, and potentially other projects (including electrical transmission lines, telecommunications sites, municipal water facilities, roads, and grazing areas) that cross national trails administered by the National Park Service.

In short, the decision below is both profoundly wrong and profoundly important. It misreads federal statutes that make clear that the designation of a trail does not transfer authority over the land being crossed. It will chill investment, harm millions of energy consumers, and unsettle long-held agency views. This decision plainly warrants this Court's plenary review.

#### **OPINIONS BELOW**

The Fourth Circuit's opinion is reported at 911 F.3d 150 and reproduced at App.1-66.

#### **JURISDICTION**

The Fourth Circuit issued its decision on December 13, 2018, and denied timely petitions for rehearing en banc filed by Petitioner and the federal respondents. App.67-68. On May 16, 2019, the Chief Justice extended the time for filing a petition to and including June 25, 2019. This Court has jurisdiction under 28 U.S.C. §1254(1).

#### **STATUTORY PROVISION INVOLVED**

The relevant provisions of the MLA, 30 U.S.C. §181 *et seq.*, and the National Trails System Act, 16 U.S.C. §1241 *et seq.*, are reproduced at App.237-301.

## STATEMENT OF THE CASE

### A. Statutory and Regulatory Background

In 1911, Congress enacted the Weeks Act, which authorized the Secretary of Agriculture to acquire certain lands to be “permanently reserved, held, and administered as national forest lands.” 16 U.S.C. §521; 36 Stat. 963 (1911). Pursuant to that authority, the Secretary acquired what initially was established as the Shenandoah National Forest, *see* 40 Stat. 1779 (1918), and later renamed the George Washington National Forest, *see* Exec. Order No. 5,867 (1932). Today, the George Washington National Forest spans roughly one million acres of Virginia and West Virginia.

As part of the National Forest System, the George Washington National Forest is administered by the Forest Service. 16 U.S.C. §1609. Congress has charged the Forest Service with ensuring the orderly development and use of the natural resources that national forests contain. The Forest Service (through the Secretary of Agriculture) “is authorized and directed to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom.” *Id.* §529. That mandate stands in contrast to the charge of the Park Service with respect to lands in the National Park System. While the National Forest System and the National Park System were both established around the turn of the twentieth century, only land in the latter was set aside principally for conservation. Accordingly, the National Park Service is charged with “conserv[ing] the scenery, natural

and historic objects, and wild life” of national parks and “provid[ing] for the[ir] enjoyment ... in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.” 54 U.S.C. §100101.

In 1968, Congress enacted the National Trails System Act, an act designed “to promote the preservation of, public access to, travel within, and enjoyment and appreciation of the open-air, outdoor areas and historic resources of the Nation.” 16 U.S.C. §1241(a). The Trails Act contemplates a variety of different types of national trails, some established administratively, *id.* §1243, and others by Congress itself, *id.* §1244. Two trails were established contemporaneously with the Trails Act: the Appalachian National Scenic Trail and the Pacific Crest National Scenic Trail. *See id.*

National trails can (and do) traverse all manner of lands—lands separately owned and administered by the Forest Service, the Park Service, other federal agencies, states and even private parties. The Appalachian Trail is a case in point. The Trail, which was completed in 1937, is a 2,200-mile footpath stretching from Maine to Georgia. JA1778.<sup>1</sup> Along the way, it winds through 14 states and crosses hundreds of miles of private land; 60 state game lands, forests, or parks; one National Wildlife Refuge; six National Parks; and eight National Forests, including the George Washington National Forest. JA1778; *see also Nationwide Sys. of Trails:*

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<sup>1</sup> “JA” refers to the Corrected Deferred Joint Appendix filed with the Fourth Circuit.

*Hearing on S. 827 Before the Comm. on Interior and Insular Affairs*, 90th Cong. 67 (1967) (around 800 trail miles privately owned when trail was established). Since its inception, then, the Trail has encompassed land administered by a wide variety of federal, state, and private interests. JA3186.

Cognizant of that dynamic, Congress chose not to convert the land that national trails traverse into Forest System or Park System land, or to put national trails under the exclusive jurisdiction of any one agency. Instead, Congress decided to give either the Interior Secretary or the Agriculture Secretary, on a case-by-case basis, principal responsibility for administering each *trail*. The Secretary with that responsibility was then authorized to obtain “rights-of-way” for the portions of the trail “across Federal lands under the jurisdiction of another Federal agency,” pursuant to an agreement with that agency. 16 U.S.C. §1246(a)(2). But that right-of-way for the trail left the ownership of and jurisdiction over the underlying lands otherwise unaffected, and left administration of those lands to the agency that administered them before the trail designation. Accordingly, while Congress has identified which Secretary should administer each trail, the Trails Act expressly also provides: “Nothing contained in this chapter shall be deemed to transfer among Federal agencies any management responsibilities established under any other law for federally administered lands which are components of the National Trails System.” *Id.* §1246(a)(1)(A).

Underscoring the point, Congress ordered whichever Secretary it charged with administering

the trail to do so in cooperation and conjunction with any agencies that administer the lands that the trail traverses. For example, the Secretary must “establish an advisory council” that includes “the head of each Federal department ... administering lands through which the trail route passes.” *Id.* §1244(d). And the Secretary may not issue regulations governing the trail without the “concurrence of the heads of any other Federal agencies administering lands through which [the] trail passes.” *Id.* §1246(i). Congress has reinforced that cooperative approach when designating specific trails as well. For instance, the statutory provision establishing the Appalachian Trail provides that it “shall be administered primarily as a footpath by the Secretary of the Interior, in consultation with the Secretary of Agriculture.” *Id.* §1244(a)(1). The Trails Act thus preserves, rather than overrides, the division of land management that preceded it.

That approach stands in stark contrast to Congress’ approach in other statutes. Notably, on the same day that it enacted the Trails Act, Congress enacted the Wild and Scenic Rivers Act (“Rivers Act”), Pub. L. No. 90-542, §6, 82 Stat. 906, 912 (1968). Unlike the Trails Act, which makes clear that it was *not* effectuating any transfers of jurisdiction over underlying lands, the Rivers Act expressly provides that “[a]ny component of the national wild and scenic rivers system that is administered by the Secretary of the Interior through the National Park Service shall become a part of the national park system.” 16 U.S.C. §1281(c). The Rivers Act also provides a mechanism through which agencies with jurisdiction over federal land that is

designated part of the National Wild and Scenic Rivers System may transfer their jurisdiction to the Secretary of Agriculture, at which point the land will “become national forest land[].” *Id.* §1277(e). Congress was thus well aware of how to transfer jurisdiction over federal land: it chose to do so in the Rivers Act, but not in the contemporaneous enacted Trails Act.

Today, some national trails are administered by the Bureau of Land Management, some by the National Park Service, and some by the Forest Service. As these agencies have repeatedly made clear, including in the specific context of the Appalachian Trail, each agency’s administration of *a trail* does not override the administrative powers and responsibilities of other agencies over the land that the trail traverses.

For example, the Park Service, to which the Secretary of the Interior has designated his statutory responsibility to administer the Appalachian Trail, has repeatedly explained: “While responsibility for overall Trail administration lies with the National Park Service, land-managing agencies retain their authority on lands under their jurisdiction.” Nat’l Park Serv., Appalachian Trail Management Plan 12-13 (1981), Nat’l Park. Serv., Appalachian Trail Management Plan III-1 (2008); General Regulations for Areas Administered by the National Park Service, 48 Fed. Reg. 30,252-01, 30,253 (June 30, 1983); Director’s Order No. 45: National Trails System, 6-8 (2013); Dep’t of the Interior, 710 Department Manual 1.4(C)(4) (1977). The Forest Service likewise has confirmed that it retains its duty and power to

administer and manage the Forest System land over which the Trail passes. *See, e.g.*, Forest Service Manual 1531.32a, ¶9 (2004), *available at* <https://bit.ly/2xcwcr9>. Accordingly, while the Appalachian Trail passes through (among others) the George Washington National Forest, those parts of the forest that the trail traverses remain, as they have always been, “permanently reserved, held, and administered as national forest lands.” 16 U.S.C. §521.

This division of authority over the underlying lands traversed by the Trail has important implications for which agency, or whether any agency, may grant rights-of-way for pipelines to cross under the Trail. The MLA generally authorizes “the Secretary of the Interior or appropriate agency head” to grant “[r]ights-of-way through any Federal lands ... for pipeline purposes for the transportation of oil, natural gas, synthetic liquid or gaseous fuels, or any refined product produced therefrom.” 30 U.S.C. §185(a). Thus, as a general matter, federal agencies may grant rights-of-way for pipelines to cross the federal lands they administer. For example, the Forest Service generally may grant rights-of-way across national forest lands, and the Secretary of Interior may grant rights-of-way across BLM lands. There is, however, an exception for National Park System lands, as the MLA defines “Federal lands” as “all lands owned by the United States except lands in the National Park System, lands held in trust for an Indian or Indian tribe, and lands on the Outer Continental Shelf.” *Id.* §185(b). Congress can specifically authorize the National Park Service to grant rights-of-ways under Park

Service lands. It has done so, for example, with respect to the Blue Ridge Parkway, which is located on Park Service land and largely parallels the Appalachian Trail. 16 U.S.C. §460a-3; *see* S. Rep. No. 93-207 (1973).

Thus, under the MLA, the Forest Service generally has the authority to grant rights-of-way for pipelines over Forest Service land. And unless the designation of the Appalachian Trail converted Forest Service lands into Park System lands, the Forest Service retains that authority with respect to Forest Service lands traversed by the Trail. The Forest Service has long taken the position that it does indeed have that authority and has granted such a right-of-way here.

### **B. Factual Background**

In 2014, Atlantic proposed to build a 600-mile pipeline to carry natural gas from Harrison County, West Virginia to the eastern portions of Virginia and North Carolina. App.2-3. The pipeline, as designed, will be capable of transporting up to 1.5 billion cubic feet of natural gas per day and, according to Federal Energy Regulatory Commission (“FERC”), will develop “gas infrastructure that will serve to ensure future domestic energy supplies and enhance the pipeline grid by connecting sources of natural gas to markets.” JA690, 714. The pipeline’s planned route crosses five noncontiguous miles of the Monongahela National Forest and 16 noncontiguous miles of the George Washington National Forest. JA11, 3571. Within the George Washington National Forest, approximately 700 feet beneath the surface, the pipeline would cross a 0.1-mile segment of the Trail.

Consistent with the longstanding understanding and universal practice of the federal government, Atlantic sought rights-of-way from the Forest Service to cross portions of the Monongahela National Forest and the George Washington National Forest, including the 0.1-mile segment traversed by the Trail in the latter. After carefully considering all relevant factors, and participating as a cooperating agency in an environmental impact statement prepared by the FERC pursuant to the National Environmental Policy Act (“NEPA”), 42 U.S.C. §4321 *et seq.*, the Forest Service issued Atlantic a special use permit granting the requested rights-of-way. App.13; JA9, 14-15, 3570.

Needless to say, the granting of a right-of-way over any federal land is just one of literally dozens of regulatory approvals necessary to authorize the massive undertaking involved in the construction and operation of a significant pipeline. All told, Atlantic and its affiliates obtained 33 separate regulatory approvals from more than a dozen federal and state agencies, as well as numerous local approvals.

### **C. Proceedings Below**

Throughout its efforts to secure the necessary approvals to build the pipeline, Atlantic has faced opposition and litigation by environment groups at every turn. *See, e.g., Sierra Club v. U.S. Dept. of the Interior*, 899 F.3d 260 (4th Cir. 2018). This approval proved no exception. Almost as soon as the Forest Service granted Atlantic the rights-of-way, a contingent of environmental groups (“respondents”)

petitioned the Fourth Circuit to vacate the agency's decision.

Respondents claimed that the Forest Service's decision-making process was deficient in numerous respects under NEPA, the National Forest Management Act ("NFMA"), 16 U.S.C. §1604, and the Administrative Procedure Act ("APA"). Not content with raising procedural roadblocks, respondents also asserted a novel *substantive* barrier to the pipeline: In their view, the MLA prohibits *any* agency from granting a right-of-way across the Appalachian Trail because the entirety of the Trail—including those parts that cross national forests—is actually part of the National Park System.

The Fourth Circuit granted the petition in whole and faulted the agency in multiple respects. The court variously criticized the Forest Service for a supposed change of "tenor" during its administrative review, and for modifying its views about how much information it would need to reach a decision. App.11. For example, the court objected that the Forest Service initially asked Atlantic to present ten studies about landslide risks, but ultimately approved the pipeline after reviewing two of these studies (though still requiring review and approval of the other eight as a precondition to construction). App.46-49. The court similarly faulted the agency for modifying its views on how much pre-decisional information it would need to assess erosion and water degradation risks. App.49-57. Notably, the court did not hold that the Forest Service's initial demands were statutorily *mandated*; it merely faulted the agency for inadequately explaining its

“shift” in position during the approval process. In a rhetorical flourish, the court ultimately accused the Forest Service of having “abdicated its responsibility” to “speak for the trees, for the trees have no tongues.” App.66 (quoting Dr. Seuss, *The Lorax* (1971)).

Like respondents, the court was not content to identify perceived procedural faults that could be fixed in further agency proceedings. It went on to impose the substantive barrier that respondents sought. According to the Fourth Circuit, by giving the Secretary of the Interior authority to administer the Appalachian Trail, the Trails Act converted all of the Forest System lands underlying the Trail into National Park System lands across which an agency may not grant a right-of-way under the MLA. App.57-61. In reaching that conclusion, the court not only effected a massive unauthorized land transfer from the Forest Service to the Park Service—over the express objections of both agencies—but also imperiled the Eastern Seaboard’s ability to access inland oil and gas sources.

The decision below does not stand alone, but is part of a pattern of Fourth Circuit decisions frustrating this pipeline and others like it. As noted, this pipeline required a host of federal approvals, and environmental groups have brought successful petitions challenging many of those approvals before this same panel. For example, last year, the same panel ruled against the pipeline on multiple occasions. *See Sierra Club*, 899 F.3d 260. The first deemed the U.S. Fish and Wildlife Service’s issuance of an Incidental Take Statement to be arbitrary and

capricious. *See id.* at 266. Even after the agency addressed the perceived deficiencies, the Fourth Circuit stayed the agency's action without explanation. *See* Order Granting Mot. for Stay, *Defenders of Wildlife v. U.S. Dept. of the Int.*, No. 18-2090 (4th Cir. Dec. 7, 2018). A second ruling found the Park Service's grant of a right-of-way underneath the Blue Ridge Parkway to be arbitrary and capricious. Although the Blue Ridge Parkway Organic Act grants the Park Service the power to grant rights-of-way to cross the Parkway, 16 U.S.C. §460a-3, the panel nonetheless faulted the Park Service for insufficiently "explain[ing] how the pipeline crossing is not inconsistent with the purposes of the Parkway and the overall National Park System." *Sierra Club*, 899 F.3d at 266. As a result, the court vacated the decisions of both agencies. *See id.* at 295.<sup>2</sup>

### **REASONS FOR GRANTING THE PETITION**

The decision below gets an exceptionally important question exceptionally wrong. According to the Fourth Circuit, the entire Appalachian Trail is land in the National Park System and thus no agency may authorize a pipeline to cross it under the MLA. Never mind that neither federal agency involved has ever taken that view, as evidenced by the approximately 56 pipelines that currently cross the Trail at various points. Never mind that the decision

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<sup>2</sup> The pending Mountain Valley Pipeline project has suffered a similar fate. *See Sierra Club, Inc. v. U.S. Forest Serv.*, 897 F.3d 582, 595-96 (4th Cir. 2018), *reh'g granted in part*, 739 Fed. Appx. 185 (4th Cir. 2018). *Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635, 639 (4th Cir. 2018).

below would convert the Trail, which primarily traverses private, state, and federal land not managed by the National Park Service, into a barrier separating natural resources west of the Trail from population centers to the east. And never mind that the decision threatens to strand billions of dollars in investments made in good-faith reliance on dozens of regulatory approvals. None of that mattered to the Fourth Circuit, which rejected long settled agency interpretations of federal statutes to erect the latest and greatest of judicial obstacles to a project that has been approved—and now repeatedly so—by more than a dozen expert agencies. That decision should not stand as the last word on this critically important issue.

The MLA allows federal agencies to grant pipeline rights-of-way to cross any federal lands except (as relevant here) “lands in the National Park System.” 30 U.S.C. §185(b)(1). Neither the Trails Act nor any other statute declares the entirety of the Appalachian Trail to be National Park System land. And for good reason, as the Appalachian Trail (like many national trails) is not composed exclusively of federal land, let alone Park System land. The Trail traverses hundreds of miles of land belonging to private parties and public agencies, both state and federal. Accordingly, while the Trails Act makes the Interior Secretary responsible for *administering* the footpath, it does not transfer authority or ownership of the lands that the Trail traverses. Instead, it sensibly preserves the authority of other state and federal agencies over the land that the Trail traverses. Indeed, the Trails Act preserves the role of other federal agencies in no uncertain terms,

emphatically providing: “Nothing contained in this chapter shall be deemed to transfer among Federal agencies any management responsibilities established under any other law for federally administered lands which are components of the National Trails System.” 16 U.S.C. §1246(a)(1)(A).

The Fourth Circuit nonetheless treated the National Park Service’s responsibility to administer the footpath as the equivalent of deeming the entire Trail “lands in the National Park System,” with the consequence that the Forest Service has lost its long-standing authority to grant rights-of-way over Forest Service land traversed by the Trail. That holding not only flies in the face of the Trails Act and long-held agency understandings, but finds no support in the Park Service Act, 54 U.S.C. §100101 *et seq.*, which respects and preserves the distinction between Park System land and national trails.

The decision below is not just profoundly wrong, but profoundly consequential. In this case alone, it has stymied a pipeline that is projected to generate billions of dollars in economic activity, hundreds of millions in consumer savings, and millions in tax revenue. And that is just one pipeline; left standing, the decision below will impede pipelines from reaching eastern Virginia and North Carolina, and undoubtedly will chill investments in pipelines that cross any national trail that is nominally managed by the National Park Service. The decision also casts doubt on the future of the 50-some pipelines that already cross the Appalachian Trail—not to mention multiple other rights-of-way that the Forest Service has granted on Forest Service property traversed by

the Trail. In short, the stakes could hardly be higher. This exceptionally important question readily warrants this Court's review.

**I. The Decision Below Erroneously Converts The Appalachian Trail Into A 2,200-Mile Barrier To Critical Infrastructure.**

The Appalachian Trail has never been understood to constitute an impediment to pipeline construction. Indeed, approximately 56 pipelines currently cross the Trail at various points. The Fourth Circuit's radical transformation of the Trail into a barrier separating energy sources from energy consumers is at fundamental odds with the very statutes that the court purported to interpret.

**A. The Trails Act Expressly Preserves the Authority of Other Federal Agencies Over Lands that a National Trail Traverses.**

1. The MLA authorizes "the Secretary of the Interior or appropriate agency head" to grant "[r]ights-of-way through any Federal lands ... for pipeline purposes for the transportation of oil, natural gas, synthetic liquid or gaseous fuels, or any refined product produced therefrom." 30 U.S.C. §185(a). The "appropriate agency head" is the head of whatever agency has jurisdiction over the federal lands at issue. *Id.* §185(b). Here, unless the Trails Act effectuated a heretofore-unnoticed massive land transfer, that agency is the Forest Service. The 0.1-mile segment of the Appalachian Trail at issue traverses part of the George Washington National Forest, all of which Congress declared more than a century ago in the Weeks Act "shall be permanently reserved, held, and administered as national forest

lands.” 16 U.S.C. §521. As the agency with jurisdiction over federal lands in national forests, the head of the Forest Service is clearly the “appropriate agency head” to grant a right-of-way over national forest land.

The fact that the Appalachian Trail is part of a national trail administered by the Park Service does not change that analysis. Indeed, far from repealing the Weeks Act and converting “national forest lands” into National Park System lands, the Trails Act goes out of its way to make clear that it does *not* effect transfers of lands or jurisdiction over them. The Act provides that the “Appalachian Trail shall be administered primarily as a footpath by the Secretary of the Interior, in consultation with the Secretary of Agriculture,” *id.* §1244(a)(1), and empowers the Secretary of the Interior to obtain “rights-of-way” for the Trail over “Federal lands under the jurisdiction of another Federal agenc[ies],” *id.* §1246(a)(2), without divesting those other agencies of jurisdiction. Indeed, the Act expressly provides: “Nothing contained in this chapter shall be deemed to transfer among Federal agencies any management responsibilities established under any other law for federally administered lands which are components of the National Trails System.” *Id.* §1246(a)(1)(A). Accordingly, the Forest Service’s authority to grant pipeline rights-of-way across Forest Service lands under the MLA is undisturbed either by the Trails Act generally or by the contemporaneous designation of the Appalachian Trail in particular.

That conclusion is reinforced by the many provisions of the Trails Act confirming that it preserves the powers of federal agencies that administer lands traversed by a trail or footpath. For instance, as noted, the Act does not transfer plenary jurisdiction over lands traversed by a trail, but envisions that the agency with administrative authority over a trail will obtain a right-of-way over “Federal lands under the jurisdiction of other Federal agencies,” and to endeavor to obtain comparable rights-of-way over state and private lands. Moreover, the Secretary charged with administering the trail must “establish an advisory council” that includes “the head of each Federal department ... administering lands through which the trail route passes.” *Id.* §1244(d). And that Secretary may not issue regulations governing the trail without the “concurrence of the heads of any other Federal agencies administering lands through which [the] trail passes.” *Id.* §1246(i); *see also, e.g., id.* §1244(b) (Secretary shall study “feasibility and desirability of designating other trails ... in consultation with the heads of other Federal agencies administering lands through which such additional proposed trails would pass”); *id.* §1244(e) (Secretary “shall, after full consultation with affected Federal land managing agencies ... submit ... a comprehensive plan for the acquisition, management, development, and use of the trail”).

These provisions would make little sense if the designation of administration of the footpath definitively transferred the federal lands underlying that trail to the Park System. Instead, they reinforce the understanding—explicitly confirmed by

Congress—that the Trails Act transfers only administrative authority over the trail (and only to a limited degree that envisions continuing cooperation), with jurisdiction and ownership over the underlying lands remaining with “other Federal agencies.” *Id.* §1246(i). It does not “transfer among Federal agencies any management responsibilities established under any other law for federally administered lands which are components of the National Trails System.” *Id.* §1246(a)(1)(A).

That conscious decision stands in stark contrast to the approach Congress took in other statutes. Most notably, the Rivers Act—enacted *the same day* as the Trails Act—does provide for the transfer of all jurisdiction over federal lands traversed by a designated river, but it does not make that transfer automatic, and it provides for that transfer explicitly. Specifically, the Rivers Act authorizes “[t]he head of any Federal department or agency having administrative jurisdiction over any lands” within the National Wild and Scenic Rivers System “to transfer to the appropriate secretary jurisdiction over such lands.” *Id.* §1277(e). The statute requires that lands transferred to the Secretary of Agriculture pursuant to this provision “shall upon such acquisition or transfer become national forest lands.” *Id.* And it makes explicit that “[a]ny component of the national wild and scenic rivers system that is administered by the Secretary of the Interior through the National Park Service shall become a part of the national park system.” *Id.* §1281(c).

Congress has enacted numerous other statutes, both before and after the Trails Act, that explicitly

transfer land to a federal agency or give agencies the power to do so. *See, e.g.*, Pub. L. No. 89-446, 80 Stat. 199 (1966) (authorizing “the Secretary of the Interior to transfer certain lands in the State of Colorado to the Department of Agriculture for recreation development, and for other purposes”); Pub. L. No. 89-72, §7, 79 Stat. 213, 217 (1965) (agency heads “authorized to transfer any such lands to the jurisdiction of the Secretary of the Interior”); Pub. L. No. 88-415, 78 Stat. 388 (1964) (authorizing “the Secretary of the Interior to accept the transfer of certain national forest lands in Cocke County, Tennessee, for purposes of the Foothills Parkway, and for other purposes”).

As these and other statutes confirm, the notion that Congress intended something comparable to happen automatically in the Trails Act in the absence of any express language and despite an express saving clause to the contrary blinks reality. When Congress wants to transfer jurisdiction over *lands* to the agency charged with administering something that traverses them, Congress says exactly that. Not only did Congress decline to say that in the Trails Act; the Trails Act says exactly the opposite.

In sum, Congress charged the Secretary of the Interior to administer the trail “primarily as a footpath.” 16 U.S.C §1244(a)(1). That responsibility did not supplant the Secretary of Agriculture’s continuing jurisdiction over the Forest Service lands that are crossed by the footpath.

2. The legislative history of the Trails Act confirms the import of its text. The Congress that enacted the Trails Act (and simultaneously

designated the Appalachian Trail a national trail and enacted the very different language of the Rivers Act) was specifically assured that granting one Secretary responsibility to administer a trail as a footpath would not displace the authority of other federal agencies to “administer” lands over which the trail traversed: “When any portion of [a trail] is within an area administered by another Federal agency, ... such portion will be administered as the appropriate Secretary and the head of that agency determine.” H.R. Rep. No. 90-1631, at 16 (1968). The Trails Act committee reports likewise made clear that “[w]hen any portion” of a trail “is within an area administered by another federal agency ... such portion will be administered as the ... Secretary and the head of that agency determine.” *Id.*; S. Rep. No. 90-1233, at 15 (1968); *see also* H.R. Rep. No. 98-28, at 5 (1983); S. Rep. No. 98-1, at 6 (1983).

That expectation is evident from Congress’ actions in the immediate wake of the enactment of the Trails Act. For example, the week after it enacted the Trails Act and designated the Appalachian Trail a national trail, Congress directed that the famed Blue Ridge Parkway be extended. *See* Pub. L. No. 90-555, §1, 82 Stat. 967, 967 (1968), *codified at* 16 U.S.C. §460a-6. To accomplish this task, Congress authorized the Secretary of the Interior to “relocate and reconstruct portions of the Appalachian Trail, including trail shelters, that may be disturbed by the parkway extension ... on non-Federal lands ... and [] upon national forest lands with the approval of the Secretary of Agriculture.” 16 U.S.C. §460a-7(3). Clearly Congress understood that Forest Service lands traversed by the Trail

retained their character as “national forest lands.”  
*Id.*

Congress’ broader treatment of the Blue Ridge Parkway underscores the implausibility of the notion that Congress meant to foreclose pipeline rights-of-way under the Appalachian Trail. When it came to the Blue Ridge Parkway, Congress expressly said that the Parkway and the federal lands it traverses shall be administered and maintained as National Park System lands. *See* 16 U.S.C. §460a-2. That further confirms that Congress knows how to make clear its intention to treat a long stretch of federal lands as National Park System land. But equally important, Congress displayed its view that the 469-mile-long Parkway should not be a 469-mile-long barrier to rights-of-way, expressly granting the Park Service authority to grant rights-of-way that pass under the Parkway. *Id.* §460a-3.

Given that the Parkway and the Appalachian Trail parallel each other for the entirety of the Parkway’s length, it is inconceivable that Congress intended rights-of-way to be available to cross the former but not the latter. Indeed, given the proximity of the two, congressionally authorized rights-of-way for the Parkway would be practically worthless if the nearby Trail were a barrier. In the case of the ACP, the pipeline would cross under both the Parkway and the Trail in the same bore. The obvious answer is that Congress never intended the Trails Act to vitiate the Forest Service’s power to grant rights-of-way across those parts of national trails that are within national forests.

3. Consistent with the text, structure, and history of the statute, both the Department of the Interior and the Department of Agriculture have consistently taken the position that the Trails Act does not deprive federal agencies of their preexisting jurisdiction over federal lands underlying national trails. Indeed, each department has long taken that position as to the Appalachian Trail itself.

The Forest Service Manual explains that “significant portions of the Appalachian National Scenic Trail traverse lands under the separate administrative jurisdictions of the National Park Service and the Forest Service, as well as privately owned lands within the exterior boundaries of units administered by those Services.” Forest Service Manual 1531.32a, at 9 (2004) (containing 1970 “Memorandum of Agreement Concerning Appalachian National Scenic Trail” with National Park Service). The Park Service likewise has stated time and again that “[w]hile responsibility for overall Trail administration lies with the National Park Service, land-managing agencies retain their authority on lands under their jurisdiction.” Nat’l Park Serv., Appalachian Trail Management Plan 12-13; *see also, e.g.*, Nat’l Park. Serv., Appalachian Trail Management Plan III-1 (“[T]he Appalachian Trail ... crosses an extensive land base administered by many other federal and state agencies” with each entity managing its segment “in accordance with its own administrative jurisdictional responsibilities.”).

Indeed, the Park Service has stated unambiguously that the Appalachian Trail is “multi-jurisdictional,” with only select “segments of the trail

under the primary land management responsibility of the National Park Service.” 48 Fed. Reg. at 30,253; *see* Director’s Order No. 45, at 6-8; 710 Department Manual 1.4(C)(4). And the Forest Service has exercised its jurisdiction over parts of the Trail that pass through national forests to grant rights-of-ways pursuant to the MLA. As those and other agency statements and actions confirm, Congress enacted the Trails Act to encourage the creation of national trails, not to reallocate primary authority over long-established federal lands—let alone to convert lands “permanently reserved, held, and administered as national forest lands,” 16 U.S.C. §521, into National Park System lands.

**B. The Decision Below Misconstrues Both of the Statutes on Which the Court Relied And Is Deeply Flawed.**

Notwithstanding the wealth of textual, structural, and historical evidence supporting the agencies’ longstanding understanding, the Fourth Circuit adopted the novel conclusion that the Trails Act ousts the Forest Service (and all other federal agencies) of the power to grant pipeline rights-of-way under the Trail. That conclusion cannot be reconciled with the text, structure, or history of the relevant statutes.

1. As noted, the MLA defines the “Federal lands” as to which an agency may grant a right-of-way as “all lands owned by the United States except lands in the National Park System....” 30 U.S.C. §185(b)(1). Although the MLA does not define “lands in the National Park System,” the Park Service Act provides a definition of “the National Park System.”

Under that statute, “the National Park System” is defined as “the areas of land and water described in section 100501.” 54 U.S.C. §100102. Section 100501, in turn, states that “[t]he System shall include any area of land and water administered by the Secretary [of the Interior], acting through the Director, for park, monument, historic, parkway, recreational, or other purposes.” *Id.* §100501.

According to the Fourth Circuit, because the Park Service administers the Appalachian Trail as a park unit, the entire Trail constitutes Park Service land exempted from the MLA’s general authorization for federal agencies to grant rights-of-way. Indeed, the Fourth Circuit viewed the Trail’s status as National Park System land as largely uncontested, pointing to a portion of FERC’s final Environmental Impact Statement (“EIS”) authorizing the pipeline that noted that the Park Service had informed FERC that “the entire [ANST] corridor [is] part of the ANST park unit’ and a ‘unit’ of the National Park System.” App.57. But the Fourth Circuit conflated the question here: whether the footpath is a “park unit” with the relevant question of whether Forest Service lands underlying that footpath were transformed into National Park System lands. In the process, the Fourth Circuit ignored the position of the Interior Department, the Agriculture Department, and the rest of the federal government that the Trails Act does not convert Forest Service land underlying the Trail into “lands in the National Park System” for purposes of the MLA.

The Fourth Circuit’s reasoning fails, first and foremost, because it is flatly inconsistent with the

Trails Act. As explained, *see supra* Part I.A, the Trails Act draws a clear distinction between administration of *a trail* and administration of the lands that a trail traverses, and it expressly declares that it “shall [not] be deemed to transfer among Federal agencies any management responsibilities established under any other law for federally administered lands which are components of the National Trails System.” 16 U.S.C. §1246(a)(1)(A). The Trails Act likewise authorizes the agency administering the trail to obtain “rights-of-way across Federal lands under the jurisdiction of another Federal agency” without obtaining jurisdiction or ownership of the underlying lands. *Id.* §1246(a)(2). Thus, no matter how the Park Service classifies the Trail for administrative purposes, the Forest Service lands traversed by the Trail are not transmogrified into “lands in the National Park System,” as the Trails Act makes clear. Given the express language of the Trails Act, that should be the end of the matter.

But a closer reading of the Park Service Act confirms the Fourth Circuit’s error. In keeping with the Trails Act (and other federal statutes), the Park Service Act makes clear that not everything that the Park Service plays some role in administering constitutes “lands in the National Park System.” For example, the Park Service Act grants the Park Service certain limited duties with respect to “related areas.” 54 U.S.C. §100801(3). That the Park Service may designate those areas “units of the National Park System” for purposes of accomplishing those objectives does not convert them into National Park System lands.

The Park Service Act also makes clear that land can be treated as part of a park “System unit” without becoming lands of the National Park System. For example, Congress has authorized the Secretary of the Interior “to consolidate Federal land ownership within the existing boundaries of any System unit,” *id.* §101102(a)(1), and to “accept title to any non-Federal property or interest in property within a System unit or related area,” *id.* §102901(b)(1); *see also id.* §200306(a)(2)(A) (authorizing “the acquisition of land, water, or an interest in land or water within the exterior boundary of ... a System unit”). These authorizations would be nonsensical if “System units” were coterminous with “lands in the National Park System.” Thus, the Fourth Circuit’s effort to convert the entire Appalachian Trail into “lands in the National Park System” is no more consistent with the Park Service Act than with the Trails Act or the MLA.

2. The Fourth Circuit alternatively suggested that the head of the Forest Service is not the “appropriate agency head” to grant a right-of-way because the Trails “Act is clear that the Secretary of the Interior *administers* the entire [Appalachian Trail], while ‘other affected State and Federal agencies,’ like the Forest Service, *manage* trail components under their jurisdiction.” App.60. The court’s assertion is doubly incorrect. First, the relevant statute is the MLA, which does not define the appropriate “agency head” as the head of the agency that “administers” a federal system within which federal lands fall. The MLA defines that “agency head” as “the head of any Federal department or independent Federal office or agency,

other than the Secretary of the Interior, *which has jurisdiction over Federal lands.*” 30 U.S.C. §185(b)(3) (emphasis added). The question under the MLA is thus not which agency “administers” *the trail* (which traverses all manner of lands, including non-federal lands), but which agency has jurisdiction over the 21-mile stretch of “Federal lands” through which the pipeline would cross (including 0.1-mile beneath the Appalachian Trail). And that agency is the Forest Service, not the Park Service.

The Fourth Circuit compounded its error by claiming that the Trails Act “clearly distinguishes between trail administration and management,” and reserves all “*administration* responsibilities” to the Secretary tasked with “administering” the trail itself. App.60. In fact, the Trails Act recognizes that while one agency will be responsible for the “overall administration” of *the trail*, 16 U.S.C. §1246(a)(1)(A), other agencies may *administer* (not just “manage”) lands within it.

For example, as noted, the Secretary charged with administering the trail may pass regulations governing the trail only with the “concurrence of the heads of any other Federal agencies *administering* lands through which” it passes. *Id.* §1246(i) (emphasis added). And the Trails Act requires that Secretary to “establish an advisory council” that includes “the head of each Federal department ... *administering* lands through which the trail route passes.” *Id.* §1244(d). It also makes certain resources available to “[t]he Secretary responsible for the *administration of any segment* of any component of the National Trails System.” *Id.* §1246(i)

(emphasis added). On top of all that, the Trails Act repeatedly uses the phrase “federally *administered* lands” to refer to parts of a national trail that are within the jurisdiction of another agency—a label that would be nonsensical if, as the Fourth Circuit claimed, the act reserves all “*administration* responsibilities” over lands that a national trail traverses to the Secretary tasked with “administering” the trail itself, App.54. *See, e.g.*, 16 U.S.C. §1243(b); *id.* §1244(a)(3)-(8), (10)-(11), (13)-(19), (21)(D); *id.* §1246(a)(1)(A), (e), (h)(1), (i).

Finally, the Fourth Circuit’s error is underscored by its implications for trails administered by the Secretary of Agriculture that traverse actual National Park Service lands. If what matters is not which agency has ownership and jurisdiction over the underlying lands, but which agency has administrative oversight over the trail, then it would follow that the Secretary of Agriculture could grant pipeline rights-of-way across National Park System lands, if those lands are traversed by trails administered by the Agriculture Secretary. That is not a hypothetical scenario. At the same time Congress designated the Interior Secretary as having primary authority over the Appalachian Trail, it vested the Secretary of Agriculture with primary authority over the Pacific Crest National Scenic Trail, which traverses several national parks, including Yosemite and Sequoia. It makes little sense to think that Congress intended to vest jurisdiction over the lands in those parks, as opposed to administrative jurisdiction over the trail, in the Secretary of Agriculture or to authorize pipeline rights-of-way on parkland. But it makes no more

sense to think Congress intended the converse with respect to Forest Service land traversed by the Appalachian Trail. The far sounder conclusion is that in both instances, the Trails Act left ownership and jurisdiction over the underlying lands unaffected.

\* \* \*

The 0.1-mile segment of the Appalachian Trail under which Atlantic's pipeline will run is and always has been Forest System land. That makes it "Federal lands" within the meaning of the MLA, and it makes the Forest Service the "appropriate agency head" to grant Atlantic a right-of-way. 30 U.S.C. §185(a), (b)(3). To say otherwise—to conclude that the Trails Act effected a massive sub silentio land transfer from the Forest Service, other federal agencies, states and even private landowners to the Park Service—betrays both the various statutes governing the Trail and decades of consistent agency understanding.

## **II. The Decision Below Will Have Dramatic Consequences Far Beyond This Case.**

The Atlantic Coast Pipeline is important to the energy needs of millions of Americans. That the Fourth Circuit's decision imperils the billions of dollars already invested in this pipeline made in good-faith reliance on dozens of regulatory approvals is reason enough for this Court's review. But the impact of the decision below goes much further than one pipeline. The court has effectively erected a 2,200-mile barrier severing the Eastern Seaboard from oil and gas sources west of the Appalachian Trail.

At the outset, the decision below immediately impedes the progress of multiple proposed energy projects. The Appalachian Trail runs the length of the Fourth Circuit and beyond. Most of the land it traverses are now federal lands, and approximately half of those federal lands falls within the Forest System. Accordingly, the decision effectively limits any pipeline from bringing natural gas to eastern Virginia or North Carolina.

The economic impact that will result just from that barrier is massive. The Atlantic Coast Pipeline alone is estimated to generate some \$2.7 billion in economic activity, and roughly \$4.2 million in tax revenue annually during construction. *See* ACP, “Powering the Future, Driving Change Through Clean Energy,” 2, 8, *available at* <https://atlanticcoastpipeline.com/resources/docs/resources/acp-factbookversion2.pdf>. The project will support 17,240 jobs during its construction and 2,200 jobs once in operation. *Id.* Perhaps most important, the pipeline will provide substantial economic benefits to consumers. Atlantic estimates that the pipeline will bring consumers some \$377 million in annual savings. *Id.* at 19.

And that is just this pipeline. Left standing, the court’s decision may well prevent construction of the Mountain Valley Pipeline, which also would cross National Forest System land traversed by the Appalachian Trail within the Fourth Circuit. *See* 81 Fed. Reg. 71,041 (Oct. 14, 2016). And the decision has almost surely nipped other yet-to-be-proposed projects in the bud by introducing significant and unnecessary regulatory uncertainty.

These and other pipelines are essential to everyday Americans. As the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) has explained, pipelines

enable the safe movement of extraordinary quantities of energy products to industry and consumers, literally fueling our economy and way of life. The arteries of the Nation’s energy infrastructure, as well as one of the safest and least costly ways to transport energy products, our oil and gas pipelines provide the resources needed for national defense, heat and cool our homes, generate power for business and fuel an unparalleled transportation system.

PHMSA, “General Pipeline FAQs,” available at <https://www.phmsa.dot.gov/faqs/general-pipeline-faqs>.

Natural gas pipelines like the Atlantic Coast Pipeline also do much for the environment. According to the PHMSA, even a “modest pipeline” eliminates the need for 750 tanker trucks per day, or 225 28,000-gallon railroad tank cars. *Id.* And, when combusted, natural gas produces half the emissions of coal. *See* “Powering the Future, Driving Change Through Clean Energy,” at 2. It is no wonder, then, that in recent years the federal government has taken steps that encourage the construction of pipelines. In 2015, for example, Congress passed the Fixing America’s Surface Transportation Act, Pub. L. No. 114-94, 129 Stat. 1312, which streamlines the permitting process for significant infrastructure

projects. Pipelines are included as a “covered project” under the statute. 42 U.S.C. §4370m(6)(A).

Now, however, any company considering investing in an infrastructure project designed to transport energy from the resource-rich areas west of the Trail to Americans residing on the East Coast will have to reconsider. Indeed, even outside the Fourth Circuit, investors undoubtedly will fear that the (il)logic of the decision below will spread, chilling critical future investment along the Eastern Seaboard and beyond.

The Fourth Circuit’s decision casts significant doubt on the approximately 56 pipelines that currently cross the Appalachian Trail. Those pipelines were authorized on the understanding that neither the Trails Act nor the MLA posed a barrier to approval. And federal agency approvals for such crossings are subject to renewal. *See, e.g., Sierra Club v. U.S. Forest Serv.*, 828 F.3d 402, 404-05 (6th Cir. 2016); App.67-68. If the MLA truly does forbid the Forest Service from granting rights-of-way across the Trail, then the Forest Service likely lacks the authority to renew those permits.

And the consequences of the decision do not necessarily stop with pipelines. In the Fourth Circuit alone, the Forest Service has granted dozens of permits for electrical transmission lines, telecommunications sites, municipal water facilities, roads, and grazing areas on Forest System lands traversed by the Appalachian Trail. The decision below suggests all those rights-of-way were granted by the wrong federal agency. Moreover, in declaring the entirety of the Appalachian Trail “lands in the

National Park System,” the Fourth Circuit gave absolutely no thought to the consequences for private landowners through whose land the Trail runs. If those landowners have lost the potentially lucrative right to grant rights-of-way under their land, then the Trails Act worked a massive sub silentio taking.

Finally, review is warranted to underscore the proper role of the appellate courts in considering challenges to a pipeline approved by more than a dozen expert agencies. As noted, the decision here does not stand alone, but forms part of a pattern of decisions by the Fourth Circuit (with identical or largely overlapping panels) finding fault after fault in the arduous approval process for pipelines. Those decisions seized on novel procedural impediments with little grounding in the APA. For example, in addition to its novel Trail holding, the decision below faulted the Forest Service for changing its position during the course of the approval process about the number of supporting designs it would first review, even though the Fourth Circuit could not fault the agency for demanding too few studies. *But see Natl. Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658-59 (2007) (“The federal courts ordinarily are empowered to review only an agency’s *final* action, see 5 U.S.C. §704, and the fact that a preliminary determination by a local agency representative is later overruled at a higher level within the agency does not render the decisionmaking process arbitrary and capricious.”).

What separates the question presented here is that it cannot be fixed by adding further details or explanations on remand. And that makes this

Court's intervention imperative. Parties that invest hundreds of millions in securing a host of regulatory approvals should not face countless delays and the risk of investments stranded by the need for a second round of judicial approvals that then produce late-breaking substantive barriers to boot. Necessary infrastructure investments will not be forthcoming if APA review devolves into a war of attrition.

In sum, the Fourth Circuit's decision will have substantial and immediate effects on the economy and the energy supply for millions of Americans residing on the East Coast. In the long-term, the decision will stifle infrastructure development and create regulatory uncertainty along the Appalachian Trail and other national trails for decades to come. That result is contrary to applicable law, and more than suffices to warrant this Court's review.

### **CONCLUSION**

For the foregoing reasons, this Court should grant the petition for certiorari.

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Respectfully submitted,

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June 25, 2019

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*Appendix A*

**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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No. 18-1144

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COWPASTURE RIVER PRESERVATION ASSOCIATION;  
HIGHLANDERS FOR RESPONSIBLE DEVELOPMENT;  
SHENANDOAH VALLEY BATTLEFIELDS FOUNDATION;  
SHENANDOAH VALLEY NETWORK; SIERRA CLUB;  
VIRGINIA WILDERNESS COMMITTEE;  
WILD VIRGINIA, INC.,

*Petitioners,*

v.

FOREST SERVICE, an agency of the U.S. Department of  
the Agriculture; KATHLEEN ATKINSON, in her official  
capacity as Regional Forester of the Eastern Region;  
KEN ARNEY, in his official capacity as Acting Regional  
Forester of the Southern Region,

*Respondents,*

ATLANTIC COAST PIPELINE LLC,

*Intervenor.*

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On Petition for Review of a Decision of the  
United States Forest Service

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Argued: Sept. 28, 2018

Decided: Dec. 13, 2018

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THACKER, Circuit Judge:

In this case, we address whether the United States Forest Service (“Forest Service”) complied with the National Forest Management Act (“NFMA”), the National Environmental Policy Act (“NEPA”), and the Mineral Leasing Act (“MLA”) in issuing a Special Use Permit (“SUP”) and Record of Decision (“ROD”) authorizing Atlantic Coast Pipeline, LLC (“Atlantic”), the project developer, to construct the Atlantic Coast Pipeline (“ACP” or “the pipeline”) through parts of the George Washington and Monongahela National Forests (“GWNF” and “MNF,” respectively) and granting a right of way across the Appalachian National Scenic Trail (“ANST”).

For the reasons more fully explained below, we conclude that the Forest Service’s decisions violate the NFMA and NEPA, and that the Forest Service lacked statutory authority pursuant to the MLA to grant a pipeline right of way across the ANST. Accordingly, we grant the petition for review of the Forest Service’s SUP and ROD, vacate those decisions, and remand to the Forest Service for further proceedings consistent with this opinion.

**I.**

**A.**

*Background*

The ACP is a proposed 604.5 mile, 42-inch diameter natural gas pipeline that would stretch from West Virginia to North Carolina. The ACP route approved by the Federal Energy Regulatory Commission (“FERC”)—and for which the Forest Service issued the SUP, ROD, and right of way

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challenged in this case—crosses 21 miles of national forest land (about 16 miles in the GWNF and five miles in the MNF) and crosses the ANST in the GWNF. Construction would involve clearing trees and other vegetation from a 125-foot right of way (reduced to 75 feet in wetlands) through the national forests, digging a trench to bury the pipeline, and blasting and flattening ridgelines in mountainous terrains. Following construction, the project requires maintaining a 50-foot right of way (reduced to 30 feet in wetlands) through the GWNF and MNF for the life of the pipeline.

Pursuant to NEPA, when a federal agency proposes to take a “major Federal action[] significantly affecting the quality of the human environment,” the agency must prepare a detailed environmental impact statement (“EIS”) describing the likely environmental effects, “adverse environmental effects which cannot be avoided,” and potential alternatives to the proposal. 42 U.S.C. § 4332(C). On April 27, 2015, the Forest Service provided scoping comments on FERC’s Notice of Intent to prepare an EIS for the ACP project. The scoping comments stated, among other concerns, that the EIS must analyze alternative routes that do not cross national forest land, and that the EIS must address the Forest Service’s policy that restricts special uses on national forest lands to those that “cannot reasonably be accommodated on non-National Forest System lands.” J.A. 3593;<sup>1</sup> *see also* Forest Serv. Manual, Addendum to Pet’rs’ Br. 65-66. The Forest Service’s comments further identified concerns about

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<sup>1</sup> Citations to the “J.A.” refer to the Corrected Deferred Joint Appendix filed by the parties in this appeal.

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landslides, slope failures, sedimentation, and impacts to groundwater, soils, and threatened and endangered species that it believed would result from the ACP project.

On September 18, 2015, Atlantic filed its formal application with FERC to construct, own, and operate the pipeline. On November 12, 2015, Atlantic applied for the SUP from the Forest Service to construct and operate the pipeline across the MNF and GWNF. This application was amended in June 2016.

### **B.**

#### *Review and Comment*

As FERC prepared the EIS, the Forest Service reviewed and commented on draft environmental resource reports, construction designs, biologic evaluations, and the first draft of Atlantic's Construction, Operation, and Maintenance ("COM") Plan filed with FERC. Additionally, in a letter to Atlantic dated October 24, 2016, the Forest Service requested ten site-specific stabilization designs for selected areas of challenging terrain to demonstrate the effectiveness of Atlantic's proposed steep slope stability program, which Atlantic called the "Best in Class" ("BIC") Steep Slopes Program. As the Forest Service explained:

Both the [GWNF and MNF] contain Forest Plan standards that limit activities in areas that are at high risk for slope and soil instability. To facilitate the acceptance of ACP's [SUP] application for further processing, the Forests need to be able to determine that the project is consistent or can

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be made consistent with this Forest Plan direction.

J.A. 3379. The letter further noted that the ten selected sites were “merely representative sites that have been selected to demonstrate whether stability can be maintained for the purpose of making a preliminary determination of Forest Plan consistency. Should the ACP Project be permitted, multiple additional high hazard areas will need to be addressed on a site-specific basis.” *Id.*

In a meeting between Atlantic and the Forest Service on November 21, 2016, Atlantic presented the first two of these site-specific stabilization designs (identified as MNF01 and GWNF02 in the October 24, 2016 letter). According to the meeting notes, the MNF Forest Supervisor noted:

[W]hile the BIC program [Atlantic] is proposing is laudable [the MNF Forest Supervisor] is skeptical the techniques will work; the Forest Service has seen slope failures on lesser slopes and would be able to provide examples. [Atlantic] needs to be able to demonstrate that the techniques will work in extreme conditions. . . . The [Forest Service] wants to know beforehand that these examples have a reasonable chance of working.

J.A. 3319. Additionally, the Forest Service observed that the MNF01 and GWNF02 “drawings are a step in the right direction but more detail is needed for site specific design, the Forest Service needs to see how this lays out on the land.” *Id.* at 3320.

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Thereafter, beginning in December 2016, Atlantic circulated a timeline of “FERC and Forest Service Reviews” to the Forest Service, which set the following deadlines for the agency’s decisions (as proposed by Atlantic): (1) FERC’s Draft Environmental Impact Statement (“DEIS”) to be issued in December 2016; (2) FERC’s Final Environmental Impact Statement (“FEIS”) to be issued in June 2017; (3) the Forest Service’s draft ROD to be issued also in June 2017; (4) a “Federal Agency Decision Deadline” of September 2017 (for issuance of the FERC Certificate of Convenience and Public Necessity and the Forest Service’s SUP and ROD); (5) Forest Plan amendments completed in October 2017; and (6) the pipeline in service by 2019. *See* J.A. 3252-53.

In line with Atlantic’s deadlines for the agencies’ decisions, FERC issued the DEIS on December 30, 2016. Regarding its analysis of alternative routes, the DEIS explicitly stated that the ACP was routed on national forest lands in order to avoid the need for congressional approval for the pipeline to cross the ANST:

*A significant factor in siting ACP was the location at which the pipeline would cross the ANST. In the general project area, the ANST is located on lands managed by either the [National Park Service (“NPS”)] or [the Forest Service]. The NPS has indicated that it does not have the authority to authorize a pipeline crossing of the ANST on its lands. Instead, legislation proposed by Congress and signed into law by the President would be necessary to allow the NPS the authority to*

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review, analyze, and approve a pipeline crossing of the ANST on its lands. *Because of this legislative process, Atlantic considered locations where the ANST was located on lands acquired and administered by the [Forest Service], which significantly constrained the pipeline route and severely limits opportunities for avoiding and/or minimizing the use of [National Forest System] lands.*

J.A. 3207-08 (emphasis supplied). Regarding the environmental impact on forest resources, the DEIS further stated:

[W]e acknowledge that a shorter pipeline route could conceptually have significantly greater qualitative impacts to sensitive resources than a longer route, which could make the longer route preferable. In this instance, we have not identified or received any information that suggests the shorter pipeline route through the National Forests has significantly greater impacts to sensitive resources than the alternative, *but acknowledge that ground resource surveys have not been conducted.*

*Id.* at 3208 (emphasis supplied).

On February 17, 2017, Atlantic and the Forest Service met again to discuss the ten requested site-specific stabilization designs. During this meeting, Atlantic informed the Forest Service that the two earlier site designs were for demonstration purposes, and the remaining eight sites were not currently being designed. The Forest Service stated that it was “not

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comfortable” with not seeing the remaining designs, and that it was the Forest Service’s understanding that specific designs for all ten sites were still needed. J.A. 2939. Significantly, the Forest Service stated, it “want[ed] to see actual information, including specs on the actual controls and protocol on how they will be installed, not conceptual drawings.” *Id.*

On April 6, 2017, the Forest Service provided comments on FERC’s DEIS. In multiple places, the Forest Service’s comments stated that FERC’s conclusions in the DEIS were premature given the incomplete information used to make them—this was particularly the case regarding the extent of impacts to national forest resources and the effectiveness of mitigation techniques. *See, e.g.*, J.A. 2444 (“This statement [in the DEIS] acknowledges deficiencies in information needed to conduct an appropriate effects analysis for at least some sensitive species. Given this, the [Forest Service] has serious reservations about the conclusions of the analyses up to this point because those conclusions have been reached prior to acquiring the necessary information to substantiate what must otherwise be presumed to represent judgments based on incomplete information.”); *id.* at 2445 (“There will be irreversible impacts to the soil and vegetation resources from construction of the ACP pipeline on [National Forest System] lands. No matter how [Atlantic] plans to implement measures to reduce these impacts, there will still be an unavoidable irreversible dedication of the soil resource as defined by NEPA . . . . The [COM] Plan is currently not complete, and substantial work remains to develop and refine measures to avoid, minimize, and mitigate impacts to a variety of resources on [National Forest

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System] lands, including steep slopes/sensitive soils; threatened, endangered, and sensitive species; and management indicator species.”).

Further, regarding the DEIS’s analysis of non-national forest alternative routes, the Forest Service commented:

No analysis of a National Forest Avoidance Alternative has been conducted, and environmental impacts of this alternative have not been considered or compared to the proposed action. *Therefore, the Forest Service cannot support the recommendation that the National Forest Avoidance Alternative be dropped from consideration. In our scoping comments, we requested that all alternatives, including a National Forest Avoidance Alternative, be fully addressed in regard to their feasibility and environmental effects. We hereby reiterate that request.*

J.A. 2454 (emphasis supplied).

The Forest Service’s comments on Atlantic’s draft biologic evaluation, issued on April 24, 2017, paint a similarly grim picture of the ACP project’s effects on erosion and on threatened and endangered species. For example, Atlantic’s draft biologic evaluation contained the following statement: “Construction activities may displace certain sensitive species from within and areas adjacent to the right-of-way, but the impact is expected to be short-term and limited to the period of construction. After construction, Atlantic will restore the right-of-way as near as practicable to preconstruction contours and conditions . . . .” J.A. 2324. In response, the Forest Service stated:

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Restoration will consist of erosion control, some NNIS [non-native invasive species] control, and some native plant re-introduction, so it will create habitat of some sort, *but the impact to sensitive species should be expected to be long-term*. Restoration plantings will take many years to establish and flourish, will in most cases consist of different species than were present before, and will in many cases not re-create the conditions sensitive species need to survive. NNIS introductions, given the current lack of plans to conduct treatment along access roads, *likely will create long-term negative impacts to the ecosystem, including potentially to sensitive species*.

*Id.* (emphasis supplied).

Additionally, in response to a statement in the draft biologic evaluation that the loss of potential roosting habitat for the little brown bat (caused by construction of the pipeline and the resulting permanent right of way) would be “offset,” since the species could use the right of way as foraging habitat, the Forest Service stated:

A potential increase in foraging habitat (which is not really proven here) does not offset the long-term loss of good roosting habitat—they apply to different life history needs and an increase in one does not offset loss of the other. Also, the loss of forested habitat would be a long-term impact given the time period required for recovery.

J.A. 2333. The Forest Service further noted, “Bats utilizing the more open areas (such as the [right of way] and road corridors) for foraging are also more vulnerable to predators. This offset is counteracted by an increase in potential predation, which negates the [right of way] and roads as potentially beneficial to the bat.” *Id.* at 2332.

C.

*Change of Course*

Despite the Forest Service’s clearly stated concerns regarding the adverse impacts of the ACP project, as Atlantic’s deadlines for the agency’s decisions drew closer, its tenor began to change. On May 14, 2017, the Forest Service sent a letter to FERC and Atlantic in which it stated—for the first time—that it would not require the remaining eight site-specific stabilization designs before authorizing the project. Specifically, the letter stated: “If the ACP project is authorized, the site-specific designs for the remaining eight sites identified in our October 24, 2016 letter must be reviewed and approved by the [Forest Service] before construction at those locations could begin.” J.A. 2307. The letter did not acknowledge that the agency was changing its position from its original request for all ten site designs prior to granting approval for the ACP nor did it provide any further explanation regarding the reason for the Forest Service’s change in position. On July 5, 2017, the Forest Service sent a letter to Atlantic “acknowledg[ing]” that the two site-specific stabilization designs that had so far been provided (MNF01 and GWNF02) and the subsequent information about those sites provided by Atlantic

“w[ere] adequate for the purposes of disclosing the environmental effects” associated with the ACP project. *Id.* at 1881. The letter did not provide any explanation as to why the two plans were “adequate.”

On July 21, 2017, FERC released the FEIS. On the very same day, and in line with Atlantic’s timeline, the Forest Service released its draft ROD proposing to adopt the FEIS, grant the SUP, and exempt Atlantic from several forest plan standards. The FEIS’s “National Forest Avoidance Route Alternatives” section, which the Forest Service commented on previously (as explained above), is identical to the DEIS. Regarding the alternatives analysis, the Forest Service’s draft ROD states: “FERC’s evaluation concluded that the major pipeline route alternatives and variations do not offer a significant environmental advantage when compared to the proposed route or would not be economically practical.” *Id.* at 1411.

Regarding the COM Plan, on October 6, 2017, the Forest Service sent a letter to Atlantic stating that Atlantic’s June 30 responses to the Forest Service’s second draft COM Plan comments “largely addressed our comments except for a limited number of items needing further explanation or clarification.” J.A. 847. The letter requested an updated COM Plan incorporating these responses. Atlantic filed this third (and final) draft of the COM Plan on October 27, 2017.

FERC issued the Certificate of Convenience and Public Necessity to ACP for construction of the pipeline on October 13, 2017.

Shortly after, on October 27, 2017, the Forest Service filed its responses to objections to the draft ROD. In response to an objection regarding the range

of non-national forest route alternatives, the Forest Service stated that FERC “adequate[ly] consider[ed] the route across the National Forests” and “concluded these alternatives would not provide a significant environmental advantage over a shorter route that passes through National Forests.” J.A. 676.

On November 16, 2017, the Forest Service sent a letter to Atlantic regarding Atlantic’s updated biologic evaluation, which had been filed on August 4, 2017. That biologic evaluation stated that the ACP project was likely to result in a “loss of viability” for three Regional Forester Sensitive Species (“RFSS”) in the MNF, a conclusion which, we note, was in line with the Forest Service’s April 24, 2017 comments on the draft biologic evaluation. Nonetheless, in an about-face, the Forest Service’s letter amended the updated biologic evaluation to conclude that, in fact, the project was *not* likely to result in a loss of viability to the three RFSS. This conclusion is significant, because the Forest Service cannot authorize uses of national forests that are likely to result in a loss of viability for a species. *See* J.A. 64 (“Per [Forest Service Manual] 2670.32, activities or decisions on [National Forest System] lands ‘must not result in a loss of species viability or create significant trends towards federal listing.’”). However, as noted above, the Forest Service had already issued its draft ROD proposing to authorize the SUP before the updated biologic evaluation was filed.

The Forest Service issued its final ROD on November 17, 2017, and it issued the SUP and granted the right of way across the ANST on January 23, 2018. Cowpasture River Preservation Association,

Highlanders for Responsible Development, Shenandoah Valley Battlefields Foundation, Shenandoah Valley Network, Sierra Club, Virginia Wilderness Committee, and Wild Virginia, Inc. (collectively, “Petitioners”) filed this challenge on February 5, 2018. We possess jurisdiction pursuant to the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-06, and the Natural Gas Act, 15 U.S.C. § 717r(d)(1).

## II.

We may “hold unlawful and set aside [a federal] agency action’ for certain specified reasons, including whenever the challenged act is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.’” *Sierra Club, Inc. v. U.S. Forest Serv.*, 897 F.3d 582, 589-90 (4th Cir. 2018) (quoting 5 U.S.C. § 706(2)(A)). An agency’s decision is arbitrary and capricious if:

the agency relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

*Id.* at 590 (quoting *Def. of Wildlife v. N.C. Dep’t of Transp.*, 762 F.3d 374, 396 (4th Cir. 2014)).

## III.

Petitioners assert that the Forest Service violated three federal Acts in issuing the ROD and SUP: the

NFMA, NEPA, and the MLA. We address each of these Acts and alleged violations in turn.

A.

*National Forest Management Act*

The NFMA sets forth substantive and procedural standards that govern the management of national forests. *See* 16 U.S.C. § 1604. As this court recently explained in *Sierra Club v. Forest Service*, the NFMA establishes a procedure for managing National Forest System lands using “Forest Plans,” which “provide a framework for where and how certain activities can occur in national forests.” *Sierra Club, Inc. v. U.S. Forest Serv.*, 897 F.3d 582, 600 (4th Cir. 2018) (quoting *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 919 (D.C. Cir. 2017); 16 U.S.C. § 1604(a)). First, the NFMA directs the Forest Service to “develop, maintain, and, as appropriate, revise” Forest Plans; second, it directs the Forest Service to ensure that all activities on national forest lands—specifically, all “resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands”—are consistent with the Forest Plans. *Id.* (quoting *Perdue*, 873 F.3d at 919; 16 U.S.C. § 1604(i)).

The NFMA also charges the Department of Agriculture (through the Forest Service, *see* 36 C.F.R. § 200.3(b)) with “promulgating guidelines for Forest Plans, which should, inter alia, ‘insure consideration of the economic and environmental aspects of various systems of renewable resource management’ and ‘provide for diversity of plant and animal communities based on the suitability and capability of the specific land area.’” *Sierra Club*, 897 F.3d at 600 (quoting 16

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U.S.C. § 1604(g)(3)(A)-(B)). At issue in this case are two Forest Service regulations issued pursuant to this authority: the 2012 Planning Rule and the 2016 Amendment to the 2012 Planning Rule, both of which deal with amendments to Forest Plans.

Petitioners assert that the Forest Service violated the NFMA by: (1) determining that amendments to the GWNF and MNF Plans' standards to accommodate the ACP were not "directly related" to the 2012 Forest Planning Rule's ("2012 Planning Rule's") substantive requirements; (2) failing to meet public participation requirements in amending forest plans; and (3) failing to analyze whether the ACP project's needs could be reasonably met off of national forest land.

### 1.

#### *2012 Planning Rule*

Petitioners assert that the Forest Service violated the NFMA by failing to apply the substantive requirements of the 2012 Planning Rule to the amendments of the GNF and MNF Plans' standards. Specifically, Petitioners assert that the amendments are directly related to the substantive requirements both in their purpose and their effects.

#### a.

#### *Background*

In 2012, the Forest Service updated its Forest Planning Rule, which superseded the 1982 rule and set forth new, substantive requirements for Forest Plans. *See* 2012 Planning Rule, 77 Fed. Reg. 21,162 (U.S. Dep't of Agric. Apr. 9, 2012). The updated substantive requirements in the 2012 Planning Rule

apply to Forest Plans developed under the 1982 rule in certain circumstances. *See* 36 C.F.R. §§ 219.8-219.11; *Sierra Club*, 897 F.3d at 600-01. Specifically, as the 2016 Amendment to the 2012 Planning Rule clarified, a substantive requirement from the 2012 Planning Rule applies to a Forest Plan amendment if that requirement is “*directly related* to the plan direction being added, modified, or removed by the amendment.” *Sierra Club*, 897 F.3d at 601 (quoting 36 C.F.R. § 219.13(b)(5) (emphasis supplied in *Sierra Club*)).

If the substantive requirement is directly related to the amendment, then the responsible official must “apply such requirement(s) within the scope and scale of the amendment.” *Sierra Club*, 897 F.3d at 601 (quoting 36 C.F.R. § 219.13(b)(5)). Conversely, if the substantive requirement from the 2012 Planning Rule is not directly related to the amendment, the responsible official is not required to apply it to the amended Forest Plan. *See id.* Thus, Petitioners’ arguments on this point turn on whether the requirements in the 2012 Planning Rule are *directly related* to the Forest Service’s amendments to the GWNF and MNF Plans.

A substantive requirement is directly related to the amendment when the requirement “is associated with either the purpose for the amendment or the effects (beneficial or adverse) of the amendment.” *Sierra Club*, 897 F.3d at 602 (quoting 2016 Amendment to 2012 Rule, 81 Fed. Reg. 90,723, 90,731 (U.S. Dep’t of Agric. Dec. 15, 2016)); *see also* 36 C.F.R. § 219.13(b)(5)(i) (“The responsible official’s determination must be based on the purpose for the

amendment and the effects (beneficial or adverse) of the amendment, and informed by the best available scientific information, scoping, effects analysis, monitoring data or other rationale.”). Further, regarding the adverse effects of an amendment, “[t]he responsible official must determine that a specific substantive requirement is directly related to the amendment when scoping or NEPA effects analysis for the proposed amendment reveals substantial adverse effects associated with that requirement, or when the proposed amendment would substantially lessen protections for a specific resource or use.” 36 C.F.R. § 219.13(b)(5)(ii).

**b.**

*GWNF and MNF Plan Amendments:  
Purpose Analysis*

In its ROD, the Forest Service decided to apply project-specific amendments to a total of 13 standards in the GWNF and MNF Plans for the purpose of construction and operation of the ACP. The amendments exempt the ACP project from four MNF Plan standards and nine GWNF Plan standards that relate to soil, water, riparian, threatened and endangered species, and recreational and visual resources.

Petitioners assert that the Forest Service violated the NFMA and the 2012 Planning Rule because it skipped the “purpose” prong of the “directly related” analysis. Consistent with our decision in *Sierra Club*, we conclude that Petitioners are correct.<sup>2</sup> Although

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<sup>2</sup> Faced with a nearly identical situation in *Sierra Club v. Forest Service*, we concluded that the Forest Service acted

the ROD states the rule correctly, *see* J.A. 36 (“[W]hether a planning regulation requirement is directly related to an amendment is based upon the amendment’s purpose or its effect (beneficial or adverse).”), it fails to analyze the purpose of the amendments and instead moves directly to analyzing the amendments’ effects, *see id.* at 36-48. This omission is particularly striking because the Forest Service specifically identified the purpose and need for the amendments in the ROD:

The purpose of the amendments are [sic] to meet the requirements of the NFMA and its implementing regulations that projects authorized on [National Forest System] lands must be consistent with the LRMP. Without the MNF and GWNF project-specific Forest Plan amendments the ACP project would not be consistent with some Forest Plan standards related to soil, riparian, threatened and endangered species, utility corridors, the ANST, an Eligible Recreational River Area, and scenic integrity objectives.

*Id.* at 31.

Indeed, this purpose and need is repeated several times throughout the ROD. *See, e.g.,* J.A. 27 (“The project-specific amendments to MNF and GWNF LRMP’s [sic] approved by this decision are needed to

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arbitrarily and capriciously by failing to analyze the *purpose* of the amendment in its ROD (and instead focusing on only the effects) when “the clear purpose of the amendment [was] to lessen requirements protecting soil and riparian resources so that the pipeline project could meet those requirements.” *Sierra Club*, 897 F.3d at 603.

allow the ACP Project to be consistent with LRMP standards.”); *id.* at 37 (“[T]he purpose of the plan amendments is to ensure consistency of the ACP Project with the provisions of the two Forest Plans.”). There would be no need to amend the Forest Plans to “ensure consistency” if the ACP project could meet the Forest Plan standards in the first place. In other words, the ROD makes clear that the purpose of the amendments was to lessen certain environmental requirements in the GWNF and MNF Plans because the ACP project could not meet those Plans’ existing requirements.

Accordingly, by failing to analyze whether the substantive requirements of the 2012 Planning Rule are directly related to the purpose of the amendments, the Forest Service “entirely failed to consider an important aspect of the problem.” *Defs. of Wildlife v. N.C. Dep’t of Transp.*, 762 F.3d 374, 396 (4th Cir. 2014) (quoting *Motor Vehicle Mnfs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). This failure is significant, because it is clear that the amendments (intended to lessen protections for soils, riparian areas, and threatened and endangered species in the GWNF and MNF Plans) *are directly related* to the 2012 Planning Rule’s substantive requirements for these same categories: “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)).

c.

*Ex Post Facto Statements of Purpose*

Notwithstanding the Forest Service's statements of purpose and need in the ROD, in its briefing and at oral argument the Forest Service attempted to recharacterize the purpose of the amendments as "to relax thirteen planning standards just enough to 'authorize [Atlantic] to use and occupy [National Forest System] lands for the [ACP] Project' consistent with the forest plans." Resp't's Br. 18. Meanwhile, Atlantic asserts that the Forest Service *did* "explicitly evaluate[] the purpose of the proposed amendments" and determined that "the purpose of ACP is not directly related to any of [the 2012 Planning Rule's] management guidelines." Intervenor's Br. 25. Instead, according to Atlantic, "the purpose of ACP is to 'serve the growing energy needs of multiple public utilities and local distribution companies, and Virginia and North Carolina' and the 'purpose and need' of the 'proposed action' is to 'respond to Atlantic's application for a special use permit.'" *Id.* (quoting J.A. 10, 37). Quite the contrary—the ROD does *not* analyze whether the amendments' purpose is directly related to the 2012 Planning Rule's substantive requirements. Rather, the ROD lists the purpose and need of the amendments but analyzes only the amendments' effects. *See* J.A. 36-48. The Forest Service's and Atlantic's attempts to recharacterize the purpose of the amendments (despite the clear statements of the amendments' purpose in the ROD) are without merit.

First, the Forest Service asserts that the true purpose of the amendments was just to authorize the ACP project—not to lessen environmental protections

for certain resources—and that “not every amendment with an *effect* on a particular resource has the *purpose* of adjusting the forest plan’s direction for that resource.” Resp’t’s Br. 18-19 (emphasis in original). But this contradicts the Forest Service’s own description of the amendments’ purpose in both the ROD and in its brief, which *begins with the phrase* “to relax thirteen planning standards.” *Id.* at 18. Relaxing, lessening, loosening—regardless of the Forest Service’s verb preference, the purpose of the Forest Plan amendments is to reduce the Plans’ environmental protections for certain resources.

Further, this is not a situation where a proposed project-specific amendment may have an *incidental* effect on a Forest Plan standard; rather, the amendments’ entire purpose is to weaken existing environmental standards in order to accommodate the ACP, which cannot meet the current standards. To say that a 2012 Planning Rule requirement protecting water resources (as one example) is not “directly related” to a Forest Plan amendment specifically relaxing protection for water resources is nonsense.

Meanwhile, Atlantic conflates the purpose of the *amendments* to the Forest Plans with, first, the overall purpose of the ACP *project* (to “serve the growing energy needs of multiple public utilities and local distribution companies, and Virginia and North Carolina,” Intervenor’s Br. 25), and second, the Forest Service’s reason for taking action at all (to “respond to Atlantic’s application for a special use permit,” *id.*). Both interpretations of “purpose” are facially incorrect applications of the 2012 Planning Rule’s “directly related” analysis, and neither address the Forest

Service's purpose for amending the GWNF and MNF Plans. First, the purpose of the *plan amendment*, not the ACP project, is the focus of this analysis. Second, the Forest Service's need to respond to Atlantic's application for the SUP is overly broad and does not address the need for amending the Forest Plans—clearly, the Forest Service could have “responded” to Atlantic's application without the amendments.

Finally, both the Forest Service and Atlantic suggest that only amendments changing a management standard for the forest as a whole—and not project-specific amendments—can trigger the substantive requirements of the 2012 Planning Rule. *See* Resp't's Br. 18-20 (“A substantive requirement is directly related to the purpose for an amendment when the amendment's objective is to adjust the management of the corresponding forest resource.”); Intervenor's Br. 26 (“[T]he proposed amendments for ACP did not change any of the generally applicable standards or guidelines in the forest plans.”). Neither party offers authority to support this assertion, which is contrary to the purpose of the 2012 Planning Rule: to promote consistency in the protections for national forest resources across Forest Plans. *See* 2012 Planning Rule, 77 Fed. Reg. at 21,162. If the Forest Service could circumvent the requirements of the 2012 Planning Rule simply by passing project-specific amendments on an ad hoc basis, both the substantive requirements in the 2012 Planning Rule and the NFMA's Forest Plan consistency requirement would be meaningless.

Accordingly, in line with our decision in *Sierra Club v. Forest Service*, we conclude that the 2012

Planning Rule requirements for soil, riparian resources, and threatened and endangered species are directly related to the purpose of the Forest Plan amendments. The Forest Service acted arbitrarily and capriciously in concluding otherwise.

**d.**

*Effects Analysis*

Although we need not reach the “effects” prong of the analysis in light of our conclusion that the purpose of the amendments is directly related to the 2012 Planning Rule’s substantive requirements, the Forest Service’s assertion that the Plan amendments will not have substantial adverse effects warrants additional discussion.

As noted above, a substantive requirement is directly related to a Forest Plan amendment when the requirement “is associated with . . . the effects (beneficial or adverse) of the amendment.” *Sierra Club*, 897 F.3d at 602 (quoting 2016 Amendment to 2012 Rule, 81 Fed. Reg. at 90,731); *see also* 36 C.F.R. § 219.13(b)(5)(i). The Forest Service asserts that an adverse effect must be “substantial” in order to be directly related to a substantive provision in the 2012 Planning Rule.<sup>3</sup> When asked at oral argument how the

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<sup>3</sup> It is not necessary for us to determine whether this characterization of the regulations is accurate because, for the reasons explained below, we conclude that the Forest Service’s determination that the amendments will not have substantial adverse effects was arbitrary and capricious. Nevertheless, we note that the regulation at issue—36 C.F.R. § 219.13—does not define “adverse effects” as including *only* substantial effects; rather, it says that the applicable substantive requirement from the 2012 Planning Rule *must apply when* the effects are

Forest Service defines “substantial adverse effects,” counsel for the Forest Service responded:

COUNSEL: [T]he best guidance for that issue can be found in the preamble to the 2012 [Planning] Rule where the Forest Service says that rarely, if ever, will a project-specific amendment rise to the level of having a substantial adverse effect on these resources.

...

COURT: How can that be, rarely if ever will something rise to have a substantial adverse effect on the forest? How many trees do you cut down before it is a substantial adverse effect? Maybe not one. All of them?

COUNSEL: The way the Forest Service stated it in the 2012 preamble to [the Planning] Rule was that it was going to look at the impact of the resource over the entire forest.

Oral Argument at 22:55-24:04, *Cowpasture River Preservation Ass’n v. Forest Serv.*, No. 18-1144 (4th Cir. Sept. 28, 2018), <http://www.ca4.uscourts.gov/oral->

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substantial. See 36 C.F.R. § 219.13(b)(5)(ii). Curiously, there is no corresponding guidance for beneficial effects. In other words, under the Forest Service’s interpretation of the regulation, only “substantial” adverse effects could trigger application of a substantive requirement, but *any beneficial effect at all* would trigger the same substantive requirement. The Forest Service does not explain why the regulations would intend to make it easier to pass amendments that harm the environment (by not requiring application of the substantive requirements, which aim to protect the environment, unless that harm is substantial) but more difficult to pass amendments that benefit the environment.

argument/listen-to-oral-arguments (hereinafter “Oral Argument”).

It is nothing short of remarkable that the Forest Service—the federal agency tasked with maintaining and preserving the nation’s forest land—takes the position that as a bright-line rule, a project-specific amendment, no matter how large, will *rarely, if ever*, cause a substantial adverse effect on a national forest. And it is even more remarkable that the agency is unable to say what *would* constitute a substantial adverse effect on the forest.

Indeed, counsel’s response did not answer the court’s question, and the Forest Service has never explained (in its briefing nor at argument) what makes an adverse effect “substantial.” Even more telling, however, is that the “rarely, if ever” language used by counsel is *nowhere to be found* in the preamble to the 2012 Planning Rule, nor in *any other* Forest Service guidance that the court could find. The closest language to counsel’s assertion that the court could identify is in the preamble to the *2016 Amendment* to the 2012 Planning Rule, which states, “[i]t is unlikely that a change in land allocation for a small area would have substantial adverse effects.” 2016 Amendment to 2012 Rule, 81 Fed. Reg. at 90,728. This language was a response by the Forest Service to a public comment which was concerned that the proposed rule (the 2016 Amendment) might impose a burden on small changes to land allocation. The Forest Service’s full response was as follows:

The 2012 rule did not require that every resource or use be present in every area. The Department clarifies in this final rule that

directly related specific substantive requirements within §§ 219.8 through 219.11 apply within the scope and scale of the amendment. Changes in land allocation for a small area would likely require a similarly narrow application of the directly related substantive requirements, depending on the purpose and effects of the changes. It is unlikely that a change in land allocation for a small area would have substantial adverse effects.

*Id.*

Even assuming that this language from the 2016 Amendment's preamble is what counsel was referring to during argument, it still does not provide any support for the Forest Service's interpretation of "substantial adverse effects." A "change in land allocation for a small area" is plainly not the same as generalizing to any project-specific amendment, and "unlikely" is a far cry from "rarely, if ever." Perhaps this is why counsel struggled to define what "rarely, if ever" would mean in this context.

Thus, we find no basis in the law for the Forest Service's assertion that "rarely, if ever, will a project-specific amendment rise to the level of having a substantial adverse effect" on the natural forests.

In any event, the Forest Service's application of the "effects" prong of the directly related test was still flawed. In each instance in the ROD where the Forest Service concluded that the 2012 Planning Rule's substantive requirements were not "directly related" to the Plan amendments, the ROD states that the amendment "will not cause substantial *long-term*

adverse effects.” J.A. 39, 41, 43 (emphasis supplied). But nowhere do the regulations (nor does the ROD, nor does the Forest Service’s brief) state that a substantial adverse effect must be *long term* for the substantive requirement in the 2012 Planning Rule to be “directly related” to the amendment.

The Forest Service’s strained and implausible interpretations of “substantial adverse effects” are especially striking in light of the significant evidence in the record that the GWNF and MNF Plan amendments *would* cause substantial adverse effects on the forests. *See, e.g.*, J.A. 25 (“Sedimentation modeling indicates annual soil loss will be 200 to 800 percent above baseline erosion during the first year of construction, returning to pre-construction levels within 5 years following restoration”); *id.* at 2320 (“Full recovery of forested sites would take many decades.”); *id.* at 2351 (“It is unsubstantiated as to how [erosion] increases of that magnitude are considered moderate and impacts will be temporary and minimal.”).

The lengths to which the Forest Service apparently went to avoid applying the substantive protections of the 2012 Planning Rule—its own regulation intended to protect national forests—in order to accommodate the ACP project through national forest land on Atlantic’s timeline are striking, and inexplicable.

Accordingly, we conclude that the Forest Service’s determination that the GWNF and MNF Plan amendments would not have substantial adverse effects on the forests was arbitrary and capricious.

e.

*Remand to the Forest Service*

Because the 2012 Planning Rule requirements for soil, riparian resources, and threatened and endangered species are directly related to the purpose and effect of the GWNF and MNF Forest Plan amendments, the Forest Service must “apply [those] requirement[s] within the scope and scale of the amendment.” *Sierra Club*, 897 F.3d at 603 (quoting 36 C.F.R. § 219.13(b)(5) (alterations in *Sierra Club*)). Accordingly, we remand to the Forest Service for proper application of the Planning Rule requirements for soil, riparian resources, and threatened and endangered species to the Forest Plan amendments.

The Forest Service contends that remand is unnecessary because the Plan amendments already meet the substantive requirements of the 2012 Planning Rule. Thus, the Forest Service asserts, any error in applying the 2012 Planning Rule was harmless. We find no basis to support such a conclusion. In fact, the ROD suggests just the opposite is true: in its analysis of the amendments’ compliance with the 2012 Planning Rule’s substantive requirements, the Forest Service explicitly stated when an amendment met the applicable substantive requirement. For example, regarding the GWNF Plan amendment for utility corridors, the ROD states:

The FEIS evaluated a variety of options to transport natural gas and adequately analyzed the appropriate placement and sustainable management of the ACP. Consequently, *I find this amendment meets the 36 CFR 219.10(a)(3) planning rule*

*requirement.* Since the amendment meets the rule requirement, there is no need to make a further determination as to whether the rule requirement is directly related to it.

J.A. 41-42 (emphasis supplied); *see also id.* at 44, 46, 47, 48 (similarly concluding that the Plan amendments for the ANST, scenic integrity objectives, road reconstruction, and management of old growth, respectively, meet the 2012 Planning Rule’s substantive requirements and thus “there is no need” to determine whether the substantive requirement is directly related to the amendment).

Yet, tellingly, the Forest Service specifically did *not* conclude that the GWNF and MNF Plan amendments for soils, riparian areas, and threatened and endangered species met the applicable 2012 Planning Rule’s substantive requirement. Instead, it concluded (incorrectly) that in each case, the substantive requirements were not directly related to the applicable Plan amendment. According to the ROD, conducting the directly related analysis would have been unnecessary if the amendment in fact satisfied the substantive requirement: where “the amendment meets the rule requirement, *there is no need to make a further determination as to whether the rule requirement is directly related to it.*” J.A. 41-42 (emphasis supplied). Accordingly, the case must be remanded.

## 2.

### *Public Participation Requirements*

Petitioners further assert that the Forest Service violated the NFMA because it provided no opportunity for public comment for four of the amended forest plan

standards. Even assuming Petitioners are correct (a point the Forest Service disputes), Petitioners do not attempt to demonstrate “that the outcome of the process would have differed in the slightest had notice been at its meticulous best.” *Friends of Iwo Jima v. Nat’l Capital Planning Comm’n*, 176 F.3d 768, 774 (4th Cir. 1999). Without even an allegation of prejudice, Petitioners fail to carry their burden to prove that any notice-related deficiency was prejudicial. Accordingly, we reject this argument.

**3.**

*Accommodation of the ACP Project on  
Non-National Forest Land*

Petitioners assert that the Forest Service violated NEPA by failing to consider alternatives that avoid national forest land. Relatedly, Petitioners argue that the Forest Service violated the GWNF and MNF Plans and the NFMA because it failed to demonstrate that the ACP project’s needs could not be reasonably met on non-national forest lands.

The GWNF Plan limits “Special Use Authorizations” to “needs that *cannot be reasonably met* on non-[National Forest System] lands or that enhance programs and activities.” J.A. 4068 (emphasis supplied). Similarly, an MNF Plan goal states: “[p]roposed special uses of [National Forest System] lands . . . are considered that meet public needs, are consistent with direction for other Forest resources and management prescriptions, and *cannot be accommodated* off the National Forest.” J.A. 4069 (emphasis supplied). Finally, the Forest Service’s regulations state: “[a]n authorized officer shall reject any proposal . . . if, upon further consideration, the

officer determines that: . . . the proposed use would not be in the public interest.” 36 C.F.R. § 251.54(e)(5)(ii). The Forest Service Manual provides further guidance on § 251.54(e)(5)(ii), directing that a proposed use should be authorized as “in the public interest” “only if . . . the proposed use *cannot reasonably be accommodated* off of National Forest System lands.” Forest Serv. Manual, Addendum to Pet’rs’ Br. 65-66 (emphasis supplied). The Forest Service Manual further directs, “[d]o not authorize the use of National Forest System lands solely because it affords the applicant a lower cost or less restrictive location.” *Id.* at 66.

We agree that the Forest Service violated its obligations under the NFMA and its own Forest Plans because it failed to demonstrate that the ACP project’s needs could not be reasonably met on non-national forest lands. The Forest Service’s ROD adopted and incorporated FERC’s alternative routes analysis in the EIS, but the EIS applied a different standard than the one imposed on the Forest Service by the NFMA and its own Forest Plans. In the EIS, FERC considered only whether a route alternative “confers a significant environmental advantage over the proposed route.” J.A. 1533. This is a significantly different standard than whether the proposed use “*cannot reasonably be accommodated* off of National Forest System lands.” Forest Serv. Manual, Addendum to Pet’rs’ Br. 65-66 (emphasis supplied); *cf. Sierra Club*, 897 F.3d at 604-05 (concluding that the Bureau of Land Management violated its MLA obligations where it failed to analyze whether alternative pipeline routes were “impractical,” as required by the Bureau’s regulations, and instead adopted an EIS that considered only

whether an alternative route offered a “significant environmental advantage”).

Accordingly, adopting FERC’s EIS was not sufficient for the Forest Service to fulfill its obligations under the Forest Service Manual and its own Forest Plans, and the Forest Service did not purport to undertake this required analysis anywhere else in the ROD.

The Forest Service asserts that it “determines project consistency only ‘with respect to standards and guidelines,’ not general forest planning ‘goals’ like Monongahela LS17.” Resp’t’s Br. 24 (quoting 2012 Planning Rule, 77 Fed. Reg. at 21,241). As an initial matter, the Forest Service regulations and the Forest Service Manual apply to both the GWNF and the MNF, so even if the court were to disregard the MNF goal cited by Petitioners, the proposed use of national forest land must still fit the Forest Service Manual’s definition of “in the public use,” which contains essentially the same requirement as the MNF goal: that the proposed use cannot be reasonably accommodated outside of the national forest. *See* Forest Serv. Manual, Addendum to Pet’rs’ Br. 65-66.

However, the Forest Service’s assertion about forest planning goals and objectives deserves additional discussion. The regulatory guidance quoted by the Forest Service—from the preamble to the 2012 Planning Rule, 77 Fed. Reg. at 21,241—is a response by the Forest Service to a public comment regarding the 2012 Planning Rule’s consistency requirement, which states:

The Forest Service policy was that consistency could only be determined with

respect to standards and guidelines, or just standards, because *an individual project alone* could almost never achieve objectives and desired conditions. . . .

The Department continues to believe that the consistency requirement cannot be interpreted to require achievement of the desired conditions or objectives of a plan *by any single project or activity*, but we believe that we can provide direction for consistency to move the plan area toward desired conditions and objectives, *or to not preclude the eventual achievement of desired conditions or objectives*, as well as direction for consistency with the other plan components.

77 Fed. Reg. at 21,241 (emphasis supplied). In other words, even if the Forest Service is not required to conclude that an individual project alone *meets* a forest planning goal, it is not free to disregard the goal entirely—as the Forest Service apparently wishes to do here.

The Forest Service was aware of its obligation to determine that the ACP project could not be reasonably accommodated on non-national forest land from the beginning of the project. Indeed, the Forest Service specifically cited to the Forest Service Manual and Forest Plan requirements in its initial scoping comments in response to FERC's Notice of Intent to Prepare an EIS. *See* J.A. 3593 (“[T]he analysis must address Forest Service Manual direction that restricts special uses to those that cannot reasonably be accommodated on non-National Forest System lands

(FSM 2703.2.”); *id.* at 3593-94 (stating that the GWNF Plan requires special use authorizations be “[l]imit[ed] to needs that cannot be reasonably met on non-[National Forest System] lands or that enhance programs and activities”). The Forest Service’s failure to undertake this analysis violated the NFMA. Accordingly, we remand to the Forest Service for proper analysis of whether the ACP project’s needs can be reasonably met on non-national forest lands, in compliance with the NFMA and the GWNF and MNF Plans.

**B.**

*National Environmental Policy Act*

As this court recently explained in *Sierra Club v. Forest Service*, Congress enacted NEPA “to reduce or eliminate environmental damage.” 897 F.3d at 590 (quoting *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 756 (2004)). “NEPA itself does not mandate particular results in order to accomplish these ends,’ but rather, ‘imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions.’” *Id.* (quoting *Dep’t of Transp.*, 541 U.S. at 756-57).

NEPA requires that agencies consider alternatives to the proposed action, 40 C.F.R. § 1502.14, and “take a hard look at environmental consequences,” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (internal quotation marks omitted). To that end, whenever a federal agency proposes to take a “major Federal action[] significantly affecting the quality of the human environment,” the agency must prepare a detailed EIS

describing the likely environmental effects of the proposal, any unavoidable adverse environmental effects, and potential alternatives. 42 U.S.C. § 4332(2)(C). Consideration of alternatives “is the heart of the [EIS].” 40 C.F.R. § 1502.14.

In this case, FERC was the lead agency charged with issuing the EIS, and the Forest Service acted as a cooperating agency by assisting FERC to analyze the environmental impacts to 430 acres of national forest lands on the proposed ACP route. As a cooperating agency, the Forest Service may adopt FERC’s EIS only if it undertakes “an independent review of the [EIS]” and “concludes that its comments and suggestions have been satisfied.” 40 C.F.R. § 1506.3(c); *see also Sierra Club*, 897 F.3d at 590. It must also ensure that the EIS is “adequate” under NEPA regulations. 40 C.F.R. § 1506.3(a). In reviewing an EIS, the court’s responsibility is to “determine whether the [agency] has considered the relevant factors and articulated a rational connection between the facts found and the choice made.” *Sierra Club*, 897 F.3d at 594 (quoting *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 105 (1983)).

Petitioners assert that the Forest Service violated NEPA by (1) failing to study alternative off-forest routes, and (2) adopting a FEIS that failed to take a hard look at landslide risks, erosion, and degradation of water quality.

1.

*Study of Alternative Off-Forest Routes*

As noted above, an agency may only adopt an EIS if it “meets the standards for an adequate statement”

under the applicable regulations. 40 C.F.R. § 1506.3(a). One applicable regulation provides:

If a [DEIS] is so inadequate *as to preclude meaningful analysis*, the agency shall prepare and circulate a revised draft of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.

*Id.* § 1502.9(a) (emphasis supplied). Petitioners assert that FERC's FEIS was inadequate because it failed to sufficiently study alternative pipeline routes for the ACP that avoided national forest lands. According to Petitioners, the Forest Service violated NEPA because it adopted FERC's inadequate EIS without undertaking the required "independent review," and because the FEIS did not satisfy the Forest Service's earlier comments and suggestions on the DEIS. *Id.* § 1506.3(c).

In counter, the Forest Service asserts that once FERC had issued the Certificate of Convenience and Public Necessity, the choice before the Forest Service was simple: either approve the pipeline route as it was authorized by FERC or deny the right of way. According to the Forest Service, since FERC was responsible for analyzing alternative pipeline routes, the Forest Service reasonably relied on that alternatives analysis in adopting the FEIS.

The Forest Service frames Petitioners' argument as an impermissible collateral attack on FERC's actions, but that ignores the Forest Service's

obligation to “independent[ly] review” the EIS and ensure its comments and suggestions to the lead agency were satisfied before adopting it. 40 C.F.R. § 1506.3(c). Neither the Forest Service nor Atlantic points to evidence in the record to demonstrate that the Forest Service undertook the required independent review. To the contrary, the record suggests that they did not. Instead, the record reflects that at first the Forest Service strenuously objected to the lack of non-national forest route alternatives in the DEIS, but it eventually reversed course and adopted the FEIS even though the analysis of non-national forest alternatives was unchanged from the DEIS—all in an effort to prevent Atlantic from having to obtain congressional approval for the project to cross the ANST.

From the beginning, the Forest Service made clear through its comments to FERC and Atlantic that the EIS would need to analyze non-national forest alternative routes and justify the necessity of any proposed route crossing of national forest lands. The Forest Service’s scoping comments for the ACP project noted:

It is . . . necessary to understand why any proposed routes (preferred or alternative) crossing [National Forest System] lands are selected over those not crossing [National Forest System] lands. Therefore, the EIS should contain a comparison of project effects for routes crossing [National Forest System] lands versus routes not crossing [National Forest System] lands. Discussions and other relevant information should also be provided

to justify the necessity of any proposed route crossing [National Forest System] lands. . . . Comparisons of the alternatives should be based on analyses of site-specific impacts to resources potentially affected by the proposed project, which may not necessarily be correlated with the footprint of the proposed project.

J.A. 3593.

Then, FERC's DEIS indicated that "[a] significant factor in siting ACP was the location at which the pipeline would cross the ANST." J.A. 3207. As the DEIS stated, crossing the ANST on NPS lands would require congressional approval. "*Because of this legislative process*"—that is, to avoid obtaining congressional approval to cross the ANST on NPS lands—"Atlantic considered locations where the ANST was located on [Forest Service lands], which significantly constrained the pipeline route and severely limits opportunities for avoiding and/or minimizing the use of [National Forest System] lands." *Id.* at 3207-08 (emphasis supplied). Because of this, and even though ground resource surveys had not been conducted, FERC concluded that it "ha[d] not identified or received any information that suggests the shorter pipeline route through the National Forests has significantly greater impacts to sensitive resources than the alternative" that avoided national forest lands. *Id.* at 3208. In response to this analysis of off-forest routes in the DEIS, the Forest Service commented:

No analysis of a National Forest Avoidance Alternative has been conducted, and

environmental impacts of this alternative have not been considered or compared to the proposed action. Therefore, the Forest Service cannot support the recommendation that the National Forest Avoidance Alternative be dropped from consideration. In our scoping comments, we requested that all alternatives, including a National Forest Avoidance Alternative, be fully addressed in regard to their feasibility and environmental effects. We hereby reiterate that request.

*Id.* at 2454. Further, in response to the DEIS's assertion that in general, as the length of a pipeline route increases, the environmental impacts also increase, the Forest Service commented: "Miles of line do not necessarily equate to severity of the environmental impact. The nature of the resources to be impacted needs to be considered. The Forest Service has previously requested that such comparative information on impacts be obtained and considered for alternatives to the proposed action." *Id.* at 2451.

Despite the Forest Service's concerns regarding the lack of study of off-forest alternatives, the "National Forest Avoidance Route Alternatives" section in the FEIS is identical to the DEIS. Nevertheless, on the very same day that FERC issued the FEIS, the Forest Service released its draft ROD, which proposed adopting the FEIS (and, consequently, the unchanged alternatives analysis). Without explaining the Forest Service's change of position from the scoping comments or its comments on the DEIS, the draft ROD states: "FERC's evaluation concluded

that the major pipeline route alternatives and variations do not offer a significant environmental advantage when compared to the proposed route or would not be economically practical.” J.A. 1411. The Forest Service’s discussion on this point was essentially identical in its response to objections filed to the draft ROD and in its final ROD.<sup>4</sup>

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<sup>4</sup> The Forest Service’s response to objections filed to the draft ROD stated:

The Project Record shows consideration of alternatives that avoid National Forests. One such alternative would have increased the route by 43 miles to the south and another would have increased the route by 15 miles to the north. The FERC noted, as a general matter, environmental impacts increase as the length of a pipeline route increases. Furthermore, the FERC lacked information concluding a shorter overall route through NFS lands would have significantly greater impacts on sensitive resources . . . . Therefore, it was concluded these alternatives would not provide a significant environmental advantage over a shorter route that passes through National Forests.

J.A. 676. Similarly, the final ROD stated:

The proposed crossing of the MNF and GWNF received a considerable amount of comment and criticism from stakeholders, and accordingly, resulted in a number of evaluated route alternatives and variations. FERC evaluated . . . several variations to avoid or minimize crossing of [Forest Service] and [NPS] lands. . . . FERC’s evaluation concluded the major pipeline route alternatives and variations do not offer a significant environmental advantage when compared to the proposed route or would not be economically practical.

*Id.* at 48.

The Forest Service asserts, “Petitioners present no record evidence that FERC did not” continue to analyze non-national forest alternatives following the Forest Service’s comments on the DEIS. Resp’t’s Br. 39. But no such analysis is apparent anywhere in the record, and most tellingly, neither the Forest Service nor Atlantic even attempt to identify evidence to demonstrate that FERC did anything to address the Forest Service’s concerns about off-forest alternative routes. What is apparent from the record is that: (1) the Forest Service repeatedly expressed concerns about the need to analyze alternative pipeline routes that avoided the national forests (particularly in the scoping comments, comments on the draft resource reports, and the DEIS); (2) FERC’s analysis of alternative pipeline routes remained unchanged from the DEIS to the FEIS, and there is no other evidence apparent from the record that FERC addressed the Forest Service’s concerns about off-forest alternative routes; and (3) the Forest Service never explains, in the ROD or elsewhere, how its concerns about off-forest alternative routes were assuaged.

The chain of events surrounding the Forest Service’s sudden acquiescence to the alternatives analysis in the FEIS is similar to that in *Sierra Club v. Forest Service*, where we determined that the Forest Service had acted arbitrarily and capriciously in adopting the sedimentation analysis in the FEIS for a different pipeline project. *See Sierra Club*, 897 F.3d at 594-96. Here, like in *Sierra Club*, “[g]iven the circumstances, we simply cannot conclude that the Forest Service undertook an independent review and determined that its comments and concerns were satisfied” when it seemingly dropped its demand that

off-forest alternative routes be studied before the ACP was authorized without any further analysis. *Id.* at 595. In light of this, and particularly considering the Forest Service's earlier skepticism that location decisions for the ACP were made solely to avoid congressional approval,<sup>5</sup> we hold that adopting the unchanged alternatives analysis in the FEIS was arbitrary and capricious.

2.

*Analysis of Landslide Risks, Erosion, and Degradation of Water Quality*

Petitioners further contend that the Forest Service's deficient analysis of landslide risks, erosion impacts, and water quality degradation from the ACP project violated NEPA. Specifically, Petitioners assert that the Forest Service abandoned its request for ten site-specific stabilization designs prior to granting the SUP, which it previously stated were necessary to evaluate effects under NEPA, and instead accepted the two that Atlantic provided as "adequate" without explanation for this change in position. Additionally, Petitioners assert that Atlantic's erosion and sedimentation mitigation plan had not been determined at the time the FEIS and ROD were issued. Thus, the Forest Service did not know if the mitigation measures it relied on to approve the project would actually be successful. As a result, Petitioners argue that the FEIS does not provide "a thorough

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<sup>5</sup> See, e.g., J.A. 3661 ("[T]he report should . . . not base all of the routing decisions for the [ANST] crossing on project timeline issues with getting [c]ongressional approval. The proposed location for crossing the [ANST] need[s] to be based on sound resource and compelling public interest determinations.").

investigation into the environmental impacts of [the] agency's action." Pet'rs' Reply Br. 29 (quoting *Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 185 (4th Cir. 2005)). For its part, the Forest Service contends that it thoroughly analyzed the impacts of the proposed route on national forest lands, and that NEPA does not require an agency to formulate and adopt a complete mitigation plan before it can act.

As noted above, NEPA does not require the Forest Service to ensure "environment-friendly outcomes." *Nat'l Audubon Soc'y*, 422 F.3d at 184. Rather, "an agency decision is acceptable even if there will be negative environmental impacts resulting from it, so long as the agency considered these costs and still decided that other benefits outweighed them. 'NEPA merely prohibits uninformed—rather than unwise—agency action.'" *Id.* (quoting *Robertson*, 490 U.S. at 350-51 (citations omitted)). Nevertheless, an EIS must still "contain a detailed discussion of possible mitigation measures." *Robertson*, 490 U.S. at 351. Further, 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.

We conclude that the Forest Service violated NEPA by failing to take a hard look at the environmental consequences of the ACP project. The Forest Service expressed serious concerns that the DEIS lacked necessary information to evaluate landslide risks, erosion impacts, and degradation of water quality, and it further lacked information about

the effectiveness of mitigation techniques to reduce those risks.

Specifically, the record reflects that the Forest Service voiced concerns about (1) authorizing the SUP without ten site-specific stabilization designs to demonstrate the effectiveness of Atlantic's BIC program; (2) the overly high efficiency rate of erosion control devices used in the sedimentation analysis (96 percent); (3) relying on the use of water bars as a mitigation technique, when Atlantic had not analyzed whether water bars would mitigate or exacerbate erosion effects during construction; and (4) Atlantic's use of averaged versus episodic sediment calculations to analyze the water resource impacts from increases in sedimentation due to the ACP project.

However, the FEIS did not address any of these concerns; rather, it made clear that this incomplete and/or inaccurate analysis in the DEIS remained incomplete. The FEIS stated (among other examples): "slope instability/landslide risk reduction measures have not been completed or have not been adopted," J.A. 1615; "[Atlantic is] 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," *id.* at 1616 (emphasis supplied); "specific [erosion] effects are unknown" and "it is unclear if erosion control and rehabilitation measures would meet the standards of the Forest Plan[s]," *id.* at 1659; and "water resource impacts from sedimentation are largely uncertain," *id.* at 1663.

Accordingly, the FEIS could not have satisfied the Forest Service's concerns that the DEIS lacked

necessary information to evaluate the environmental consequences of the pipeline. Indeed, the FEIS conceded that the Forest Service's concerns remained unresolved. Nevertheless, as Atlantic's deadlines drew near, the Forest Service disregarded these concerns and adopted the FEIS—including its conclusions that landslide risks, erosion impacts, and degradation of water quality remained unknown—the very same day FERC issued it. To support its decision to approve the project and grant the SUP, the Forest Service relied on the very mitigation measures it previously found unreliable. This was insufficient to satisfy NEPA, and did not constitute the necessary hard look at the environmental consequences of the ACP project.

**a.**

*Landslide Risks*

The Forest Service clearly explained its concerns about landslides, erosion, and pipeline safety and stability in its October 24, 2016 letter requesting the ten site-specific stabilization designs:

The route for the [ACP project] proposed by [Atlantic] would cross some very challenging terrain in the central Appalachians. Potentially difficult situations include 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. These hazards are exacerbated by high annual rates of precipitation and the potential for extreme precipitation events.

Similar hazards on other smaller pipeline projects in the central Appalachians have led to slope failures, erosion and sedimentation incidents, and damage to aquatic resources. Therefore, the [Forest Service] is concerned that crossing such challenging terrain with a much larger pipeline could present a high risk of failures that lead to resource damage.

J.A. 3379.

In addition to highlighting these concerns, the Forest Service's October 24, 2016 letter made clear that the ten selected sites were "merely representative sites," required for the Forest Service to determine whether the ACP project could be permitted in the GWNF and MNF. J.A. 3379. In other words, the site designs were needed to aid the Forest Service in its decision whether to permit the pipeline at all. Accordingly, the Forest Service's later decision to only require the designs prior to construction was not simply a question of timing. It meant the Forest Service approved the pipeline without information it previously determined was necessary to making its decision, and it did so without acknowledging, much less explaining, its change in position.

The Forest Service's reversal is particularly puzzling considering the reason it requested the site-specific stabilization designs in the first place: to demonstrate that Atlantic's BIC program could actually work in particular conditions, rather than simply being a "cookbook with generalities." J.A. 2514. The Forest Service also conducted a literature review on Atlantic's BIC incremental controls to attempt to determine the effectiveness of these measures. Far

from proving the effectiveness of the BIC program, the literature review concluded: “[T]he majority of these BIC incremental controls are either too new to provide any real insight to the effectiveness on erosion control, especially on steep slopes, or there has not been any research to prove the effectiveness of these incremental controls for adequate erosion control.” *Id.* at 3703.

Thus, despite its own well-documented concerns with Atlantic’s mitigation plans, the Forest Service abandoned its request for the eight site-specific stabilization designs and adopted the FEIS, all without science-based evidence of the BIC program’s effectiveness. This falls far short of NEPA’s hard look requirement, and the Forest Service’s brief, conclusory letter stating that the information provided by Atlantic was “adequate” is insufficient to show that the Forest Service’s concerns had been addressed as NEPA requires. J.A. 1881.

Perhaps nothing demonstrates the dangers of the Forest Service’s insufficient analysis of landslide risks clearer than the FEIS’s use of the Columbia Gas Transmission pipeline as an example of an existing pipeline in the Appalachian Mountains that safely crosses karst terrain. *See, e.g.*, J.A. 1589, 1609 (“There are differences between ACP and corridor and the Columbia pipeline project and corridor, and so, there can be more potential for project-induced slope failures in the ACP corridor. But the decades of slope stability performance of the Columbia pipeline corridor on slopes generally similar to those along the ACP pipeline route is relevant information to consider.”). Significantly, during the briefing of this

case, a landslide in Marshall County, West Virginia, caused the Columbia pipeline—highlighted by the Forest Service for its safety and stability—to rupture and explode.<sup>6</sup> Clearly, the Forest Service’s concerns about landslide risks and pipeline safety highlighted in its October 24, 2016 letter deserve serious consideration, for the protection of both the environment and the public.

**b.**

*Erosion Impacts and Degradation of Water Quality*

In adopting the FEIS and approving the pipeline, the Forest Service concluded that because of “mitigation measures, impacts on groundwater and surface waters will be effectively minimized or mitigated.” J.A. 25. However, as explained above, the Forest Service had previously expressed serious concerns about the extensive erosion and sedimentation that the ACP project could cause, and it additionally questioned the mitigation techniques that Atlantic relied on to reduce those impacts. This is particularly true regarding the overly high efficiency rate of erosion control devices used in the sedimentation analysis (96 percent), the use of water bars as a mitigation technique, and the use of

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<sup>6</sup> See, e.g., Anya Litvak, *Landslide Caused West Virginia Pipeline Explosion*, *TransCanada Reports*, Pittsburgh Post-Gazette (July 11, 2018), <http://www.post-gazette.com/business/powersource/2018/07/11/Landslide-caused-pipeline-explosion-Columbia-Gas-reported/stories/201807100176>. We can take judicial notice of this fact because it “is not subject to reasonable dispute” and “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b).

averaged versus episodic sediment calculations to analyze water resource impacts in the sedimentation analysis. Despite these concerns, and the FEIS's conclusion that "specific [erosion] effects [remained] unknown," *id.* at 1659, the Forest Service nevertheless relied on the incomplete analysis in the FEIS and disregarded its concerns about the effectiveness of the mitigation techniques.

For example, in the draft biologic evaluation, Atlantic asserted that installation of erosion control devices would "reduce erosion by about 96 percent." J.A. 2633. The Forest Service criticized this conclusion in its March 10, 2017 comments to the draft biologic evaluation, stating, "Use of lab testing and efficiency rates are inappropriate for steep slope pipeline construction. Update model with more conservative assumptions about containment efficiencies. Document the literature references that apply to efficiencies in the field, particularly mountainous terrain in WV and VA." *Id.* at 2357.

However, Atlantic did not comply with the Forest Service's request, and the 96 percent erosion control efficiency rate remained in Atlantic's August 2017 Soil Erosion and Sedimentation Modeling Report. *See* J.A. 909 ("Installation of [erosion control devices] was predicted to reduce erosion by about 96 percent."). We note that this report was issued five months *after* the Forest Service directed Atlantic to update its erosion efficiency rate, one month after the Forest Service issued its draft ROD, just two months before the final version of the COM Plan was issued, and only three months before the Forest Service issued the final ROD. Accordingly, we see no evidence in the record

that the Forest Service's concerns regarding the 96 percent erosion control efficiency rate were ever resolved; nonetheless, the Forest Service ultimately relied on this figure to determine that Atlantic's proposed mitigation measures would effectively reduce erosion and sedimentation impacts from the ACP project.

During oral argument, Atlantic claimed that the Forest Service's concern about the 96 percent efficiency rate was resolved because Atlantic agreed not to use silt fences as a mitigation technique in certain areas, which it claims were the cause of the "overly optimistic" efficiency rate. Oral Argument at 37:50-39:41. As counsel for Atlantic stated:

The Forest Service never accepted the 96 percent efficiency. Indeed, that model was predicated on a standard erosion and sediment control device called the silt fence. Instead of debating . . . over the percent effectiveness of the silt fence, the Forest Service made a much more direct and compelling move, which was to prohibit the use of silt fences in the areas over which it had concern. . . Atlantic committed not to use the silt fences that were the subject of the overly optimistic erosion sediment model.

*Id.*

As an initial matter, we note that the Soil Erosion and Sedimentation Modeling Report attributes the 96 percent erosion control efficiency rate to all erosion control devices "such as silt fences, waterbars, and mulch application," not just silt fences. J.A. 929. Additionally, the final draft of the COM Plan is riddled

with uses of silt fences as proposed mitigation techniques. *See, e.g., id.* at 303, 409, 473, 475, 586, 587.

However, even if Atlantic is correct that it committed not to use silt fences in certain areas, this is beside the point. The use of silt fences was not the problem. The problem, as the Forest Service itself pointed out, was assuming that these devices would function nearly perfectly to reduce erosion and sediment, despite a wealth of evidence to the contrary. This assumption remained in the August 2017 Soil Erosion and Sedimentation Modeling Report. *See* J.A. 908 n.2 (“The effectiveness predicted by the model is influenced by slope, soil, groundcover, and type of erosion control device; *the model assumes perfect installation, soil retention, and maintenance.*” (emphasis supplied)). This assumption infected the sedimentation model—the model that produced the “200 to 800 percent above baseline erosion” estimate cited in in the ROD. *Id.* at 25.

Crucially, we can identify no other more conservative efficiency rate used to correct the sedimentation model which drove the Forest Service’s erosion and sedimentation analysis. Indeed, the use of the 96 percent efficiency rate in the August 2017 Soil Erosion and Sedimentation Modeling Report, which was issued only three months before the Forest Service’s final ROD, suggests that the Forest Service’s concern with Atlantic’s overly high efficiency rate for erosion control devices was never resolved. *See* J.A. 908-09 (“Installation of [erosion control devices] was predicted to reduce erosion by about 96 percent.”).

Additionally, the FEIS relied on the use of water bars as a mitigation technique that would reduce the environmental impacts of the ACP project. *See* J.A. 1662 (“The use of water bars (i.e., slope breakers) was assumed on long slopes . . .”). The Forest Service had previously stated in its comments on Atlantic’s updated biologic evaluation that further analysis was needed to determine whether water bars would be effective: “Slope breaker locations relative to pertinent habitat features need to be disclosed[.] It is important to be sure that they are not potentially directing water into habitats (in which case they would actually do more harm than good).” *Id.* at 2337. Nevertheless, the FEIS candidly acknowledged that this further analysis was never done:

[W]ater bars create concentrated flows where they discharge adjoining off right-of-way areas. *The [Forest Service] has stated that Atlantic has not assessed how or whether the adjoining areas can receive concentrated flows, or whether measures would be implemented to allow these areas to safely receive and convey the concentrated flows.* In addition, the slopes to be encountered in the MNF and GWNF would require several water bars to be “stacked” along their length, creating multiple points of discharge. *The [Forest Service] has stated the potential impacts of multiple points of concentrated discharges onto the adjoining areas has not been assessed.*

*Id.* at 1663 (emphasis supplied). Once again, the Forest Service adopted the FEIS (including its use of

water bars as a mitigation technique), issued its ROD, and granted the SUP based on an erosion and sedimentation analysis using water bars as a mitigation technique, despite the clear evidence in the record that (1) the Forest Service had concerns with this technique; (2) the Forest Service's concerns were not resolved in the FEIS; and (3) the effectiveness of water bars for this project was never analyzed.

Finally, the record further reflects that the Forest Service believed Atlantic used an incorrect calculation to analyze how sedimentation from the ACP project would impact aquatic species. In its draft biologic evaluation, Atlantic analyzed the total sediment that would erode a stream in a year divided by the volume of water that would flow through the stream in a year—to create an *average* sediment level over an entire year—rather than analyzing sediment levels in terms of discrete episodic events, where the sediment levels vary based on precipitation events that cause larger amounts of erosion to enter the stream. In other words, Atlantic employed a simplistic (and unrealistic) calculation that made in-stream sedimentation levels look much lower than they would be during construction. Of note, the Forest Service sharply criticized this approach in its comments on the draft biologic report:

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.

J.A. 2358. However, despite the Forest Service's concerns with Atlantic's calculations in the sedimentation analysis, the record does not indicate that Atlantic ever updated its calculation to reflect actual conditions. Nevertheless, the Forest Service adopted Atlantic's updated biologic report and the FEIS, and it concluded that erosion and sedimentation from the ACP project would not substantially adversely affect sensitive aquatic species.

The Forest Service argues—correctly—that NEPA does not require a fully formed mitigation plan to be in place. As this court has noted, “it would be inconsistent with NEPA’s reliance on procedural mechanisms—as opposed to substantive, result-based standards—to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act.” *Robertson*, 490 U.S. at 353. However, in this case, the Forest Service adopted the FEIS and issued its draft ROD *in reliance on a mitigation plan that had not been established*, and one that, as demonstrated by the Forest Service’s own concerns, had not been proven effective.

To satisfy NEPA in this case, the Forest Service needed to resolve its own concerns with the EIS—which, for the reasons we have explained, it did not do—and it needed to have a reasonable basis for concluding that the mitigation plan, once fully formed, *would be effective*. Here, the Forest Service relied on the generalities of the BIC program and other

techniques proposed by Atlantic to achieve particular mitigating results, with neither actual site designs nor science-based evidence demonstrating such results were likely. This is precisely the sort of uninformed agency action that NEPA prohibits. *See Nat'l Audubon Soc'y*, 422 F.3d at 184.

Accordingly, we cannot conclude that the Forest Service took a hard look at the environmental consequences of its decision. Rather, the record before us readily leads to the conclusion that the Forest Service's approval of the project "was a preordained decision" and the Forest Service "reverse engineered" the [ROD] to justify this outcome," despite that the Forest Service lacked necessary information about the environmental impacts of the project. *Nat'l Audubon Soc'y*, 422 F.3d at 183 (concluding that the U.S. Navy "reverse engineered" its EIS to achieve a particular outcome, and although "[t]he deficiencies in each area of the Navy's analysis would not, on their own, be sufficient to invalidate the EIS," "a review of the various components of the EIS taken together indicates that the Navy did not conduct the 'hard look' that NEPA requires.").

Pursuant to NEPA, we conclude the Forest Service acted arbitrarily and capriciously in adopting the FEIS and granting the SUP. Upon remand, the Forest Service should explain its decision that receiving only two of the eight site-specific stabilization designs was "adequate" to determine the environmental effects of the ACP project, and it should also explain how it took a "hard look" at the erosion, sedimentation, and water quality issues discussed here considering the Forest Service's numerous

concerns that were not addressed in the FEIS. If supplemental analysis is needed, particularly regarding the effectiveness of mitigation strategies relied on in the COM Plan, the Forest Service should perform that analysis as well.

C.

*Mineral Leasing Act*

1.

The MLA authorizes the “Secretary of the Interior or appropriate agency head” to grant gas pipeline rights of way across “Federal lands.” 30 U.S.C. § 185(a). As relevant here, “Federal lands” means “all lands owned by the United States *except lands in the National Park System.*” 30 U.S.C. § 185(b)(1) (emphasis supplied). Pursuant to the Park Service’s Organic Act, land in the National Park System includes “any area of land and water administered by the Secretary [of the Interior]” through NPS. 54 U.S.C. § 100501.

Congress designated the ANST as a National Scenic Trail administered by the Secretary of the Interior, who delegated that duty to NPS. *See* 16 U.S.C. § 1244(a)(1). Accordingly, the ANST is land in the National Park System. The parties are generally in agreement about this; after NPS informed FERC that “the entire [ANST] corridor [is] part of the ANST park unit” and a “unit” of the National Park System, J.A. 1849, 3186, FERC’s FEIS concluded that NPS is “the lead federal agency for the administration of the entire ANST” and that the ANST “is a ‘unit’ of the national park system,” J.A. 1794. The parties also do not dispute that NPS indicated it does not have authority under the MLA to grant pipeline rights of

way across the ANST. However, the parties disagree about whether the Forest Service has the authority to grant such rights of way across the ANST. The FEIS concluded:

The ANST is a unit of the National Park system; *however*, the lands acquired and administered by the [Forest Service] for the ANST are [National Forest System] lands and subject exclusively to [Forest Service] regulations and management authority. . . . [A]n authorization from the NPS is not required for Atlantic’s proposed ANST crossing on [National Forest System] lands.”

*Id.* at 1489 (emphasis supplied).

The Forest Service asserts that the MLA authorizes the Forest Service to grant pipeline rights of way on Forest Service land traversed by the ANST. Specifically, the Forest Service argues that the National Trails System Act, which provides for the administration of national trails like the ANST, distinguishes between the “overall” administration of the ANST (with which NPS is charged) and administration of the ANST’s underlying lands (most of which are under the jurisdiction of other agencies, like the Forest Service). Pursuant to this reading of the National Trails System Act, the Forest Service asserts, the MLA authorizes the Forest Service to grant pipeline rights of way on portions of the ANST traversing lands administered by the Forest Service.

The Forest Service largely relies on the following language from the National Trails System Act to support this argument:

The Secretary of the Interior *or the Secretary of Agriculture as the case may be*, may grant easements and rights-of-way upon, over, under, across, or along any component of the national trails system in accordance with the laws applicable to the national park system *and the national forest system, respectively*: Provided, That any conditions contained in such easements and rights-of-way shall be related to the policy and purposes of this chapter.

16 U.S.C. § 1248(a) (emphasis supplied). The MLA, the Forest Service asserts, prevents NPS from authorizing pipeline rights of way across components of the ANST on *National Park System* lands, but it does not prevent the Forest Service from authorizing pipeline rights of way across components of the ANST on *National Forest System* lands. In any event, the Forest Service concedes that its position on this issue is entitled to no judicial deference. *See* Resp’s Surreply Br. 12-13.

The problem with the Forest Service’s argument is it misreads both the MLA and the National Trails System Act. The MLA specifically excludes *lands* in the National Park System from the authority of the Secretary of the Interior “or appropriate agency head” to grant pipeline rights of way. *See* 30 U.S.C. §§ 185(a), 185(b)(1). In other words, the MLA concerns the *land*, not the agency. The FEIS concluded, and the parties agree, that the ANST is a unit of the National Park System. Accordingly, even if the Forest Service were the “appropriate agency head” in this instance, it could not grant a pipeline right of way across the ANST

pursuant to the MLA. Interpreting the MLA as the Forest Service argues would give the Forest Service more authority than NPS on National Park System land. This defies logic.

Further, the Forest Service is *not* the “appropriate agency head” for the ANST. The Forest Service’s arguments notwithstanding, the National Trails System Act does not distinguish between various levels of administration of the ANST (“overall” versus by “jurisdiction”); rather, as NPS explained to FERC, the Act is clear that the Secretary of the Interior *administers* the entire ANST, while “other affected State and Federal agencies,” like the Forest Service, *manage* trail components under their jurisdiction. *See* 16 U.S.C. §§ 144(a), 1246(a). Indeed, 16 U.S.C. § 1246(a) clearly distinguishes between trail administration and management:

The Secretary charged with the overall *administration* of a trail pursuant to section 1244(a) of this title shall, in *administering and managing* the trail, consult with the heads of all other affected State and Federal agencies. Nothing contained in this chapter shall be deemed to transfer among Federal agencies any *management responsibilities* established under any other law for federally *administered* lands which are components of the National Trails System.

§ 1246(a)(1)(A) (emphasis supplied).

Section 1248(a) of the Act does not transfer *administration* responsibilities of the ANST to the Forest Service simply because the Forest Service *manages* land underlying components of the ANST.

Although it is true that § 1248(a) does permit the Secretary charged with overall administration of a national trail—“[t]he Secretary of the Interior or the Secretary of Agriculture as the case may be”—to grant easements and rights of way in accordance with the laws applicable to either the National Park System or the National Forest System, in this case, the applicable *administrator* is the Secretary of the Interior, not the Secretary of Agriculture, and the applicable laws are those of the National Park System. *See* 16 U.S.C. § 1244(a)(1) (“The Appalachian Trail shall be administered primarily as a footpath by the Secretary of the Interior, in consultation with the Secretary of Agriculture.”). Other national trails are *administered* by the Secretary of Agriculture and are subject to laws applicable to the National Forest System—the ANST is simply not one of those trails. *See, e.g.*, § 1244(a)(2), (5), (13), (14), (27), (30) (charging the Secretary of Agriculture with overall administration of the Pacific Crest Trail, the Continental Divide National Scenic Trail, the Florida National Scenic Trail, the Nez Perce National Historic Trail, the Arizona National Scenic Trail, and the Pacific Northwest National Scenic Trail).

The Forest Service’s arguments to the contrary are unavailing, and the Forest Service does not have statutory authority to grant pipeline rights of way across the ANST pursuant the MLA. The Forest Service’s ROD and SUP granting this right of way are, accordingly, vacated.

**2.**

The Forest Service also argues that Petitioners have no standing to bring this challenge because they

allege no harm traceable to the right of way grant. For the reasons this court explained in *Sierra Club v. U.S. Department of the Interior*, this standing argument fails. See 899 F.3d 260, 282-85 (4th Cir. 2018). Petitioners' alleged injuries are fairly traceable to the Forest Service because "without [the Forest Service's] grant of a right of way, the pipeline could not have been authorized in its currently proposed form. It therefore cannot be said that Petitioners' injuries are 'the result of the independent action of some third party not before the court.'" *Id.* at 284 (quoting *Bennett v. Spear*, 520 U.S. 154, 168-69 (1997)).

Furthermore, the Forest Service asserts that Petitioners waived their argument that the Forest Service lacks statutory authority to grant rights of way across the ANST because Petitioners failed to adequately raise that argument before the Forest Service. In comments on the draft ROD, Petitioners objected to the agency's failure to consider non-national forest routes for the pipeline and the viability of Atlantic's proposed method for crossing the ANST. Petitioners did not challenge the Forest Service's authority to issue the right of way in the first instance.

Those challenging agency actions, such as Petitioners here, are generally required to raise their arguments to the agency during the administrative review process and to exhaust their administrative remedies before this Court may consider their arguments. See 7 U.S.C. § 6912(e). Nonetheless, the draft ROD—to which the Forest Service claims that Petitioners should have lodged their MLA objection—nowhere mentions that the Forest Service was contemplating granting right of way through lands

administered by *NPS*, or the ANST, in particular. To the contrary, the draft ROD characterizes the decision to be made as “[W]hether to authorize the use and occupancy of *NFS* lands for [Atlantic] to construct, operate, maintain, and eventually decommission a natural gas pipeline that crosses *NFS lands administered by the MNF and GWNF*.” J.A. 1378 (emphasis added).

Because (1) the draft ROD purported to be considering granting right of way through *only* Forest Service “lands administered by the MNF and GWNF” and (2) the FEIS, upon which the draft ROD relied, stated that NPS “administered” the entire ANST and that the entire ANST is a “unit” of the National Park System, there was no reason for Petitioners, or any other public commenter, to believe that the ROD or the SUP would grant right of way across the ANST. To be sure, Petitioners may have been on notice from the FEIS that the pipeline would require a right of way across the ANST from some agency at some point, but Petitioners had no way to know that such right of way would be granted by the Forest Service through the ROD. Indeed, the plain language of the SUP authorizes Atlantic “to use or occupy” only “*National Forest System lands* in the [MNF] and the [GWNF] of *the National Forest System*.” Put simply, the Forest Service never notified the public that it intended to grant Atlantic right of way through a unit of the National Park System like the ANST.

Furthermore, and significantly, the draft ROD nowhere mentions that the Forest Service intended to rely on the MLA as the basis of its authority to grant the right of way across the ANST. Indeed, regarding

the MLA, the FEIS stated only that separate, congressional approval would be required if NPS were the agency issuing the right of way. *See, e.g., Bowen v. City of New York*, 476 U.S. 467, 482-87 (1986) (refusing to enforce exhaustion requirement when plaintiffs could not have been expected to administratively “attack a policy they could not be aware existed” (internal quotation marks omitted)); *Beth V. v. Carroll*, 87 F.3d 80, 83 (3d Cir. 1996) (excepting plaintiff from statutory exhaustion requirement when he “was given no prior notice or opportunity to object” and requiring exhaustion would be “futile”).

Moreover, the question of whether the MLA authorized the Forest Service to issue the SUP is a purely legal question that this Court may answer without the benefit of the Forest Service’s expertise. Our sister courts have recognized an exception to the administrative exhaustion requirement for such legal issues. *See Bartlett v. U.S. Dep’t of Agric.*, 716 F.3d 464, 474 (8th Cir. 2013); *Vt. Dep’t of Pub. Serv. v. United States*, 684 F.3d 149, 159-60 (D.C. Cir. 2012); *Beth V.*, 87 F.3d at 88. Under the legal question exception, a party’s failure to exhaust administrative remedies is excused if the issues “are legal questions which are not suitable for administrative resolution and are more properly resolved by the courts.” *Bartlett*, 716 F.3d at 474 (citation omitted). This exception is narrow. *See id.*; 7 West’s Fed. Admin. Prac. § 8226 (2018) (“[C]ourts have plenary power over questions of law, but usually legal questions must first be presented to the agency.”). Nonetheless, when the agency has no expertise in the issue, and no factual disputes must be resolved, the question may be ripe

for judicial review notwithstanding a party's failure to exhaust its administrative remedies. *See Ace Prop. and Cas. Ins. Co. v. Fed. Crop Ins. Corp.*, 440 F.3d 992, 1001 (8th Cir. 2006); *see also EEOC v. Seafarers Int'l Union*, 394 F.3d 197, 201 (4th Cir. 2005) (discussing exhaustion exception for legal issues and stating that "courts have limited it to issues that are quintessentially legal and fail to implicate the agency's expertise in any meaningful manner" (citation omitted)).

The issue of whether the Forest Service had authority under the MLA to issue a right of way across the ANST is a question of statutory interpretation. Such a question is the peculiar province of the courts. Indeed, "[t]he judiciary is the final authority on issues of statutory construction . . ." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). And the Forest Service has pointed to no factual disputes that must otherwise be resolved before the Court may determine the scope of the agency's authority under the MLA.

Accordingly, because (1) Petitioners were not put on notice that the right of way across the ANST would be granted by the Forest Service through the ROD; (2) the Forest Service gave no hint of the legal authority that it would claim in issuing the SUP during the administrative review process; and (3) the Forest Service's authority to issue rights of way pursuant to the MLA is a purely legal question, we decline to find that Petitioners were required to exhaust their administrative remedies in connection with their MLA argument.

**IV.**

We trust the United States Forest Service to “speak for the trees, for the trees have no tongues.” Dr. Seuss, *The Lorax* (1971). A thorough review of the record leads to the necessary conclusion that the Forest Service abdicated its responsibility to preserve national forest resources. This conclusion is particularly informed by the Forest Service’s serious environmental concerns that were suddenly, and mysteriously, assuaged in time to meet a private pipeline company’s deadlines. Accordingly, for the reasons set forth herein, we grant the petition to review the Forest Service’s Record of Decision and Special Use Permit, vacate the Forest Service’s decisions, and remand to the Forest Service for proceedings consistent with this opinion.

*PETITION FOR REVIEW GRANTED,  
VACATED AND REMANDED*

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*Appendix B*

**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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No. 18-1144

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COWPASTURE RIVER PRESERVATION ASSOCIATION;  
HIGHLANDERS FOR RESPONSIBLE DEVELOPMENT;  
SHENANDOAH VALLEY BATTLEFIELDS FOUNDATION;  
SHENANDOAH VALLEY NETWORK; SIERRA CLUB;  
VIRGINIA WILDERNESS COMMITTEE;  
WILD VIRGINIA, INC.,

*Petitioners,*

v.

FOREST SERVICE, an agency of the U.S. Department of  
the Agriculture; KATHLEEN ATKINSON, in her official  
capacity as Regional Forester of the Eastern Region;  
KEN ARNEY, in his official capacity as Acting Regional  
Forester of the Southern Region,

*Respondents,*

ATLANTIC COAST PIPELINE LLC,

*Intervenor.*

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Decided: Feb. 25, 2019

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**ORDER**

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Upon consideration of the petition for en banc  
rehearing filed by Atlantic Coast Pipeline and the

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petition for panel and en banc rehearing filed by the federal respondents, and no judge having requested a poll of the court on the petitions for en banc rehearing, the court denies the petition for en banc rehearing and the petition for panel and en banc rehearing.

Entered at the direction of the panel: Chief Judge Gregory, Judge Wynn, and Judge Thacker.

For the Court

/s/ Patricia S. Conner, Clerk

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*Appendix C*

**UNITED STATES DEPARTMENT OF  
AGRICULTURE**

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ATLANTIC COAST PIPELINE PROJECT SPECIAL USE  
PERMIT/LAND AND RESOURCE MANAGEMENT  
PLAN AMENDMENTS

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Pocahontas County, West Virginia and Highland,  
Bath, and Augusta Counties, Virginia

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Lead Agency: Federal Energy Regulatory  
Commission  
Cooperating Agency: U.S.D.A. Forest Service

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Dated: Nov. 17, 2017

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**RECORD OF DECISION**

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**LIST OF ACRONYMS**

ACP	Atlantic Coast Pipeline
ANST	Appalachian National Scenic Trail
ATWS	Additional Temporary Workspace
BA	Biological Assessment
BASI	Best Available Scientific Information
BI	Beneficial Impact
BIC	Best in Class

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BRP	Blue Ridge Parkway
BO	Biological Opinion
CFR	Code of Federal Regulations
CWA	Clean Water Act
COM	Construction, Operations, and Maintenance
DEIS	Draft Environmental Impact Statement
EPA	Environmental Protection Agency
ESA	Endangered Species Act
FEIS	Final Environmental Impact Statement
FERC	Federal Energy Regulatory Commission
FS	Forest Service
FWS	US Fish and Wildlife Service
FR	Federal Register
FR	Forest Road
GWNF	George Washington National Forest
HDD	Horizontal Directional Drilling
KOP	Key Observation Point
LRMP	Land and Resource Management Plan
MNF	Monongahela National Forest
NEPA	National Environmental Policy Act
NFS	National Forest System
NFMA	National Forest Management Act
NOA	Notice of Availability

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NOI	Notice of Intent
NRCS	Natural Resource Conservation Service
NRHP	National Register of Historic Places
RACR	Roadless Area Conservation Rule
RFSS	Regional Forester Sensitive Species
ROD	Record of Decision
ROW	Rights of Way
RUSLE	Revised Universal Soil Loss Equation
SHP	Supply Header Project
SHPO	State Historic Preservation Office
SIO	Scenic Integrity Objectives
SSURGO	Soil Survey Geographic Database
SUP	Special Use Permit
TEP	Threatened, Endangered, and Proposed Species
U.S.C.	United States Code
USDA	United States Department of Agriculture
VDCR-DNH	Virginia Department of Conservation and Recreation–Division of Natural Heritage
VIA	Visual Impact Analysis
WVDEP	West Virginia Department of Environmental Protection

## INTRODUCTION

This record of decision (ROD) documents Forest Service (FS) decisions and rationale for:

- (1) Authorizing the use and occupancy of National Forest System (NFS) land for Atlantic Coast Pipeline, LLC (Atlantic) to construct, operate, maintain, and eventually decommission a natural gas pipeline that crosses NFS lands administered by the Monongahela National Forest (MNF) and George Washington National Forest (GWNF); and
- (2) Approving:
  - a. a project-specific Forest Plan amendment to the Monongahela National Forest's Land and Resource Management Plan<sup>1</sup> (United States Department of Agriculture [USDA] Forest Service 2011), and
  - b. a project-specific Forest Plan amendment to the George Washington National Forest's LRMP (USDA Forest Service 2014).

Our decisions are based on the Final Environmental Impact Statement (FEIS) prepared by the Federal Energy Regulatory Commission (FERC) for the Atlantic Coast Pipeline (ACP) Project and Supply Header Project (SHP) (FERC 2017). In accordance with the Natural Gas Act (Title 15 United States Code [U.S.C.] § 717), the FERC is the lead Federal agency for the environmental analysis of the

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<sup>1</sup> Hereafter referred to as the "LRMP" or "Forest Plan"

construction and operation of the ACP and SHP. Federal agencies with a role in authorizing an application for a natural gas pipeline are required by law to cooperate in processing the application and to comply with the processing schedule established by FERC (Section 313 of Energy Policy Act of 2005). We participated as a cooperating agency with the FERC during the FEIS development. We have adopted the environmental analysis conducted by FERC (in accordance with 40 Code of Federal Regulations [CFR] 1506 (a) and (c)) to support this ROD.

Please note, while the pronoun “we” is used in this document, the Regional Forester for the Eastern Region (R9) is responsible for any decisions related to the MNF and the Regional Forester for the Southern Region (R8) is responsible for any decisions related to the GWNF.

## **BACKGROUND**

The ACP Project will involve the construction and operation of 604.5 miles of an interstate natural gas pipeline. Of the total ACP route miles, about 21 miles are located on NFS lands. The SHP involves the construction and operation of 37.5 miles of pipeline, but since it will not impact NFS lands, it is not addressed in this ROD. Figure 1-1 in the FEIS provides an overview map of the two pipeline projects analyzed in the FERC’s FEIS.

Section 1.0 (Introduction) of the FEIS describes the background for the ACP Project. The ACP Project on NFS lands includes the construction, operation, and maintenance of a buried 42-inch diameter interstate mainline natural gas pipeline that crosses about 5 miles of lands managed by the MNF and 16

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miles of lands managed by the GWNF. The pipeline route will cross the Appalachian National Scenic Trail (ANST) on the GWNF and the Blue Ridge Parkway (BRP) on National Park Service land.

The construction corridor for the pipeline in most instances will be 125 feet wide, but narrows to 75-foot wide when crossing wetlands. The construction corridor will be reclaimed to a final operational corridor width of 50 feet. The pipeline will be buried so that there will be three feet of cover in most areas, 18 inches of cover in consolidated rock and deeper when crossing waterbodies. There will be no significant above ground facilities located on either the MNF or GWNF, although there will be minor equipment such as test stations and line markers (size of a fence post). The land use requirements of the project on NFS lands is shown in Table 1:

Table 1 - Land Requirements of the Atlantic Coast Pipeline on NFS Lands

National Forest/Facility/Component	Total (acres)	
	Construction	Operation
<b>Monongahela National Forest</b>		
AP-1 Mainline Right-of-Way	77.9	30.9
Additional Temporary Workspace <sup>a</sup>	7.9	0.0
Access Roads		
Existing/Hybrid Roads <sup>b</sup>	24.9	24.8
New To-Be-Constructed Roads	0.1	0.1
Pipe/Contractor Yards		
Pipe Yard 06-A	1.5	0.0
Monongahela National Forest Subtotal	112.3	55.8
<b>George Washington National Forest</b>		
AP-1 Mainline Right-of-Way	235.0	94.7
Additional Temporary Workspace <sup>a</sup>	16.4	0.0
Access Roads		
Existing Roads	65.3	62.1
New To-Be-Constructed Roads	1.5	1.5
George Washington National Forest Subtotal	318.1	158.2
<b>National Forest System Lands Total</b>	<b>430.4</b>	<b>214.0</b>
<sup>a</sup>	Includes additional temporary workspace, topsoil segregation areas, and water impoundment structure locations.	
<sup>b</sup>	Includes two access roads where a portion of the road is existing and a portion is new, to-be-constructed.	
Note:	The totals shown in this table may not equal the sum of addends due to rounding.	

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If all approvals are in place, construction activity to install the pipeline on NFS lands is scheduled to begin in April 2018 and conclude in late 2019. Timber removal would occur prior to pipeline installation activity, but must occur between November 15 and March 31 to avoid impacts to threatened and endangered bats. Operation and maintenance within the right-of-way (ROW) will begin shortly thereafter and continue during the 30 year life of the special use permit (SUP).

### **PURPOSE AND NEED AND PROPOSED ACTION**

Section 1.1 (Project Purpose and Need) of the FEIS describes the purpose of the project is to serve the growing energy needs of multiple public utilities and local distribution companies in Virginia and North Carolina. Atlantic states the ACP Project will increase the reliability and security of natural gas supplies in these two States, with the majority of the gas supplied to be used to generate electricity for industrial, commercial, and residential uses.

The purpose and need for the FS proposed action is to respond to Atlantic's application for a special use permit that was submitted to the FS on June 16, 2016. The proposed action by the FS is to authorize Atlantic to use and occupy NFS lands for the ACP Project and approve LRMP amendments to allow the project to be consistent with the LRMPs. The FS decisions are needed to meet our statutory obligations as a cooperating agency in processing applications for natural gas pipelines involving Federal land under provisions Section 28 of the Mineral Leasing Act of

1920 (30 U.S.C. § 181) and the Energy Policy Act of 2005.

The Mineral Leasing Act of 1920 and federal regulations at 36 CFR 251 Subpart B provide the FS with authority to issue a SUP for construction and operation of an oil and gas pipeline across these NFS lands. The FS may include stipulations in the SUP it deems necessary to protect Federal property and otherwise protect the public interest.

Section 4.8.9 (“Federal Lands”) of the FEIS describes the four MNF and nine GWNF Forest Plan standards that will be modified and constitute the amendment of each Forest LRMP. These amendments allow the ACP Project to meet Forest Plan Standards and minimize impacts to soil, water, riparian, threatened and endangered species, recreational and visual resources. Section 4.8.9.1 (“Forest Service”) of the FEIS describes the function of Forest Plan standards, as well as other types of management direction that guide design of the ACP Project across NFS lands. The National Forest Management Act (NFMA) requires that proposed projects, including third-party proposals subject to permits, be consistent with the Forest Plan of the administrative unit where the project will occur. The amendments are being approved concurrently with our adoption and use/occupancy decisions for the MNF and GWNF in accordance with 36 CFR 219.15(c)(4).

#### **DECISION TO BE MADE**

The decisions to be made by the Forest Service are:

- (1) Whether to authorize the use and occupancy of NFS land for Atlantic Coast Pipeline, LLC to

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construct, operate, maintain, and eventually decommission a natural gas pipeline that crosses NFS lands administered by the MNF and GWNF; and

(2) Whether to approve:

- a. A project-specific Forest Plan amendment to modify four standards in the MNF's Forest Plan, and
- b. A project-specific Forest Plan amendment to modify nine standards in the GWNF's Forest Plan.

We have reviewed those portions of the FEIS directly related to NFS lands and the effects from the ACP Project on those lands. We adopted the FEIS because the analysis provides sufficient evidence to support our decisions in compliance with Forest Service regulations 36 CFR Part 219 (Planning), Part 220 (National Environmental Policy Act Compliance), and Part 251 (Land Uses).

We have determined that the scope of the FEIS analysis and this decision is limited to considering authorizing use and occupancy and approving project-specific plan amendments related to the ACP Project on NFS lands. "Project-specific plan amendments" means the amendments are applicable only to the ACP Project and not to other current or future projects. We have determined whether and how the four MNF and nine GWNF modified Forest Plan standards are directly related to the substantive requirements (36 CFR 219.8 through 219.11) of the Forest Service planning regulations. The substantive requirements address sustainability, diversity of plant and animal communities, multiple use, and timber requirements

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based on the NFMA. A forest plan amendment is “directly related” to a substantive requirement if it has one or more of the following relationships to a substantive requirement:

- the purpose for the amendment,
- there would be a beneficial effect of the amendment,
- there would be a substantial adverse effect of the amendment, or
- there would be a substantial lessening of plan protections by the amendment.

If a proposed amendment is determined to be “directly related” to a substantive rule requirement, we as the responsible officials must apply that requirement within the scope and scale of the proposed amendment and, if necessary, make adjustments to the proposed amendment to meet the substantive requirements. 36 CFR 219.13 (b)(5) and (6); 81 *Federal Register* (FR) 90738 (Dec. 15, 2016).

Finally, mitigation for the ACP Project on NFS lands is described in Section 2.3.1 (“Mitigation”) of the FEIS. This section in the FEIS identifies the construction and restoration plans that apply to the ACP project as required both by FERC and by the FS. Specifically, the Construction, Operation, and Maintenance Plan (COM Plan) is a series of construction plans, procedures, and mitigation measures that will be implemented on NFS lands. The COM Plan will be attached to and made a part of the SUP issued by the FS. The SUP is the administrative instrument that will implement this ROD.

### **CHANGES FROM DRAFT EIS (DEIS) TO FEIS**

In the DEIS, the proposed Forest Plan amendments consisted of one part with two potential modified standards for the MNF and six parts with eight proposed modified standards and three potential modified standards for the GWNF. One part of the GWNF amendment was proposed to be a “plan-level” amendment; that is, it would have applied not only to the ACP Project but also any future projects within the area covered by the applicable modified standard. The amendment proposals were based on the knowledge and anticipated effects of the proposed project at that time.

Since the DEIS, we reviewed additional information, recent revisions to our planning regulations, and comments from the public on the DEIS. Our review resulted in determining that two of the standards considered in the DEIS (FW-243 and 11-019 in the GWNF LRMP) do not need to be modified for the project. However, the FEIS includes modification of four standards (SW03 and TE07 in the MNF LRMP; FW-8 and 11-003 in the GWNF LRMP) that were not considered for modification in the DEIS. Another change addressed in the FEIS was that we no longer proposed to reallocate 104.2 acres of land on the GWNF to Management Area 5C – Designated Utility Corridor, but instead will exempt the ACP linear ROW from being reallocated to the 5C management prescription (See FW-244 in Table 3 below).

With one exception, the public was notified of the aforementioned changes to the proposed Forest Plan amendments through a notice that was published in the *Federal Register* on June 5, 2017 (82 FR 25756).

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One standard (TE07 in the MNF LRMP relating to threatened and endangered species) was not included in the DEIS nor in the June 5 FR Notice. TE07 is identified in the FEIS as a standard that needs modification based on results of biological surveys completed since the DEIS.

The net result of the aforementioned changes is that the FEIS evaluated proposed project-specific amendments consisting of two parts modifying four standards in the MNF LRMP (See Table 2 below) and six parts modifying ten standards in the GWNF LRMP (see Table 3 below.) The FEIS acknowledged that the results of surveys completed after the release of the FEIS would determine the need to modify two of the standards identified (TE07 and FW-85). The applicable surveys have now been completed and from that information, it has been determined that TE07 (in the MNF's LRMP) will need to be modified, but FW-85 (in the GWNF's LRMP) will not need to be modified.

We also reviewed analyses from Atlantic and worked with them to develop project design features and mitigation measures that are designed to protect resources including soil, riparian, special status species habitat, visual, and recreational resources. The additional mitigation measures or project design features relating to the proposed amended standards are discussed in the FEIS, Chapter 4 and in Atlantic's COM Plan. As described in the FEIS in Section 2.3.1.2 ("General Forest Service Mitigation"), our intent is to avoid or minimize adverse impacts on NFS lands. The COM Plan outlines mitigation measures that are referenced throughout Chapter 4 in the FEIS

describing how the measures minimize impacts to NFS resources. The COM Plan underwent a number of changes from the DEIS to FEIS as described in Section 4 of the FEIS. By adopting the FERC-prepared FEIS, all design features and mitigation measures applicable to NFS lands are made a part of this decision. Atlantic submitted an updated COM plan in October 2017 which addressed Forest Service comments and includes additional details on mitigation measures to minimize impacts. The COM Plan will be a requirement of the SUPs the Forest Service issues to implement the project.

The *Federal Register* on June 5, 2017 (82 FR 25756) also informed the public of a change to the administrative review procedures for the ACP Project. By not designating the ACP permit area as a Management Area 5C Utility Corridor on the GWNF, we are no longer considering a plan-level amendment and the requisite administrative review process under 36 CFR 219 is no longer applicable. For this decision, all of the modified standards were project-specific and therefore the administrative review procedures of 36 CFR 218 were followed. (See the “Administrative Review/Objections” section below for more information.)

#### **UPDATES SINCE DRAFT ROD RELEASE**

This ROD reflects a number of updates since the Draft ROD was published on July 21, 2017. The completion of additional biological and cultural resource surveys; updates to supporting documents, reports, and plans; completion of our pre-decision administrative review; and actions by other federal agencies have helped shape the ROD. Discussed in

more detail throughout this document, the major items influencing the ROD are summarized here:

- Atlantic submitted an updated Biological Evaluation (BE) report on August 4, 2017. The BE assesses impacts and identifies conservation measures for avoiding or minimizing impacts on Regional Forester Sensitive Species (RFSS). The updated report incorporated the results of additional field surveys and FS comments. On November 16, 2017, the Forest Service accepted the BE but made different determinations for three RFSS.
- Atlantic completed a survey of old growth areas that would be impacted by the ACP Project and provided the results to the Forest Service on September 8, 2017. Upon review of survey results, the FS determined that the GWNF's old growth standard does not need to be modified is addressed in this ROD.
- On October 13, 2017, FERC issued a Certificate to Atlantic<sup>2</sup> for authorization to construct and operate the ACP Project, subject to a number of environmental conditions designed to mitigate the environmental impacts associated with construction and operation of the ACP Project. The FERC's Certificate will be referenced throughout this ROD.
- The US Fish and Wildlife Service (FWS) provided a biological opinion (BO) to FERC on October 16, 2017, which contained the FWS review of the effects of the ACP Project on eight

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<sup>2</sup> Hereafter referred to as the "FERC's Certificate"

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federally listed threatened and endangered species. It also provided reasonable and prudent measures which Atlantic must implement to minimize harm as required by the Endangered Species Act (ESA).

- Atlantic submitted an updated COM Plan on October 24, 2017 which incorporated clarifications, additional information and addressed FS comments. The updated COM Plan is available at: [http://elibrary.FERC.gov/idmws/filelist.asp?accession\\_num=20171027-5240](http://elibrary.FERC.gov/idmws/filelist.asp?accession_num=20171027-5240)
- On October 27, 2017, the FS completed its pre-decision administrative review of public objections that were filed after the Draft ROD was released. Objectors received a collective response letter that addressed issues raised in their objections.
- Atlantic completed a Phase II cultural resource survey on sites in the GWNF and on November 1, 2017, the FS notified the Virginia Department of Historic Resources that the tested sites were determined to not be eligible for listing on the NRHP.
- FERC requested a Conference Opinion from the FWS on the candy darter on November 9, 2017. The FWS had recently proposed the candy darter for listing as a threatened species under the ESA. FERC's request asks FWS to confirm its provisional finding that the ACP Project is not likely to jeopardize the candy darter.
- We recognize a need for the public to stay informed as new information is obtained and the project progresses on the National Forests.

We will meet this obligation by posting on the GWNF website for the ACP Project relevant plans, documents, weekly inspection/monitoring reports, photos, and links to other websites (FERC, Dominion Energy Transmission, Inc., etc...) containing information about the project.

## **DECISION AND RATIONALE FOR THE DECISION**

### **Authorization of the use and occupancy of NFS land**

Based on our review of the FEIS and project record, we are authorizing Atlantic to use and occupy NFS land to construct, operate, maintain, and eventually decommission a natural gas pipeline, the ACP Pipeline Project, on NFS lands administered by the MNF and GWNF. The construction phase of the project on NFS lands will disturb approximately 430.4 acres of land, including the pipeline construction right-of-way, additional temporary workspaces (ATWS), and access roads. Following construction, 214 acres of NFS lands will be maintained and operated for long-term use. The long-term use will include approximately 56 acres of lands associated with the proposed 5.1 mile pipeline corridor and associated access roads for the ACP Project that crosses the MNF in Pocahontas County, West Virginia; and approximately 158 acres and 15.9 miles of pipeline corridor on the GWNF in Highland, Bath, and Augusta Counties, Virginia. See Figure 1. More detailed maps of the pipeline route are found in Appendix B of the FEIS. This authorization will be

implemented through the FS issuing two SUPs: 1)a temporary SUP for the construction of the ACP; and 2) a SUP for use and maintenance of the ACP for a term of 30 years with an option to renew in accordance with 36 CFR 251.64.

Our decision allows Atlantic to implement the ACP Project in a manner consistent with the terms and conditions of this decision.

### **Approval of Forest Plan amendments**

Based on our review of the FEIS and project record, we amend the MNF's LRMP as displayed in Table 2 and the GWNF's LRMP as displayed in Table 3. As the Tables show, the plan amendments modify certain plan standards relating to: Utility Corridors, Soil and Riparian, Threatened and Endangered Species, Eligible Recreational River Access, Appalachian National Scenic Trail Area, and Scenic Integrity Objectives. Modified plan amendment language is in "**bold**" text in column 2 of the tables.



Figure 1 - Atlantic Coast Pipeline Route on the MNF and GWNF.

Table 2. MNF Revised Land and Resource Management Plan Amendment Specific to the ACP Project

MNF Forest Plan Standards Prior to Modifying for the ACP Project	Standards as Modified for the ACP Project
<b>Part One - Soils</b>	
Standard SW06: Severe rutting resulting from management activities shall be confined to less than 5 percent of an activity area.	Standard SW06: Severe rutting resulting from management activities shall be confined to less than 5 percent of an activity area <b>with the exception of the</b>

	<p><b>construction of Atlantic Coast Pipeline, where the applicable mitigation measures identified in the COM Plan and SUP must be implemented.</b></p>
<p>Standard SW07: Use of wheeled and/or tracked motorized equipment may be limited on soil types that include the following soil/site conditions:</p> <p>Steep Slopes (40 to 50 percent) – Operations on these slopes shall be analyzed on a case-by-case basis to determine the best method of operation while maintaining soil stability and productivity. Very Steep Slopes (more than 50 percent) – Use is prohibited without recommendations from interdisciplinary team review and line officer approval.</p>	<p>Standard SW07: Use of wheeled and/or tracked motorized equipment may be limited on soil types that include the following soil/site conditions <b>with the exception of the construction of Atlantic Coast Pipeline, where the applicable mitigation measures identified in the COM Plan and SUP must be implemented:</b></p> <p>Steep Slopes (40 to 50 percent) – Operations on these slopes shall be analyzed on a case-by-case basis to determine the best method of operation while maintaining soil stability and</p>

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<p>Susceptible to Landslides – Use on slopes greater than 15 percent with soils susceptible to downslope movement when loaded, excavated, or wet is allowed only with mitigation measures during periods of freeze-thaw and for one to multiple days following significant rainfall events. If the risk of landslides during these periods cannot be mitigated, then use is prohibited.</p> <p>Soils Commonly Wet At or Near the Surface During a Considerable Part of the Year or Soils Highly Susceptible to Compaction. Equipment use shall normally be prohibited or mitigated when soils are saturated or when freeze-thaw cycles occur.</p>	<p>productivity. Very Steep Slopes (more than 50 percent) – Use is prohibited without recommendations from interdisciplinary team review and line officer approval.</p> <p>Susceptible to Landslides – Use on slopes greater than 15 percent with soils susceptible to downslope movement when loaded, excavated, or wet is allowed only with mitigation measures during periods of freeze-thaw and for one to multiple days following significant rainfall events. If the risk of landslides during these periods cannot be mitigated, then use is prohibited.</p> <p>Soils Commonly Wet At or Near the Surface During a Considerable Part of the Year or Soils Highly Susceptible to Compaction. Equipment use shall normally be</p>
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	prohibited or mitigated when soils are saturated or when freeze-thaw cycles occur.
<p>Standard SW03: Disturbed soils dedicated to growing vegetation shall be rehabilitated by fertilizing, liming, seeding, mulching, or constructing structural measures as soon as possible, but generally within 2 weeks after project completion, or prior to periods of inactivity, or as specified in contracts. Rip compacted sites when needed for vegetative reestablishment and recovery of soil productivity and hydrologic function.</p>	<p>Standard SW03: Disturbed soils dedicated to growing vegetation shall be rehabilitated by fertilizing, liming, seeding, mulching, or constructing structural measures as soon as possible, but generally within 2 weeks after project completion, or prior to periods of inactivity, or as specified in contracts. Rip compacted sites when needed for vegetative reestablishment and recovery of soil productivity and hydrologic function <b>with the exception of the construction, restoration, and rehabilitation activities associated with the Atlantic Coast Pipeline where the applicable mitigation measures</b></p>

	<p><b>identified in the COM Plan and SUP must be implemented.</b></p>
<p><b>Part 2 - Threatened and Endangered Species</b></p>	
<p>Standard TE07: Special use permits may be authorized in TEP [Threatened, Endangered, Proposed] species habitat if the uses do not adversely affect populations or habitat. This standard does not apply to Indiana bat or running buffalo clover. See special use direction for these species, [in the MNF LRMP].</p>	<p>Standard TE07: Special use permits may be authorized in TEP species habitat if the uses do not adversely affect populations or habitat. <b>However, this requirement will not apply to the Atlantic Coast Pipeline Construction SUP for the northern long-eared bat and small whorled pogonia where the applicable mitigation measures identified in the COM Plan and SUP must be implemented.</b> This standard does not apply to Indiana bat or running buffalo clover.</p>

Table 3: GWNF Land and Resource Management Plan Amendment Specific to the ACP Project

GWNF Forest Plan Standard Prior to Modification for the ACP Project	Standard as Modified for the ACP Project
Part 1 - Utility Corridors	
<p><b>Standard FW-244:</b> Following evaluation of the above criteria, decisions for new authorizations outside of existing corridors and designated communication sites will include an amendment to the Forest Plan designating them as Prescription Area 5B or 5C</p> <p><i>(Note: Use of the phrase “above criteria” in this standard refers to criteria in other Plan standards related to utility corridors.)</i></p>	<p>Standard FW 244: Following evaluation of the above criteria, decisions for new authorizations outside of existing corridors and designated communication sites will include an amendment to the Forest Plan designating them as Prescription Area 5B or 5C <b>with the exception of the operational right-of-way for the Atlantic Coast Pipeline.</b></p>
Part 2 - Soil and Riparian	
<p><b>Standard FW-5:</b> On all soils dedicated to growing vegetation, the organic layers, topsoil and root mat will be left</p>	<p>Standard FW-5: On all soils dedicated to growing vegetation, the organic layers, topsoil and root mat will be left</p>

<p>in place over at least 85% of the activity area and revegetation is accomplished within 5 years.</p>	<p>in place over at least 85% of the activity area and revegetation is accomplished within 5 years, <b>with the exception of the operational right-of-way and the construction zone for the Atlantic Coast Pipeline, where the applicable mitigation measures identified in the approved COM Plan and SUP must be implemented.</b></p>
<p><b>Standard FW-8:</b> Water saturated in areas expected to produce biomass should not receive vehicle traffic or livestock trampling to prevent excessive soil compaction.</p>	<p>Standard FW-8: Water saturated in areas expected to produce biomass should not receive vehicle traffic or livestock trampling to prevent excessive soil compaction, <b>with the exception of the operational right-of-way and the construction zone for the Atlantic Coast Pipeline, where the applicable mitigation measures identified in the approved COM</b></p>

	<b>Plan and SUP must be implemented.</b>
<p><b>Standard FW-16:</b> Management activities expose no more than 10% mineral soil in the channeled ephemeral zone.</p>	<p>Standard FW-16: Management activities expose no more than 10% mineral soil in the channeled ephemeral zone, <b>with the exception of the operational right-of-way and the construction zone for the Atlantic Coast Pipeline, where the applicable mitigation measures identified in the COM Plan and SUP must be implemented.</b></p>
<p><b>Standard FW-17:</b> In channeled ephemeral zones, up to 50% of the basal area may be removed down to a minimum basal area of 50 square feet per acre. Removal of additional basal area is allowed on a case-by-case basis when needed to benefit riparian dependent resources</p>	<p>Standard FW-17: Up to 50% of the basal area may be removed, down to a minimum basal area of 50 square feet per acre. Removal of additional basal area is allowed on a case-by-case basis when needed to benefit riparian-dependent resources, <b>with the exception of the operational right-of-way and the</b></p>

	<p><b>construction zone for the Atlantic Coast Pipeline, where the applicable mitigation measures identified in the COM Plan and SUP must be implemented.</b></p>
<p><b>Standard 11-003:</b> Management activities expose no more than 10 percent mineral soil within the project area riparian corridor</p>	<p>Standard 11-003: Management activities expose no more than 10 percent mineral soil within the project area riparian corridor, <b>with the exception of the operational right-of-way and the construction zone for the Atlantic Coast Pipeline, where the applicable mitigation measures identified in the COM Plan and SUP must be implemented</b></p>
<p>Part 3 - Appalachian National Scenic Trial Crossing</p>	
<p><b>Standard 4A-025:</b> Locate new public utilities and rights-of-way in areas of this Rx area where major impacts already exist. Limit linear utilities and</p>	<p>Standard 4A-025: Locate new public utilities and rights-of-way in areas of this Rx area where major impacts already exist, <b>with the exception of the Atlantic Coast</b></p>

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<p>rights-of-way to a single crossing of the Rx area per project.</p>	<p><b>Pipeline right-of-way.</b> Limit linear utilities and rights-of-way to a single crossing of the Rx area per project.</p>
<p>Part 4 - Management Prescription 2C3 Eligible Recreational River Area</p>	
<p><b>2C3-015:</b> Allow road construction or reconstruction to improve recreational access, improve soil and water, to salvage timber, or to protect property or public safety.</p>	<p>Standard 2C3-015: Allow road construction or reconstruction to improve recreational access, improve soil and water, to salvage timber, or to protect property or public safety, <b>and to reconstruct FR 281 for the Atlantic Coast Pipeline, where the applicable mitigation measures identified in the COM Plan and SUP must be implemented.</b></p>
<p>Part 5 - Scenic Integrity Objectives</p>	
<p><b>Standard FW-182:</b> The Forest SIOs [Scenic Integrity Objectives] are met for all new projects (including special uses). Existing conditions may not currently meet the assigned SIO.</p>	<p>Standard FW-182: The Forest SIOs are met for all new projects (including special uses), <b>with the exception of the Atlantic Coast Pipeline right-of-way. The ACP ROW must meet the established</b></p>

	<p><b>SIOs within five years after completion of the construction phase of the project for areas identified in the COM Plan and SUP, except for the immediate foreground of the Shenandoah Mountain Trail crossing where the project must meet the SIO of Low.</b> Existing conditions may not currently meet the assigned SIO.</p>
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**Terms and Conditions**

This decision will require compliance with the following measures as special terms and conditions of the special use permits:

1. Atlantic shall implement the ACP Project in compliance with the October 2017 version of the Construction, Operations and Maintenance Plan.
2. Atlantic shall comply with its proposal as described in its submission to the Forest Service dated October 17, 2017 regarding use of and improvements to FR 281 (Campbell Hollow Road).
3. Atlantic shall implement the conservation measures of the August 2017 version of the Biological Evaluation

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4. Atlantic shall comply with applicable provisions of Appendix A – Environmental Conditions of FERC’s Order Issuing Certificate; Docket Nos CP15-554-000 and CP15- 554-001 (Issued October 13, 2017)
5. Atlantic shall not begin activities with the potential to impact any eligible historic properties on NFS lands until all signatories have signed the Programmatic Agreement for compliance with the National Historic Preservation Act for the ACP Project and any required cultural resource treatment plans for sites on NFS lands have been completed.
6. Atlantic shall comply with applicable provisions of the Reasonable and Prudent Measures and Terms and Conditions of the USFWS Biological Opinion (BO) for the ACP Project. In addition, Atlantic will also comply with the BO’s Monitoring and Reporting Requirements for the rusty patched bumble bee and the Indiana bat to the extent applicable to NFS land.
7. Atlantic shall not begin activity on NFS land that may impact candy darter habitat until the USFWS provides FERC with a non-jeopardy determination for the species. The FS will not authorize activity that could impact candy darter habitat until the aforementioned condition is satisfied.
8. Atlantic shall obtain West Virginia and Virginia Clean Water Act Section 401 Certifications (or waivers thereof) before beginning activity on NFS land that may impact waters of the U.S.
9. Atlantic shall obtain and comply with the Erosion and Sediment Control Plan as approved by the

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Virginia DEQ before beginning construction on NFS land.

10. Atlantic shall obtain and comply with the Stormwater Pollution Prevention Plan as approved by the Virginia DEQ before beginning construction on NFS land.
11. Atlantic shall obtain and comply with the Erosion and Sediment Control Plan as approved by the West Virginia DEP before beginning construction on NFS land.
12. Where mechanical removal of timber products is employed, merchantable material will be removed from NFS lands in accordance with provisions of Timber Sale Contract.
13. Atlantic shall provide a timber removal plan that addresses access road improvements for Forest Service approval prior to removing timber.
14. In addition to consideration of areas where safe removal of timber is not reasonable, on the GWNF merchantable timber will not be required to be removed on lands that are less than or equal to site index 40, slopes greater than 55%, and forest types not equal to 48, 53, 56, and 81.
15. On the GWNF, forwarders and/or shovel loggers may be utilized on slopes from 35% to 45%. Skyline and/or helicopters may be used on slopes steeper than 35%, but are required on slopes steeper than 45%.
16. Where windrows are necessary and do not conflict with the COM Plan, windrowed slash shall be limited to 8-foot-high, 20-foot-wide, and 100-foot-long with 50-foot breaks between the windrows to

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allow for movement of wildlife across the construction corridor.

17. Atlantic will mitigate for the loss of habitat for threatened, endangered, and sensitive bats on MNF with a combination of tree-snagging and installation of bat box (rocket box) clusters along the edge of disturbance (within the temporary workspace) following construction. These efforts shall include suitable replacement habitat for the loss of potential optimal roost trees (i.e., all shagbark hickory greater than 5 inches DBH and any snags cut within the construction right-of-way), shall be focused in those affected areas, and specific locations guided by coordination with the MNF. The installed boxes shall be monitored annually for a minimum of three years to ensure proper installation and assess efficacy in providing roosting habitat in the impacted area.
18. No surface-disturbing activity would occur on NFs lands as part of the crossing under the Appalachian National Scenic Trail.
19. Wild brook trout activity timing restrictions of October 1 to March 31 shall be applied to stream crossings saua427p, saua428, and saua429.
20. Any adjustments to stream buffers must be approved by the Forest Service prior to any work in the area that is proposed for adjustment.
21. To reduce movement barriers to small animals, protective barriers for wetlands shall substitute filter stocks wherever silt fences would ordinarily be used.

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22. Atlantic shall employ the COM Plan feathering vegetation clearing technique at the following milepost locations to minimize impacts to visually sensitive areas:

73.3-73.6	98.65-98.75
78.0-78.3	105.9-106.0
80.35-80.85	115.8-116.2
81.25-81.32	116.5-120.5
82.6-84.7	121.0-123.2
93.7-94.2	154.0-155.1

23. Atlantic shall identify trees to be retained for feathering purposes and protected during construction by clearly marking with flagging or safety fencing.

24. Atlantic shall have a landscape architect onsite to monitor for activities pertaining to scenery including but not limited to feathered construction right-of-way edges, and monitoring growth of vegetation from a variety of viewpoints to assure scenic integrity objectives are met within five years.

25. Atlantic shall employ enhanced restoration techniques of the permanent ROW at the aforementioned mileposts to include a planting configuration that transitions from the outside edges to the center with small, shallow rooted trees, then shrub species, then a minimum 10-foot herbaceous strip centered over the pipe. Atlantic shall coordinate with the FS on details of planting prior to implementing restoration. The width and frequency of mowing within the ROW will be determined by the FS following completion of planting.

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26. Atlantic shall monitor herbaceous vegetation used for stabilization at least quarterly for three years after restoration is completed. Post-construction and post-disturbance monitoring for tree and shrub vegetation will be conducted annually for the first five growing seasons following the initial revegetation effort, and at five-year intervals thereafter, for the life of the Project on the NFS lands. Written reports, including photographs, will be submitted to the Forest Service following each monitoring cycle.
27. Any proposed substitutes for the ProGanics and Flexterra soil supplements must be approved by the Forest Service prior to use.
28. Atlantic shall conduct bleeder drain water quality monitoring monthly to identify if there are seasonal variability in parameters.
29. Atlantic shall install twelve-inch diameter (or larger) compost filter socks at the outlet of slope breakers to control sediment transport until vegetation becomes established.
30. Atlantic shall employ standard industry standard industry practices to ensure backfill, compaction, and restoration activities occur only during suitable soil moisture content conditions.
31. Atlantic shall submit Site Specific Designs (SSDs) for the remaining eight steep slope sites identified by the FS in its letter dated October 24, 2016. Each respective SSD must be submitted to the FS a minimum of 30 days in advance before beginning work at the involved site. Each SSD will be certified by a registered professional engineer or engineering geologist with experience using

engineering geologic information in steep slope design and construction of this type of facility. Qualified professionals, including an engineering geologist and a geotechnical engineer, will also monitor construction activities at sites on NFS lands to oversee implementation of design and address unforeseen circumstances.

32. Prior to construction, Atlantic will provide FS with all outstanding geotechnical studies and status of Best in Class (BIC) program team analysis relating to operations on NFS lands. At least 30 days prior to the start of construction for a spread with slopes greater than 30% and over 100 foot long, Atlantic will notify FS. The notification will include the anticipated start date, location based on mileposts, and estimated duration of the construction activities for that spread. The holder will participate in pre-construction conference with FS.
33. Atlantic will immediately notify the FS of a slope failure on NFS land during construction. Atlantic shall use qualified professionals, including a geotechnical engineer and an engineering geologist, to assess the nature and extent of the slope failure (including the potential for off-site impacts) and to develop a remediation plan for review and approval by the FS.
34. Atlantic shall provide access road designs for FS review and approval at least 30 days prior to any activity on the roads. In addition to construction and improvements, designs shall also include plans for deconstructing and restoring roads to their prior maintenance standard within six months after pipeline construction has been completed. No

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use or improvement of roads shall occur until any corrections required by the FS have been made and FS approval of designs has been granted.

35. Atlantic shall provide legal access to the FS on any roads that cross private land in the course of accessing NFS land for purposes of administering this project.
36. Atlantic shall inspect, at a frequency commensurate with weather conditions, temporary erosion and sedimentation control features installed within 250 feet of identified RFSS habitat to ensure proper function of the feature.
37. Atlantic shall implement the following protections for the potential hibernaculum near FR 1026:
  - a. No trees shall be cut within 200' of the hibernaculum, except where public or worker safety concerns require it;
  - b. Explosives shall not be used within 200 feet of the hibernaculum, unless the Forest Service concurs that this activity will not have an adverse effect on bat populations or habitat. Explosives outside of these areas shall not be used when such use has potential to damage the cave or disturb the bats;
  - c. Any road work (e.g., upgrades, maintenance) within 200' of the hibernaculum shall occur outside the hibernacula period (Nov 15-March 31); and
  - d. No entry into the cave is allowed. Ensure that all personnel working on site are made aware of this restriction.

38. If active northern goshawk nests are found in the project area during tree clearing and other construction activities, Atlantic shall notify the FS for direction on appropriate course of action.
39. If active long-eared owl nests are found in the project area during tree clearing and other construction activities, Atlantic shall notify the FS for direction on appropriate course of action.
40. Prior to construction, provide analysis of new RFSS that were added to the MNF's RFSS list in October, 2017. Include effect determinations and any avoidance, minimization, and mitigation needed to meet Forest Plan direction.
41. Atlantic shall perform additional surveys in suitable habitats near the project area for populations of Roan Mountain sedge, Appalachian oak fern, and white alumroot to improve size and abundance data for the species.

#### **Decision Rationale**

Based on the analysis provided by FERC in the FEIS, we are authorizing Atlantic to use and occupy NFS lands for the ACP Project, and approve project-specific amendments for the MNF and GWNF LRMPs as described above, because our decision:

- Can be implemented with limited adverse impacts and will not impair the overall long-term productivity of NFS lands;
- Meets the requirements of Forest Service planning and special use regulations (36 CFR Part 219 and Part 251 Subpart B);
- Meets the purpose and need of the project to transport natural gas to serve the growing

energy needs of multiple public utilities and local distribution companies in Virginia and North Carolina;

- Has been developed through an extensive public involvement and collaboration effort with our publics, partners, adjacent landowners, and other agencies; and
- Is consistent with other Federal policy.

### **Rationale by Topic Area**

#### *Long-term productivity of NFS lands*

The FERC analysis in the FEIS concludes that implementation of the ACP Project will result in limited adverse environmental impacts, noting an increased potential for: project-induced landslides on steep slopes; long term impacts related to slope instability adjacent to waterbodies (impacting water quality, stream channel geometry, and downstream aquatic biota); creation of additional forest edge habitat through fragmentation; and significant impacts associated with karst, cave, subterranean habitat, and the species associated with subterranean habitat. (FEIS, Sections 4 and 5). We recognize that the ACP Project will directly impact resources, though mostly in the area disturbed by construction. The extent of these impacts will occur within the 430-acre construction phase footprint on the MNF and the GWNF, which is a small percentage of their nearly two million-acre total land base. The greatest potential for impact will be during the estimated 18-month construction phase, with impacts diminishing as reclamation is completed. Because of the adverse environmental impacts, we are requiring a broad spectrum of mitigation measures for the ACP Project.

Therefore through application of mitigation and the limited extent of the project, long-term productivity of NFS lands will be maintained.

The SUPs issued by the FS will be subject to required terms, conditions, and mitigation described throughout the FEIS (particularly Sections 2.3.1. and 4.8.9 and the COM Plan) and highlighted in the “Terms and Conditions” section of this ROD. Measures to avoid or minimize environmental harm that are incorporated in this decision include forestwide LRMP standards and guidelines, which at a minimum meet all requirements of applicable laws, regulations, State standards, and additional standards and guidelines for the affected NFS lands.

Adverse effects of pipeline construction will be mitigated through measures proposed by Atlantic and through measures required by FERC’s Certificate, the FWS’s BO, and FS SUPs, as well as other agencies’ permits and plans. Singularly and collectively, they avoid, rectify, reduce, or eliminate potential adverse environmental impacts to NFS lands. The listing of Construction and Restoration Plans that are applicable to the ACP Project, taken from FEIS, Table 2.3.1-1, are displayed in Table 4 below. Readers should note that there may be updates to the documents and their associated website links shown in Table 4. Refer to FERC’s eLibrary webpage (<https://www.ferc.gov/docs-filing/elibrary.asp>) and search by Docket Number CP15-554 for the latest information if any of the links provided are no longer valid.

Table 4: Construction and Restoration Plans Applicable to ACP Project

General Plan Name	Location of Plan
<i>Upland Erosion Control, Revegetation, and Maintenance Plan</i>	The FERC <i>Plan</i> and <i>Procedures</i> can both be viewed on the FERC Internet website at <a href="https://www.ferc.gov/industries/gas/enviro/guidelines.asp">https://www.ferc.gov/industries/gas/enviro/guidelines.asp</a>
<i>Wetland and Waterbody Construction and Mitigation Procedures</i>	FERC Accession No. 20170526-5257. PDF file: <a href="https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=14598802">https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=14598802</a>
<i>Atlantic's proposed modifications to FERC Plan and Procedures</i>	
<i>Restoration and Rehabilitation Plan</i>	EIS Appendix F
<i>Construction, Operation, and Maintenance Plan</i>	EIS Appendix G
<i>Horizontal Directional Drill Drilling Fluid Monitoring, Operations, and Contingency Plan</i>	EIS Appendix H1
<i>Contingency Plan for the Proposed Crossing of the Appalachian National Scenic Trial and Blue Ridge Parkway</i>	EIS Appendix H2

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<i>Site-Specific Crossing Plans</i>	<i>HDD</i>	EIS Appendix H3
<i>Karst Assessment, Construction, Monitoring, and Mitigation Plan</i>	<i>Terrain</i>	EIS Appendix I
<i>Residential Construction Plans</i>		EIS Appendix J1
<i>Site-Specific Crossing Plan for the James River Wildlife Management Area</i>		EIS Appendix J2
<i>Spill Control, Countermeasures Plan (SPCC Plan)</i>	<i>Prevention, and</i>	FERC Accession No. 20160718-5164. PDF file: <a href="http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=14311323">http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=14311323</a>
<i>Timber Removal Plan</i>		FERC Accession No. 20160718-5164. PDF file: <a href="http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=14311323">http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=14311323</a>
<i>Stormwater Pollution Prevention Plans (SHP; AP-1 [WV]; AP-2 [NC]; remaining facility plans are pending)</i>		FERC Accession No. 20170609-5196. PDF file: <a href="https://elibrary.ferc.gov/idmws/file_list.asp?accession_num=20170609-5196">https://elibrary.ferc.gov/idmws/file_list.asp?accession_num=20170609-5196</a>
<i>Contaminated Media Plan</i>		FERC Accession No. 20160718-5164. PDF file: <a href="http://elibrary.ferc.gov/">http://elibrary.ferc.gov/</a>

		idmws/common/OpenNat. asp?fileID=14311323
<i>Traffic Transportation Management Plan</i>	<i>and</i>	FERC Accession No. 20160718-5164. PDF file: <a href="http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=14311323">http://elibrary.ferc.gov/ idmws/common/OpenNat. asp?fileID=14311323</a>
<i>Non-Native Plant Management Plan</i>	<i>Invasive Species</i>	FERC Accession No. 20161115-5160. PDF file: <a href="http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=14399112">http://elibrary.ferc.gov/ idmws/common/OpenNat. asp?fileID=14399112</a>
<i>Blasting Plan</i>		FERC Accession No. 20161109-5138. PDF file: <a href="http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=14395436">http://elibrary.ferc.gov/ idmws/common/OpenNat. asp?fileID=14395436</a>
<i>Slope Stability Policy and Procedure</i>		FERC Accession No. 20170127-51202. PDF file: <a href="http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=14475036">http://elibrary.ferc.gov/ idmws/common/OpenNat. asp?fileID=14475036</a>
<i>Winter Plan</i>	<i>Construction</i>	FERC Accession No. 20170127-5202. PDF file: <a href="http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=14475037">http://elibrary.ferc.gov/ idmws/common/OpenNat. asp?fileID=14475037</a>
<i>Plans for Unanticipated Discovery of Historic Properties or Human Remains</i>	<i>During</i>	FERC Accession No. 20160718-5164. PDF file: <a href="http://elibrary.ferc.gov/">http://elibrary.ferc.gov/</a>

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*Construction* (ACP: idmws/common/OpenNat.  
West Virginia, Virginia, asp?fileID=14311323  
North Carolina, SHP:  
West Virginia,  
Pennsylvania

*Unanticipated* FERC Accession No.  
*Discoveries Plans for* 20170512-5163. PDF file:  
*Cultural Resources and* <http://elibrary.ferc.gov/>  
*Human Remains Policy* idmws/common/OpenNat.  
(MNF and GWNF) asp?fileID=14588372

*Migratory Bird Plan* FERC Accession No.  
20170505-5036. PDF file:  
<http://elibrary.ferc.gov/>  
idmws/common/OpenNat.  
asp?fileID=14582932

*Fire Prevention and* FERC Accession No.  
*Suppression Plan* 20170127-5202. PDF file:  
<http://elibrary.ferc.gov/>  
idmws/common/OpenNat.  
asp?fileID=14475038

*Open Burning Plan* FERC Accession No.  
20160701-5255. PDF file:  
<http://elibrary.ferc.gov/>  
idmws/common/OpenNat.  
asp?fileID=14295967

*Fugitive Dust Control* FERC Accession No.  
*and Mitigation Plan* 20160718-5164. PDF file:  
<http://elibrary.ferc.gov/>  
idmws/common/OpenNat.  
asp?fileID=14311323

*Protected Snake* FERC Accession No.  
*Conservation Plan* 201607295-5256. PDF

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file:

[http://elibrary.ferc.gov/  
idmws/common/OpenNat.  
asp?fileID=14319660](http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=14319660)

<i>Virginia Relocation Plan</i>	<i>Fish</i>	FERC Accession No. 20160816-5051. PDF file: <a href="http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=14330185">http://elibrary.ferc.gov/ idmws/common/OpenNat. asp?fileID=14330185</a>
<i>North Carolina Revised Fish and Other Aquatic Taxa Collection and Relocation Protocol for Instream Construction Activities</i>		FERC Accession No. 20170310-5157. PDF file: <a href="http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=14515832">http://elibrary.ferc.gov/ idmws/common/OpenNat. asp?fileID=14515832</a>

The following paragraphs and other sections of this ROD discuss how impacts to Forest resources would be mitigated to the extent practical. Impacts and mitigation relating to Forest resources that are the subject of the LRMP amendments are discussed in the “Compliance with 36 CFR 219 Applicable Substantive Provisions” section of this ROD. Additional discussion of impacts and mitigation is also contained in the “Findings Required by Other Laws, Regulations, and Policy” section of this ROD.

Sustainability of surface and groundwater resources was considered in our decision. Landslide potential and slope instability concerns, soil erosion, stream crossings, and karst topography are activities associated with this project that could potentially impact water quality. The ACP will be installed under 17 perennial, 28 intermittent, and 11 ephemeral waterbodies on NFS lands. It will also cross about 2.4

miles of karst topography on the Forests. Sedimentation modeling indicates annual soil loss will be 200 to 800 percent above baseline erosion during the first year of construction, returning to pre-construction levels within 5 years following restoration. Water for hydrostatic testing of the pipeline will not come from, or be discharged on, NFS lands. Pipeline construction activities affecting surface waters would be conducted in accordance with Atlantic's construction and restoration plans, along with conditions that are part of other federal or state water approvals. Atlantic will implement the *Spill Prevention, Control, and Countermeasure Plan* and the *Karst Mitigation Plan* to minimize impacts on karst systems and protect groundwater quality. We agree with the FERC's conclusion that with these measures, along with our additional recommended mitigation measures, impacts on groundwater and surface waters will be effectively minimized or mitigated, and will be largely temporary in duration. Restoration and revegetation of disturbed areas will be completed in accordance with federal and state/commonwealth permits, the FERC *Plan and Procedures*, and the COM Plan that will be approved and incorporated as a requirement into the SUPs. Acknowledging that revegetation of steep slopes is made more challenging due to soil erosion by water, Section 5.6 of Atlantic's *Restoration and Rehabilitation Plan* (FEIS Appendix F) describes the methods that will be used to establish vegetation in steep slope areas. Post-construction monitoring will also be required to assure successful re-establishment of vegetation and stability of upland soils and slopes that drain to surface waters.

Sustainability of wildlife species and their habitats was considered in our decision. The ACP Project's impacts to wildlife will vary depending on the habitat requirements of each species and the existing habitat present within the project area. The FEIS concludes that despite the mitigation measures, forested areas would experience long-term to permanent significant impacts as a result of fragmentation. The landscape context of fragmentation is of particular concern to the FS. The fragmentation of larger blocks, as is often the case on NFS lands, may have an impact on habitat quality potential of the entire patch thus affecting a much larger amount of interior forest than a direct measurement of acreage cleared. These effects will diminish after construction, and some wildlife could return to the newly disturbed areas and adjacent, undisturbed habitats after right-of-way restoration is completed and access roads are restored or their use is no longer required. ACP could also impact cave invertebrates and other subterranean obligate species (amphipods, isopods, copepods, flatworms, millipedes, beetles, etc.) that are endemic to only a few known locations. Atlantic's *Karst Mitigation Plan* outlines measures to avoid or minimize potential impacts on karst and subterranean habitats. The Virginia Department of Conservation and Recreation-Division of Natural Heritage and the Virginia Cave Board have endorsed the revised *Karst Mitigation Plan* as comprehensive and indicate that the measures included will reduce the potential risk posed by ACP to karst resources.

A variety of migratory bird species are associated with the habitats that will be affected by the ACP

Project. Atlantic developed a *Migratory Bird Plan* to minimize breeding and nesting impacts. Atlantic currently plans to avoid tree clearing during the state-specific migratory bird season, and will implement no-activity buffers around active nests for certain species of raptors and rookeries. Atlantic will maintain its permanent right-of-way according to the FERC *Plan and Procedures* (see FEIS table 2.3.1-1), the COM Plan, and state-specific migratory bird time of year restrictions. Environmental Condition 19 of the FERC's Certificate states "Atlantic and DETI shall file with the Secretary, a revised *Migratory Bird Plan* that incorporates the results of consultation with the West Virginia Department of Natural Resources, Virginia Department of Game and Inland Fisheries (VDGIF), North Carolina Wildlife Resources Commission (NCWRC), and the Forest Service, and verify that no additional conservation measures will be required to minimize impacts on active rookeries." The FS will continue to comment on ACP Migratory Bird Plan and make changes as needed.

Sustainability of vegetation resources was considered in our decision. The ACP right-of-way will be restored and maintained in a vegetated state. Isolation resulting from fragmentation varies by species, but generally occurs at shorter distances for plants (tens to hundreds of meters), invertebrates, amphibians, reptiles, and small mammals (less than 1 km), to large mammals and birds (several kilometers). At its widest, the construction right-of-way will be 125 feet wide through forested communities. Following construction, a 50-foot-wide right-of-way will be maintained in upland areas and a 30-foot-wide area maintained in wetlands. Although we recognize that

regeneration of forested habitat will be long term, it is unlikely that the pipeline rights-of-way will serve as a long-term barrier to plant or wildlife movement, with the possible exception of some sensitive plant species, or wildlife species with very limited mobility.

Atlantic is proposing use of Forest Road (FR) 281 (also referred to as Access Road 36-016-AR1) in the vicinity of Brown's Pond Special Biological Area (SBA), a unique natural area on the GWNF. In the FEIS, the FS expressed concern about the potential for road construction on FR 281 and associated impacts to Brown's Pond SBA. In its updated COM Plan, Atlantic stated that except for a widening the road at the point where it intersects Indian Draft Road (this work being downslope of the SBA), reconstruction of FR 2281 would not be needed. In an October 17, 2017 submission to the Forest, Atlantic provided additional detail of the planned improvements it would make to the approximately 1,100 feet of FR 281 that lies within the Brown's Pond SBA to minimize impacts; discussed potential impacts to adjacent vegetation communities, surface ponds, and locally rare species; and measures to minimize potential impacts.

Edge effects, such as increased predation, changes in microclimate and community structure along the newly formed forest edge, and spread of noxious and invasive species also have the potential to occur along the construction and operations right-of-way. Atlantic will reduce some of these impacts by restoring the right-of-way following construction according to the FERC *Upland Erosion Control, Revegetation and Maintenance Plan* and *Wetland and Waterbody Construction and Mitigation Procedures* (FEIS table

2.3.1-1), Atlantic's *Restoration and Rehabilitation Plan* (FEIS Appendix F) and the approved COM plan. Atlantic will also control the spread of noxious and invasive plants along the rights-of-way as described in the *Invasive Plant Species Management Plan* (see FEIS table 2.3.1-1). Environmental Condition 18 of the FERC's Certificate requires Atlantic to revise their Restoration and Rehabilitation Plan and Invasive Species Management Plan to minimize and/or restrict herbicide, pesticide, and insecticide applications.

By including the mitigation measures described above and the measures relating to soil, riparian, wetland, sensitive species, recreation, and scenic resources described later in this ROD, our decision will not impair the overall long-term productivity of NFS lands on the MNF and GWNF.

*Compliance with Forest Service Planning and Special Use Regulations (36 CFR 219 and 251 Subpart B)*

The Forest Service's planning regulations at 36 CFR 219 allow for amending an LRMP at any time. A plan amendment is required to add, modify, or remove plan components. The detailed discussion of how our decision complies with the requirements of 36 CFR 219 for amending a plan is located in the "Compliance with the Rule's Procedural provisions" and "Compliance with the Rule's Applicable Substantive Provisions" sections of this ROD.

The project-specific amendments to MNF and GWNF LRMP's approved by this decision are needed to allow the ACP Project to be consistent with LRMP standards. Standards are mandatory constraints on project and activity decision-making, established to

help achieve or maintain desired conditions, to avoid or mitigate undesirable effects, or to meet applicable legal requirements (36 CFR 219.7(e)(1)(iii)). Atlantic modified its proposal with several route adjustments, additional design features, and mitigation measures (where feasible to minimize environmental effects) to achieve consistency with many of the Plan standards; however, the amendments described in this ROD are necessary to make the ACP Project consistent with the LRMPs. Section 4.8.9.1 of the FEIS, “Proposed Amendments to Forest Service Land and Resource Management Plans”, details how these amendments comply with the planning regulations.

The plan amendments in this ROD apply specifically to the ACP Project and will not change the existing Forest Plan standards for other current or future projects. The approved plan amendments consist of modifying 13 forest plan standards (four on MNF; nine on GWNF) to allow variances for the operational ROW and the construction zone for the ACP Project. Eleven of the modified forest plan standards require the Forest Service to ensure the ACP design requirements and mitigation measures identified in the SUPs and COM Plan are implemented. These 11 standards are associated with soil stability and productivity, riparian habitat, threatened and endangered species, and scenery. By including the ACP Project design requirements and mitigation measures contained in their SUPs and COM Plan into these 11 modified standards, this decision will be consistent with the MNF and the GWNF LRMPs as amended. We conclude the project-specific amendments for the MNF and GWNF comply with this provision of the Planning Rule.

FS regulations at 36 CFR 251 Subpart B govern the processing of applications for special uses on NFS lands. These regulations require that applications are screened before acceptance for processing and once accepted, the proposed use is evaluated, including effects on the environment. Atlantic submitted its amended application to construct and operate the ACP project to the FS on June 17, 2016. The FS formally accepted Atlantic's application on February 22, 2017. Based on the evaluation of the information provided by the applicant and other relevant information such as environmental findings, the authorized officers shall decide in this ROD whether to approve the proposed use, approve the proposed use with modifications, or deny the proposed use. The regulation at 36 CFR 251.54(f)(2)(iii) also states the authorized officers shall give due deference to the findings of another agency such as the FERC. Atlantic has satisfied the § 251 Subpart B regulatory requirements by providing information to allow the authorized officers to determine the feasibility of the ACP Project, the benefits to be provided to the public, the safety of the proposal, the lands to be occupied or used, the terms and conditions to be included, and the proposal's compliance with applicable laws, regulations, and orders.

We recognize the National Historic Preservation Act (NHPA) consultation and state Clean Water Act section 401 certifications, Clean Water Act Section 404 permits, and several other permits, both state and federal, have yet to be completed or issued. These processes involve additional coordination with numerous agencies, some may require additional studies or inventories, which may result in additional

mitigation. The FERC process allows information to be gathered and considered after the release of the FEIS and prior to construction. The FERC process also allows for and expects minor pipeline route realignment and workspace refinements as the project is implemented and has processes in place to address this. The FEIS explains the FERC Post- Approval Variance process (Section 2.5.5, p. 2-54 and 2-55) and the Draft ROD noted additional mitigation may be added to the COM Plan if necessary. It is unavoidable that the COM Plan is, and will continue to be, dynamic in nature. We will attach the current COM Plan to the SUPs and allow for updates as needed. As discussed earlier we recognize the public's interest in and concerns about this project. The public can stay informed of ACP Project updates through information posted on the FERC website, and for updates directly related to NFS lands, the GWNF website for the ACP Project.

*Public Involvement and Collaboration*

The ACP project has been developed through an extensive public involvement and collaboration effort with our publics, partners, adjacent landowners, and other agencies. For more details, see the "Providing opportunities for public participation (§ 219.4) and providing public notice (§ 219.16)" section of this ROD where public involvement for the plan amendments is discussed. The FERC took the lead in addressing public comments. However, as it specifically relates to the Forest Service's issuance of a special use permit and approving project-specific plan amendments, we made every effort to review comments on the DEIS and develop mitigation that would further reduce

impacts to resources. These comments assisted us in adjusting our mitigation measures to address resource concerns.

For example, comments to the DEIS that voiced concerns related to the pipeline route crossing the challenging terrain in the central Appalachians resulted in the inclusion of specific operating procedures and mitigation measures in the COM Plan to address soil stability and productivity. Comments expressing concerns about impacts to views from hiking trails, including the ANST, and other scenic points resulted in additional viewshed analysis and consideration of measures to reduce visual impacts to the extent practical. In the case of Shenandoah Mountain Trail, it was not practical to avoid visual impacts and the view along 200 to 225 feet of the trail will be impaired. We also responded to comments that the DEIS did not analyze other potential development that could occur within a designated utility corridor, by exercising discretion not to designate the ACP route as a utility corridor, but instead to authorize a stand-alone right-of-way.

Additional discussion of how FERC engaged the public and tribes in development of the FEIS is included in the “Public Involvement” and “Tribal Consultation” found later in this ROD. Since the Draft ROD, we have used the information discussed in the “Updates Since Draft ROD Release” section to further address concerns and refine the COM Plan and SUP requirements.

#### *Other Federal Policy Considerations*

In making this decision, we have considered other federal policy that has underscored the development

of energy infrastructure as a priority need of the nation. Executive Order 13212, directed federal agencies to expedite reviews of authorizations for energy-related projects and to take other action necessary to accelerate the completion of such projects, while maintaining safety public health and environmental protections. Executive Order 13604, “Improving Performance of Federal Permitting and Review of Infrastructure Projects” (Executive Order 2012), emphasized the United States must have a reliable and environmentally sound means of moving energy and that investments in infrastructure provide immediate and long-term economic benefits to the Nation. More recently, Executive Order 13766, “Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects” (Executive Order 2017) states the policy of the executive branch to “expedite, in a manner consistent with law, environmental reviews and approvals for all infrastructure projects, especially projects that are a high priority for the Nation, such as...pipelines ....”

Additional federal policy focuses on encouraging jobs and economic growth. Construction of the ACP Project would have a beneficial, short-term impact on employment, local goods and service providers, and state governments in the form of sales tax revenues. An economic study commissioned by Atlantic shows the one-time economic effects of construction of the Atlantic Coast Pipeline on the Three-State/Commonwealth Region would result in 17,240 direct, indirect, and induced Jobs; \$2.7 billion in direct, indirect, and induced spending; and \$25 million in tax revenues to State Governments. (Estimated Totals for 2014-2019; FEIS; Table 4.9.8-1)

Payroll taxes would be collected from workers employed on ACP, resulting in additional beneficial, short-term effects. Atlantic estimates that payroll spending would be approximately \$1.5 billion during the construction phase (of which, it is anticipated that \$750 million would go to the local construction workforce) and an estimated total annual payroll of \$41.3 million during operation. Atlantic estimates that approximately 13.6 percent of the total dollar amount of materials purchased would be spent on locally purchased materials in the three-state/commonwealth region. Atlantic's estimates that following construction, operation of the ACP in the Three-State/Commonwealth Region would annually result in 271 direct, indirect, and induced jobs, \$69.2 million in spending, and \$418,443 in income tax revenue to State Governments.

A second study, *The Economic Impacts of the Atlantic Coast Pipeline*, conducted by ICF International (ICF, 2015) assessed anticipated effects of ACP on natural gas and electricity prices as well as economic impacts on the project area. The study, which measured the net effect of energy cost savings to homes and businesses due to increased access to natural gas supplies, concluded that from years 2019 to 2038, operation of ACP could result in a net annual average energy cost savings of \$377 million for natural gas and electricity consumers in Virginia and North Carolina. Additionally, the study found that the energy cost savings (due to increased supply of low-cost energy sources) could allow consumers and businesses to spend money in other parts of the economy, leading to the creation of new jobs, labor income, tax revenues, and gross domestic product.

ur decision would be consistent with the aforementioned federal policies by accommodating the ACP Project through issuing SUPs and approving associated project-specific plan amendments that provide for social, economic, and ecological sustainability.

### **PUBLIC INVOLVEMENT**

On October 13, 2014, Atlantic filed a request with the FERC to initiate the Commission's pre-filing environmental review process for the ACP Project and the SHP. During the pre-filing process, Atlantic sponsored 13 public open house meetings held at various locations throughout the project areas between December 2015 and July 2015. Representatives of the FERC staff also attended those open house meetings to answer questions from the public.

FERC issued a Notice of Intent<sup>3</sup> (NOI) to prepare an EIS on February 27, 2015 and mailed to more than 6,613 interested parties. The NOI initiated a 60-day formal public comment period. Scoping meetings were held in the following cities, sorted by State, during March, 2015:

- In North Carolina: Fayetteville, Wilson, and Roanoke Rapids
- In Virginia: Chesapeake, Dinwiddie, Farmville, Lovingston, Stuarts Draft

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<sup>3</sup> "Notice of Intent to Prepare an Environmental Impact Statement for the Planned Supply Header Project and Atlantic Coast Pipeline Project, Request for Comments on Environmental Issues, and Notice of Public Scoping Meetings" (80 FR 12163; March 6, 2015)

- In West Virginia: Elkins, Bridgeport

Approximately 1,525 people attended the public scoping meetings.

On May 3, 2016, the FERC issued a supplemental NOI<sup>4</sup> to prepare an EIS that described route modifications identified in amended application filed by Atlantic and announced the time and location of two additional public scoping meetings. In addition, the second supplemental NOI requested comments related to proposed actions of the FS, including potential LRMP amendments and for issuance of a ROW grant for the proposed ACP Project. The second supplemental NOI was sent to 9,694 parties. Issuance of the second supplemental NOI also opened a 30-day formal scoping and comment period for filing written comments on the alternatives under consideration and proposed LRMP amendments.

On May 20 and 21, 2016, the FERC held two public scoping/comment meetings during the formal supplemental scoping period to provide the public with the opportunity to learn more about the amended Atlantic application and present oral comments on environmental issues that should be addressed in the EIS and proposed LRMP amendments. The meetings were held in Marlinton, West Virginia and Hot Springs, Virginia. Approximately 250 people attended the public meetings. Transcripts of each meeting and

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<sup>4</sup> “Supplemental Notice of Intent to Prepare an Environmental Impact Statement and Proposed Land and Resource Plan Amendment(s) for the Proposed Atlantic Coast Pipeline, Request for Comments on Environmental Issues Related to New Route and Facility Modifications, and Notice of Public Scoping Meetings” (80 FR 28060; May 9, 2016)

all written comments filed with the FERC are part of the public record for ACP and SHP and are available for viewing on the FERC Internet website ([www.ferc.gov](http://www.ferc.gov)).

In total, FERC received approximately 5,600 written comment letters during the Pre-filing Process, formal scoping and supplemental scoping periods, and throughout preparation of the EIS. These 5,600 written comments included approximately 3,200 form letters expressing opposition or support for the projects. Table 1.3-1 of the FEIS summarizes the environmental issues and concerns identified by the commenters during the scoping process and identifies the EIS section where each issue is addressed.

The FS, serving as a cooperating agency in the development of the EIS, assisted FERC in identifying several issues regarding the effects of the proposed action using comments from the public, other agencies, elected officials, interested Native American and Indian tribes, affected landowners, and non-governmental organizations. Main issues of concern included potential impacts to biological resources, cultural resources, karst topography, water quality, slope stability, and visual resources, including visual effects to the ANST (see FEIS Table 1.3-1). To address these concerns, FERC, in consultation with cooperating agencies, developed the alternatives described in the FEIS. See FEIS, Section 2 for detailed descriptions of the Proposed Action, and Section 3 for the No Action, Modes of Natural Gas Transportation, and Route alternatives.

FERC issued a Notice of Availability (NOA) for the DEIS on December 30, 2016 that listed the dates,

times, and locations of seven public sessions to take verbal comments on the DEIS, and established a 90-day public comment period on the DEIS, ending April 6, 2017. The NOA also included how people could submit comments on this project. The NOA was published in the Federal Register on January 9, 2017 (82 FR 2348). The DEIS was mailed to 9,805 parties. FERC held 10 public comment sessions during the draft EIS comment period. The comment sessions held in February and March 2017 were located in the following cities, sorted by State:

- In North Carolina: Fayetteville, Wilson, and Roanoke Rapids
- In Virginia: Suffolk, Farmville, Lovingston, Staunton, Monterey
- In West Virginia: Elkins, Marlinton

A total of 620 people commented at the meetings. In addition, 1,230 parties submitted a total of 1,675 timely letters in response to the DEIS. Multiple form letters and petitions were also submitted in response to the DEIS. FERC's responses to relevant comments, including those applicable to NFS lands are provided in Appendix Z of the FEIS. A subject index is provided in Appendix AA of the FEIS.

### **COMPLIANCE WITH 36 CFR 219 PROCEDURAL PROVISIONS**

The MNF and GWNF amendments comply with the procedural provisions of 36 CFR Part 219.13(b) as follows:

#### **Identification of Need for the LRMP Amendments**

The purpose of the amendments are to meet the requirements of the NFMA and its implementing

regulations that projects authorized on NFS lands must be consistent with the LRMP. Without the MNF and GWNF project-specific Forest Plan amendments the ACP project would not be consistent with some Forest Plan standards related to soil, riparian, threatened and endangered species, utility corridors, the ANST, an Eligible Recreational River Area, and scenic integrity objectives. The FEIS serves as documentation of the need to amend the MNF and GWNF LRMP's.

**Using the Best Available Scientific Information (BASI) to Inform the Planning Process (§ 219.3)**

The decision to amend the LRMPs was informed by the FEIS analysis, which used the best available scientific information. Data that informed the analysis is discussed below and grouped by the relevant resource areas:

***Soil and Riparian***

Atlantic contractors reviewed topographic maps, geologic maps, aerial imagery, the Soil Survey Geographic Database (SSURGO), and test pits to determine which soil types would be affected on the MNF and GWNF. In the Soil Survey Report (COM Plan, Attachment G), Atlantic utilized the USDA soil classification terminology – the National Soil Information System) and the National Resource Conservation Service (NRSC) “Field Book for Describing and Sampling Soils, Version 3.0” (NRCS 2012).

A hydrologic sedimentation analysis was prepared to analyze effects to a wide range of forest resources, including water and aquatic species. The analysis provides a real-world representation of

sedimentation hazards to forest resources. The best available data used included the revised universal soil loss equation model (RUSLE) to estimate effects of the proposed activities. Inputs to the RUSLE model included SSURGO and the US Geological Survey water boundary dataset to determine appropriate soil erodibility factors and watershed designations, respectively. In addition, FS hydrology and aquatic biology specialists reviewed the sedimentation analysis, and we attained expertise from local, certified consultants.

We worked with Atlantic to identify and develop industry-standard construction plans (site-specific designs) for representative high hazard construction areas. Through a Geohazard Analysis Program, Atlantic conducted an initial review of the pipeline route using aerial photographs and LiDAR imagery, aerial reconnaissance, and ground reconnaissance to identify geotechnical hazard locations. Atlantic will utilize a Best in Class Steep Slope Management Program (BIC Team) to incorporate the results of the Geohazard Analysis Program into the project design and engineering and to address issues of landslide potential and susceptibility. The BIC Team will also draw on industry techniques commonly utilized in pipeline construction, as well as industry-specific guidance, including “Mitigation of Land Movement in Steep and Rugged Terrain for Pipeline Projects” (INGAA, 2016). Atlantic would also implement the measures in its Slip Avoidance, Identification, Prevention, and Remediation - Policy and Procedure) to avoid, minimize, and mitigate potential landslide issues in slip prone areas prior to, during, and after construction. Atlantic would employ frequent

inspection and monitoring of the project area, taking prompt corrective action or making repairs as needed. Atlantic's commitment to these practices is described in their COM plan. With these construction plans, we expect to reduce the possibility of adversely impacting soils located on steep slopes in the vicinity of streams that are located below and on these steep slopes (see FEIS, Section 2.3.3). Consultants (with expert-level knowledge in these site-specific designs) identified and evaluated steep slope hazards to determine slope failure risk. Slope stability (at sites identified by FS specialists to be "high hazard") was determined using a combination of contractor experience, probabilistic analysis, and field observations. Environmental consequences to soils, water, and riparian resources are discussed in FEIS in sections 4.2.7, 4.3.1.8, 4.3.2.9, and 4.3.3.9.

The FERC's Certificate addresses steep slopes, landslides and karst terrain in detail on pp 81 and 82. This includes recognition that Atlantic has committed to implementing a Best in Class Steep Slope Management Program and to using specialized techniques when constructing on steep slopes. It points out that Atlantic will also implement their Slip Avoidance, Identification, Prevention, and Remediation - Policy and Procedure to avoid, minimize, and mitigate potential landslide issues in slip prone areas prior to, during, and after construction. It goes on to list eight specific mitigation measures part of the Steep Slope Management Program and then states "because the Phase 2 analysis of slopes was still ongoing, the final EIS recommended, and we will require in Environmental Condition 51, that the final outcomes and designs

developed as a result of the Phase 2 analysis be filed with the Commission prior to project construction.”

To supplement FS measures to minimize impacts to soil and riparian resources, the special use permit for the ACP would require compliance with erosion and sedimentation control and stormwater plans that will be required by the West Virginia Department of Environmental Protection (WVDEP) and Virginia Department of Environmental Quality (VDEQ). VDEQ is utilizing an engineering consulting firm to review Atlantic’s detailed, project-specific construction plans for adequacy in protecting State water quality from sedimentation.

### ***Threatened and Endangered Species***

The FWS provided Atlantic with current information on federally listed threatened or endangered species and their critical habitat within the area potentially affected by the ACP Project. Atlantic surveyed in and near the ACP project area to determine whether special status species or their habitat would be affected. The survey corridor was generally 300 feet wide, but was expanded in certain areas to accommodate potential variability in the proposed pipeline alignment. Based on special status species habitat preferences and the results of the habitat surveys, Atlantic, as well as the FWS, FS, and state agencies determined which special status species have the greatest potential to be affected by ACP. The narrowed list of special status species was then used to develop survey requirements and protocols. The survey plans identified which special status species required species-specific surveys, where the surveys

should be conducted, and what time of year the surveys should be completed.

Atlantic has completed habitat and species surveys and filed survey reports with FERC that outlined the survey methodologies, locations where surveys were conducted, and the survey results. If a special status species was identified, the location was recorded and information about the species characteristics and habitat was documented. The FS reviewed and provided input to the survey reports relating to species and habitat on NFS lands. (See FEIS Sections 4.7 and 5.1.7).

Atlantic's construction and restoration plans include a number of the measures that would minimize the potential impacts on vegetation, wildlife, and aquatic species, including ESA-listed, proposed, and under review species and their habitat. Atlantic has also adopted a number of additional species-specific conservation measures recommended by the FWS. Sensitive waterbodies include those identified in appendix K of the FEIS where ESA-listed, proposed, or under review species have been documented, as well as perennial tributaries to these designated waterbodies within 1 mile of the proposed crossing location where construction activities are also proposed. Atlantic has committed to implement various measures at ESA sensitive waterbodies to minimize potential impacts on ESA-listed, proposed, or under review aquatic species. These measures are referred to as the "FWS enhanced conservation measures." FERC's Certificate directs that these measures be implemented at a number of waterbodies identified in Appendix K, and also directs that

Atlantic limit water withdrawal to not exceed 10 percent of instantaneous flow at ESA sensitive waterbodies. Additionally, the FWS's Biological Opinion (BO) for ACP contains non-discretionary terms and conditions which implement the reasonable and prudent measures to minimize take; requirements for monitoring and reporting; and conservation recommendations to minimize or avoid adverse effects of the proposed action on listed species or critical habitat. The Forest Service will incorporate applicable provisions of the BO into its SUPs for the ACP Project.

Additional discussion on ACP's impact on threatened and endangered species is found later in this ROD in Sections entitled "Compliance with 36 CFR 219 Applicable Substantive Provisions" and "Findings Required by Other Laws and Regulations"

#### ***Areas of Old Growth***

For the development of the FEIS, surveys of old growth stands crossed by ACP were not available; therefore, Atlantic determined the miles, acreages, and sizes of trees to be cleared within the pipeline construction and permanent rights-of-way with a desktop analysis using 2015 aerial photography and recent satellite photography. The FS in the Southern Region defines old growth as Forest stands that meet one or more of the preliminary inventory criteria from its Regional Guidance.<sup>5</sup> The Forest Service's forest inventory data (FSVeg) was used to estimate old

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<sup>5</sup> *Guidance for Conserving and Restoring Old Growth Forest Communities on National Forests in the Southern Region* (Forestry Report R8-FR 62, June 1997).

growth presence and to determine the impact on “possible old growth” forests from ACP on NFS lands. Additional information on old growth is discussed in FEIS in Section 4.4.2 (“Vegetation Communities of Special Concern or Management”) and 4.4.8 (“General Impacts and Mitigation on Federal Lands”) and 4.8.9.1 (“Forest Service”).

Following the release of the FEIS, an old growth survey of stands located in the ACP construction corridor within the GWNF was conducted during the late summer of 2017 and the results were provided to the FS in September 2017. The data provided included plot number, latitude and longitude of the plot, species, and diameter. A total of 69 plots were installed on an estimated 285 acres in the construction corridor, with each plot representing approximately 4 acres.

***Appalachian National Scenic Trail (ANST)***

A significant factor in siting the ACP was the location at which the pipeline would cross the ANST. In the area of the project, the ANST is located on lands managed by either the Forest Service or National Park Service. FERC did not find that avoidance of the NFS lands would provide a significant environmental advantage when compared to shorter proposed pipeline route through the National Forests (FEIS, Section 3.3.4.1 (“National Forest Avoidance Route Alternatives”). Each of these alternatives and variations were evaluated based on comments received from the FS, the public, other agencies, elected officials, interested Native American and Indian tribes, affected landowners, and non-governmental organizations. These comments

indicated concerns for disruption for hikers using the trail, as well as potential visual impacts from the ACP Project both at the ANST crossing location and from more distant viewpoints. See the visual resources discussion (below) for the best available scientific information that was used to assess potential visual impacts to the ANST.

### ***Visual Resources and Scenic Integrity Objectives***

Forest Service specialists (landscape architects) utilized the Forest Service Scenery Management System<sup>6</sup> to assess the effects of the ACP Project on scenic classes in areas of the MNF and GWNF. See Tables 4.8.9-15 and 4.8.9-17 in Section 4.8.9.1 of the FEIS for results. Atlantic prepared a landscape-scale Visual Impacts Analysis (VIA) to assess the foreground, middleground, and a portion of the background distance zones. The VIA also considered other factors such as seen areas, scenic class, distance viewed, duration of view, angle of view, and aspect of the project in relation to the key observation points (KOPs) to determine whether the project would achieve the Forest Plan SIOs at project locations on NFS lands. A digital elevation model that uses USGS terrain data (and the visibility function within the computer model “Viewshed Analysis for ArcGIS Spatial Analyst”) was developed. The ACP VIA utilized several contemporary software tools to create accurate visual simulations using the KOPs including TrueView<sup>7</sup> photo simulations. Our FS specialists

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<sup>6</sup> “Agriculture Handbook 701, Landscape Aesthetics—A Handbook for Scenery Management” (USDA 1995)

<sup>7</sup> A registered trademark of Truescape, Ltd.

worked with the Atlantic's contractor to identify KOPs; this effort involved field reconnaissance, field survey photography, topographic maps, and publically available satellite maps, and photos. Further details on the VIA and methodology is found in Appendix T of the FEIS.

**Providing opportunities for public participation (§ 219.4) and providing public notice (§ 219.16):**

The FS published a notice of availability<sup>8</sup> of the FERC DEIS on January 6, 2017. The FS's 90-day comment period ended on April 10, 2017. The FS's NOA included additional information on the Forest Service LRMP amendments necessary to allow the proposed pipeline construction and operation to be consistent with the MNF LRMP and GWNF LRMP (36 CFR 219.15).

On December 15, 2016, during the public comment period for the FERC DEIS, the Department of Agriculture Under Secretary for Natural Resources and Environment issued a final rule<sup>9</sup> that amended the 36 CFR 219 regulations pertaining to National Forest System Land Management Planning Rule. The amendment to the 2012 planning rule clarified the Department's direction for amending LRMPs and added a requirement that when amending a forest plan, the responsible official will provide notice "about

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<sup>8</sup> "Notice of Availability of the Atlantic Coast Pipeline Project and Supply Header Project Draft Environmental Impact Statement and Forest Service Draft of Associated Land and Resource Management Plan Amendments" (82 FR 1685, January 6, 2017)

<sup>9</sup> 81 FR 90723, 90737

which substantive requirements of §§ 219.8 through 219.11 are likely to be directly related to the amendment (36 CFR 219.13(b)(2)).<sup>10</sup>

In response to the new requirements in the amended 36 CFR 219 regulation to inform the public of the regulatory substantive requirements that are likely to be directly related to the proposed plan amendments<sup>11</sup> (and also to provide notification of the changes to the plan amendments from DEIS to FEIS), a notice of updated information<sup>12</sup> was published in the *Federal Register* on June 5, 2017. The notice also informed the public that a change to the administrative review procedures was applicable.

Copies of the FEIS (which described the changes to the proposed plan amendments) were mailed to FERC's environmental mailing list, including elected officials, government agencies, interested Native American and Indian tribes, regional environmental groups and non-governmental organizations, affected landowners, intervenors, local newspapers and libraries, and individuals who attended FERC-sponsored public meetings or sessions, or who submitted comments on the projects or on the FERC's DEIS.

As mentioned above, as part of FERC's government-to-government consultation program,

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<sup>10</sup> 81 FR 90738

<sup>11</sup> 36 CFR 219.13(b)(2)

<sup>12</sup> "Notice of Updated Information Concerning the Atlantic Coast Pipeline Project and Supply Header Project and the Associated Forest Service Land and Resource Management Plan Amendments" (82 FR 25756; June 5, 2017)

Native American and Indian tribes were included in all project notifications. Section 4.10.4 of the FEIS (“Tribal Consultation”) describes FERC’s process for consulting with federally recognized American Indian tribes; and FEIS Section 4.10.6 (“Cultural Resources on Federal Lands”) lists the tribal partners assisting with cultural resource reports.

**Applying the planning rule’s format requirements for plan components (§ 219.13 (b)(4)):**

The MNF and GWNF project-specific Forest Plan amendments modify a total of 13 standards. Those standards conform to the formatting requirements for plan amendments, and the amendment’s modifications of these standards maintained the correct format. See §§ 219.13 (b)(4) and 219.7 (e).

**The plan amendment process (§ 219.13):**

See the “Purpose and Need” section, the “Changes from DEIS to FEIS” section, Tables 2 and Table 3 in the “Decision” section and the response provided above in “Providing opportunities for public participation and providing public notice” for details related to the amendment process.

**COMPLIANCE WITH 36 CFR 219 APPLICABLE SUBSTANTIVE PROVISIONS**

Section 219.13 (b)(5) of the FS planning regulations requires that, when amending a LRMP, the Responsible Official must apply the regulation’s substantive requirements that are directly related to the amendment, within the scope and scale of the amendment. The substantive requirements are identified in 36 CFR 219.8 through 219.11 and address

sustainability, diversity of plant and animal communities, multiple use, and timber management. The regulation sets criteria for determining whether any of its substantive requirements are directly related to an amendment. Section § 219.13(b)(5)(i) provides that whether a planning regulation requirement is directly related to an amendment is based upon the amendment's purpose or its effect (beneficial or adverse). The regulation further provides that an adverse effect finding can be made if scoping or the National Environmental Policy Act (NEPA) effects analysis reveals the amendment would have a substantial adverse effect on, or would substantially lessen protections for, a specific resource or use (§ 219.13 (b)(5)(ii)(A)). Application of a substantive requirement that is directly related to the amendment may demonstrate 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) (§ 219.13 (b)(5)).

In the discussions that follows, we first explain that the scale of the amendments are quite small, and their scope narrow. Then, we determine how each amendment for the MNF and GWNF relates to the regulation's substantive provisions. For the MNF amendment, which modifies plan standards for soil and for threatened and endangered species, our analysis leads to the conclusion that substantive rule provisions are not directly related to the amendment. For the GWNF amendment, we find that for the modification of five soil and riparian standards, the analysis leads to the conclusion that substantive rule

provisions are not directly related to the amendment. The modifications of the plan standards for utility corridors, ANST, scenic integrity objectives, and the standard relating to road reconstruction in the eligible recreation river area, the amendment meets the relevant substantive rule requirements and consequently, there is no need to make a determination as to whether the Rule requirement is directly related to these parts of the amendment.

***Scope and scale of the amendment***

We have determined the scope and scale of the amendments based on the purpose for the amendment (§ 219.13(b)(5)(i)). While the overall purpose of the project is to serve the growing energy needs of multiple public utilities and local distribution companies, and Virginia and North Carolina (FEIS, Introduction Section), the purpose of the plan amendments is to ensure consistency of the ACP Project with the provisions of the two Forest Plans.

The scale of the project-specific amendment for the MNF LRMP is a project area that includes the construction phase where 112 acres of the MNF would be involved (comprised of 77.9 acres for a 125-foot wide ROW, 7.9 acres of additional temporary work space, 1.5 acres of pipe yard, and 24.9 acres of existing access roads). Within this temporary construction zone will be the eventual operational ROW of approximately 56 acres (5.1 miles of a 50-foot wide pipeline corridor). Finally, 0.1 miles of permanent new access roads would be constructed.

The scale of the project-specific amendment for the GWNF LRMP is a project area that includes the construction phase where 318.1 acres would be

involved (comprised of 235 acres for a 125- foot wide ROW, 16.4 acres of additional temporary work space and 65.3 acres of existing access roads). Within this temporary construction zone will be the eventual operational ROW of 158.2 acres (15.9 miles of a 50-foot wide pipeline corridor). Finally, 1.5 acres of permanent new access roads will be constructed.

The scope of the amendments is project-specific, to allow construction and operation of the pipeline which would otherwise not be consistent with certain LRMP standards. For the MNF, the amendment exempts the project from four Forest Plan standards, and for the GWNF, the amendment exempts the project from nine Forest Plan standards. These standards are intended to minimize impacts authorized activities would have to soil, water, riparian, threatened and endangered species, recreational and visual resources. However, the project includes mitigation measures to lessen impacts on these resources, and so the exemption of the project from the standards is limited in effect.

***Description of the Plan Amendments and the Planning regulation requirements associated with the amendments.***

The following sections, grouped by National Forest and subject area, discuss the amended standards and whether they are directly related to the substantive requirements of 36 CFR 219.

***Monongahela National Forest LRMP***

The findings, conclusions, and determinations in this section are made by Kathleen Atkinson as Regional Forester for the Eastern Region of the FS.

## **Soils**

This decision modifies three Forest Plan standards associated with soil stability and productivity (SW06, SW07 and SW03) as described in Table 2. These three standards, as currently written, preclude standard industry pipeline construction methods like those being proposed by Atlantic. Even though the ACP Project construction methods have been modified in an attempt to be consistent with the Forest Plan, it is not possible to achieve project consistency with these three standards. Thus, the modified standards will allow the ACP Project to be consistent with the Forest Plan. With the requirement to apply the best management practices and other appropriate mitigation included in the SUPs and COM Plan, these modified plan standards will provide protection for soils resources.

Learning from experiences with other pipeline construction projects in conditions similar to those on the MNF, we have worked with Atlantic to inventory, analyze and evaluate the geologic, soil, and hydrologic resources that could be affected by this project. We also utilized a third party consultant for technical support in reviewing the information gathered for the project. We have worked with Atlantic to develop the COM Plan, a document that contains the design features, mitigation measures, roles and responsibilities, monitoring, and procedures for the construction and operation of the pipeline on NFS lands. We expect the COM Plan to appropriately protect the affected natural resources during the pipeline's construction and operation. The COM Plan will be incorporated as a requirement of the SUPs.

The mitigation measures incorporated into these three modified standards are designed to minimize the potential for soil movement and to ensure that adequate restoration and revegetation are identified in the Upland Erosion Control Plan (COM Plan, Section 8), Restoration and Rehabilitation Plan (COM Plan, Section 10), Slope Stability Policy and Procedure (COM Plan, Attachment C), Winter Construction Plan (COM Plan, Attachment D), and Typical Erosion & Sediment Control Details (COM Plan, Attachment I). Atlantic will also follow the FERC Upland Erosion Control, Revegetation, and Maintenance Plan, Restoration and Rehabilitation Plan (FEIS, Appendix F), Storm Water Pollution Prevention Plans and the Erosion and Sediment Control Best Management Practices for the states of West Virginia and Virginia. Atlantic will continue to work with the FS and WVDEP to ensure that high quality and multiple-tiered erosion control measures are employed on NFS lands. We expect this extensive set of plans to minimize potential erosion and impacts on soil productivity.

Environmental compliance roles and responsibilities for the ACP Project are described in the COM Plan, Section 3 – Environmental Compliance. This portion of the COM Plan applies to the construction, operation, and maintenance of the project on NFS lands and describes training, compliance, and reporting in assuring environmental compliance. The COM plan details how FERC, the FS, government-selected third-party compliance monitors, and Atlantic’s compliance monitoring team will provide a multi-pronged approach to ensuring overall environmental compliance.

The FS Authorized Officers will be responsible for administering and enforcing the SUP provisions and will have “stop work” authority in the event that impacts to resources are unacceptable. The FS Authorized Officers’ designated representatives will be responsible to ensure stipulations and mitigation measures included in the COM Plan are adhered to during project construction, operation, and maintenance. Field variance requests will be coordinated with the Authorized Officers.

The 36 CFR 219 regulations pertaining to NFS Land Management Planning (the planning rule) (81 FR 90723, 90737) require that plan amendments include a description of which substantive requirements of §§ 219.8 through 219.11 are likely to be directly related to the amendment (36 CFR 219.13(b)(2)). Whether a rule provision is directly related to an amendment is determined by any one of the following: the purpose for the amendment, a beneficial effect of the amendment, a substantial adverse effect of the amendment, or a substantial lessening of plan protections by the amendment.

The following substantive requirements of the planning rule are relevant to the plan amendment for standards SW03, SW06 and SW07:

- § 219.8(a)(2)(ii)—“[The plan must include plan components to maintain or restore] Soils and soil productivity, including guidance to reduce soil erosion and sedimentation,” and
- § 219.10(a)(3)—“[The responsible official shall consider] Appropriate placement and sustainable management of infrastructure,

such as recreational facilities and transportation and utility corridors.”

Having considered the BASI and the FEIS effects analysis for this amendment, as well as the above mentioned process and plans, I conclude that modifying these three plan standards will help minimize adverse environmental impacts to soils resources and will not cause substantial long-term adverse effects, nor a substantial lessening of protections, to the soils resources. Therefore, I have determined that the substantive requirements listed above are not “directly related” to the LRMP amendment, and that these rule provisions need not be applied.

#### **Threatened and Endangered Species**

As discussed earlier, FWS issued their BO covering the ACP Project on October 16, 2017. The BO concluded that there are some subactivities of the ACP Project that are likely to adversely affect (LAA) small whorled pogonia (*Isotria medeoloides*). Appendix B Table 1 of the BO includes a LAA subactivities section that describes these impacts and notes conservation measures in the form of avoidance and minimization measures (AMMs) that have been incorporated to ameliorate those effects. The FWS BO further concluded “that authorization to construct and operate the pipeline, as proposed, is not likely to jeopardize the continued existence of...” all eight species covered in the BO. The LAA finding for small whorled pogonia means this species must be added to the modification of Forest Plan standard TE07 of the MNF Forest Plan. Therefore, this decision modifies Forest Plan standard (TE07), as described in Table 2 of this ROD, specific to

the northern long-eared bat (*Myotis septentrionalis*) and the small whorled pogonia (*Isotria medeoloides*).

In addition to FERC's consultation requirements with the FWS, we have coordinated with FERC and Atlantic to identify management concerns for the northern long-eared bat within NFS lands. The MNF requested that Atlantic perform presence/probable absence surveys for bats within the ownership boundaries of the MNF, regardless of whether prior records of occurrence exist at any given locale. These surveys were first conducted in 2015, and Atlantic continues to collect survey information. Based on survey data collected to date, no active maternal colony roost trees have been identified in the MNF, and no known hibernacula were found within the 300-foot project area on the MNF.

The FWS has acknowledged that the primary threat to the northern long-eared bat is white-nose syndrome. However, construction of the pipeline through forested areas known to support, or capable of supporting, northern long-eared bats could result in direct and indirect impacts on the species. Potential impacts include: changes to occupied foraging habitat or migration corridors, habitat fragmentation, changes to potential roost trees or hibernacula in occupied habitat, injury or harm to individual bats, and disturbance near roosting bats. In addition, construction may create foraging corridors, improve conditions around potential roost trees by allowing more solar radiation to penetrate the forest adjacent to the pipeline, and potentially create additional roost trees along the pipeline as trees die in the future from construction damage.

Through our expertise and understanding of this species, and with coordination with the FWS, we have worked with Atlantic to identify and include project design features and mitigation measures that will protect the northern long-eared bat and its habitat, which are described in the FEIS. As discussed in Atlantic's COM Plan (Appendix G), Atlantic will comply with the tree clearing restrictions identified in table 4.7.1-6 of the FEIS. Atlantic is consulting with the FS regarding revegetation and seeding requirements for permanent easements and temporary construction rights-of-way on federally managed lands, which will be provided in the final COM Plan prior to construction. My decision includes the requirements of the final COM Plan.

Specific to the northern long-eared bat, my decision also includes the following conservation measures on NFS lands that will further reduce adverse impacts to this species:

- Atlantic will replant all additional temporary work space and the outermost portions of the construction right-of-way, including 20 feet on the working side and 13 feet on the spoil side, with a combination of indigenous tree and shrub seedlings on NFS property per the COM Plan. The mix of tree and shrub species will be determined in consultation with the FS.
- The right-of-way edges will be shaped or feathered by retaining forest vegetation up to 10 feet into the construction right-of-way along straight-line tangents of pipeline corridor that are visible to the public.

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- Atlantic will employ the least-intrusive tree removal methods to reduce damage to the adjacent forest. Additional temporary work space will be set back at least 100 feet from in-stream waterbody crossings that occur on NFS lands.
- A combination of tree-snagging and installation of bat box (rocket box) clusters will be implemented along the edge of disturbance within the temporary workspace following construction. The installed boxes will be monitored annually for a minimum of 3 years to ensure that they are installed appropriately and assess their efficacy in providing roosting habitat in the impacted area.

Specific to the small whorled pogonia, my decision is based on the FWS conclusion within the BO that with the avoidance and minimization measures included as part of the proposed action, there will be no reductions in the overall range, numbers and distribution of the species. Thus, no further conservation measures need to be considered to avoid any substantial adverse impact to the small whorled pogonia from this project.

The following substantive requirement of the planning rule is relevant to the plan amendment for standard TE07:

- § 219.9(b) *Additional, species-specific plan components.* (1) The responsible official shall determine whether or not the plan components required by paragraph (a) of this section provide the ecological conditions necessary to: contribute to the recovery of federally listed

threatened and endangered species,...within the plan area. If the responsible official determines that the plan components required in paragraph (a) are insufficient to provide such ecological conditions, then additional, species-specific plan components, including standards or guidelines, must be included in the plan to provide such ecological conditions in the plan area.

Having considered the BASI and the FEIS effects analysis for this amendment, I conclude that the mitigation measures in the modification of this plan standard will minimize adverse environmental impacts to the northern long-eared bat and small whorled pogonia; will not cause substantial long-term adverse effects; nor will result in a substantial lessening of protections to these species. Therefore, I have determined the substantive requirement listed above is not “directly related” to the LRMP amendment, and this rule provision need not be applied.

*George Washington National Forest LRMP*

The findings, conclusions, and determinations in this section are made by Ken Arney as Acting Regional Forester for the Southern Region of the FS.

**Utility Corridors**

In the DEIS, we had proposed the ACP pipeline route to be within a newly designated 50-foot wide utility corridor. Existing plan standard FW-243 directs use of existing utility corridors to their greatest potential to reduce the need for additional commitment of land for these uses. FERC’s review of alternative routes considered co-locating ACP with

existing utility corridors and concluded those alternatives to be either impractical or did not offer significant environmental advantages (FEIS, Section 3.4.1). FERC's review of alternatives demonstrated consistency with FW-243 and supported creation of a new route for the ACP.

Existing plan standard FW-244 directed that, if a route is created outside of an existing corridor, the new route would be reallocated as Management Prescription 5C, a designated utility corridor. The existing standard is intended to reduce fragmentation and minimize visual impacts by encouraging collocation of any future utility corridors. Many public comments on the DEIS expressed concern that a utility corridor designation could adversely impact private landowners that are interspersed and/or adjacent to the National Forest. Other comments pointed out the analysis didn't address the impacts of other prospective utilities that may be constructed in a designated corridor. We acknowledge the mixed ownership of the area and the potential impacts to adjacent land uses. We also recognize that it would be too speculative and complex to attempt to address in the FEIS the impact of prospective utilities that may be constructed at some future time. The resource impacts disclosed in the FEIS suggest collocation of utility corridors in mountainous terrain may not always be logistically feasible, or environmentally preferable. For these reasons, we revised the proposed approach in the FEIS to consider the ACP pipeline corridor on a project-level basis instead of pursuing designation of a new utility corridor.

This decision modifies the FW-244 plan standard to exclude the ACP from being designated as a Management Prescription 5C Utility Corridor. Although my decision does not preclude future collocation of utility facilities, a future proposal that would parallel the ACP route would be subject to environmental review and public involvement to assess logistic, safety, and resource impacts. Such a proposal would also require an amendment of this plan standard.

The Forest Service planning rule requirement that is relevant to this amendment is 36 CFR 219.10(a)(3) which requires that the responsible official must consider the appropriate placement and sustainable management of utility corridors when developing plan components. The FEIS evaluated a variety of options to transport natural gas and adequately analyzed the appropriate placement and sustainable management of the ACP. Consequently, I find this amendment meets the 36 CFR 219.10(a)(3) planning rule requirement. Since the amendment meets the rule requirement, there is no need to make a further determination as to whether the rule requirement is directly related to it.

### **Soil and Riparian**

This decision modifies five Forest Plan standards associated with soil productivity and riparian habitat (FW-5, FW-8, FW-16, FW-17 and 11-003) as described in Table 3. The standards are designed to protect soil and riparian resources on the Forest which also serves to protect water quality.

These five standards in the Forest Plan preclude standard industry pipeline construction methods like

those being proposed by Atlantic. It was not possible to modify the ACP Project to use construction methods to achieve project consistency with these five standards. The modified standards will allow the ACP Project to vary from the standards. However, with the requirement in this decision to apply the best management practices and other appropriate mitigation included in the SUPs and COM Plan, these modified standards will minimize impacts to these resources as Standards FW-5, FW-8, FW-16, FW-17 and 11-003 did before being modified.

Learning from experiences with previous pipeline construction projects on the Forest, we have worked with Atlantic to inventory, analyze and evaluate the geologic, soil, and hydrologic resources that could be affected by this project. We also utilized a third party consultant for technical support in reviewing the information gathered for the project. The COM Plan is a document developed between the FS and Atlantic that contains the design features, mitigation measures, roles and responsibilities, monitoring, and procedures for the construction and operation of the pipeline on NFS lands. The COM Plan will be incorporated as a requirement of the SUPs.

The mitigation measures incorporated into this amendment are designed to minimize the potential for soil movement and to ensure adequate restoration and revegetation are identified in the Upland Erosion Control Plan (COM Plan, Section 8), Restoration and Rehabilitation Plan (COM Plan, Section 10), Slope Stability Policy and Procedure (COM Plan, Attachment C), Winter Construction Plan (COM Plan, Attachment D), and Typical Erosion & Sediment

Control Details (COM Plan, Attachment I). Atlantic would also follow the FERC Upland Erosion Control, Revegetation, and Maintenance Plan, Restoration and Rehabilitation Plan (FEIS, Appendix F), Storm Water Pollution Prevention Plans and the Erosion and Sediment Control Best Management Practices for the states of West Virginia and Virginia. Atlantic will also continue to work with the FS and Virginia Department of Environmental Quality to ensure high quality and multiple-tiered erosion control measures are employed on NFS lands to minimize potential erosion and subsequent water quality impacts.

About 0.15 acre of wetlands may be impacted by the ACP Project on NFS lands. The required mitigation measures in the COM Plan to protect wetlands and minimize compaction include: limiting the construction right-of-way width to 75 feet or less through wetlands ; placing equipment on mats; using low-pressure ground equipment; limiting equipment operation and construction traffic along the right-of-way; locating ATWS at least 100 feet away from wetland boundaries (unless approved by the FS); cutting vegetation at ground level; limiting stump removal to the trench; segregating the top 12 inches of soil, or to the depth of the topsoil horizon; using “push-pull” techniques in saturated wetlands; limiting the amount of time that the trench is open by not trenching until the pipe is assembled and ready for installation; not using imported rock and soils for backfill; and not using fertilizer, lime, or mulch during restoration in wetlands. Atlantic must also follow U.S. Army Corps of Engineer permit terms and conditions and the FERC Waterbody and Wetland Construction and Mitigation Procedures. The Forest Service will

continue to work with Atlantic to ensure appropriate erosion control and restoration measures are incorporated into the COM plan to further reduce potential impacts to wetlands on NFS lands.

Additionally, environmental compliance roles and responsibilities for the ACP Project are described in Section 3 – Environmental Compliance of the COM Plan. This portion of the COM Plan applies to the construction, operation, and maintenance of the project on NFS lands and describes training, compliance, and reporting in assuring environmental compliance. FERC and their third-party compliance monitors, the FS, and Atlantic's compliance monitoring team will provide a multi-pronged approach to ensuring overall environmental compliance. The FS Authorized Officer would be responsible for administering and enforcing the SUP provisions and would have stop work authority. The FS Authorized Officer's designated representatives would be responsible to ensure stipulations and mitigation measures included in the COM Plan are adhered to during project construction, operation, and maintenance. Post-approval requests for changes not specifically authorized by the SUPs will require prior approval of the appropriate Authorized Officer(s). Further, the FERC's certificate is conditioned on Atlantic's compliance with all environmental conditions detailed in Appendix A of the certificate (pp 132-151).

The Forest Service planning requirements relevant to this amendment are those that require the plan to contain plan components to maintain or restore:

- soils and soil productivity, including guidance to reduce soil erosion and sedimentation (36 CFR § 219.8(a)(2)(ii));
- water resources in the plan area, including lakes, streams, and wetlands; ground water; public water supplies; sole source aquifers; source water protection areas; and other sources of drinking water (including guidance to prevent or mitigate detrimental changes in quantity, quality, and availability)(36 CFR 219.8(a)(2)(iv)); and
- the ecological integrity of riparian areas, including their structure, function, composition, and connectivity (219.8(a)(3)(i)).

Having considered the BASI and the FEIS effects analysis for this amendment, I conclude the modification of these five soil and riparian plan standards will minimize adverse environmental impacts to soil and riparian resources and will not cause substantial long-term adverse effects, nor a substantial lessening of protections, to the soil and riparian resources. Therefore, I have determined the requirements of 36 CFR § 219.8(a)(2)(ii), § 219.8(a)(2)(iv), and § 219.8(a)(3)(i) are not “directly related” to the LRMP amendment, and these rule provisions need not be applied.

*Appalachian National Scenic Trail*

This decision modifies a Forest Plan standard (4A-025, refer to Table 2 of this ROD) associated with Management Prescription 4A – Appalachian National Scenic Trail Corridor, to allow ACP to cross the ANST at a location where no other major impacts already exist. Forest Plan standard 4A-025 is intended to

minimize impacts to the ANST by collocating proposed infrastructure projects into previously impacted locations. This standard is an acknowledgement of the importance of the ANST for its recreational value (the nation's first National Scenic Trail) and its cultural value (eligible for nomination to the National Register of Historic Places [NRHP]). This decision to allow a crossing at this location is based on FERC's consideration of other routes which crossed the ANST. Section 3 of the FEIS evaluated a number of major route alternatives crossing the ANST at different locations than the proposed route, with some of the alternatives crossing in areas with existing impacts. FERC concluded each of these alternatives were either not technically feasible or did not result in significant environmental advantage over the corresponding proposed route.

For the proposed route, Atlantic would cross the ANST (along with the BRP) using the Horizontal Directional Drilling (HDD) method. The current location of the ANST in this area has been determined to also be the optimal permanent location for this trail. While some minor hand cutting of brush to lay a guide wire for an HDD may typically be required between the HDD entry and HDD exit points, Atlantic would use a gyroscopic guidance system at the ANST and BRP crossing that does not require a guide wire or associated brush clearing. The HDD entry and exit points would be located on private land about 1,400 feet and 3,400 feet, respectively, away from the ANST footpath. The entry and exit points would not be visible to ANST users due to intervening vegetation and terrain. The High SIO would be maintained for the Rx 4A – ANST. A temporarily closure or detour

around the construction area for ANST recreationalists would not be needed, nor would the removal of vegetation and trees between the HDD entry and exit points. HDD activities at the entry and exit points would last about 12 to 14 months. Users of the ANST would experience temporary, minor noise and night-sky impacts for the duration of HDD activities. ACP has also proposed a trenchless contingency plan (i.e. direct pipe method) to supplement its proposal in the event of problems with conventional boring under the ANST. The contingency plan entry and exit points would be 600+ feet and 400 feet from the ANST and also would not result in land disturbance with the GWNF or be visible from the ANST.

By incorporating the COM Plan and other appropriate mitigation into the SUPs, the ACP Project will be consistent with the Rx 4A standard 4A-017 which requires all management activities to meet or exceed a SIO of High. Mitigating the visual impacts at this point not only ensures Forest Plan consistency, but also avoids permanent adverse impacts to the cultural resource values of the ANST (a historic district eligible for listing on the National Register of Historic Places) and ensures compliance with Section 106 of the National Historic Preservation Act.

The FEIS analysis of ACP's ANST crossing on the proposed route supports our decision to modify Plan Standard 4A-025 to provide an exception for the ACP ROW to cross Rx 4A area at a location where major impact do not already exist. The modified standard 4A-025 will allow ACP Project to be consistent with the GWNF LRMP as amended.

The planning rule requirement relevant to this modified LRMP standard is 36 CFR 219.10(b)(1)(vi) which requires plan components to provide for appropriate management of other designated areas of the plan area. FERC's determination that alternative routes for ACP, including routes with existing major impacts, did not offer significant environmental advantages over the proposed crossing at this location supports my determination that this decision appropriately manages utility corridors. Mitigation for crossing the ANST specifies Atlantic will use the HDD method to bore underneath the ANST. Should the HDD bore under the ANST fail, Atlantic will utilize the direct pipe method described in the Contingency Plan for the Proposed Crossing of the Appalachian National Scenic Trail (COM Plan, Attachment P), which is also a trench-less method for crossing of the ANST. Both the primary and contingency methods avoid impacts to the scenic integrity and cultural resource values of the ANST and demonstrates appropriate management of the designated ANST corridor as required by 36 CFR 219.10(b)(1)(vi). Since the amendment meets the rule requirement, there is no need to make a further determination as to whether the rule requirement is directly related to it.

### **Scenic Integrity Objectives**

My decision to modify Forest plan standard FW-182 (refer to Table 3 of this decision) will allow the ACP Project a variance from meeting the GWNF SIO's crossed by the ACP corridor. The modified standard includes wording that requires the Forest Service to ensure the ACP Project meets the established SIO's at

areas identified in the COM Plan and SUPs within 5 years after completion of the construction phase of the project. A VIA that produced visual simulations for KOPs was prepared by Atlantic to assess the degree to which construction of the pipeline corridor is expected to create visible deviations by introducing contrasts in form, line, color, texture, pattern or scale that do not currently exist in the landscape character. KOPs were located on travel routes and trails, designated recreation areas, and waterbodies from which the pipeline and facilities on NFS lands could be visible to the public. The series of simulations provided in the VIA show potential views of ACP after construction from select KOPs after one growing season, after 5 years, and after 15 to 20 years Atlantic's COM Plan states it will "feather" the edges of the construction right-of-way during construction and will utilize enhanced mitigation measures in visually sensitive areas to lessen the visual impact of the right-of-way corridor.

The operational ACP ROW would cross about 15.7 miles (93 acres) of the GWNF in areas designated as Moderate SIO and 0.1 mile (2.3 acres) designated as High SIO. Access roads would impact approximately 44 acres designated as Moderate SIO and 3.5 acres designated as High SIO. Without mitigation, the permanently maintained right-of-way would not repeat or mimic the natural attributes currently found in the landscape character of the GWNF.(See the Visual Impact Analysis in Appendix T of the FEIS.)

The FS has consulted with FERC on additional mitigation measures to reduce visual impacts of the operational ROW, such as reducing the permanent

operational ROW that will be converted to herbaceous cover from 50' wide to approximately 10' wide. Application of these measures in visually sensitive areas identified in the approved SUPs and COM Plan will significantly reduce the visibility of the pipeline, especially when viewed in the far middle-ground and background distance zones, and it will reduce or eliminate its visibility when viewed on an angle. Along the edge of this linear corridor a variety of FS-approved shrubs, small trees and shallow rooted trees will be planted and maintained along a slightly undulating line to break up the straight edge and offer a variety of plant heights to reduce a hard shadow line. Reducing the herbaceous right-of-way width and allowing more of a vegetative transition within the operational corridor (that is, grasses over the pipeline then shrubs between the grasses and treeline) will help mitigate the effects of the change to the scenic character of an affected area. This will also lessen the visual impacts of the project as seen from the ANST and from other highly use recreation areas and trails, including KOPs that were identified in public comments. By including these measures into the SUPs and COM Plan, we expect the ACP Project would achieve the desired SIO objective within five years of completing construction, meeting Forest plan standard FW-182 as amended. Atlantic's COM Plan has proposed areas of the route where they will feather the edge of the construction right-of-way. The FS has identified additional areas of the route where feathering will be required in order to minimize impacts to views from visually sensitive areas, which include trails, roads, a resort, overlooks, fire tower sites accessed by open roads and/or trails, and a fire

tower converted to a rental cabin in a State forest. The FS will require feathering at these additional areas as a condition of the SUPs.

The modified standard acknowledges that even with mitigation, the foreground view from the portion of the Shenandoah Mountain Trail impacted by the ACP route (200-225 feet) would be reduced from an SIO of Moderate to Low.

Section 4.8.9 and Appendix T of the FEIS discloses the visual impacts associated with the project. The analysis supports the decision to modify Plan Standard FW-182 to exempt the ACP ROW from meeting the established Forest SIO for these high value scenic areas and provides a five-year period following completion of the ACP construction for the scenic integrity of the project area on the Forest to be restored.

The planning regulation requirement relevant to this amendment is 36 CFR 219.10(b)(1)(i) which requires the LRMP to include plan components for sustainable recreation and scenic character. With respect to meeting the planning rule requirement at § 219.10(b)(1)(i), FS and Atlantic have developed additional mitigation measures that would be included in the COM Plan and SUPs. The mitigation measures are described above in this section. These mitigation measures will help mitigate the effects of the change to the scenic character of these high scenic value areas. With the implementation of these mitigation measures, this planning rule requirement to provide for scenic character will be met. Since the amendment meets the rule requirement, there is no

need to make a further determination as to whether the rule requirement is directly related to it.

**Road Reconstruction – Eligible Recreational River Area**

The modification of Standard 2C3-015 (as described in Table 3) is needed because Forest Road (FR) 281 intersects Indian Draft Road within the boundary of Management Prescription [Rx] 2C3–Eligible Recreational River area. FR 281 has been proposed for use by Atlantic for an access road and to do so they want to widen the road at this intersection and gravel its surface.

GWNF Management Prescription 2C3 is for “Eligible Recreational Rivers” and includes rivers that are eligible for the National Wild and Scenic River System under the recreational river designation as well as a 0.25-mile-wide corridor on each side of the waterbody. The GWNF Forest Plan describes these rivers as "readily accessible by road or railroad, that may have some development along their shorelines, and that may have undergone some impoundment or diversion in the past." and says “The river is readily accessible by roads and may be accessed by railroads as well. Transportation facilities may parallel the river for long stretches.”

For the ACP Project, the Eligible Recreational River Area impacted is the Cowpasture River, Segment B. The point where FR281 intersects Indian Draft Road is within the 0.25 mile corridor for this river segment. Indian Draft Road parallels the Cowpasture River for a considerable distance and FR281 intersects Indian Draft Road at nearly a right angle within the 0.25 mile corridor for this river

segment but does so on the side of Indian Draft Road that is away from the River. In other words, Indian Draft Road is between FR281 and the Cowpasture River.

Road construction or reconstruction is allowed to improve recreational access, improve soil and water, salvage timber or protect property, or public safety in Standard 2C3-015. Atlantic stated that it would widen the entrance-way where FR 281 intersects Indian Draft Road, and apply gravel to the road surface. Prior to the actual road work being performed, Atlantic will provide the engineering details of proposed improvement to the FS for review and approval. Atlantic contends that it is not proposing construction or reconstruction of FR 281. It could be argued that allowing Atlantic to use it for access for the pipeline is to protect property or a public safety issue but to err on the side of disclosure of impacts, we are amending the standard to specific allow this road widening project.

The concerns about Atlantic's use of FR281 and the inclusion of mitigation measures for its use in the FEIS and COM Plan were focused on potential impacts on the Browns Pond Special Biological Area (SBA), as this road is a two-track primitive road along the southern boundary of RX 4D, which is the Browns Pond SBA. However this SBA is not within the eligible river corridor. The Draft ROD stated "This standard may not need modification depending on the need for this access road which the FS is still negotiating with Atlantic. The reconstruction of FR 281 would not substantially affect the outstandingly remarkable values associated with the Cowpasture River Segment

B. The final determination as to the need to modify this standard will be made in the final ROD.” Because Atlantic will not reconstruct the road for its length, but will widen the entrance and gravel the surface, and use of this road will be authorized for the ACP Project, the modification of Standard 2C3-015 is needed.

The planning rule requirement that is relevant to this amendment is § 219.10(b)(v), which states that a plan must include plan components for rivers found eligible for the National Wild and Scenic River system that will “protect the values that provide the basis for their suitability for inclusion in the system.”

Requiring road improvements to be consistent with Forest Service standards and with incorporation of appropriate mitigation, the reconstruction of FR 281 within the Rx 2C3 area would not substantially affect the outstandingly remarkable values associated with the Cowpasture River Segment B (see FEIS, Section 4.8.9), that include Class A-distinctive for fish and wildlife values and for historic and cultural values, Class B-common for scenic values and recreational values, and Class C-minimal for geologic values.

Since the outstanding remarkable values of Cowpasture River Segment B will still be protected with the standard as modified, the rule requirement at § 219.10(b)(v) is being met. Consequently, there is no need to make a further determination as to whether the rule requirement is directly related to this modification.

### **Management of Old Growth**

The Draft ROD identified that the need to modify Standard FW-85 would depend upon Atlantic completing an old growth inventory on the portion of the corridor on the GWNF using the specified inventory criteria. Such an inventory is required by standard FW-85 to identify existing old growth conditions.

Old growth surveys in the ACP construction corridor located on the GWNF were completed in late summer, 2017 and the results were provided to the GWNF in September 2017. The results of the survey indicate approximately 8 acres within the construction corridor meet all of the criteria to meet the operational definition of old growth pursuant to the *Guidance for Conserving and Restoring Old Growth Forest Communities on National Forests in the Southern Region* (FS, 1997). Of these acres, approximately 4 acres occur within the Dry Mesic Oak forest community type (Type 21) and approximately 4 other acres occur within the Dry and Xeric Oak forest community type (Type 22). An estimate of another 8 acres were found to meet the minimum age criterion, but these acres did not meet all of other criteria to be defined as old growth. (These acres occur within the Dry Mesic Oak forest community type [Type 21].)

According to Standard FW-85, stands in Old Growth Forest Type 21 may be suitable for timber harvest, while stands in Old Growth Forest Type 22 that meet the age criteria for old growth will be unsuitable for timber production. For Old Growth Forest Type 21, the LRMP for the GWNF estimated there are approximately 151,400 acres of possible old

growth within this old growth forest community type across the Forest (see Table B-3, LRMP for the GWNF), indicating the harvest of these old growth acres within the ACP pipeline corridor will not affect the distribution and abundance of this old growth community type. For the 4 acres of Old Growth Forest Type 22 that will need to be removed within the ACP pipeline corridor, while these acres are identified as unsuitable for timber production, the regulations at 36 CFR 219.11(c) stipulate that timber harvesting for purposes other than timber production can be used as a tool to assist in achieving or maintaining one or more applicable desired conditions or objectives of the plan. Desired Condition LSU-07 of the GWNF's LRMP (p. 2-32) states that "Special uses exist that serve a local, regional or national public benefit and need by providing for ... a reliable supply of electricity, natural gas ..." With these results from the September 2017 old growth survey, we can determine that the removal of an estimated 8 acres of old growth stands within the ACP pipeline construction corridor will meet the requirements of Standard FW-85 and an amendment to this standard is not needed.

**Project and activity consistency with the plan**

All future projects and activities must be consistent with the amended plans (16 U.S.C. 1604(i)). The FS planning regulation consistency provisions at 36 CFR 219.15(d) apply only to the plan component(s) added or modified under the 2012 Planning Rule. With respect to determinations of project consistency with other plan provisions, the FS's prior interpretation of consistency (that the consistency requirement is applicable only to plan standards and guidelines)

applies. (Forest Service Handbook 1909.12, Ch. 20, sec. 21.33.) With these amendments to the MNF LRMP and GWNF LRMP, we find that the ACP Project, including the applicable mitigation measures identified in the COM Plan and described in the FERC's Certificate, is consistent with the amended plans.

### **ALTERNATIVES CONSIDERED IN DETAIL**

Section 3 of the FEIS describes the process used by FERC to evaluate identified alternatives. Each alternative was considered to the point where it was clear the alternative was either not reasonable, would result in greater environmental impacts that could not be readily mitigated, offered no significant environmental advantages over the proposed projects, or could not meet the projects' purpose, which is to provide transportation of 1.5 billion cubic feet per day of natural gas to consuming markets at the delivery points specified by the projects' customers.

Section 3.3.4 ("National Forest Route Alternatives") describes the considerations by FERC when considering alternative routes for the ACP. The proposed crossing of the MNF and GWNF received a considerable amount of comment and criticism from stakeholders, and accordingly, resulted in a number of evaluated route alternatives and variations. FERC evaluated 14 major pipeline route alternative, including routes collocated with other pipelines, electric transmission lines, and interstate/highway rights-of-way, and several variations to avoid or minimize crossing of NFS and National Park Service lands. Increasing collocation with existing rights-of-way, avoiding federal lands, concern about

construction through karst sensitive terrain, impacts on affected landowners and communities, and general environmental concerns were all reasons for evaluating pipeline alternatives and variations. In evaluating the alternatives, FERC compared a number of factors including (but not limited to) total length, acres affected, wetlands and waterbodies crossed, forested land crossed, recreation features crossed, collocation with existing rights-of-way, construction constrains, and economic practicality. FERC's evaluation concluded the major pipeline route alternatives and variations do not offer a significant environmental advantage when compared to the proposed route or would not be economically practical.

Given FERC's evaluation described above, the range of alternatives considered within the scope of our decision was limited to the following:

- **Proposed Action—Authorize Use and Occupancy and Approve Plan Amendments**— The proposed action is to authorize the use and occupancy of NFS lands for Atlantic to construct and operate an interstate natural gas pipeline along the route entitled GWNF6<sup>13</sup> and to contemporaneously amend the MNF and GWNF LRMPs so that the ACP Project will be consistent with the plan as amended.
- **No Action Alternative**— Under the no action alternative, the FERC would deny the requested actions by Atlantic to construct an

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<sup>13</sup> See FEIS Section 3.3.4.2 (“Former National Forest Route”) for the discussion on the evolution of Atlantic's current and preferred route through the National Forests.

interstate natural gas pipeline. The FS would deny Atlantic's application for a SUP and the proposed ACP Project would not occur.

**ENVIRONMENTALLY PREFERABLE  
ALTERNATIVE**

NEPA regulations require agencies to specify the alternative or alternatives which were considered to be environmentally preferable (40 CFR 1505.2(b)). Forest Service NEPA regulations define an environmentally preferable alternative as: "the alternative that best promote the national environmental policy as expressed in NEPA's section 101." Section 101 declares it is the policy of the Federal Government to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

The scope of this decision was limited to considering the proposed action as described in Section 2 of the FEIS. The effects analysis in the FEIS for this project shows the project can be implemented without impairing the long-term productivity of NFS lands (FEIS, Section 4.0 and 5.0). The ACP Project SUPs will be subject to required terms, conditions, and mitigation referenced in this ROD. The decision includes measures to avoid or minimize environmental harm including Forest Plan standards and guidelines, which at a minimum, meet all requirements of applicable laws, regulations, State standards, and additional standards and guidelines for the affected NFS lands. Adverse effects of the proposed pipeline will be minimized through

measures proposed by Atlantic and through measures required by FERC or other federal and state agencies.

Compared to the proposed action, the no action alternative would avoid the environmental impacts to NFS lands. However, if the ACP Project is not authorized or not constructed, the lack of a new pipeline with access to supply sources into the region could result in other social, economic, and environmental impacts. Prolonging the existing supply constraints in the proposed delivery areas could create winter-premium pricing and exacerbate price volatility for all natural gas users in the areas, and could increase the difficulty for others, such as the operators of gas-fired electric generating plants, in finding economical gas supplies. This in turn could lead to higher gas and electric rates in the region and could lead to energy shortages during times of winter peak demand. Most of the natural gas that would be transported by ACP would be used as a fuel to generate electricity for industrial, commercial, and residential uses. The no action alternative would impact the reliability and security of the natural gas supply to power plants to produce electricity. If those plants rely on other fossil fuels, such as coal and fuel oil, air emissions would be greater than if natural gas were used. The no-action alternative would not provide the potential economic benefits associated with the proposed projects, including increased jobs, secondary spending, tax revenues, and lower energy costs to consumers of electricity.

Given consideration of these factors, we concur with FERC's conclusion (FEIS, Section 3.1) that the no action alternative is not preferable because although

it would avoid the environmental impacts of the proposed project, it would likely result in the need for an alternate energy means to satisfy the demand for natural gas and energy in the project area, or would result in end users seeking alternate energy from other sources such as other natural gas transporters, fossil fuels, or renewable energy.

Therefore, we find the proposed action, subject to compliance with design features and mitigation outlined in the COM Plan, is preferable. When compared to the no action alternative, it best supports the purpose and need of transporting natural gas produced in the Appalachian Basin to markets in the Virginia and North Carolina.

## **FINDINGS REQUIRED BY OTHER LAWS AND REGULATIONS**

### **National Forest Management Act (NFMA)**

This decision authorizes the use and occupancy of NFS lands for the ACP Project and approves project-specific forest plan amendments to both the MNF and GWNF LRMPs. The NFMA requires projects, including those that authorize use and occupancy, be consistent with the forest plan of the administrative unit where the project would occur.

The discussion in the “Decision Rationale” section of this ROD describes how the analysis supports our determination that the project can be implemented without impairing the long-term productivity of NFS lands (FEIS, Sections 4 and 5). Measures to avoid or minimize environmental harm that are incorporated in this decision include LRMP forest-wide standards and guidelines, which at a minimum, meet all requirements of applicable laws, regulations, State

standards, and standards and guidelines for the affected NFS lands. For these reasons, we find the authorization aspect of this decision to be consistent with the NFMA.

The Forest Service land management planning regulations (36 CFR 219 as amended) set out requirements for the amendment of plans. See 36 CFR 219.13 (81 FR 90738 (December 15, 2016)). The discussion in this ROD in the section, “Compliance with the Rule’s Procedural provisions,” explains how the following procedural rule requirements for the amendments were met; specifically, consideration of the best available scientific information, (§ 219.3), providing opportunities for public participation and public notice (§§ 219.4, 219.13 (b)(2), and 219.16), using the correct format for standards (§ 219.7 (e) and 219.13 (b)4)). The discussion in the section, “Compliance with the Rule’s Applicable Substantive Provisions” in this ROD, explains how the substantive requirements for the amendments were met.

Specifically, with respect to the GWNF LRMP amendment approved in this decision, I, Ken Arney, have concluded that the modifications to GWNF LRMP Standards FW-244 (utility corridors), 4A-025 (ANST), FW-182 (scenic integrity objectives), and 2C3-015 (road reconstruction in a recreational river corridor), meet the relevant requirements of the rule. Under the current planning rule, I am also required to determine if the proposed Forest Plan amendment is directly related to the substantive requirements of § 219.8 through 219.11. I have concluded that substantive rule provisions were not directly related, and therefore need not be applied, to the modifications

to Standards FW-5, FW-8, FW-16, FW-17, and 11-003 (soil and riparian).

With respect to the MNF LRMP amendment approved in this decision, I, Kathleen Atkinson, have concluded that substantial rule provisions were not directly related, and therefore need not be applied, to the modifications to the MNF LRMP Standards SW06, SW07, SW03, and TE-07, respective to soils and threatened and endangered species.

The discussion under the sections “Rationale,” “Compliance with the Rule’s Procedural Provisions,” “Compliance with the Rule’s Applicable Substantive Provisions,” and “Use of Best Available Scientific Information” in this record of decision explain how our decision meets the applicable requirements of the 36 CFR 219 planning rule and is consistent with NFMA. The discussion in the “National Environmental Policy Act,” heading of this section explains that the FEIS is consistent with Forest Service NEPA procedures as required by the rule (§ 219.13 (b)(3)).

#### **National Environmental Policy Act (NEPA)**

Our independent review of the FEIS finds it meets the requirements of the NEPA, Council on Environmental Quality (40 CFR 1500-1508) and Forest Service regulations (36 CFR Part 220). Forest Service direction pertaining to implementation of the NEPA and CEQ regulations is contained in chapter 10 and 20 of Forest Service Handbook 1909.15 (Environmental Policy and Procedures). The FERC initiated the public involvement process in 2014 and received about 5,600 written comment letters during the pre-filing process, the formal scoping and supplemental scoping periods, and throughout

preparation of the EIS. Section 3 of the FEIS describes alternative development. Using the best available scientific information, the FEIS provides an adequate analysis and discloses the environmental effects related to the use and occupancy of NFS lands for the ACP Project and for amending select MNF and GWNF LRMP standards. The analysis adequately addresses agency comments and mitigation recommendations. Measures to avoid or minimize environmental harm that are incorporated in this decision include forestwide LRMP standards and guidelines (which at a minimum, meet all requirements of applicable laws, regulations, and State standards) and additional standards and guidelines for the affected NFS lands. Other protective measures are included in the construction and restoration plans that are applicable to the ACP Project (FEIS, Table 2.3.1-1). We adopted the FEIS pursuant to 40 CFR 1506.3(c) to support our decision to authorize Atlantic use and occupancy for the ACP Project and amend the LRMPs as outlined in this ROD.

#### **Endangered Species Act (ESA)**

The ESA requires federal agencies to ensure that any agency action does not jeopardize the continued existence of federally threatened or endangered species and their designated critical habitat. The FERC, as lead federal agency, consulted with the FWS to determine whether any federally listed (or proposed for listing) species, or their designated critical habitats, would be affected by the ACP Project.

In compliance with section 7, the FERC submitted to the FWS the FEIS, mostly section 4.7.1, as FERC's Biological Assessment (BA) and requested initiation of

formal consultation with the FWS. ESA section 7(a)(2) requires federal agencies, through consultation with the FWS, to ensure that their activities are not likely to jeopardize the continued existence of listed species or adversely modify designated critical habitats. FERC received a non-jeopardy Biological Opinion (BO) with incidental take authorization from FWS on October 16, 2017. The FWS BO addresses eight federally-listed species for which certain activities associated with the ACP are likely to have an adverse effect. The effects analysis of the BO is for the project in its entirety, which includes National Forest System (NFS) lands. Of the eight species addressed in the BO, six (small whorled pogonia, running buffalo clover, rusty patched bumble bee, Madison cave isopod, Indiana bat, and Northern long-eared bat) are known, or have the potential, to occur on NFS lands. The BO is available on FERC's website at [http://elibrary.ferc.gov/idmws/file\\_list.asp?accession\\_num=20171103-3008](http://elibrary.ferc.gov/idmws/file_list.asp?accession_num=20171103-3008).

The BO divided the proposed action into discrete subactivities to standardize the effects analysis and focused its discussion on subactivities of the project that are likely to adversely affect the listed species. The new construction subactivity will impact suitable habitat and/or individuals. Incorporation of avoidance and minimization measures would lessen adverse effects. The FWS concludes that the proposed action is not anticipated to result in reductions in the overall reproduction, numbers, and distribution of each of the species considered; and in their opinion, authorization of the project is not likely to jeopardize their continued existence.

The BO contains several Reasonable and Prudent Measures and associated Terms and Conditions. These are mandatory nondiscretionary items that must be implemented. We will require measures from the BO that are applicable to species and habitat on NFS land as a condition of approval in the Forest Service special use permit. It should be noted that the FWS does not provide these nondiscretionary items for plant species; therefore, no Reasonable and Prudent Measures or Terms and Conditions are provided for the small whorled pogonia or running buffalo clover. With the project as proposed, the FWS does not anticipate any impact to the range, numbers, or distribution of these plant species, and therefore, no additional measures are necessary to ensure their continued existence.

On October 4, 2017, the FWS published a notice in the Federal Register (FR) proposing the candy darter (*Etheostoma osburni*) be listed as a threatened species under the ESA, citing hybridization with the variegate darter (*Etheostoma variatum*) as the primary threat to the species. The FWS determined it was not prudent to designate critical habitat for the species at this time. Due to the timing of the FR Notice, the BO did not address the candy darter. On November 9, 2017 FERC requested a conference opinion from the FWS for a jeopardy/non-jeopardy determination for the candy darter and reiterated the measures it will require to protect the species. FERC's Certificate requires Atlantic to assume presence of the candy darter within specific streams in the project area and apply the FWS' enhanced conservation measures outlined in section 4.7.1 of the FEIS to these waterbodies, and any perennial tributaries within 1

mile of stream crossing locations to minimize impacts on this species. There is no suitable candy darter habitat on NFS land, but stream crossings on the MNF may have an indirect impact on candy darter habitat located downstream. The FS special use permit will require compliance with the Environmental Conditions of FERC's Certificate to ensure mitigation measures to minimize impact to candy darter habitat are implemented on NFS lands. The FS will also condition the special use permit to prohibit activity that may impact candy darter habitat until the FWS provides FERC with a non-jeopardy determination for the species. The FS would authorize activity that could impact candy darter habitat until the aforementioned condition is satisfied.

Based on the conclusions of the BO; requiring Atlantic to comply with the BO's mandatory measures and the FWS enhanced conservation measures; and conditioning the ACP special use permit to prohibit activity unless and until FWS issues a non-jeopardy conference opinion; we find this decision to be in compliance with the requirements of ESA.

### **Regional Forester Sensitive Species**

Federal law and direction applicable to Forest Service sensitive species are included in the NFMA and the Forest Service Manual (FSM) 2670. The Regional Foresters developed the sensitive species lists for plants and animals for which population viability is a concern. The ACP Project analysis was based on the April 2001 sensitive species list for the GWNF and on the May 2012 sensitive species list for the MNF. Atlantic submitted a Biological Evaluation (BE) on March 10, 2017 which assessed the potential

impacts of the ACP on Forest Service sensitive species. With FS feedback and additional field data, Atlantic submitted an updated BE on August 4, 2017.

*Monongahela National Forest*

In total, there are 136 species on the MNF sensitive species list. Of these, 72 species were eliminated from further analysis based on known species ranges occurring outside of the analysis area, or because suitable habitat was not identified in the analysis area per the Biological Evaluation (BE, Section 3.3.1). The remaining 64 species were further analyzed for impacts from the ACP.

A determination of “may impact individuals but is not likely to cause a trend toward federal listing or loss of viability” (MIILNT) applies to all species that were analyzed on the MNF, with the exception of a beneficial impact (BI) determination expected for three species.

For three species (Appalachian oak fern, white alumroot, and Roan Mountain sedge), the March 2017 draft BE determined ACP “may impact individuals but is not likely to cause a trend toward federal listing or loss of viability”. The July 21, 2017 Draft ROD identified a preliminary determination of “likely to result in loss of viability” for these three species, but acknowledged that discussions with Atlantic were ongoing to determine potential remedies or conservation measures to minimize or avoid negative effects to population viability. On August 4, 2017, an updated BE was submitted to the Forest Service and reflected the Draft ROD language with a determination that ACP is “likely to result in loss of viability” for the three species. In its final review and

acceptance of the BE, the Forest Service has determined the appropriate determinations for all three species is “may adversely impact individuals, but unlikely to lead to a loss of viability or a trend towards federal listing.” We believe the BE documents that the forest contains adequate populations of non-impacted plants, and that these populations will ensure the viability of the species on the forest. These determinations will be supported by requiring in the SUPs that Atlantic implement the conservation measures contained in the BE. In addition to the conservation measures of the BE, the following measure will also be included in the SUPs:

*Atlantic shall perform additional surveys in suitable habitats near the project area for populations of Roan Mountain sedge, Appalachian oak fern, and white alumroot to improve size and abundance data for the species.*

*George Washington National Forest*

There are 141 species on the GWNF sensitive species list. Of these, 74 were eliminated from further analysis in the BE based on known species ranges occurring outside of the analysis area. Of the 67 remaining species, 46 species were eliminated from further consideration because suitable habitat was not identified in the analysis area. The remaining 21 species were determined to warrant further analysis in the BE due to their detection during field surveys; or because suitable habitat is present but field surveys could not be done; or because field surveys were negative, but the species is difficult to detect. (BE, Section 3.3.2)

A determination of “may impact individuals but is not likely to cause a trend toward federal listing or loss of viability” applies to all species analyzed for the GWNF, with the exception of a beneficial impact (BI) determination expected for 4 species.

The FS will require Atlantic to implement conservation measures contained in the SUPs, the COM Plan, and the BE to minimize impacts to sensitive species during construction and operation activities on the MNF and GWNF. With implementation of these measures, the ACP Project will not result in loss of species viability or create significant trends toward federal listing of RFSS on the MNF or GWNF.

### **Special Status Species**

#### *Bald and Golden Eagle Protection Act*

Bald and golden eagles are not listed species under the ESA; however, they are protected under the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. Federal protection of bald and golden eagles and their presence in the vicinity of the ACP Project are discussed in the FEIS in sections 4.5.3.1 and 4.5.9. Golden eagle winter roosting locations are known from eastern West Virginia and western Virginia, in particular along ridges and in areas of higher elevation. Bald eagles are known to occur year-round in the project area. The “Migratory Bird Plan” and the FERC’s “Plan and Procedures” (FEIS, Table 2.3.1-1) documents describe the timing restrictions, mitigation, and monitoring that will be implemented from the pre-construction phase to the right-of-way maintenance phase and are required by the FERC’s Certificate. For example, Atlantic will not

construct within the 660-foot nest buffer when the nests are active from approximately December 15 through July 15. If Atlantic identifies additional bald eagle nests or occupied bald or golden eagle winter roosting habitat prior to or during construction, Atlantic will follow the National Bald Eagle Management Guidelines. Bald eagle nests identified during aerial survey or the Center for Conservation Biology database will be monitored during preconstruction to determine bird activity. Atlantic will also adhere to the FWS guidance for “Project Design and Maintenance” reviews of communication towers provided by the Raleigh FWS Office (FWS, 2013c) and the FWS Migratory Bird Office (FWS, 2016o). Implementation of this decision includes mitigation and coordination with the FWS and other State agencies that will protect bald and golden eagles. For these reasons, this decision is compliant with this Act.

**Migratory Bird Treaty Act (MBTA) of 1918 and Executive Order 13186**

The MBTA, as amended, makes it illegal for anyone to take, possess, import, export, transport, sell, purchase, barter, or offer for sale, purchase, or barter, any migratory bird, or the parts, nests, or eggs of such a bird except under the terms of a valid permit issued pursuant to Federal regulations.

Executive Order 13186 requires analysis of effects of federal actions on migratory birds as part of the environmental analysis process. Under a memorandum of understanding between the Forest Service and the FWS, the FS evaluates effects of proposed actions on migratory birds, focusing first on

species of management concern, along with their priority habitats and key risk factors.

The FEIS discloses that construction and operation of ACP Project may directly and indirectly affect migratory birds and their habitats. The majority of direct impacts will be on nesting birds during construction. In addition, noise from construction activities may disturb and displace nesting adults. Outside of the nesting season, direct impacts on migratory birds will be minimized because individual birds would disperse to adjacent habitat. Habitat fragmentation and edge effects could affect birds as discussed in section 4.5.6 of the FEIS. Agency-recommended migratory bird buffers and time of year restrictions are described in the FEIS in Table 4.5.3-2. The ACP Project was designed to comply with the FERC and the FWS Memorandum of Understanding on migratory birds by implementing avoidance and minimization measures developed in consultation with the FWS and state natural resource agencies. FWS field offices provided recommendations regarding migratory bird avoidance and minimization measures that will be implemented. Potential impacts to migratory birds and migratory bird habitat will be reduced by implementing “The Migratory Bird Plan” that is summarized in Table 2.3.1-1 of the FEIS. Mitigating measures contained in the Migratory Bird Plan and the conservation measures in the Biological Evaluation will be required by the SUPs. Because impacts will be reduced to the extent practicable, this decision is compliant with the MBTA and Executive Order 13186.

### **National Historic Preservation Act**

Section 106 of the National Historic Preservation Act and its implementing regulations under 36 CFR 800 require Federal agencies to consider effects of its actions on cultural and historic resources, prior to approving expenditure of Federal funds on an undertaking or prior to issuing any license. Cultural and historic resources include prehistoric or historic archaeological sites, districts, buildings, structures, objects, or properties of traditional religious or cultural importance to Native Americans or other groups that are listed or eligible for listing on the NRHP.

As the lead federal agency for NEPA compliance, the FERC is required to consult with the appropriate State Historic Preservation Offices (SHPO), interested American Indian tribes, and other consulting parties; identify cultural and historic resources in the area of potential effect; assess project effects on cultural and historic resources; and resolve adverse effects.

The ACP Project could adversely affect cultural and historic resources. Direct effects could include destruction or damage to all, or a portion, of a cultural resources or historic property. Indirect effects could include the introduction of visual, atmospheric, or audible elements that affect the setting or character of a cultural resource or historic property. If a cultural or historic resource would be adversely affected, avoidance or other mitigation measures will be required.

In that ACP is a complex multi-state project, effects on all historic properties cannot be determined prior to agencies approval of the undertaking. FERC

is developing a Programmatic Agreement (PA), under 36 CFR Part 800.14.b, to resolve adverse effects for this Project as a whole. The PA will contain stipulations that would be implemented in order to take into account the effect of the undertaking on historic properties, and would satisfy all responsibilities under Section 106 of the NHPA. The FS will be a signatory to the PA. Execution and implementation of the PA by all the signatories will satisfy Section 106 responsibilities for all individual actions of the ACP Project. As a signatory on the PA, the FS will ensure that its responsibilities under Section 106 of the NHPA are satisfied.

Atlantic coordinated with the FS and prepared separate survey reports for both the MNF and GWNF. On the MNF, several archaeological sites were found or were previously located; no aboveground resources were recorded. None of these sites were found to be eligible for listing in the NRHP after recommendations from the FS and concurrence by the West Virginia Division of Culture and History. On the GWNF, several archaeological sites were found or previously located; no standing structures were recorded. The FS determined some of the found sites were not eligible for NRHP listing and the Virginia Department of Historic Resources concurred with the FS findings. The FS recommended additional testing at the remaining sites to evaluate NRHP eligibility. Atlantic documented the additional testing and its findings in a September 27, 2017 report which was submitted to the FS for review. On November 1, 2017, the FS notified the Virginia Department of Historic Resources (Virginia SHPO) that none of the tested sites were considered eligible for NRHP listing; but

added that due to the potential for the sites to add to the scientific understanding of the prehistory of Appalachia, the FS will work with Atlantic to minimize impacts to the extent practical. Should SHPO determine any of these archaeological sites as eligible for listing in the NRHP and adversely affected, the PA negotiations with the SHPO and other consulting parties which will include stipulated actions to mitigate adverse effects to these sites.

With regard to the ANST, this property was previously determined eligible for the NRHP (Reeve et al., May 2016) and is in the process of being nominated to the NRHP by the National Park Service as a historic district. Atlantic proposes to mitigate adverse effects to the trail, including visual impacts, by boring under it. The FS finds that during boring operations there will be temporary (12 to 14 months) adverse impact on users of the ANST due to noise, dust, and night-sky impacts which may diminish user experience of the property's historic features. The FS determined the ACP Project would have no long lasting impacts upon the ANST. Again, should SHPO determine construction of the ACP will result in adverse impacts to the historic character of the ANST, negotiations with consulting parties under the PA would include measures to mitigate adverse effects to the ANST.

Copies of cultural resource survey reports have been sent to MNF tribal partners, including the Absentee-Shawnee Tribe of Indians of Oklahoma, Cayuga Indian Nation, Cherokee Nation of Oklahoma, Delaware Nation, Delaware Tribe of Indians, Eastern Band of Cherokee Indians, Eastern Shawnee Tribe of

Oklahoma, Oneida Indian Nation of New York, Onondaga Nation of New York, Seneca Nation of Indians, Seneca-Cayuga Tribe of Oklahoma, Shawnee Tribe, Tonawanda Band of Seneca, Tuscarora Nation of New York, and the United Keetoowah Band of Cherokee Indians in Oklahoma. To date, no comments on the reports have been received. The GWNF contacted the above-listed Tribes and the Pamunky Tribe to initiate consultation. The Pamunky and Eastern Band of Cherokee responded that they were not interested in this geographical area. No responses on cultural resource survey reports have been received from the other Tribes to date.

Unanticipated Discovery Plans were also prepared for the MNF and GWNF. The Plans incorporate the FS's requested changes, notably that their offices be notified immediately in the event of the discovery of an archaeological site, including human remains during construction. The plans were also submitted to the MNF tribal partners, and to date, no comments have been received.

#### **National Trails System Act (NTSA)**

The NTSA established the Appalachian Trail and the Pacific Crest Trail as National Scenic Trails. It authorized a national system of trails to provide additional outdoor recreation opportunities and to promote the preservation of access to the outdoor areas and historic resources of the nation. The NTSA provides authority for the Secretary of the Interior or the Secretary of Agriculture to grant easements and rights-of-way upon, over, under, across, or along any component of the national trails system in accordance with the laws applicable to the national park system

and national forest system, respectively: provided, that any conditions contained in such instruments shall be related to the policy and purposes of the Act. Because the special use permit for ACP will require design features and mitigation measures to reduce impacts and reasonably harmonize with the experience of users of the ANST, this decision is compliant with the NTSA.

### **Tribal Consultation**

Federal agencies consult on a government-to-government basis with federally recognized Native American tribes having traditional interests in and/or ties to the lands potentially affected by a proposed action and alternatives. Federal land management agencies, including the FS, are required to consult with American Indian tribes under federal law, implementing regulations, executive orders, and the U.S. Government's trust responsibility to tribal nations.

FERC, as the lead federal agency, along with the FS, consulted with federally recognized American Indian tribes that may attach religious or cultural significance to historic properties potentially impacted by the ACP Project. The FS provided specific recommendations on tribal consultation to ensure that the FERC's consultation efforts adhered to the FS's standards. The FERC sent regular communications, including NOIs, project updates, and requests for comments, to Federally recognized and State recognized Tribes to gather their feedback and comments on the ACP.

The FERC learned that the Seneca Nation of Indians, the Catawba Indian Nation, the Delaware

Tribe of Indians, the Eastern Shawnee Tribe of Oklahoma, the Tonawanda Band of Seneca Indians, and the Tuscarora Nation were interested in more information about the project. During the course of the project, the Pamunkey Tribe of Virginia were confirmed as a federally recognized tribe and requested the archaeology survey reports for Virginia. The FERC and Atlantic responded to several requests from these tribes.

We find the tribal consultation conducted by FERC meets the minimum legal requirements for our decision. The FERC, in coordination with the FS, will continue to consult with tribes who are interested in the project to ensure they get the information they request and have an opportunity to engage with federal agencies as the project progresses.

Additional discussion of tribal consultations for the portion of the project on federal lands is provided in section 4.10.6. A listing of Federally Recognized Tribes consulted and State Recognized Tribes that provided comments on the ACP Project are as follows:

**List of Federally Recognized Tribes Consulted**

Pamunkey Indian Tribe  
Absentee-Shawnee Tribe of Oklahoma  
Catawba Indian Nation  
Cherokee Nation  
Delaware Tribe of Indians  
Delaware Nation  
Eastern Band of Cherokee Indians  
Eastern Shawnee Tribe of Oklahoma  
Seneca Nations of Indians  
Seneca-Cayuga Tribe of Oklahoma  
Shawnee Tribe

Stockbridge Munsee Community  
Tonawanda Band of Seneca Indians  
Tuscarora Nation  
United Keetoowah Band of Cherokee Indians.

**List of State Recognized Tribes that Commented  
on Project**

Chickahominey Indian Tribe  
Lumbee Tribe of North Carolina  
Haliwa-Saponi  
Coharie  
Meherrin  
Nottoway Tribe of Virginia  
Upper Mattaponi Indian Tribe  
Cheroenhaka (Nottoway) Indian Tribe  
Mattaponi Indian Tribe  
Monacan Indian Nation

**Clean Air Act**

The Clean Air Act contains provisions to control common air pollutants, requires the United States Environmental Protection Agency (EPA) to establish national ambient air quality standards, and requires States to develop plans to achieve the standards. The EPA has delegated to States the responsibility to issue permits to protect air quality. Section 4.11.1 of the FEIS discloses the air quality impacts of the ACP Project.

Construction of the ACP Project will have air quality impacts on the MNF and GWNF, as well as at the ANST. Construction air quality impacts will be limited primarily to the immediate construction area and will include fugitive dust and construction and commuter vehicle emissions. The ACP will employ mitigation measures to reduce impacts to air quality

(i.e., efficient construction sequencing, limited idling of engines, a fugitive dust control plan, and mulching instead of burning). Once construction activities in an area are completed, fugitive dust and construction equipment emissions will diminish. Operational emissions will be limited to fugitive pipeline methane leaks from valves and should not impede or impact use of the ANST. The FEIS finds construction and operation of ACP will not have a significant impact on air in the MNF and GWNF or along the ANST and BRP.

The ACP will result in a noise increase during construction over several months during the daylight hours and may impact users or wildlife on the MNF, GWNF and ANST. Local noise will be an impact in the immediate vicinity of the workspace; however, noise will dissipate with increased distance from the construction area. Once construction is complete, noise will return to preconstruction levels. There would be no noise impacts on NFS lands due to operation of the pipeline. The FEIS finds that there will be no significant impact from noise as a result of the ACP Project in the MNF and GWNF and along the ANST (FEIS 4.11.3.2). We find the ACP Project will not result in noise levels that will be a public nuisance or are otherwise objectionable and therefore is consistent with the noise pollution provisions of the Clean Air Act.

We find our decision is compliant with the Clean Air Act. The special use authorizations and LRMP amendments approved by our decision will incorporate terms and conditions to ensure that design requirements and mitigation measures of the

FEIS and COM Plan applicable to air quality are implemented. The FEIS states that for the proposed projects, all non-permitted emissions that would occur within a nonattainment area were considered in the general conformity applicability analysis. Based on these results, the operational emissions that will occur in nonattainment or maintenance areas will not exceed the general conformity applicability thresholds for any criteria pollutant in a single calendar year. Therefore, general conformity does not apply to ACP. Likewise, construction emissions occurring in nonattainment counties will be below the applicable de minimis levels; therefore, a general conformity analysis is not required. We conclude that the projects' construction-related impacts will not result in a significant impact on local or regional air quality.

#### **Clean Water Act (CWA)**

The CWA establishes the basic structure for regulating the discharges of pollutants into waters of the United States and regulating quality standards for surface waters. The EPA has delegated other authority to issue discharge permits under section 402 of the CWA to the States.

Design features and mitigation measures to minimize the potential for soil movement (to affect water resources) and to ensure adequate restoration and revegetation are identified in the COM Plan and incorporate conditions from the FERC's Upland Erosion Control, Revegetation, and Maintenance Plan and Best Management Practices for the States of West Virginia and Virginia, as well as Atlantic's internal management standards and specifications.

Project impacts to groundwater are expected to be limited to those associated with clearing, grading, and trenching during construction, although it is unlikely trenching will be deep enough to measurably affect aquifers. No sole source or state designated aquifers, well head protection areas, water supply wells, or potential sources of groundwater contamination have been identified along the ACP Project that crosses the MNF, GWNF, or ANST. However, several springs were identified near (within 0.1 mile) the ACP within the MNF and GWNF. Implementation of construction, mitigation, and monitoring procedures listed above will avoid or minimize groundwater impacts on the MNF and GWNF.

The ACP Project will require 26 waterbody crossing on the MNF (2 crossed by the pipeline, 24 crossed by access roads) and 38 on the GWNF (26 crossed by pipeline, about 12 crossed by access roads). All waterbodies within the MNF and GWNF will be crossed using dry open cut methods. Modeling methods in the FEIS indicate increased sedimentation on the MNF and GWNF for 1 to 3 years following construction, even with the implementation of erosion control methods, with erosion rates approximating preconstruction levels within 5 years following restoration. Additional temporary work spaces adjacent to perennial, intermittent, and ephemeral waterbody crossings will be reviewed by the FS on a case by case basis to determine an optimum set back to expedite stream crossings in accordance with State requirements. Specialized pipeline construction procedures, waterbody crossing methods, and erosion and sediment control details are discussed in the COM

Plan. These requirements are affirmed in the FERC Certificate.

We find our decision is compliant with the CWA. The special use authorizations and LRMP amendments approved by our decision will incorporate terms and conditions to ensure that design requirements and mitigation measures described in the FEIS and COM Plan applicable to water quality are implemented.

**Floodplains and Wetlands (Executive Orders 11988 and 11990)**

These Executive Orders require federal agencies to avoid, to the extent possible, short and long-term effects resulting from the occupancy and modification of flood plains, and the modification or destruction of wetlands. Forest-wide standards and guidelines are provided in the MNF and GWNF LRMPs for soil and water, wetlands, and riparian areas to minimize effects to flood plains and wetlands.

Six wetland will be crossed by the ACP Project; one on the MNF and five on the GWNF. The estimated temporary impacts to wetlands on both Forests is approximately 0.15 acre. The permanent impacts (i.e. the long term vegetative conversion of palustrine forested wetlands within the permanent ROW) is estimated at approximately 0.04 acre. Our decision incorporates applicable mitigation measures in the COM Plan to protect wetlands and minimize compaction. The ACP will also follow the FERC's Waterbody and Wetland Construction and Mitigation Procedures and measures required by other federal or state/commonwealth wetland crossing permits.

Based on Atlantic's construction and restoration measures, and the minor project-related modifications within floodplains, FERC concludes constructing and operating ACP will not result in a significant impact on floodplains or result in a measurable increase on future flood events. We concur with FERC's conclusion for floodplains on the MNF and GWNF.

We find our decision is compliant with the Executive Orders. The special use authorizations and LRMP amendments approved by our decision will incorporate terms and conditions to ensure that design requirements and mitigation measures of the FEIS and COM Plan applicable to wetlands and floodplains are implemented.

**Environmental Justice (Executive Order 12898)**

Executive Order 12898 requires federal agencies to consider the adverse health or environmental effects of their programs, policies, and activities on minority and low-income populations. The FERC analysis (FEIS, Section 4.9.9) evaluated potential impacts to minority populations as well as other vulnerable populations in the project area including children, the elderly, disabled, non-English speakers, and other disadvantaged people that may be disproportionately affected by the projects. The FERC analysis determined low-income populations exist in the area impacted by ACP; however, impacts from the projects will not disproportionately fall on these populations, nor will the impacts appreciably exceed impacts on the general population.

The analysis concludes there is no evidence the project will cause significant adverse health or environmental harm to any community with a

disproportionate number of minorities, low-income, or other vulnerable populations. As it relates to our decision in this ROD, we find the FERC analysis has adequately addressed potential impacts to minority, low income, and vulnerable populations.

### **ADMINISTRATIVE REVIEW AND RESPONSE TO OBJECTIONS**

This decision was subject to objection pursuant to the project-level pre-decisional administrative review process outlined in regulations at 36 CFR Part 218. A 45-day objection filing period on the draft ROD was held, with the objection filing period ended on September 5, 2017. Sixty-nine individual objections were received. Objections that did not meet the filing requirements were dismissed and those people were notified that their objections were not considered per 36 CFR § 218.10.

Reviewing Officer Glenn Casamassa issued a response to the objections on October 27, 2017. He considered objectors' issues as they relate to the agency's specific decision whether to allow the pipeline on the proposed route through NFS lands. Several issues dealt with the concerns about the entire pipeline, including pipeline safety, social and economic issues, private property rights, maintenance practices, and greenhouse gas/carbon emissions issues. The reviewing officer deferred to the FERC with respect to overall pipeline authorization issues.

Many of these issues are addressed in the FERC's Certificate.

Several objectors requested a meeting to discuss the issues raised in their objections. Resolution meetings are held at the discretion of the reviewing

officer (36 CFR 218.11(a)). The purpose of such a meeting is for the reviewing officer to gain additional understanding of the issues and work with objectors and Responsible Officials to find opportunities to resolve those issues. The objector's issues and proposed remedies were clear. In an effort to weigh the need for a meeting and the timeframe required to complete the review of objections, Reviewing Officer Casamassa decided not to host a resolution meeting.

Objection issues addressed in his objection response include:

- The adequacy of the NEPA documentation for the entire pipeline, including concerns regarding correct identification of the purpose and need, adequacy of the cumulative effects, range of alternatives, and new or incomplete information (including surveys, particularly for rare species and old growth).
- The FEIS and the Forest Service Draft ROD should not have been issued prior to the completion of the Endangered Species Act consultation on the pipeline with U.S. Fish and Wildlife Service and National Marine Fisheries Service.
- The FEIS inadequately addressed threatened and endangered, sensitive or locally rare species, Management Indicator Species, and the effects of forest fragmentation.
- Effects determinations for wetlands, soils, and riparian areas were premature and/or underestimated. The efficacy of erosion control mitigation is questioned.

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- The pipeline corridor could facilitate the spread of invasive plant species and would require extensive use of chemical herbicides, negatively impacting surface water quality, groundwater, invertebrates, and fish.
- There has been insufficient analysis of high hazard/steep slope areas, caves, karst features, ponds and special biological areas.
- The pipeline will cause negative impacts to surface water quality, impacting freshwater mussels, trout populations, and their associated habitats.
- The pipeline could negatively affect groundwater by re-directing run-off, disturbing sensitive karst by digging and blasting and potentially burying waterways and springs.
- Impacts to visual and recreational characteristics were not adequately analyzed or were improperly dismissed in the FEIS. Several specific locations were highlighted by objectors. The pipeline corridor will provide miles of easy, illegal motorized access to wilderness, roadless areas, old growth forest and other interior portions of the Forest.
- FERC does not explain whether any aspects of the project could impact the Outstandingly Remarkable Values for which these rivers were found to be eligible Wild and Scenic Rivers under the GWNF and inadequately addresses impacts to the Paddy Knob potential wilderness area. The proposed Forest Plan amendment conflicts with Forest Service planning rule requirements to protect rivers

found eligible or determined suitable for the National Wild and Scenic River system.

- The proposed Forest Plan amendments are improper and the Plans should not be modified to meet Atlantic's needs. Some objectors also disagree with the Forest Service's determination that substantive Planning Rule provisions are not "directly related" to the proposed amendments and, therefore, do not apply. Some objectors also disagree with the Forest Service's determination that substantive Planning Rule provisions are not "directly related" to the proposed amendments and, therefore, do not apply.

An independent team of Forest Service resource specialists reviewed all objections. The review team analyzed the issues raised along with the FEIS, Draft ROD, and other documentation in the Project Record, including the COM Plan. Of substantial consequence to the review was the fact that since release of the Draft ROD, the U.S. Fish and Wildlife Service issued its Biological Opinion addressing potential effects on federally listed species; the FERC issued its Certificate of Public Convenience and Necessity; old growth and sensitive species surveys were completed; the biological evaluation was updated; and other minor updates to the project record occurred. Upon considering the objections raised, the Project Record, and the recommendations of the review team, the reviewing official determined that the FEIS and the Forest Service Draft ROD were adequate and the approval of plan amendments would be consistent with 36 CFR 219.

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Reviewing Officer Casamassa highlighted several items he expects to occur and developed his response based on the following, which have been addressed in this ROD:

- New information obtained since the Draft ROD was issued, such as completed surveys and associated mitigations, will be addressed in the final ROD.
- Aspects of the Biological Opinion, particularly reasonable and prudent measures, terms and conditions, monitoring and reporting requirements, and conservation recommendations applicable to NFS lands will be addressed in the final ROD.
- The Responsible Officials will ensure the COM Plan is being followed and any needed corrective actions or adjustments occur in a timely manner.
- The Responsible Officials will provide a mechanism for the public to stay informed as new information is obtained and the project progresses on the National Forests.
- The status of needed follow up actions described in the Draft ROD (for example additional mitigation measures associated with the Visual Impact Analysis, results of the old growth survey, final determinations on Regional Forester Sensitive Species, and status of compliance with Section 106 of the National Historic Preservation Act) will be updated in the final ROD.



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**EXHIBIT B**

Authorization ID: FS-2700-4 (VER. 03-17)  
MAR205003 OMB 0596-0082

Contact ID: ATLANTIC  
COAST PIPELINE

Expiration Date:  
12/31/2022

Use Code: 634, 753

**U.S. DEPARTMENT OF AGRICULTURE  
FOREST SERVICE**

**SPECIAL USE PERMIT**

**AUTHORITY:**

**MINERAL LEASING ACT, AS AMENDED  
February 25, 1920,**

**FEDERAL LAND POLICY AND MGMT ACT, AS  
AMENDED October 21, 1976**

**ATLANTIC COAST PIPELINE, LLC of 707  
EAST MAIN STREET, RICHMOND, VA 23219**  
(hereinafter “the holder”) is authorized to use or  
occupy National Forest System lands in  
**Monongahela National Forest** and the **George  
Washington and Jefferson National Forest** of the  
National Forest System, subject to the terms and  
conditions of this special use permit (the permit).

This permit covers **381.78 acres** (GIS) or **36.43  
miles** (GIS) in various **US Tracts** in West Virginia  
County of Pocahontas, and Virginia Counties of  
Highland, Bath, and Augusta, (“the permit area”), as  
shown on the maps attached as **Exhibits A-D** and  
described in the land list attached as **Exhibit E**.  
These and any other exhibits to this permit are hereby

incorporated into this permit. Alignment sheets and “as built” plans to be provided by the Holder will be the most accurate representation of the pipeline location and will be provided as completed by the Holder upon request by the Authorized Officer or his delegated contact.

This permit is issued for the purpose of:

**Temporary construction, installation, and use of a 42 inch natural gas transmission pipeline right-of-way** (known as Atlantic Coast Pipeline/ACP), temporary pipeline rights-of-way, temporary additional workspace, new access roads, and widening of existing system roads that are closed to the public within both the Monongahela and George Washington and Jefferson National Forests as shown on attached maps and land list Exhibits A-E.

The authorized width of the long-term pipeline right-of-way shall be 50 feet. The authorized width of temporary pipeline rights-of-way, temporary additional workspace, and roads are shown on Exhibits A-E.

A Construction, Operation and Maintenance **(COM) Plan** is attached to and made part of this permit as **Exhibit F**. The holder shall exercise the privileges granted herein in accordance with the COM Plan. Additional requirements for construction and operation are found in **Exhibit G**. Changes or updates to the COM Plan may be made in accordance with Clause III.C. of this permit. Following construction, all areas used shall be returned to its pre-existing state in accordance with the COM Plan and to the satisfaction of the Forest Service authorized officer as stated in Clause VII.E. of this permit. The exception

shall be the pipeline and long-term road rights-of-way authorized in special use permit MAR205002.

As-built surveys, drawings, and maps shall be submitted to the Forest Service upon completion of the construction. These surveys will become part of special use permit MAR205002, issued for the operation and maintenance of the ACP pipeline.

Maps showing threatened endangered species are shown on **Exhibit H** while maps showing sensitive species are shown on **Exhibit I**. Both maps are privilege information and not for public release.

## **TERMS AND CONDITIONS**

### **I. GENERAL TERMS**

**A. AUTHORITY.** This permit is issued pursuant to the **MINERAL LEASING ACT, AS AMENDED February 25, 1920, FEDERAL LAND POLICY AND MGMT ACT, AS AMENDED October 21, 1976** and 36 CFR Part 251, Subpart B, as amended, and is subject to their provisions.

**B. AUTHORIZED OFFICER.** The authorized officer is the Regional Forester, the Forest or Grassland Supervisor, a District Ranger, or a Station Director with delegated authority pursuant to Forest Service Manual 2700.

**C. TERM.** This permit shall expire at midnight on **12/31/2022, 5 years** from the date of issuance.

**D. CONTINUATION OF USE AND OCCUPANCY.** This permit is not renewable. Prior to expiration of this permit, the holder may apply for a new permit for the use and occupancy authorized by this permit. Applications for a new permit must be submitted at least 6 months prior to expiration of this permit.

Issuance of a new permit is at the sole discretion of the authorized officer. At a minimum, before issuing a new permit, the authorized officer shall ensure that (1) the use and occupancy to be authorized by the new permit is consistent with the standards and guidelines in the applicable land management plan; (2) the type of use and occupancy to be authorized by the new permit is the same as the type of use and occupancy authorized by this permit; and (3) the holder is in compliance with all the terms of this permit. The authorized officer may prescribe new terms and conditions when a new permit is issued.

**E. AMENDMENT.** This permit may be amended in whole or in part by the Forest Service when, at the discretion of the authorized officer, such action is deemed necessary or desirable to incorporate new terms that may be required by law, regulation, directive, the applicable forest land and resource management plan, or projects and activities implementing a land management plan pursuant to 36 CFR Part 215.

**F. COMPLIANCE WITH LAWS, REGULATIONS, AND OTHER LEGAL REQUIREMENTS.** In exercising the rights and privileges granted by this permit, the holder shall comply with all present and future federal laws and regulations and all present and future state, county, and municipal laws, regulations, and other legal requirements that apply to the permit area, to the extent they do not conflict with federal law, regulation, or policy. The Forest Service assumes no responsibility for enforcing laws, regulations, and other legal requirements that fall under the jurisdiction of other governmental entities.

**G. NON-EXCLUSIVE USE.** The use or occupancy authorized by this permit is not exclusive. The Forest Service reserves the right of access to the permit area, including a continuing right of physical entry to the permit area for inspection, monitoring, or any other purpose consistent with any right or obligation of the United States under any law or regulation. The Forest Service reserves the right to allow others to use the permit area in any way that is not inconsistent with the holder's rights and privileges under this permit, after consultation with all parties involved. Except for any restrictions that the holder and the authorized officer agree are necessary to protect the installation and operation of authorized temporary improvements, the lands and waters covered by this permit shall remain open to the public for all lawful purposes.

**H. ASSIGNABILITY.** This permit is not assignable or transferable.

**I. TRANSFER OF TITLE TO THE IMPROVEMENTS**

1. Notification of Transfer. The holder shall notify the authorized officer when a transfer of title to all or part of the authorized improvements is planned.

2. Transfer of Title. Any transfer of title to the improvements covered by this permit shall result in termination of the permit. The party who acquires title to the improvements must submit an application for a permit. The Forest Service is not obligated to issue a new permit to the party who acquires title to the improvements. The authorized officer shall determine that the applicant meets requirements under applicable federal regulations.

**J. CHANGE IN CONTROL OF THE BUSINESS ENTITY**

1. Notification of Change in Control. The holder shall notify the authorized officer when a change in control of the business entity that holds this permit is contemplated.

(a) In the case of a corporation, control is an interest, beneficial or otherwise, of sufficient outstanding voting securities or capital of the business so as to permit the exercise of managerial authority over the actions and operations of the corporation or election of a majority of the board of directors of the corporation.

(b) In the case of a partnership, limited partnership, joint venture, or individual entrepreneurship, control is a beneficial ownership of or interest in the entity or its capital so as to permit the exercise of managerial authority over the actions and operations of the entity.

(c) In other circumstances, control is any arrangement under which a third party has the ability to exercise management authority over the actions or operations of the business.

2. Effect of Change in Control. Any change in control of the business entity as defined in paragraph 1 of this clause shall result in termination of this permit. The party acquiring control must submit an application for a special use permit. The Forest Service is not obligated to issue a new permit to the party who acquires control. The authorized officer shall determine whether the applicant meets the requirements established by applicable federal regulations.

## II. IMPROVEMENTS

**A. LIMITATIONS ON USE.** Nothing in this permit gives or implies permission to build or maintain any structure or facility or to conduct any activity, unless specifically authorized by this permit. Any use not specifically authorized by this permit must be proposed in accordance with 36 CFR 251.54. Approval of such a proposal through issuance of a new permit or permit amendment is at the sole discretion of the authorized officer.

**B. PLANS.** All plans for development, layout, construction, reconstruction, or alteration of improvements in the permit area, as well as revisions to those plans must be prepared by a professional engineer, architect, landscape architect, or other qualified professional based on federal employment standards acceptable to the authorized officer. These plans and plan revisions must have written approval from the authorized officer before they are implemented. The authorized officer may require the holder to furnish as-built plans, maps, or surveys upon completion of the work.

**C. CONSTRUCTION.** Any construction authorized by this permit shall commence **after the date this permit is issued** and shall be completed by **the date this permit expires**.

## III. OPERATIONS

**A. PERIOD OF USE.** Use or occupancy of the permit area shall be exercised at least 10 days each year.

**B. CONDITION OF OPERATIONS.** The holder shall maintain the authorized improvements and permit area to standards of repair, orderliness,

neatness, sanitation, and safety acceptable to the authorized officer and consistent with other provisions of this permit. Standards are subject to periodic change by the authorized officer when deemed necessary to meet statutory, regulatory, or policy requirements or to protect national forest resources. The holder shall comply with inspection requirements deemed appropriate by the authorized officer.

**C. OPERATING PLAN.** The holder shall prepare and annually revise by **a date determined by the Forest Service** an operating plan. The operating plan shall be prepared in consultation with the authorized officer or the authorized officer's designated representative and shall cover all operations authorized by this permit. The operating plan shall outline steps the holder will take to protect public health and safety and the environment and shall include sufficient detail and standards to enable the Forest Service to monitor the holder's operations for compliance with the terms and conditions of this permit. The operating plan shall be submitted by the holder and approved by the authorized officer or the authorized officer's designated representative prior to commencement of operations and shall be attached to this permit as an appendix. The authorized officer may require an annual meeting with the holder to discuss the terms and conditions of the permit or operating plan, annual use reports, or other concerns either party may have.

**D. MONITORING BY THE FOREST SERVICE.** The Forest Service shall monitor the holder's operations and reserves the right to inspect the permit area and transmission facilities at any time for

compliance with the terms of this permit. The holder shall comply with inspection requirements deemed appropriate by the authorized officer. The holder's obligations under this permit are not contingent upon any duty of the Forest Service to inspect the permit area or transmission facilities. A failure by the Forest Service or other governmental officials to inspect is not a justification for noncompliance with any of the terms and conditions of this permit.

#### **IV. RIGHTS AND LIABILITIES**

**A. LEGAL EFFECT OF THE PERMIT.** This permit, which is revocable and terminable, is not a contract or a lease, but rather a federal license. The benefits and requirements conferred by this authorization are reviewable solely under the procedures set forth in 36 CFR 214, and 5 U.S.C. 704. This permit does not constitute a contract for purposes of the Contract Disputes Act, 41 U.S.C. 601. The permit is not real property, does not convey any interest in real property, and may not be used as collateral for a loan.

**B. VALID EXISTING RIGHTS.** This permit is subject to all valid existing rights. Valid existing rights include those derived under mining and mineral leasing laws of the United States. The United States is not liable to the holder for the exercise of any such right.

**C. ABSENCE OF THIRD-PARTY BENEFICIARY RIGHTS.** The parties to this permit do not intend to confer any rights on any third party as a beneficiary under this permit.

**D. SERVICES NOT PROVIDED.** This permit does not provide for the furnishing of road or trail maintenance, water, fire protection, search and

rescue, or any other such service by a government agency, utility, association, or individual.

**E. RISK OF LOSS.** The holder assumes all risk of loss associated with use or occupancy of the permit area, including but not limited to theft, vandalism, fire and any fire-fighting activities (including prescribed burns), avalanches, rising waters, winds, falling limbs or trees, and other forces of nature. If authorized temporary improvements in the permit area are destroyed or substantially damaged, the authorized officer shall conduct an analysis to determine whether the improvements can be safely occupied in the future and whether rebuilding should be allowed. If rebuilding is not allowed, the permit shall terminate.

**F. DAMAGE TO UNITED STATES PROPERTY.** The holder has an affirmative duty to protect from damage the land, property, and other interests of the United States. Damage includes but is not limited to fire suppression costs and damage to government-owned improvements covered by this permit.

1. The holder shall be liable for all injury, loss, or damage, including fire suppression, prevention and control of the spread of invasive species, or other costs in connection with rehabilitation or restoration of natural resources resulting from the use or occupancy authorized by this permit. Compensation shall include but not be limited to the value of resources damaged or destroyed, the costs of restoration, cleanup, or other mitigation, fire suppression or other types of abatement costs, and all administrative, legal (including attorney's fees), and other costs. Such costs may be deducted from a performance bond required under clause IV.J.

2. The holder shall be liable for damage caused by use of the holder or the holder's heirs, assigns, agents, employees, contractors, or lessees to all roads and trails of the United States to the same extent as provided under clause IV.F.1, except that liability shall not include reasonable and ordinary wear and tear.

**G. HEALTH AND SAFETY.** The holder shall take all measures necessary to protect the health and safety of all persons affected by the use and occupancy authorized by this permit. The holder shall promptly abate as completely as possible and in compliance with all applicable laws and regulations any physical or mechanical procedure, activity, event, or condition existing or occurring in connection with the authorized use and occupancy during the term of this permit that causes or threatens to cause a hazard to the health or safety of the public or the holder's employees or agents. The holder shall as soon as practicable notify the authorized officer of all serious accidents that occur in connection with these procedures, activities, events, or conditions. The Forest Service has no duty under the terms of this permit to inspect the permit area or operations of the holder for hazardous conditions or compliance with health and safety standards.

**H. ENVIRONMENTAL PROTECTION**

1. For purposes of clause IV.H and section V, "hazardous material" shall mean (a) any-hazardous substance under section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601(14); (b) any pollutant or contaminant under section 101(33) of

CERCLA, 42 U.S.C. 9601(33); (c) any petroleum product or its derivative, including fuel oil, and waste oils; and (d) any hazardous substance, extremely hazardous substance, toxic substance, hazardous waste, ignitable, reactive or corrosive materials, pollutant, contaminant, element, compound, mixture, solution or substance that may pose a present or potential hazard to human health or the environment under any applicable environmental laws.

2. The holder shall avoid damaging or contaminating the environment, including but not limited to the soil, vegetation (such as trees, shrubs, and grass), surface water, and groundwater, during the holder's use and occupancy of the permit area. Environmental damage includes but is not limited to all costs and damages associated with or resulting from the release or threatened release of a hazardous material occurring during or as a result of activities of the holder or the holder's heirs, assigns, agents, employees, contractors, or lessees on, or related to, the lands, property, and other interests covered by this permit. If the environment or any government property covered by this permit becomes damaged in connection with the holder's use and occupancy, the holder shall as soon as practicable repair the damage or replace the damaged items to the satisfaction of the authorized officer and at no expense to the United States.

3. The holder shall as soon as practicable, as completely as possible, and in compliance With all applicable laws and regulations abate any physical or mechanical procedure, activity, event, or condition existing or occurring in connection with the authorized use and occupancy during or after the term

of this permit that causes or threatens to cause harm to the environment, including areas of vegetation or timber, fish or other wildlife populations, their habitats, or any other natural resources.

**I. INDEMNIFICATION OF THE UNITED STATES.** The holder shall indemnify, defend, and hold harmless the United States for any costs, damages, claims, liabilities, and judgments arising from past, present, and future acts or omissions of the holder in connection with the use or occupancy authorized by this permit. This indemnification provision includes but is not limited to acts and omissions of the holder or the holder's heirs, assigns, agents, employees, contractors, or lessees in connection with the use or occupancy authorized by this permit which result in: (1) violations of any laws and regulations which are now or which may in the future become applicable; (2) judgments, claims, demands, penalties, or fees assessed against the United States; (3) costs, expenses, and damages incurred by the United States; or (4) the release or threatened release of any solid waste, hazardous waste, hazardous materials, pollutant, contaminant, oil in any form, or petroleum product into the environment. The authorized officer may prescribe terms that allow the holder to replace, repair, restore, or otherwise undertake necessary curative actions to mitigate damages in addition to or as an alternative to monetary indemnification.

**J. BONDING.** The authorized officer may require the holder to furnish a surety bond or other security for any of the obligations imposed by the terms and

conditions of this permit or any applicable law, regulation, or order.

1. As a further guarantee of compliance with the terms and conditions of this permit, the holder shall deliver and maintain a surety bond or other acceptable security; such as cash deposited and maintained in a federal depository or negotiable securities of the United States, in the amount of **\$4,300,000 for environmental restoration efforts of the authorized area if Holder fails to comply with terms and conditions acceptable to the authorized officer for the duration of this permit until closed by the authorized officer.**

The authorized officer may periodically evaluate the adequacy of the bond or other security and increase or decrease the amount as appropriate. If the bond or other security becomes unsatisfactory to the authorized officer, the holder shall within 30 days of demand furnish a new bond or other security issued by a surety that is solvent and satisfactory to the authorized officer. If the holder fails to meet any of the requirements secured under this clause, money deposited pursuant to this clause shall be retained by the United States to the extent necessary to satisfy the obligations secured under this clause, without prejudice to any other rights and remedies of the United States.

2. The bond shall be released or other security returned 30 days after (a) the authorized officer certifies that the obligations covered by the bond or other security are met and (b) the holder establishes to the satisfaction of the authorized officer that all

claims for labor and material for the secured obligations have been paid or released.

3. Prior to undertaking additional construction or alteration not covered by the bond or other security, or when the authorized improvements are to be removed and the permit area restored the holder may be required to obtain additional bonding or security.

**K. STRICT LIABILITY.** The holder shall be strictly liable (liable without proof of negligence) to the United States for **\$1,000,000.00** per occurrence for any injury, loss, or damage arising in tort under this permit. Liability in tort for injury, loss, or damage to the United States exceeding the prescribed amount of strict liability in tort shall be determined under the law of negligence.

**L. INSURANCE.** The holder shall furnish proof of insurance, such as a certificate of insurance, to the authorized officer prior to issuance of this permit and each year thereafter that this permit is in effect. The Forest Service reserves the right to review the insurance policy and require any changes needed to ensure adequate coverage of the United States in connection with the authorized use and occupancy. The holder shall send an authenticated copy of any insurance policy obtained pursuant to this clause to the authorized officer immediately upon issuance of the policy. Any insurance policies obtained by the holder pursuant to this clause shall name the United States as an additional insured, and the additional insured provision shall provide for insurance coverage for the United States as required under this clause and to the extent of the full limits of insurance available to the holder. The holder shall give 30 days

prior written notice to the authorized officer of cancellation of or any modification to the insurance policy. The certificate of insurance, the authenticated copy of the insurance policy, and written notice of cancellation or modification of insurance policies should be sent to **United States, C/O Monongahela National Forest, 200 Sycamore Street, Elkins, WV 26241, Attention: Special Use Administrator.** Minimum amounts of coverage and other insurance requirements are subject to change at the sole discretion of the authorized officer on the anniversary date of this permit

1. The holder shall have in force liability insurance covering losses, **including those arising from strict liability**, associated with the use or occupancy authorized by this permit arising from personal injury or death and third-party property damage in the minimum amount of **\$1 million** as a combined single limit per occurrence.

2. Depending on the holder's operations, the Forest Service may require the holder to demonstrate the availability of funds to address any release or threatened release of hazardous materials that may occur in connection with the holder's use or occupancy. Any requirements imposed would be established on a case-by-case basis by the authorized officer based on the degree of environmental risk from the holder's operations. The storage and use of normal maintenance supplies in nominal amounts generally would not trigger financial assurance requirements.

## **V. RESOURCE PROTECTION**

**A. COMPLIANCE WITH ENVIRONMENTAL LAWS.** The holder shall in connection with the use or

occupancy authorized by this permit comply with all applicable federal, state, and local environmental laws and regulations, including but not limited to those established pursuant to the Resource Conservation and Recovery Act, as amended, 42 U.S.C. 6901 *et seq.*, the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1251 *et seq.*, the Oil Pollution Act, as amended, 33 U.S.C. 2701 *et seq.*, the Clean Air Act, as amended, 42 U.S.C. 7401 *et seq.*, CERCLA, as amended, 42 U.S.C. 9601 *et seq.*, the Toxic Substances Control Act, as amended, 15 U.S.C. 2601 *et seq.*, the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. 136 *et seq.*, and the Safe Drinking Water Act, as amended, 42 U.S.C. 300f *et seq.*

**B. VANDALISM.** The holder shall take reasonable measures to prevent and discourage vandalism and disorderly conduct and when necessary shall contact the appropriate law enforcement officer.

**C. PESTICIDE USE**

1. Authorized Officer Concurrence. Pesticides may not be used outside of buildings in the permit area to control pests, including undesirable woody and herbaceous vegetation (including aquatic plants), insects, birds, rodents, or fish without prior written concurrence of the authorized officer. Only those products registered or otherwise authorized by the U.S. Environmental Protection Agency and appropriate State authority for the specific purpose planned shall be authorized for use within areas on National Forest System lands.

2. Pesticide-Use Proposal. Requests for concurrence of any planned uses of pesticides shall be provided in

advance using the Pesticide-Use Proposal (form FS-2100-2). Annually the holder shall, on the due date established by the authorized officer, submit requests for any new, or continued, pesticide usage. The Pesticide-Use Proposal shall cover a 12-month period of planned use. The Pesticide-Use Proposal shall be submitted at least 60 days in advance of pesticide application. Information essential for review shall be provided in the form specified. Exceptions to this schedule may be allowed, subject to emergency request and approval, only when unexpected outbreaks of pests require control measures which were not anticipated at the time a Pesticide-Use Proposal was submitted.

3. Labeling, Laws, and Regulations. Label instructions and all applicable laws and regulations shall be strictly followed in the application of pesticides and disposal of excess materials and containers. No pesticide waste, excess materials, or containers shall be disposed of in any area administered by the Forest Service.

**D. ARCHAEOLOGICAL AND PALEONTOLOGICAL DISCOVERIES.** The holder shall immediately notify the authorized officer of all antiquities or other objects of historic or scientific interest, including but not limited to historic or prehistoric ruins, fossils, or artifacts discovered in connection with the use and occupancy authorized by this permit. The holder shall follow the applicable inadvertent discovery protocols for the undertaking provided in an agreement executed pursuant to section 106 of the National Historic Preservation Act, 54 U .S.C. 306108; if there are no such agreed upon

protocols, the holder shall leave these discoveries intact and in place until consultation has occurred, as informed, if applicable, by any programmatic agreement with tribes. Protective and mitigation measures developed under this clause shall be the responsibility of the holder. However, the holder shall give the authorized officer written notice before implementing these measures and shall coordinate with the authorized officer for proximate and contextual discoveries extending beyond the permit area.

**E. NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT (NAGPRA).** In accordance with 25 U.S.C. 3002(d) and 43 CFR 10.4, if the holder inadvertently discovers human remains, funerary objects, sacred objects, or objects of cultural patrimony on National Forest System lands, the holder shall immediately cease work in the area of the discovery and shall make a reasonable effort to protect and secure the items. The holder shall follow the applicable NAGPRA protocols for the undertaking provided in the NAGPRA plan of action or the NAGPRA comprehensive agreement; if there are no such agreed-upon protocols, the holder shall as soon as practicable notify the authorized officer of the discovery and shall follow up with written confirmation of the discovery. The activity that resulted in the inadvertent discovery may not resume until 30 days after the forest archaeologist certifies receipt of the written confirmation, if resumption of the activity is otherwise lawful, or at any time if a binding written agreement has been executed between the Forest Service and the affiliated Indian tribes that

adopts a recovery plan for the human remains and objects.

**F. PROTECTION OF THREATENED AND ENDANGERED SPECIES, SENSITIVE SPECIES, AND SPECIES OF CONSERVATION CONCERN AND THEIR HABITAT**

1. Threatened and Endangered Species and Their Habitat. The location of sites within the permit area needing special measures for protection of plants or animals listed as threatened or endangered under the Endangered Species Act (ESA) of 1973, 16 U.S.C. 1531 *et seq.*, as amended, or within designated critical habitat shall be shown on a map in an appendix to this permit and may be shown on the ground. The holder shall take any protective and mitigation measures specified by the authorized officer as necessary and appropriate to avoid or reduce effects on listed species or designated critical habitat affected by the authorized use and occupancy. Discovery by the holder or the Forest Service of other sites within the permit area containing threatened or endangered species or designated critical habitat not shown on the map in the appendix shall be promptly reported to the other party and shall be added to the map.

2. Sensitive Species and Species of Conservation Concern and Their Habitat. The location of sites within the permit area needing special measures for protection of plants or animals designated by the Regional Forester as sensitive species or as species of conservation concern pursuant to FSM 2670 shall be shown on a map in an appendix to this permit and may be shown on the ground. The holder shall take any protective and mitigation measures specified by the

authorized officer as necessary and appropriate to avoid or reduce effects on sensitive species or species of conservation concern or their habitat affected by the authorized use and occupancy. Discovery by the holder or the Forest Service of other sites within the permit area containing sensitive species or species of conservation concern or their habitat not shown on the map in the appendix shall be promptly reported to the other party and shall be added to the map.

**G. CONSENT TO STORE HAZARDOUS MATERIALS.** The holder shall not store any hazardous materials at the site without prior written approval from the authorized officer. This approval shall not be unreasonably withheld. If the authorized officer provides approval, this permit shall include, or in the case of approval provided after this permit is issued, shall be amended to include specific terms addressing the storage of hazardous materials, including the specific type of materials to be stored, the volume, the type of storage, and a spill plan. Such terms shall be proposed by the holder and are subject to approval by the authorized officer.

1. If the holder receives consent to store hazardous material, the holder shall identify to the Forest Service any hazardous material to be stored at the site. This identifying information shall be consistent with column (1) of the table of hazardous materials and special provisions enumerated at 49 CFR 172.101 whenever the hazardous material appears in that table. For hazard communication purposes, the holder shall maintain Material Safety Data Sheets for any stored hazardous chemicals, consistent with 29 CFR 1910.1200(c) and (g). In addition, all hazardous

materials stored by the holder shall be used, labeled, stored, transported, and disposed of in accordance with all applicable federal, state, and local laws and regulations.

2. The holder shall not release any hazardous material as defined in clause **IV.H** onto land or into rivers, streams, impoundments, or natural or man-made channels leading to them. All prudent and safe attempts must be made to contain any release of these materials. The authorized officer in charge may specify specific conditions that must be met, including conditions more stringent than federal, state, and local regulations, to prevent releases and protect natural resources.

3. If the holder uses or stores hazardous materials at the site, upon revocation or termination of this permit the holder shall provide the Forest Service with a report certified by a professional or professionals acceptable to the Forest Service that the permit area is uncontaminated by the presence of hazardous materials and that there has not been a release or discharge of hazardous materials upon the permit area, into surface water at or near the permit area, or into groundwater below the permit area during the term of the permit. If a release or discharge has occurred, the professional or professionals shall document and certify that the release or discharge has been fully remediated and that the permit area is in compliance with all applicable federal, state, and local laws and regulations.

#### **H. CLEANUP AND REMEDIATION**

1. The holder shall immediately notify all appropriate response authorities, including the National Response

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Center and the authorized officer or the authorized officer's designated representative, of any oil discharge or of the release of a hazardous material in the permit area in an amount greater than or equal to its reportable quantity, in accordance with 33 CFR Part 153, Subpart B, and 40 CFR Part 302. For the purposes of this requirement, "oil" is as defined by section 311(a)(1) of the Clean Water Act, 33 U.S.C. 1321(a)(1). The holder shall immediately notify the authorized officer or the authorized officer's designated representative of any release or threatened release of any hazardous material in or near the permit area which may be harmful to public health or welfare or which may adversely affect natural resources on federal lands.

2. Except with respect to any federally permitted release as that term is defined under Section 101(10) of CERCLA, 42 U.S.C. 9601(10), the holder shall clean up or otherwise remediate any release, threat of release, or discharge of hazardous materials that occurs either in the permit area or in connection with the holder's activities in the permit area, regardless of whether those activities are authorized under this permit. The holder shall perform cleanup or remediation immediately upon discovery of the release, threat of release, or discharge of hazardous materials. The holder shall perform the cleanup or remediation to the satisfaction of the authorized officer and at no expense to the United States. Upon revocation or termination of this permit, the holder shall deliver the site to the Forest Service free and clear of contamination.

## **VI. LAND USE FEE AND DEBT COLLECTION**

**A. LAND USE FEES.** The holder shall pay an initial annual land use fee of **\$45,733.79** for the period from **01/01/2018** to **12/31/2018**, and thereafter on **January 1st**, shall pay an annual land use fee of **\$45,733.79**. The annual land use fee shall be adjusted annually using the **IDP-GNP**.

**B. MODIFICATION OF THE LAND USE FEE.** The land use fee may be revised whenever necessary to reflect the market value of the authorized use or occupancy or when the fee system used to calculate the land use fee is modified or replaced.

### **C. FEE PAYMENT ISSUES.**

1. Crediting of Payments. Payments shall be credited on the date received by the deposit facility, except that if a payment is received on a non-workday, the payment shall not be credited until the next workday.

2. Disputed Fees. Fees are due and payable by the due date. Disputed fees must be paid in full. Adjustments will be made if dictated by an administrative appeal decision, a court decision, or settlement terms.

#### 3. Late Payments

(a) Interest. Pursuant to 31 U.S.C. 3717 *et seq.*, interest shall be charged on any fee amount not paid within 30 days from the date it became due. The rate of interest assessed shall be the higher of the Prompt Payment Act rate or the rate of the current value of funds to the United States Treasury (i.e., the Treasury tax and loan account rate), as prescribed and published annually or quarterly by the Secretary of the Treasury in the *Federal Register* and the Treasury Fiscal Requirements Manual Bulletins. Interest on

the principal shall accrue from the date the fee amount is due.

(b) Administrative Costs. If the account becomes delinquent, administrative costs to cover processing and handling the delinquency shall be assessed.

(c) Penalties. A penalty of 6% per annum shall be assessed on the total amount that is more than 90 days delinquent and shall accrue from the same date on which interest charges begin to accrue.

(d) Termination for Nonpayment. This permit shall terminate without the necessity of prior notice and opportunity to comply when any permit fee payment is 90 calendar days from the due date in arrears. The holder shall remain responsible for the delinquent fees.

4. Administrative Offset and Credit Reporting. Delinquent fees and other charges associated with the permit shall be subject to all rights and remedies afforded the United States pursuant to 31 U.S.C. 3711 *et seq.* and common law. Delinquencies are subject to any or all of the following:

(a) Administrative offset of payments due the holder from the Forest Service.

(b) If in excess of 60 days, referral to the United States Department of the Treasury for appropriate collection action as provided by 31 U.S.C. 3711(g)(1).

(c) Offset by the Secretary of the Treasury of any amount due the holder, as provided by 31 U.S.C. 3720 *et seq.*

(d) Disclosure to consumer or commercial credit reporting agencies.

**VII. REVOCATION, SUSPENSION, AND TERMINATION**

**A. REVOCATION AND SUSPENSION.** The Authorized Officer may revoke or suspend this authorization in whole or in part:

1. For noncompliance with applicable Federal, State, or local laws and regulations, other than common carrier provisions in 30 U.S.C. § 185(r), which are enforced by the Secretary of the Interior.
2. For noncompliance with the terms of this authorization, other than common carrier provisions in clause VII.C, which are enforced by the Secretary of the Interior.
3. For abandonment of the right-of-way. Failure of the holder to use the right-of-way for a continuous 2-year period shall constitute a rebuttable presumption of abandonment of the right-of-way.

Prior to revocation or suspension under this clause, other than immediate suspension under clause VII.B, the Authorized Officer or, for common carrier provisions, the Secretary of the Interior, shall give the holder written notice of the grounds for revocation or suspension and a reasonable period, not to exceed **90** days, to resume use of the right-of-way or to cure any noncompliance.

**B. IMMEDIATE SUSPENSION.** The Authorized Officer may immediately suspend this authorization in whole or in part when necessary to protect public health or safety or the environment. The suspension decision shall be in writing. The holder may request an on-site review with the Authorized Officer's supervisor of the adverse conditions prompting the

suspension. The Authorized Officer's supervisor shall grant this request within 48 hours. Following the on-site review, the Authorized Officer's supervisor shall promptly affirm, modify, or cancel the suspension.

**C. COMMON CARRIER OBLIGATIONS.**

1. Pipelines and related facilities covered by this authorization shall be constructed, operated, and maintained as common carriers. The holder shall accept, convey, transport, or purchase without discrimination all oil or gas delivered to those pipelines without regard to whether the oil or gas was produced from Federal or non-Federal lands.

2. Whenever the Secretary of the Interior has reason to believe that the holder is not operating any oil or gas pipeline in complete accord with its obligations as a common carrier, the Secretary of the Interior may request the Attorney General to prosecute an appropriate proceeding before the Secretary of Energy or Federal Energy Regulatory

Commission or any appropriate state agency or Federal district court for the district in which the pipeline or any part of it is located to enforce the holder's common carrier obligations or to impose any penalty provided for noncompliance with those obligations, or the Secretary of the Interior may suspend or revoke this authorization pursuant to clause VII.A.

3. In the case of oil and gas produced from Federal lands or from resources on Federal lands in the vicinity of the pipelines covered by this authorization, the Secretary of the Interior may; after notice to the interested parties, a full hearing, and proper finding of facts, determine the proportionate amounts of oil

and gas to be accepted, conveyed, transported, or purchased.

4. The common carrier provisions in clause VII.C shall not apply to any natural gas pipeline covered by this authorization that is operated by any person subject to regulation under the Natural Gas Act, 15 U.S.C. 717 et seq., or by any public utility subject to regulation by a State or municipal regulatory agency with jurisdiction to regulate the rates and charges for the sale of natural gas to consumers in that State or municipality.

5. Where natural gas not subject to state regulatory or conservation laws governing its purchase by pipelines is offered for sale, pipelines covered by this authorization shall purchase without discrimination any such natural gas produced in the vicinity of those pipelines.

**D. APPEALS AND REMEDIES.** Written decisions by the Authorized Officer relating to administration of this authorization, other than revocation or suspension decisions, are subject to administrative appeal pursuant to 36 CFR Part 214, as amended. Revocation and suspension of this authorization by the Authorized Officer are subject to administrative proceedings pursuant to 7 CFR Part 1, Subpart H, as amended. Revocation and suspension of this authorization by the secretary of the Interior are subject to administrative proceedings pursuant to regulations promulgated by the U.S. Department of the Interior. Revocation or suspension of this authorization shall not give rise to any claim for damages by the holder against the Forest Service or the Secretary of the Interior.

**E. TERMINATION.** This permit shall terminate when by its terms a fixed or agreed upon condition, event, or time occurs without any action by the authorized officer. Examples include but are not limited to expiration of the permit by its terms on a specified date and termination upon change of control of the business entity. Termination of this permit shall not require notice, a decision document, or any environmental analysis or other documentation. Termination of this permit is not subject to administrative appeal and shall not give rise to any claim for damages by the holder against the Forest Service.

**F. RIGHTS AND RESPONSIBILITIES UPON REVOCATION OR TERMINATION WITHOUT ISSUANCE OF A NEW PERMIT.** Upon revocation or termination of this permit without issuance of a new permit, the holder shall remove all structures and improvements, except those owned by the United States, within a reasonable period prescribed by the authorized officer and shall restore the site to the satisfaction of the authorized officer. If the holder fails to remove all structures and improvements within the prescribed period, they shall become the property of the United States and may be sold, destroyed, or otherwise disposed of without any liability to the United States. However, the holder shall remain liable for all costs associated with their removal, including costs of sale and impoundment, cleanup, and restoration of the site.

### **VIII. MISCELLANEOUS PROVISIONS**

**A. MEMBERS OF CONGRESS.** No member of or delegate to Congress or resident commissioner shall

benefit from this permit either directly or indirectly, except to the extent the authorized use provides a general benefit to a corporation.

**B. CURRENT ADDRESSES.** The holder and the Forest Service shall keep each other informed of current mailing addresses, including those necessary for billing and payment of land use fees.

**C. SUPERSEDED PERMIT.** This permit supersedes a special use permit designated **Not Applicable**.

**D. SUPERIOR CLAUSES.** If there is a conflict between any of the preceding printed clauses and any of the following clauses, the preceding printed clauses shall control.

**E. RIGHT-OF-WAY WIDTH, OIL AND GAS PIPELINE.** The width of the right-of-way is limited to **50 feet regardless of the pipeline's diameter**.

**F. STANDARDS AND PRACTICES.** All designs, materials, construction, operation, maintenance, and termination practices employed in connection with this use shall be in accordance with safe and proven engineering practices and shall meet or exceed the standards contained in the following:

1. U.S. Department of Transportation Regulations at 49 CFR Part 192.

**G. SURVEYS, LAND CORNERS.** The holder shall protect, in place, all public land survey monuments, private property corners; and Forest boundary markers. In the event that any such land markers or monuments are destroyed in the exercise of the privileges permitted by this authorization, depending on the type of monument destroyed, the holder shall

see that they are reestablished or referenced in accordance with (1) the procedures outlined in the "Manual of Instructions for the Survey of the Public Land of the United States," (2) the specifications of the county surveyor, or (3) the specifications of the Forest Service.

Further, the holder shall cause such official survey records as are affected to be amended as provided by law. Nothing in this clause shall relieve the holder's liability for the willful destruction or modification of any Government survey marker as provided at 18 U.S.C. 1858.

**H. GROUND SURFACE PROTECTION AND RESTORATION.** The holder shall prevent and control soil erosion and gulying on National Forest System lands in and adjacent to the permit area resulting from construction, operation, maintenance, and termination of the authorized use. The holder shall construct authorized improvements so as to avoid accumulation of excessive amounts of water in the permit area and encroachment on streams. The holder shall revegetate or otherwise stabilize (for example, by constructing a retaining wall) all ground where the soil has been exposed as a result of the holder's construction, maintenance, operation, or termination of the authorized use.

**I. OIL AND GAS PIPELINE AUTHORIZATION.** This clause was inserted earlier to replace standard clauses in Sections VII.A through VII.D of this 2700-4 permit.

**J. IMPROVEMENT RELOCATION.** This authorization is granted with the express understanding that should future location of United

States Government-owned improvements or road rights-of-way require the relocation of the holder's improvements, such relocation will be done by, and at the expense of, the holder within a reasonable time as specified by the Authorized Officer.

**K. CORPORATION STATUS NOTIFICATION.**

The holder may furnish the Authorized Officer with the names and addresses of shareholders owning three (3) percent or more of the shares, and number and percentage of any class of voting shares of the entity which such shareholder is authorized to vote. In addition, the holder shall notify the Authorized Officer within fifteen (15) days of the following changes:

1. Names of officers appointed or terminated.
2. Names of stockholders who acquire stock shares causing their ownership to exceed 50 percent of shares issued or who otherwise acquire controlling interest in the corporation.
3. A copy of the articles of incorporation and bylaws.
4. An authenticated copy of a resolution of the board of directors specifically authorizing a certain individual or individuals to represent the holder in dealing with the Forest Service.
5. A list of officers and directors of the corporation and their addresses.
6. Upon request, a certified list of stockholders and amount of stock owned by each.
7. The Authorized Officer may, when necessary, require the holder to furnish additional information as set forth in 36 CFR 251.54(d)(2)(ii)(D).

**L. OIL, GAS AND RELATED MATERIALS PIPELINE STANDARDS.** Related mechanical facilities such as pumps, pump stations, and tanks shall be designed, constructed, operated and maintained in accordance with safe and proven engineering practice, and meet or exceed recognized engineering standards for the type of facility.

**M. PIPELINE CERTIFICATION REQUIREMENTS.**

Pipeline and related mechanical facilities herein authorized shall be designed, constructed, operated and maintained under the supervision of, and certified by, a qualified professional engineer licensed in the State in which the project is located.

Operation of pipelines or related mechanical facilities is not authorized until the holder has furnished to the Forest Service written certification, by the qualified engineer who inspected construction, that the pipeline and related mechanical facilities have been constructed in accordance with the standards identified in clause **VIII.F** and the Forest Service has issued written operating approval.

**N. INVASIVE SPECIES PREVENTION AND CONTROL.** The holder shall be responsible for the prevention and control of noxious weeds and invasive species arising from the authorized use. For the purpose of this clause, noxious weeds and invasive species include those species recognized as such by **the Monongahela and George Washington and Jefferson National Forests**. When determined to be necessary by the authorizing officer, the holder shall develop a plan for noxious weed and invasive species prevention and control. Such plans must have prior

written approval from the authorizing official and upon approval, shall be attached to the permit as an appendix.

**O. REMOVAL AND PLANTING OF VEGETATION AND OTHER RESOURCES.** This permit does not authorize the cutting of timber or other vegetation. Trees or shrubbery may be removed or destroyed only after the Authorized Officer or the Authorized Officer's designated representative has approved in writing and marked or otherwise identified what may be removed or destroyed. Timber cut or destroyed shall be paid for at current stumpage rates for similar timber in the **Monongahela and the George Washington and Jefferson** National Forests. The Forest Service reserves the right to dispose of the merchantable timber to those other than the holder at no stumpage cost to the holder. Unmerchantable material shall be disposed of as directed by the Authorized Officer. Trees, shrubs, and other plants may be planted within the permit area with prior written approval of the Authorized Officer.

**P. TIMBER PAYMENT.** All National Forest timber cut or destroyed in the construction of the permitted improvements shall be paid for at current stumpage rates for similar timber in the National Forest. Young-growth timber below merchantable size will be paid for at current damage-appraisal value; and all slash and debris resulting from the cutting or destruction of such timber shall be disposed of as necessary or as the Forest Service may direct.

**Q. SIGNS.** Signs or advertising devices erected on National Forest System lands shall have prior approval by the Forest Service as to location, design,

size, color, and message. Erected signs shall be maintained or renewed as necessary to neat and presentable standards, as determined by the Forest Service.

**R. PERFORMANCE BY HOLDER, SUCCESSORS, OR ASSIGNS.** Notwithstanding the expiration or any renewal of this authorization or its earlier relinquishment, abandonment, or other termination, the provisions of this authorization, to the extent applicable, shall continue in effect and shall be binding on the holder, successors, or assigns, until they have fully performed their respective obligations and liabilities accruing before or on account of the expiration, or prior termination, of the authorization.

**S. PERFORMANCE BY OTHER THAN HOLDER.** The acquisition or assumption by another party under an agreement with the holder of any right or obligation of the holder under this authorization shall be ineffective as to the Forest Service unless and until approved by the Authorized Forest Officer. A subsequent acquisition or assumption shall not:

1. Operate to relieve the holder of the responsibilities or liabilities they have assumed hereunder, or
2. Be given unless such other party (1) is acceptable to the Forest Service as a holder, and assumes in writing all of the obligations to the Forest Service under the terms of this authorization as to the incomplete portion thereof, or (2) acquires the rights in trust as security and subject to such conditions as may be necessary for the protection of the public interests.

**T. APPROVAL TO INITIATE WORK.** Before actively initiating work under this authorization, the holder's or holder's representative shall advise the

Authorized Officer of the date upon which active field work will be initiated. Approval for the work shall be issued in writing by the Authorized Officer. The approval shall list local restrictions pertaining to fire hazard, off-road vehicles, camp locations, and so forth.

**U. OWNERSHIP CHANGE.** Holder shall immediately advise the authorized officer in the likelihood of any ownership changes affecting the operations authorized by this permit. The holder will inform the prospective buyer of the authorization and recommend contact with the authorized officer before a new permit application is submitted.

**V. PRIVATE ROAD GATE INSTALLATION.** To ensure against unauthorized public use of the permitted road without interference with the government's use for administrative purposes, the permittee is authorized to install and/or sign a gate in accordance with design and location approved in advance by the Forest Officer in charge. Once installed, the custody, control, and safety maintenance of said gate is the sole duty and responsibility of the permittee.

**THIS PERMIT IS ACCEPTED SUBJECT TO ALL ITS TERMS AND CONDITIONS.**

ACCEPTED:

[handwritten: signature] [handwritten: 12/14/17]

LESLIE HARTZ DATE

Vice President - Engineering  
and Construction

Dominion Energy, INC

App-236

[handwritten: signature] [handwritten:  
1/23/18]

KATHLEEN ATKINSON      DATE

Regional Forester,  
Eastern Region  
National Forest Service

[handwritten signature] [handwritten:  
1/23/2018]

KEN ARNEY      DATE

Acting Regional Forester,  
Southern Region  
National Forest Service

*Appendix D*

**RELEVANT STATUTORY PROVISIONS**

**Mineral Leasing Act**

**30 U.S.C. §185**

(a) Grant of authority

Rights-of-way through any Federal lands may be granted by the Secretary of the Interior or appropriate agency head for pipeline purposes for the transportation of oil, natural gas, synthetic liquid or gaseous fuels, or any refined product produced therefrom to any applicant possessing the qualifications provided in section 181 of this title in accordance with the provisions of this section.

(b) Definitions

(1) For the purposes of this section “Federal lands” means all lands owned by the United States except lands in the National Park System, lands held in trust for an Indian or Indian tribe, and lands on the Outer Continental Shelf. A right-of-way through a Federal reservation shall not be granted if the Secretary or agency head determines that it would be inconsistent with the purposes of the reservation.

(2) “Secretary” means the Secretary of the Interior.

(3) “Agency head” means the head of any Federal department or independent Federal office or agency, other than the Secretary of the Interior, which has jurisdiction over Federal lands.

**National Trails System Act**

**16 U.S.C. §1244**

(a) Establishment and designation; administration

National scenic and national historic trails shall be authorized and designated only by Act of Congress. There are hereby established the following National Scenic and National Historic Trails:

(1) The Appalachian National Scenic Trail, a trail of approximately two thousand miles extending generally along the Appalachian Mountains from Mount Katahdin, Maine, to Springer Mountain, Georgia. Insofar as practicable, the right-of-way for such trail shall comprise the trail depicted on the maps identified as "Nationwide System of Trails, Proposed Appalachian Trail, NST-AT-101-May 1967", which shall be on file and available for public inspection in the office of the Director of the National Park Service. Where practicable, such rights-of-way shall include lands protected for it under agreements in effect as of October 2, 1968, to which Federal agencies and States were parties. The Appalachian Trail shall be administered primarily as a footpath by the Secretary of the Interior, in consultation with the Secretary of Agriculture.

(2) The Pacific Crest National Scenic Trail, a trail of approximately two thousand three hundred fifty miles, extending from the Mexican-California border northward generally along the mountain ranges of the west coast States to the Canadian-Washington border near Lake Ross, following the route as generally depicted on the map, identified as "Nationwide System of Trails, Proposed Pacific Crest Trail, NST-PC-103-May 1967" which shall be on file and available for public inspection in the office of the Chief of the Forest Service. The Pacific Crest Trail shall be administered

by the Secretary of Agriculture, in consultation with the Secretary of the Interior.

(3) The Oregon National Historic Trail, a route of approximately two thousand miles extending from near Independence, Missouri, to the vicinity of Portland, Oregon, following a route as depicted on maps identified as "Primary Route of the Oregon Trail 1841-1848", in the Department of the Interior's Oregon Trail study report dated April 1977, and which shall be on file and available for public inspection in the office of the Director of the National Park Service. The trail shall be administered by the Secretary of the Interior. No land or interest in land outside the exterior boundaries of any federally administered area may be acquired by the Federal Government for the trail except with the consent of the owner of the land or interest in land. The authority of the Federal Government to acquire fee title under this paragraph shall be limited to an average of not more than  $\frac{1}{4}$  mile on either side of the trail.

(4) The Mormon Pioneer National Historic Trail, a route of approximately one thousand three hundred miles extending from Nauvoo, Illinois, to Salt Lake City, Utah, following the primary historical route of the Mormon Trail as generally depicted on a map, identified as, "Mormon Trail Vicinity Map, figure 2" in the Department of the Interior Mormon Trail study report dated March 1977, and which shall be on file and available for public inspection in the office of the Director, National Park Service, Washington, D.C. The trail shall be administered by the Secretary of the Interior. No land or interest in land outside the exterior boundaries of any federally administered area

may be acquired by the Federal Government for the trail except with the consent of the owner of the land or interest in land. The authority of the Federal Government to acquire fee title under this paragraph shall be limited to an average of not more than  $\frac{1}{4}$  mile on either side of the trail.

(5) The Continental Divide National Scenic Trail, a trail of approximately thirty-one hundred miles, extending from the Montana-Canada border to the New Mexico-Mexico border, following the approximate route depicted on the map, identified as "Proposed Continental Divide National Scenic Trail" in the Department of the Interior Continental Divide Trail study report dated March 1977 and which shall be on file and available for public inspection in the office of the Chief, Forest Service, Washington, D.C. The Continental Divide National Scenic Trail shall be administered by the Secretary of Agriculture in consultation with the Secretary of the Interior. Notwithstanding the provisions of section 1246(c) of this title, the use of motorized vehicles on roads which will be designated segments of the Continental Divide National Scenic Trail shall be permitted in accordance with regulations prescribed by the appropriate Secretary. No land or interest in land outside the exterior boundaries of any federally administered area may be acquired by the Federal Government for the trail except with the consent of the owner of the land or interest in land. The authority of the Federal Government to acquire fee title under this paragraph shall be limited to an average of not more than  $\frac{1}{4}$  mile on either side of the trail.

(6) The Lewis and Clark National Historic Trail, a trail of approximately 4,900 miles, extending from the Ohio River in Pittsburgh, Pennsylvania, to the mouth of the Columbia River in Oregon, following the outbound and inbound routes of the Lewis and Clark Expedition depicted on the map entitled “Lewis and Clark National Historic Trail Authorized Trail Including Proposed Eastern Legacy Extension”, dated April 2018, and numbered 648/143721. The map shall be on file and available for public inspection in the office of the Director, National Park Service, Washington, D.C. The trail shall be administered by the Secretary of the Interior. No land or interest in land outside the exterior boundaries of any federally administered area may be acquired by the Federal Government for the trail except with the consent of the owner of the land or interest in land. The authority of the Federal Government to acquire fee title under this paragraph shall be limited to an average of not more than  $\frac{1}{4}$  mile on either side of the trail.

(7) The Iditarod National Historic Trail, a route of approximately two thousand miles extending from Seward, Alaska, to Nome, Alaska, following the routes as depicted on maps identified as “Seward-Nome Trail”, in the Department of the Interior’s study report entitled “The Iditarod Trail (Seward-Nome Route) and other Alaskan Gold Rush Trails” dated September 1977. The map shall be on file and available for public inspection in the office of the Director, National Park Service, Washington, D.C. The trail shall be administered by the Secretary of the Interior. No land or interest in land outside the exterior boundaries of any federally administered area may be acquired by the Federal Government for the trail except with the

consent of the owner of the land or interest in land. The authority of the Federal Government to acquire fee title under this paragraph shall be limited to an average of not more than  $\frac{1}{4}$  mile on either side of the trail.

(8) The North Country National Scenic Trail, a trail of approximately 4,600 miles, extending from the Appalachian Trail in Vermont to the vicinity of Lake Sakakawea in North Dakota, following the approximate route depicted on the map identified as “North Country National Scenic Trail, Authorized Route”, dated February 2014, and numbered 649/116870. The map shall be on file and available for public inspection in the office of the Director, National Park Service, Washington, District of Columbia. The trail shall be administered by the Secretary of the Interior. No land or interest in land outside the exterior boundaries of any federally administered area may be acquired by the Federal Government for the trail except with the consent of the owner of the land or interest in land.

(9) The Overmountain Victory National Historic Trail, a system totaling approximately two hundred seventy-two miles of trail with routes from the mustering point near Abingdon, Virginia, to Sycamore Shoals (near Elizabethton, Tennessee); from Sycamore Shoals to Quaker Meadows (near Morganton, North Carolina); from the mustering point in Surry County, North Carolina, to Quaker Meadows; and from Quaker Meadows to Kings Mountain, South Carolina, as depicted on the map identified as Map 3--Historic Features--1780 in the draft study report entitled “Overmountain Victory Trail” dated

December 1979. The map shall be on file and available for public inspection in the Office of the Director, National Park Service, Washington, District of Columbia. The trail shall be administered by the Secretary of the Interior.

(10) The Ice Age National Scenic Trail, a trail of approximately one thousand miles, extending from Door County, Wisconsin, to Interstate Park in Saint Croix County, Wisconsin, generally following the route described in "On the Trail of the Ice Age--A Hiker's and Biker's Guide to Wisconsin's Ice Age National Scientific Reserve and Trail", by Henry S. Reuss, Member of Congress, dated 1980. The guide and maps shall be on file and available for public inspection in the Office of the Director, National Park Service, Washington, District of Columbia. Overall administration of the trail shall be the responsibility of the Secretary of the Interior pursuant to subsection (d) of this section. The State of Wisconsin, in consultation with the Secretary of the Interior, may, subject to the approval of the Secretary, prepare a plan for the management of the trail which shall be deemed to meet the requirements of subsection (e) of this section. Notwithstanding the provisions of section 1246(c) of this title, snowmobile use may be permitted on segments of the Ice Age National Scenic Trail where deemed appropriate by the Secretary and the managing authority responsible for the segment. No land or interest in land outside the exterior boundaries of any federally administered area may be acquired by the Federal Government for the trail except with the consent of the owner of the land or interest in land.

(11) The Potomac Heritage National Scenic Trail, a corridor of approximately seven hundred and four miles following the route as generally depicted on the map identified as “National Trails System, Proposed Potomac Heritage Trail” in “The Potomac Heritage Trail”, a report prepared by the Department of the Interior and dated December 1974, except that no designation of the trail shall be made in the State of West Virginia. The map shall be on file and available for public inspection in the office of the Director of the National Park Service, Washington, District of Columbia. The trail shall initially consist of only those segments of the corridor located within the exterior boundaries of federally administered areas. The trail shall be administered by the Secretary of the Interior. No land or interest in land outside the exterior boundaries of any federally administered area may be acquired by the Federal Government for the trail except with the consent of the owner of the land or interest in land.

(12) The Natchez Trace National Scenic Trail, a trail system of approximately six hundred and ninety-four miles extending from Nashville, Tennessee, to Natchez, Mississippi, as depicted on the map entitled “Concept Plan, Natchez Trace Trails Study” in “The Natchez Trace”, a report prepared by the Department of the Interior and dated August 1979. The map shall be on file and available for public inspection in the office of the Director of the National Park Service, Department of the Interior, Washington, District of Columbia. The trail shall be administered by the Secretary of the Interior.

(13) The Florida National Scenic Trail, a route of approximately thirteen hundred miles extending through the State of Florida as generally depicted in "The Florida Trail", a national scenic trail study draft report prepared by the Department of the Interior and dated February 1980. The report shall be on file and available for public inspection in the office of the Chief of the Forest Service, Washington, District of Columbia. No lands or interests therein outside the exterior boundaries of any federally administered area may be acquired by the Federal Government for the Florida Trail except with the consent of the owner thereof. The Secretary of Agriculture may designate lands outside of federally administered areas as segments of the trail, only upon application from the States or local governmental agencies involved, if such segments meet the criteria established in this chapter and are administered by such agencies without expense to the United States. The trail shall be administered by the Secretary of Agriculture.

(14) The Nez Perce National Historic Trail, a route of approximately eleven hundred and seventy miles extending from the vicinity of Wallowa Lake, Oregon, to Bear Paw Mountain, Montana, as generally depicted in "Nez Perce (Nee-Me-Poo) Trail Study Report" prepared by the Department of Agriculture and dated March 1982. The report shall be on file and available for public inspection in the Office of the Chief of the Forest Service, Washington, District of Columbia. The trail shall be administered by the Secretary of Agriculture. So that significant route segments and sites recognized as associated with the Nez Perce Trail may be distinguished by suitable markers, the Secretary of Agriculture is authorized to

accept the donation of suitable markers for placement at appropriate locations. Any such markers associated with the Nez Perce Trail which are to be located on lands administered by any other department or agency of the United States may be placed on such lands only with the concurrence of the head of such department or agency. No land or interest in land outside the exterior boundaries of any federally administered area may be acquired by the Federal Government for the trail except with the consent of the owner of the land or interest in land. The authority of the Federal Government to acquire fee title under this paragraph shall be limited to an average of not more than  $\frac{1}{4}$  mile on either side of the trail.

(15) The Santa Fe National Historic Trail, a trail of approximately 950 miles from a point near Old Franklin, Missouri, through Kansas, Oklahoma, and Colorado to Santa Fe, New Mexico, as generally depicted on a map entitled "The Santa Fe Trail" contained in the Final Report of the Secretary of the Interior pursuant to subsection (b) of this section, dated July 1976. The map shall be on file and available for public inspection in the office of the Director of the National Park Service, Washington, District of Columbia. The trail shall be administered by the Secretary of the Interior. No lands or interests therein outside the exterior boundaries of any federally administered area may be acquired by the Federal Government for the Santa Fe Trail except with the consent of the owner thereof. Before acquiring any easement or entering into any cooperative agreement with a private landowner with respect to the trail, the Secretary shall notify the landowner of the potential liability, if any, for injury to the public resulting from

physical conditions which may be on the landowner's land. The United States shall not be held liable by reason of such notice or failure to provide such notice to the landowner. So that significant route segments and sites recognized as associated with the Santa Fe Trail may be distinguished by suitable markers, the Secretary of the Interior is authorized to accept the donation of suitable markers for placement at appropriate locations.

(16)(A) The Trail of Tears National Historic Trail, a trail consisting of water routes and overland routes traveled by the Cherokee Nation during its removal from ancestral lands in the East to Oklahoma during 1838 and 1839, generally located within the corridor described through portions of Georgia, North Carolina, Alabama, Tennessee, Kentucky, Illinois, Missouri, Arkansas, and Oklahoma in the final report of the Secretary of the Interior prepared pursuant to subsection (b) of this section entitled "Trail of Tears" and dated June 1986. Maps depicting the corridor shall be on file and available for public inspection in the Office of the National Park Service, Department of the Interior. The trail shall be administered by the Secretary of the Interior. No lands or interests therein outside the exterior boundaries of any federally administered area may be acquired by the Federal Government for the Trail of Tears except with the consent of the owner thereof.

(B) In carrying out his responsibilities pursuant to sections 1244(f) and 1246(c) of this title, the Secretary of the Interior shall give careful consideration to the establishment of appropriate interpretive sites for the Trail of Tears in the vicinity

of Hopkinsville, Kentucky, Fort Smith, Arkansas, Trail of Tears State Park, Missouri, and Tahlequah, Oklahoma.

(C) In addition to the areas otherwise designated under this paragraph, the following routes and land components by which the Cherokee Nation was removed to Oklahoma are components of the Trail of Tears National Historic Trail, as generally described in the environmentally preferred alternative of the November 2007 Feasibility Study Amendment and Environmental Assessment for Trail of Tears National Historic Trail:

(i) The Bengé and Bell routes.

(ii) The land components of the designated water routes in Alabama, Arkansas, Oklahoma, and Tennessee.

(iii) The routes from the collection forts in Alabama, Georgia, North Carolina, and Tennessee to the emigration depots.

(iv) The related campgrounds located along the routes and land components described in clauses (i) through (iii).

(D) The Secretary may accept donations for the Trail from private, nonprofit, or tribal organizations. No lands or interests in lands outside the exterior boundaries of any federally administered area may be acquired by the Federal Government for the Trail of Tears National Historic Trail except with the consent of the owner thereof.

(17) The Juan Bautista de Anza National Historic Trail, a trail comprising the overland route traveled by Captain Juan Bautista de Anza of Spain during the

years 1775 and 1776 from Sonora, Mexico, to the vicinity of San Francisco, California, of approximately 1,200 miles through Arizona and California, as generally described in the report of the Department of the Interior prepared pursuant to subsection (b) entitled "Juan Bautista de Anza National Trail Study, Feasibility Study and Environmental Assessment" and dated August 1986. A map generally depicting the trail shall be on file and available for public inspection in the Office of the Director of the National Park Service, Washington, District of Columbia. The trail shall be administered by the Secretary of the Interior. No lands or interests therein outside the exterior boundaries of any federally administered area may be acquired by the Federal Government for the Juan Bautista de Anza National Historic Trail without the consent of the owner thereof. In implementing this paragraph, the Secretary shall encourage volunteer trail groups to participate in the development and maintenance of the trail.

(18) The California National Historic Trail, a route of approximately five thousand seven hundred miles, including all routes and cutoffs, extending from Independence and Saint Joseph, Missouri, and Council Bluffs, Iowa, to various points in California and Oregon, as generally described in the report of the Department of the Interior prepared pursuant to subsection (b) of this section entitled "California and Pony Express Trails, Eligibility/Feasibility Study/Environmental Assessment" and dated September 1987. A map generally depicting the route shall be on file and available for public inspection in the Office of the National Park Service, Department of the Interior. The trail shall be administered by the

Secretary of the Interior. No lands or interests therein outside the exterior boundaries of any federally administered area may be acquired by the United States for the California National Historic Trail except with the consent of the owner thereof.

(19) The Pony Express National Historic Trail, a route of approximately one thousand nine hundred miles, including the original route and subsequent route changes, extending from Saint Joseph, Missouri, to Sacramento, California, as generally described in the report of the Department of the Interior prepared pursuant to subsection (b) of this section entitled “California and Pony Express Trails, Eligibility/Feasibility Study/Environmental Assessment”, and dated September 1987. A map generally depicting the route shall be on file and available for public inspection in the Office of the National Park Service, Department of the Interior. The trail shall be administered by the Secretary of the Interior. No lands or interests therein outside the exterior boundaries of any federally administered area may be acquired by the United States for the Pony Express National Historic Trail except with the consent of the owner thereof.

(20) The Selma to Montgomery National Historic Trail, consisting of 54 miles of city streets and United States Highway 80 from Brown Chapel A.M.E. Church in Selma to the State Capitol Building in Montgomery, Alabama, traveled by voting rights advocates during March 1965 to dramatize the need for voting rights legislation, as generally described in the report of the Secretary of the Interior prepared pursuant to subsection (b) of this section entitled “Selma to

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Montgomery” and dated April 1993. Maps depicting the route shall be on file and available for public inspection in the Office of the National Park Service, Department of the Interior. The trail shall be administered in accordance with this chapter, including section 1246(h) of this title. The Secretary of the Interior, acting through the National Park Service, which shall be the lead Federal agency, shall cooperate with other Federal, State and local authorities to preserve historic sites along the route, including (but not limited to) the Edmund Pettus Bridge and the Brown Chapel A.M.E. Church.

### (21) El Camino Real de Tierra Adentro

(A) El Camino Real de Tierra Adentro (the Royal Road of the Interior) National Historic Trail, a 404 mile long trail from the Rio Grande near El Paso, Texas to San Juan Pueblo, New Mexico, as generally depicted on the maps entitled “United States Route: El Camino Real de Tierra Adentro”, contained in the report prepared pursuant to subsection (b) entitled “National Historic Trail Feasibility Study and Environmental Assessment: El Camino Real de Tierra Adentro, Texas-New Mexico”, dated March 1997.

### (B) Map

A map generally depicting the trail shall be on file and available for public inspection in the Office of the National Park Service, Department of the Interior.

### (C) Administration

The Trail shall be administered by the Secretary of the Interior.

### (D) Land acquisition

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No lands or interests therein outside the exterior boundaries of any federally administered area may be acquired by the Federal Government for El Camino Real de Tierra Adentro except with the consent of the owner thereof.

(E) Volunteer groups; consultation

The Secretary of the Interior shall--

(i) encourage volunteer trail groups to participate in the development and maintenance of the trail; and

(ii) consult with other affected Federal, State, local governmental, and tribal agencies in the administration of the trail.

(F) Coordination of activities

The Secretary of the Interior may coordinate with United States and Mexican public and non-governmental organizations, academic institutions, and, in consultation with the Secretary of State, the government of Mexico and its political subdivisions, for the purpose of exchanging trail information and research, fostering trail preservation and educational programs, providing technical assistance, and working to establish an international historic trail with complementary preservation and education programs in each nation.

(22) Ala Kahakai National Historic Trail

(A) In general

The Ala Kahakai National Historic Trail (the Trail by the Sea), a 175 mile long trail extending from 'Upolu Point on the north tip of Hawaii Island down the west coast of the Island around Ka Lae to the east boundary of Hawai'i Volcanoes National Park at the

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ancient shoreline temple known as “Waha'ula”, as generally depicted on the map entitled “Ala Kahakai Trail”, contained in the report prepared pursuant to subsection (b) entitled “Ala Kahakai National Trail Study and Environmental Impact Statement”, dated January 1998.

(B) Map

A map generally depicting the trail shall be on file and available for public inspection in the Office of the National Park Service, Department of the Interior.

(C) Administration

The trail shall be administered by the Secretary of the Interior.

(D) Land acquisition

No land or interest in land outside the exterior boundaries of any federally administered area may be acquired by the United States for the trail except with the consent of the owner of the land or interest in land.

(E) Public participation; consultation

The Secretary of the Interior shall--

(i) encourage communities and owners of land along the trail, native Hawaiians, and volunteer trail groups to participate in the planning, development, and maintenance of the trail; and

(ii) consult with affected Federal, State, and local agencies, native Hawaiian groups, and landowners in the administration of the trail.

(23) Old Spanish National Historic Trail

(A) In general

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The Old Spanish National Historic Trail, an approximately 2,700 mile long trail extending from Santa Fe, New Mexico, to Los Angeles, California, that served as a major trade route between 1829 and 1848, as generally depicted on the maps numbered 1 through 9, as contained in the report entitled “Old Spanish Trail National Historic Trail Feasibility Study”, dated July 2001, including the Armijo Route, Northern Route, North Branch, and Mojave Road.

### (B) Map

A map generally depicting the trail shall be on file and available for public inspection in the appropriate offices of the Department of the Interior.

### (C) Administration

The trail shall be administered by the Secretary of the Interior (referred to in this paragraph as the “Secretary”).

### (D) Land acquisition

The United States shall not acquire for the trail any land or interest in land outside the exterior boundary of any federally-managed area without the consent of the owner of the land or interest in land.

### (E) Consultation

The Secretary shall consult with other Federal, State, local, and tribal agencies in the administration of the trail.

### (F) Additional routes

The Secretary may designate additional routes to the trail if--

(i) the additional routes were included in the Old Spanish Trail National Historic Trail Feasibility

Study, but were not recommended for designation as a national historic trail; and

(ii) the Secretary determines that the additional routes were used for trade and commerce between 1829 and 1848.

(24) El Camino Real de los Tejas National Historic Trail

(A) In general

El Camino Real de los Tejas (the Royal Road to the Tejas) National Historic Trail, a combination of historic routes (including the Old San Antonio Road) totaling approximately 2,580 miles, extending from the Rio Grande near Eagle Pass and Laredo, Texas, to Natchitoches, Louisiana, as generally depicted on the map entitled "El Camino Real de los Tejas" contained in the report entitled "National Historic Trail Feasibility Study and Environmental Assessment: El Camino Real de los Tejas, Texas-Louisiana", dated July 1998.

(B) Map

A map generally depicting the trail shall be on file and available for public inspection in the appropriate offices of the National Park Service.

(C) Administration

(i) The Secretary of the Interior (referred to in this paragraph as "the Secretary") shall administer the trail.

(ii) The Secretary shall administer those portions of the trail on non-Federal land only with the consent of the owner of such land and when such trail portion qualifies for certification as an officially established

component of the trail, consistent with section 1242(a)(3) of this title. An owner's approval of a certification agreement shall satisfy the consent requirement. A certification agreement may be terminated at any time.

(iii) The designation of the trail does not authorize any person to enter private property without the consent of the owner.

(D) Consultation

The Secretary shall consult with appropriate State and local agencies in the planning and development of the trail.

(E) Coordination of activities

The Secretary may coordinate with United States and Mexican public and nongovernmental organizations, academic institutions, and, in consultation with the Secretary of State, the Government of Mexico and its political subdivisions, for the purpose of exchanging trail information and research, fostering trail preservation and educational programs, providing technical assistance, and working to establish an international historic trail with complementary preservation and education programs in each nation.

(F) Land acquisition

The United States shall not acquire for the trail any land or interest in land outside the exterior boundary of any federally-administered area without the consent of the owner of the land or interest in land.

(25) Captain John Smith Chesapeake National Historic Trail

(A) In general

The Captain John Smith Chesapeake National Historic Trail, a series of water routes extending approximately 3,000 miles along the Chesapeake Bay and the tributaries of the Chesapeake Bay in the States of Virginia, Maryland, and Delaware, and in the District of Columbia, that traces the 1607-1609 voyages of Captain John Smith to chart the land and waterways of the Chesapeake Bay, as generally depicted on the map entitled "Captain John Smith Chesapeake National Historic Trail Map MD, VA, DE, and DC", numbered P-16/8000 (CAJO), and dated May 2006.

(B) Map

The map referred to in subparagraph (A) shall be on file and available for public inspection in the appropriate offices of the National Park Service.

(C) Administration

The trail shall be administered by the Secretary of the Interior--

(i) in coordination with--

(I) the Chesapeake Bay Gateways and Watertrails Network authorized under the Chesapeake Bay Initiative Act of 1998 (112 Stat. 2961); and

(II) the Chesapeake Bay Program authorized under section 1267 of Title 33; and

(ii) in consultation with--

(I) other Federal, State, tribal, regional, and local agencies; and

(II) the private sector.

(D) Land acquisition

The United States shall not acquire for the trail any land or interest in land outside the exterior boundary of any federally-managed area without the consent of the owner of the land or interest in land.

(26) Star-Spangled Banner National Historic Trail

(A) In general

The Star-Spangled Banner National Historic Trail, a trail consisting of water and overland routes totaling approximately 290 miles, extending from Tangier Island, Virginia, through southern Maryland, the District of Columbia, and northern Virginia, in the Chesapeake Bay, Patuxent River, Potomac River, and north to the Patapsco River, and Baltimore, Maryland, commemorating the Chesapeake Campaign of the War of 1812 (including the British invasion of Washington, District of Columbia, and its associated feints, and the Battle of Baltimore in summer 1814), as generally depicted on the map titled “Star-Spangled Banner National Historic Trail”, numbered T02/80,000, and dated June 2007.

(B) Map

The map referred to in subparagraph (A) shall be maintained on file and available for public inspection in the appropriate offices of the National Park Service.

(C) Administration

Subject to subparagraph (E)(ii), the trail shall be administered by the Secretary of the Interior.

(D) Land acquisition

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No land or interest in land outside the exterior boundaries of any federally administered area may be acquired by the United States for the trail except with the consent of the owner of the land or interest in land.

(E) Public participation

The Secretary of the Interior shall--

(i) encourage communities, owners of land along the trail, and volunteer trail groups to participate in the planning, development, and maintenance of the trail; and

(ii) consult with other affected landowners and Federal, State, and local agencies in the administration of the trail.

(F) Interpretation and assistance

Subject to the availability of appropriations, the Secretary of the Interior may provide, to State and local governments and nonprofit organizations, interpretive programs and services and technical assistance for use in--

(i) carrying out preservation and development of the trail; and

(ii) providing education relating to the War of 1812 along the trail.

(27) Arizona National Scenic Trail

(A) In general

The Arizona National Scenic Trail, extending approximately 807 miles across the State of Arizona from the U.S.-Mexico international border to the Arizona-Utah border, as generally depicted on the map entitled "Arizona National Scenic Trail" and dated December 5, 2007, to be administered by the

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Secretary of Agriculture, in consultation with the Secretary of the Interior and appropriate State, tribal, and local governmental agencies.

(B) Availability of map

The map shall be on file and available for public inspection in appropriate offices of the Forest Service.

(28) New England National Scenic Trail

The New England National Scenic Trail, a continuous trail extending approximately 220 miles from the border of New Hampshire in the town of Royalston, Massachusetts to Long Island Sound in the town of Guilford, Connecticut, as generally depicted on the map titled "New England National Scenic Trail Proposed Route", numbered T06/80,000, and dated October 2007. The map shall be on file and available for public inspection in the appropriate offices of the National Park Service. The Secretary of the Interior, in consultation with appropriate Federal, State, tribal, regional, and local agencies, and other organizations, shall administer the trail after considering the recommendations of the report titled the "Metacomet Monadnock Mattabesset Trail System National Scenic Trail Feasibility Study and Environmental Assessment", prepared by the National Park Service, and dated Spring 2006. The United States shall not acquire for the trail any land or interest in land without the consent of the owner.

(29) Washington-Rochambeau Revolutionary Route National Historic Trail

(A) In general

The Washington-Rochambeau Revolutionary Route National Historic Trail, a corridor of

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approximately 600 miles following the route taken by the armies of General George Washington and Count Rochambeau between Newport, Rhode Island, and Yorktown, Virginia, in 1781 and 1782, as generally depicted on the map entitled "WASHINGTON-ROCHAMBEAU REVOLUTIONARY ROUTE NATIONAL HISTORIC TRAIL", numbered T01/80,001, and dated June 2007.

### (B) Map

The map referred to in subparagraph (A) shall be on file and available for public inspection in the appropriate offices of the National Park Service.

### (C) Administration

The trail shall be administered by the Secretary of the Interior, in consultation with--

(i) other Federal, State, tribal, regional, and local agencies; and

(ii) the private sector.

### (D) Land acquisition

The United States shall not acquire for the trail any land or interest in land outside the exterior boundary of any federally-managed area without the consent of the owner of the land or interest in land.

## (30) Pacific Northwest National Scenic Trail

### (A) In general

The Pacific Northwest National Scenic Trail, a trail of approximately 1,200 miles, extending from the Continental Divide in Glacier National Park, Montana, to the Pacific Ocean Coast in Olympic National Park, Washington, following the route depicted on the map entitled "Pacific Northwest

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National Scenic Trail: Proposed Trail”, numbered T12/80,000, and dated February 2008 (referred to in this paragraph as the “map”).

(B) Availability of map

The map shall be on file and available for public inspection in the appropriate offices of the Forest Service.

(C) Administration

The Pacific Northwest National Scenic Trail shall be administered by the Secretary of Agriculture.

(D) Land acquisition

The United States shall not acquire for the Pacific Northwest National Scenic Trail any land or interest in land outside the exterior boundary of any federally-managed area without the consent of the owner of the land or interest in land.

(b) Additional national scenic or national historic trails; feasibility studies; consultations; submission of studies to Congress; scope of studies; qualifications for national historic trail designation

The Secretary of the Interior, through the agency most likely to administer such trail, and the Secretary of Agriculture where lands administered by him are involved, shall make such additional studies as are herein or may hereafter be authorized by the Congress for the purpose of determining the feasibility and desirability of designating other trails as national scenic or national historic trails. Such studies shall be made in consultation with the heads of other Federal agencies administering lands through which such additional proposed trails would pass and in cooperation with interested interstate, State, and local

governmental agencies, public and private organizations, and landowners and land users concerned. The feasibility of designating a trail shall be determined on the basis of an evaluation of whether or not it is physically possible to develop a trail along a route being studied, and whether the development of a trail would be financially feasible. The studies listed in subsection (c) of this section shall be completed and submitted to the Congress, with recommendations as to the suitability of trail designation, not later than three complete fiscal years from the date of enactment of their addition to this subsection, or from November 10, 1978, whichever is later. Such studies, when submitted, shall be printed as a House or Senate document, and shall include, but not be limited to:

(1) the proposed route of such trail (including maps and illustrations);

(2) the areas adjacent to such trails, to be utilized for scenic, historic, natural, cultural, or developmental, purposes;

(3) the characteristics which, in the judgment of the appropriate Secretary, make the proposed trail worthy of designation as a national scenic or national historic trail; and in the case of national historic trails the report shall include the recommendation of the Secretary of the Interior's National Park System Advisory Board as to the national historic significance based on the criteria developed under the Historic Sites Act of 1935 (49 Stat. 666; 16 U.S.C. 461);<sup>1</sup>

(4) the current status of land ownership and current and potential use along the designated route;

(5) the estimated cost of acquisition of lands or interest in lands, if any;

(6) the plans for developing and maintaining the trail and the cost thereof;

(7) the proposed Federal administering agency (which, in the case of a national scenic trail wholly or substantially within a national forest, shall be the Department of Agriculture);

(8) the extent to which a State or its political subdivisions and public and private organizations might reasonably be expected to participate in acquiring the necessary lands and in the administration thereof;

(9) the relative uses of the lands involved, including: the number of anticipated visitor-days for the entire length of, as well as for segments of, such trail; the number of months which such trail, or segments thereof, will be open for recreation purposes; the economic and social benefits which might accrue from alternate land uses; and the estimated man-years of civilian employment and expenditures expected for the purposes of maintenance, supervision, and regulation of such trail;

(10) the anticipated impact of public outdoor recreation use on the preservation of a proposed national historic trail and its related historic and archeological features and settings, including the measures proposed to ensure evaluation and preservation of the values that contribute to their national historic significance; and

(11) to qualify for designation as a national historic trail, a trail must meet all three of the following criteria:

(A) It must be a trail or route established by historic use and must be historically significant as a result of that use. The route need not currently exist as a discernible trail to qualify, but its location must be sufficiently known to permit evaluation of public recreation and historical interest potential. A designated trail should generally accurately follow the historic route, but may deviate somewhat on occasion of necessity to avoid difficult routing through subsequent development, or to provide some route variation offering a more pleasurable recreational experience. Such deviations shall be so noted on site. Trail segments no longer possible to travel by trail due to subsequent development as motorized transportation routes may be designated and marked onsite as segments which link to the historic trail.

(B) It must be of national significance with respect to any of several broad facets of American history, such as trade and commerce, exploration, migration and settlement, or military campaigns. To qualify as nationally significant, historic use of the trail must have had a far-reaching effect on broad patterns of American culture. Trails significant in the history of native Americans may be included.

(C) It must have significant potential for public recreational use or historical interest based on historic interpretation and appreciation. The potential for such use is generally greater along roadless segments developed as historic trails, and at historic sites associated with the trail. The presence of recreation potential not related to historic appreciation is not sufficient justification for designation under this category.

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(c) Routes subject to consideration for designation as national scenic trails

The following routes shall be studied in accordance with the objectives outlined in subsection (b) of this section:

(1) Continental Divide Trail, a three-thousand-one-hundred-mile trail extending from near the Mexican border in southwestern New Mexico northward generally along the Continental Divide to the Canadian border in Glacier National Park.

(2) Potomac Heritage Trail, an eight-hundred-and-twenty-five-mile trail extending generally from the mouth of the Potomac River to its sources in Pennsylvania and West Virginia, including the one-hundred-and-seventy-mile Chesapeake and Ohio Canal towpath.

(3) Old Cattle Trails of the Southwest from the vicinity of San Antonio, Texas, approximately eight hundred miles through Oklahoma via Baxter Springs and Chetopa, Kansas, to Fort Scott, Kansas, including the Chisholm Trail, from the vicinity of San Antonio or Cuero, Texas, approximately eight hundred miles north through Oklahoma to Abilene, Kansas.

(4) Lewis and Clark Trail, from Wood River, Illinois, to the Pacific Ocean in Oregon, following both the outbound and inbound routes of the Lewis and Clark Expedition.

(5) Natchez Trace, from Nashville, Tennessee, approximately six hundred miles to Natchez, Mississippi.

(6) North Country Trail, from the Appalachian Trail in Vermont, approximately three thousand two

hundred miles through the States of New York, Pennsylvania, Ohio, Michigan, Wisconsin, and Minnesota, to the Lewis and Clark Trail in North Dakota.

(7) Kittanning Trail from Shirleysburg in Huntingdon County to Kittanning, Armstrong County, Pennsylvania.

(8) Oregon Trail, from Independence, Missouri, approximately two thousand miles to near Fort Vancouver, Washington.

(9) Santa Fe Trail, from Independence, Missouri, approximately eight hundred miles to Santa Fe, New Mexico.

(10) Long Trail, extending two hundred and fifty-five miles from the Massachusetts border northward through Vermont to the Canadian border.

(11) Mormon Trail, extending from Nauvoo, Illinois, to Salt Lake City, Utah, through the States of Iowa, Nebraska, and Wyoming.

(12) Gold Rush Trails in Alaska.

(13) Mormon Battalion Trail, extending two thousand miles from Mount Pisgah, Iowa, through Kansas, Colorado, New Mexico, and Arizona to Los Angeles, California.

(14) El Camino Real from St. Augustine to San Mateo, Florida, approximately 20 miles along the southern boundary of the St. Johns River from Fort Caroline National Memorial to the St. Augustine National Park Monument.

(15) Bartram Trail, extending through the States of Georgia, North Carolina, South Carolina, Alabama, Florida, Louisiana, Mississippi, and Tennessee.

(16) Daniel Boone Trail, extending from the vicinity of Statesville, North Carolina, to Fort Boonesborough State Park, Kentucky.

(17) Desert Trail, extending from the Canadian border through parts of Idaho, Washington, Oregon, Nevada, California, and Arizona, to the Mexican border.

(18) Dominguez-Escalante Trail, extending approximately two thousand miles along the route of the 1776 expedition led by Father Francisco Atanasio Dominguez and Father Silvestre Velez de Escalante, originating in Santa Fe, New Mexico; proceeding northwest along the San Juan, Dolores, Gunnison, and White Rivers in Colorado; thence westerly to Utah Lake; thence southward to Arizona and returning to Santa Fe.

(19) Florida Trail, extending north from Everglades National Park, including the Big Cypress Swamp, the Kissimmee Prairie, the Withlacoochee State Forest, Ocala National Forest, Osceola National Forest, and Black Water River State Forest, said completed trail to be approximately one thousand three hundred miles long, of which over four hundred miles of trail have already been built.

(20) Indian Nations Trail, extending from the Red River in Oklahoma approximately two hundred miles northward through the former Indian nations to the Oklahoma-Kansas boundary line.

(21) Nez Perce Trail extending from the vicinity of Wallowa Lake, Oregon, to Bear Paw Mountain, Montana.

(22) Pacific Northwest Trail, extending approximately one thousand miles from the Continental Divide in Glacier National Park, Montana, to the Pacific Ocean beach of Olympic National Park, Washington, by way of--

(A) Flathead National Forest and Kootenai National Forest in the State of Montana;

(B) Kaniksu National Forest in the State of Idaho; and

(C) Colville National Forest, Okanogan National Forest, Pasayten Wilderness Area, Ross Lake National Recreation Area, North Cascades National Park, Mount Baker, the Skagit River, Deception Pass, Whidbey Island, Olympic National Forest, and Olympic National Park in the State of Washington.

(23) Overmountain Victory Trail, extending from the vicinity of Elizabethton, Tennessee, to Kings Mountain National Military Park, South Carolina.

(24) Juan Bautista de Anza Trail, following the overland route taken by Juan Bautista de Anza in connection with his travels from the United Mexican States to San Francisco, California.

(25) Trail of Tears, including the associated forts and specifically, Fort Mitchell, Alabama, and historic properties, extending from the vicinity of Murphy, North Carolina, through Georgia, Alabama, Tennessee, Kentucky, Illinois, Missouri, and Arkansas, to the vicinity of Tahlequah, Oklahoma.

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(26) Illinois Trail, extending from the Lewis and Clark Trail at Wood River, Illinois, to the Chicago Portage National Historic Site, generally following the Illinois River and the Illinois and Michigan Canal.

(27) Jedediah Smith Trail, to include the routes of the explorations led by Jedediah Smith--

(A) during the period 1826-1827, extending from the Idaho-Wyoming border, through the Great Salt Lake, Sevier, Virgin, and Colorado River Valleys, and the Mojave Desert, to the San Gabriel Mission, California; thence through the Tehachapi Mountains, San Joaquin and Stanislaus River Valleys, Ebbetts Pass, Walker River Valley, Bald Mount, Mount Grafton, and Great Salt Lake to Bear Lake, Utah; and

(B) during 1828, extending from the Sacramento and Trinity River Valleys along the Pacific coastline, through the Smith and Willamette River Valleys to the Fort Vancouver National Historic Site, Washington, on the Columbia River.

(28) General Crook Trail, extending from Prescott, Arizona, across the Mogollon Rim to Fort Apache.

(29) Beale Wagon Road, within the Kaibab and Coconino National Forests in Arizona: Provided, That such study may be prepared in conjunction with ongoing planning processes for these National Forests to be completed before 1990.

(30) Pony Express Trail, extending from Saint Joseph, Missouri, through Kansas, Nebraska, Colorado, Wyoming, Utah, Nevada, to Sacramento, California, as indicated on a map labeled "Potential Pony Express Trail", dated October 1983 and the

California Trail, extending from the vicinity of Omaha, Nebraska, and Saint Joseph, Missouri, to various points in California, as indicated on a map labeled "Potential California Trail" and dated August 1, 1983. Notwithstanding subsection (b) of this section, the study under this paragraph shall be completed and submitted to the Congress no later than the end of two complete fiscal years beginning after August 28, 1984. Such study shall be separated into two portions, one relating to the Pony Express Trail and one relating to the California Trail.

(31) De Soto Trail, the approximate route taken by the expedition of the Spanish explorer Hernado de Soto in 1539, extending through portions of the States of Florida, Georgia, South Carolina, North Carolina, Tennessee, Alabama, Mississippi, to the area of Little Rock, Arkansas, on to Texas and Louisiana, and any other States which may have been crossed by the expedition. The study under this paragraph shall be prepared in accordance with subsection (b) of this section, except that it shall be completed and submitted to the Congress with recommendations as to the trail's suitability for designation not later than one calendar year after December 11, 1987.

(32) Coronado Trail, the approximate route taken by the expedition of the Spanish explorer Francisco Vasquez de Coronado between 1540 and 1542, extending through portions of the States of Arizona, New Mexico, Texas, Oklahoma, and Kansas. The study under this paragraph shall be prepared in accordance with subsection (b) of this section. In conducting the study under this paragraph, the Secretary shall provide for (A) the review of all

original Spanish documentation on the Coronado Trail, (B) the continuing search for new primary documentation on the trail, and (C) the examination of all information on the archeological sites along the trail.

(33) The route from Selma to Montgomery, Alabama traveled by people in a march dramatizing the need for voting rights legislation, in March 1965, includes Sylvan South Street, Water Avenue, the Edmund Pettus Bridge, and Highway 80. The study under this paragraph shall be prepared in accordance with subsection (b) of this section, except that it shall be completed and submitted to the Congress with recommendations as to the trail's suitability for designation not later than 1 year after July 3, 1990.

(34) American Discovery Trail, extending from Pt. Reyes, California, across the United States through Nevada, Utah, Colorado, Kansas, Nebraska, Missouri, Iowa, Illinois, Indiana, Ohio, West Virginia, Maryland, and the District of Columbia, to Cape Henlopen State Park, Delaware; to include in the central United States a northern route through Colorado, Nebraska, Iowa, Illinois, and Indiana and a southern route through Colorado, Kansas, Missouri, Illinois, and Indiana.

(35) Ala Kahakai Trail in the State of Hawaii, an ancient Hawaiian trail on the Island of Hawaii extending from the northern tip of the Island of Hawaii approximately 175 miles along the western and southern coasts to the northern boundary of Hawai'i Volcanoes National Park.

(36)(A) El Camino Real de Tierra Adentro, the approximately 1,800 mile route extending from

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Mexico City, Mexico, across the international border at El Paso, Texas, to Santa Fe, New Mexico.

(B) The study shall--

(i) examine changing routes within the general corridor;

(ii) examine major connecting branch routes; and

(iii) give due consideration to alternative name designations.

(C) The Secretary of the Interior is authorized to work in cooperation with the Government of Mexico (including, but not limited to providing technical assistance) to determine the suitability and feasibility of establishing an international historic route along the El Camino Real de Tierra Adentro.

(37)(A) El Camino Real Para Los Texas, the approximate series of routes from Saltillo, Monclova, and Guerrero, Mexico across Texas through San Antonio and Nacogdoches, to the vicinity of Los Adaes, Louisiana, together with the evolving routes later known as the San Antonio Road.

(B) The study shall--

(i) examine the changing roads within the historic corridor;

(ii) examine the major connecting branch routes;

(iii) determine the individual or combined suitability and feasibility of routes for potential national historic trail designation;

(iv) consider the preservation heritage plan developed by the Texas Department of Transportation entitled "A Texas Legacy: The Old San Antonio Road and the Caminos Reales", dated January, 1991; and

(v) make recommendations concerning the suitability and feasibility of establishing an international historical park where the trail crosses the United States-Mexico border at Maverick County, Texas, and Guerrero, Mexico.

(C) The Secretary of the Interior is authorized to work in cooperation with the government of Mexico (including, but not limited to providing technical assistance) to determine the suitability and feasibility of establishing an international historic trail along the El Camino Real Para Los Texas.

(D) The study shall be undertaken in consultation with the Louisiana Department of Transportation and Development and the Texas Department of Transportation.

(E) The study shall consider alternative name designations for the trail.

(F) The study shall be completed no later than two years after the date funds are made available for the study.

(38) The Old Spanish Trail, beginning in Santa Fe, New Mexico, proceeding through Colorado and Utah, and ending in Los Angeles, California, and the Northern Branch of the Old Spanish Trail, beginning near Espanola, New Mexico, proceeding through Colorado, and ending near Crescent Junction, Utah.

(39) The Great Western Scenic Trail, a system of trails to accommodate a variety of travel users in a corridor of approximately 3,100 miles in length extending from the Arizona-Mexico border to the Idaho-Montana-Canada border, following the approximate route depicted on the map identified as

“Great Western Trail Corridor, 1988”, which shall be on file and available for public inspection in the Office of the Chief of the Forest Service, United States Department of Agriculture. The trail study shall be conducted by the Secretary of Agriculture, in consultation with the Secretary of the Interior, in accordance with subsection (b) and shall include--

(A) the current status of land ownership and current and potential use along the designated route;

(B) the estimated cost of acquisition of lands or interests in lands, if any; and

(C) an examination of the appropriateness of motorized trail use along the trail.

(40) Star-Spangled Banner National Historic Trail

(A) In general

The Star-Spangled Banner National Historic Trail, tracing the War of 1812 route from the arrival of the British fleet in the Patuxent River in Calvert County and St. Mary's County, Maryland, the landing of the British forces at Benedict, the sinking of the Chesapeake Flotilla at Pig Point, the American defeat at the Battle of Bladensburg, the siege of the Nation's Capital, Washington, District of Columbia (including the burning of the United States Capitol and the White House), the British naval diversions in the upper Chesapeake Bay leading to the Battle of Caulk's Field in Kent County, Maryland, the route of the American troops from Washington through Georgetown, the Maryland Counties of Montgomery, Howard, and Baltimore, and the City of Baltimore, Maryland, to the Battle of North Point, and the

ultimate victory of the Americans at Fort McHenry on September 14, 1814.

(B) Affected areas

The trail crosses eight counties within the boundaries of the State of Maryland, the City of Baltimore, Maryland, and Washington, District of Columbia.

(C) Coordination with other Congressionally mandated activities

The study under this paragraph shall be undertaken in coordination with the study authorized under section 603 of the Omnibus Parks and Public Lands Management Act of 1996 (110 Stat. 4172) and the Chesapeake Bay Gateways and Watertrails Network authorized under the Chesapeake Bay Initiative Act of 1998 (112 Stat. 2961). Such coordination shall extend to any research needed to complete the studies and any findings and implementation actions that result from the studies and shall use available resources to the greatest extent possible to avoid unnecessary duplication of effort.

(D) Deadline for study

Not later than 2 years after funds are made available for the study under this paragraph, the study shall be completed and transmitted with final recommendations to the Committee on Resources in the House of Representatives and the Committee on Energy and Natural Resources in the Senate.

(41) Metacomet-Monadnock-Mattabesett Trail

The Metacomet-Monadnock-Mattabesett Trail, a system of trails and potential trails extending

southward approximately 180 miles through western Massachusetts on the Metacomet-Monadnock Trail, across central Connecticut on the Metacomet Trail and the Mattabesett Trail, and ending at Long Island Sound.

(42) The Long Walk Trail, a series of routes which the Navajo and Mescalero Apache Indian tribes were forced to walk beginning in the fall of 1863 as a result of their removal by the United States Government from their ancestral lands, generally located within a corridor extending through portions of Canyon de Chelley, Arizona, and Albuquerque, Canyon Blanco, Anton Chico, Canyon Piedra Pintado, and Fort Sumner, New Mexico.

(43)(A) The Captain John Smith Chesapeake National Historic Watertrail, a series of routes extending approximately 3,000 miles along the Chesapeake Bay and the tributaries of the Chesapeake Bay in the States of Virginia, Maryland, Pennsylvania, and Delaware and the District of Columbia that traces Captain John Smith's voyages charting the land and waterways of the Chesapeake Bay and the tributaries of the Chesapeake Bay.

(B) The study shall be conducted in consultation with Federal, State, regional, and local agencies and representatives of the private sector, including the entities responsible for administering

(i) the Chesapeake Bay Gateways and Watertrails Network authorized under the Chesapeake Bay Initiative Act of 1998 (16 U.S.C. 461 note; title V of Public Law 105-312); and

(ii) the Chesapeake Bay Program authorized under section 1267 of Title 33.

(C) The study shall include an extensive analysis of the potential impacts the designation of the trail as a national historic watertrail is likely to have on land and water, including docks and piers, along the proposed route or bordering the study route that is privately owned at the time the study is conducted.

(44) Chisholm Trail

(A) In general

The Chisholm Trail (also known as the “Abilene Trail”), from the vicinity of San Antonio, Texas, segments from the vicinity of Cuero, Texas, to Ft. Worth, Texas, Duncan, Oklahoma, alternate segments used through Oklahoma, to Enid, Oklahoma, Caldwell, Kansas, Wichita, Kansas, Abilene, Kansas, and commonly used segments running to alternative Kansas destinations.

(B) Requirement

In conducting the study required under this paragraph, the Secretary of the Interior shall identify the point at which the trail originated south of San Antonio, Texas.

(45) Great Western Trail

(A) In general

The Great Western Trail (also known as the “Dodge City Trail”), from the vicinity of San Antonio, Texas, north-by-northwest through the vicinities of Kerrville and Menard, Texas, north-by-northeast through the vicinities of Coleman and Albany, Texas, north through the vicinity of Vernon, Texas, to Doan's Crossing, Texas, northward through or near the vicinities of Altus, Lone Wolf, Canute, Vici, and May,

Oklahoma, north through Kansas to Dodge City, and north through Nebraska to Ogallala.

(B) Requirement

In conducting the study required under this paragraph, the Secretary of the Interior shall identify the point at which the trail originated south of San Antonio, Texas.

(46) Pike National Historic Trail

The Pike National Historic Trail, a series of routes extending approximately 3,664 miles, which follows the route taken by Lt. Zebulon Montgomery Pike during the 1806-1807 Pike expedition that began in Fort Bellefontaine, Missouri, extended through portions of the States of Kansas, Nebraska, Colorado, New Mexico, and Texas, and ended in Natchitoches, Louisiana.

(d) Trail advisory councils; establishment and termination; term and compensation; membership; chairman

The Secretary charged with the administration of each respective trail shall, within one year of the date of the addition of any national scenic or national historic trail to the System, and within sixty days of November 10, 1978, for the Appalachian and Pacific Crest National Scenic Trails, establish an advisory council for each such trail, each of which councils shall expire ten years from the date of its establishment, except that the Advisory Council established for the Iditarod Historic Trail shall expire twenty years from the date of its establishment. If the appropriate Secretary is unable to establish such an advisory council because of the lack of adequate public interest,

the Secretary shall so advise the appropriate committees of the Congress. The appropriate Secretary shall consult with such council from time to time with respect to matters relating to the trail, including the selection of rights-of-way, standards for the erection and maintenance of markers along the trail, and the administration of the trail. The members of each advisory council, which shall not exceed thirty-five in number, shall serve for a term of two years and without compensation as such, but the Secretary may pay, upon vouchers signed by the chairman of the council, the expenses reasonably incurred by the council and its members in carrying out their responsibilities under this section. Members of each council shall be appointed by the appropriate Secretary as follows:

(1) the head of each Federal department or independent agency administering lands through which the trail route passes, or his designee;

(2) a member appointed to represent each State through which the trail passes, and such appointments shall be made from recommendations of the Governors of such States;

(3) one or more members appointed to represent private organizations, including corporate and individual landowners and land users, which in the opinion of the Secretary, have an established and recognized interest in the trail, and such appointments shall be made from recommendations of the heads of such organizations: Provided, That the Appalachian Trail Conference shall be represented by a sufficient number of persons to represent the various

sections of the country through which the Appalachian Trail passes; and

(4) the Secretary shall designate one member to be chairman and shall fill vacancies in the same manner as the original appointment.

(e) Comprehensive national scenic trail plan; consultation; submission to Congressional committees

Within two complete fiscal years of the date of enactment of legislation designating a national scenic trail, except for the Continental Divide National Scenic Trail and the North Country National Scenic Trail, as part of the system, and within two complete fiscal years of November 10, 1978, for the Pacific Crest and Appalachian Trails, the responsible Secretary shall, after full consultation with affected Federal land managing agencies, the Governors of the affected States, the relevant advisory council established pursuant to subsection (d), and the Appalachian Trail Conference in the case of the Appalachian Trail, submit to the Committee on Natural Resources of the House of Representatives and the Committee on Energy and Natural Resources of the Senate, a comprehensive plan for the acquisition, management, development, and use of the trail, including but not limited to, the following items:

(1) specific objectives and practices to be observed in the management of the trail, including the identification of all significant natural, historical, and cultural resources to be preserved (along with high potential historic sites and high potential route segments in the case of national historic trails), details of anticipated cooperative agreements to be consummated with other entities, and an identified

carrying capacity of the trail and a plan for its implementation;

(2) an acquisition or protection plan, by fiscal year, for all lands to be acquired by fee title or lesser interest, along with detailed explanation of anticipated necessary cooperative agreements for any lands not to be acquired; and

(3) general and site-specific development plans including anticipated costs.

(f) Comprehensive national historic trail plan; consultation; submission to Congressional committees

Within two complete fiscal years of the date of enactment of legislation designating a national historic trail or the Continental Divide National Scenic Trail or the North Country National Scenic Trail as part of the system, the responsible Secretary shall, after full consultation with affected Federal land managing agencies, the Governors of the affected States, and the relevant Advisory Council established pursuant to subsection (d) of this section, submit to the Committee on Natural Resources of the House of Representatives and the Committee on Energy and Natural Resources of the Senate, a comprehensive plan for the management, and use of the trail, including but not limited to, the following items:

(1) specific objectives and practices to be observed in the management of the trail, including the identification of all significant natural, historical, and cultural resources to be preserved, details of any anticipated cooperative agreements to be consummated with State and local government agencies or private interests, and for national scenic

or national historic trails an identified carrying capacity of the trail and a plan for its implementation;

(2) the process to be followed by the appropriate Secretary to implement the marking requirements established in section 1246(c) of this title;

(3) a protection plan for any high potential historic sites or high potential route segments; and

(4) general and site-specific development plans, including anticipated costs.

(g) Revision of feasibility and suitability studies of existing National historic trails

(1) Definitions

In this subsection:

(A) Route

The term “route” includes a trail segment commonly known as a cutoff.

(B) Shared route

The term “shared route” means a route that was a segment of more than 1 historic trail, including a route shared with an existing national historic trail.

(2) Requirements for revision

(A) In general

The Secretary of the Interior shall revise the feasibility and suitability studies for certain national trails for consideration of possible additions to the trails.

(B) Study requirements and objectives

The study requirements and objectives specified in subsection (b) shall apply to a study required by this subsection.

(C) Completion and submission of study

A study listed in this subsection shall be completed and submitted to Congress not later than 3 complete fiscal years from the date funds are made available for the study.

(3) Oregon National Historic Trail

(A) Study required

The Secretary of the Interior shall undertake a study of the routes of the Oregon Trail listed in subparagraph (B) and generally depicted on the map entitled "Western Emigrant Trails 1830/1870" and dated 1991/1993, and of such other routes of the Oregon Trail that the Secretary considers appropriate, to determine the feasibility and suitability of designation of 1 or more of the routes as components of the Oregon National Historic Trail.

(B) Covered routes

The routes to be studied under subparagraph (A) shall include the following:

- (i) Whitman Mission route.
- (ii) Upper Columbia River.
- (iii) Cowlitz River route.
- (iv) Meek cutoff.
- (v) Free Emigrant Road.
- (vi) North Alternate Oregon Trail.
- (vii) Goodale's cutoff.
- (viii) North Side alternate route.
- (ix) Cutoff to Barlow Road.
- (x) Naches Pass Trail.

(4) Pony Express National Historic Trail

The Secretary of the Interior shall undertake a study of the approximately 20-mile southern alternative route of the Pony Express Trail from Wathena, Kansas, to Troy, Kansas, and such other routes of the Pony Express Trail that the Secretary considers appropriate, to determine the feasibility and suitability of designation of 1 or more of the routes as components of the Pony Express National Historic Trail.

(5) California National Historic Trail

(A) Study required

The Secretary of the Interior shall undertake a study of the Missouri Valley, central, and western routes of the California Trail listed in subparagraph (B) and generally depicted on the map entitled “Western Emigrant Trails 1830/1870” and dated 1991/1993, and of such other and shared Missouri Valley, central, and western routes that the Secretary considers appropriate, to determine the feasibility and suitability of designation of 1 or more of the routes as components of the California National Historic Trail.

(B) Covered routes

The routes to be studied under subparagraph (A) shall include the following:

(i) Missouri Valley routes

(I) Blue Mills-Independence Road.

(II) Westport Landing Road.

(III) Westport-Lawrence Road.

(IV) Fort Leavenworth-Blue River route.

(V) Road to Amazonia.

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- (VI) Union Ferry Route.
- (VII) Old Wyoming-Nebraska City cutoff.
- (VIII) Lower Plattsmouth Route.
- (IX) Lower Bellevue Route.
- (X) Woodbury cutoff.
- (XI) Blue Ridge cutoff.
- (XII) Westport Road.
- (XIII) Gum Springs-Fort Leavenworth route.
- (XIV) Atchison/Independence Creek routes.
- (XV) Fort Leavenworth-Kansas River route.
- (XVI) Nebraska City cutoff routes.
- (XVII) Minersville-Nebraska City Road.
- (XVIII) Upper Plattsmouth route.
- (XIX) Upper Bellevue route.
- (ii) Central routes
  - (I) Cherokee Trail, including splits.
  - (II) Weber Canyon route of Hastings cutoff.
  - (III) Bishop Creek cutoff.
  - (IV) McAuley cutoff.
  - (V) Diamond Springs cutoff.
  - (VI) Secret Pass.
  - (VII) Greenhorn cutoff.
  - (VIII) Central Overland Trail.
- (iii) Western routes
  - (I) Bidwell-Bartleson route.
  - (II) Georgetown/Dagget Pass Trail.
  - (III) Big Trees Road.

- (IV) Grizzly Flat cutoff.
- (V) Nevada City Road.
- (VI) Yreka Trail.
- (VII) Henness Pass route.
- (VIII) Johnson cutoff.
- (IX) Luther Pass Trail.
- (X) Volcano Road.
- (XI) Sacramento-Coloma Wagon Road.
- (XII) Burnett cutoff.
- (XIII) Placer County Road to Auburn.
- (6) Mormon Pioneer National Historic Trail
  - (A) Study required

The Secretary of the Interior shall undertake a study of the routes of the Mormon Pioneer Trail listed in subparagraph (B) and generally depicted in the map entitled "Western Emigrant Trails 1830/1870" and dated 1991/1993, and of such other routes of the Mormon Pioneer Trail that the Secretary considers appropriate, to determine the feasibility and suitability of designation of 1 or more of the routes as components of the Mormon Pioneer National Historic Trail.

(B) Covered routes

The routes to be studied under subparagraph (A) shall include the following:

- (i) 1846 Subsequent routes A and B (Lucas and Clarke Counties, Iowa).
- (ii) 1856-57 Handcart route (Iowa City to Council Bluffs).

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- (iii) Keokuk route (Iowa).
- (iv) 1847 Alternative Elkhorn and Loup River Crossings in Nebraska.
- (v) Fort Leavenworth Road; Ox Bow route and alternates in Kansas and Missouri (Oregon and California Trail routes used by Mormon emigrants).
- (vi) 1850 Golden Pass Road in Utah.
- (7) Shared California and Oregon Trail routes
  - (A) Study required

The Secretary of the Interior shall undertake a study of the shared routes of the California Trail and Oregon Trail listed in subparagraph (B) and generally depicted on the map entitled "Western Emigrant Trails 1830/1870" and dated 1991/1993, and of such other shared routes that the Secretary considers appropriate, to determine the feasibility and suitability of designation of 1 or more of the routes as shared components of the California National Historic Trail and the Oregon National Historic Trail.

(B) Covered routes

The routes to be studied under subparagraph (A) shall include the following:

- (i) St. Joe Road.
- (ii) Council Bluffs Road.
- (iii) Sublette cutoff.
- (iv) Applegate route.
- (v) Old Fort Kearny Road (Oxbow Trail).
- (vi) Childs cutoff.
- (vii) Raft River to Applegate.

**16 U.S.C. §1246**

(a) Consultation of Secretary with other agencies; transfer of management responsibilities; selection of rights-of-way; criteria for selection; notice; impact upon established uses

(1)(A) The Secretary charged with the overall administration of a trail pursuant to section 1244(a) of this title shall, in administering and managing the trail, consult with the heads of all other affected State and Federal agencies. Nothing contained in this chapter shall be deemed to transfer among Federal agencies any management responsibilities established under any other law for federally administered lands which are components of the National Trails System. Any transfer of management responsibilities may be carried out between the Secretary of the Interior and the Secretary of Agriculture only as provided under subparagraph (B).

(B) The Secretary charged with the overall administration of any trail pursuant to section 1244(a) of this title may transfer management of any specified trail segment of such trail to the other appropriate Secretary pursuant to a joint memorandum of agreement containing such terms and conditions as the Secretaries consider most appropriate to accomplish the purposes of this chapter. During any period in which management responsibilities for any trail segment are transferred under such an agreement, the management of any such segment shall be subject to the laws, rules, and regulations of the Secretary provided with the management authority under the agreement, except to such extent as the agreement may otherwise expressly provide.

(2) Pursuant to section 1244(a) of this title, the appropriate Secretary shall select the rights-of-way for national scenic and national historic trails and shall publish notice of the availability of appropriate maps or descriptions in the Federal Register: Provided, That in selecting the rights-of-way full consideration shall be given to minimizing the adverse effects upon the adjacent landowner or user and his operation. Development and management of each segment of the National Trails System shall be designed to harmonize with and complement any established multiple-use plans for that specific area in order to insure continued maximum benefits from the land. The location and width of such rights-of-way across Federal lands under the jurisdiction of another Federal agency shall be by agreement between the head of that agency and the appropriate Secretary. In selecting rights-of-way for trail purposes, the Secretary shall obtain the advice and assistance of the States, local governments, private organizations, and landowners and land users concerned.

(b) Relocation of segment of national, scenic or historic, trail right-of-way; determination of necessity with official having jurisdiction; necessity for Act of Congress

After publication of notice of the availability of appropriate maps or descriptions in the Federal Register, the Secretary charged with the administration of a national scenic or national historic trail may relocate segments of a national scenic or national historic trail right-of-way, with the concurrence of the head of the Federal agency having jurisdiction over the lands involved, upon a

determination that: (i) such a relocation is necessary to preserve the purposes for which the trail was established, or (ii) the relocation is necessary to promote a sound land management program in accordance with established multiple-use principles: Provided, That a substantial relocation of the rights-of-way for such trail shall be by Act of Congress.

(c) Facilities on national, scenic or historic, trails; permissible activities; use of motorized vehicles; trail markers; establishment of uniform marker; placement of uniform markers; trail interpretation sites

National scenic or national historic trails may contain campsites, shelters, and related-public-use facilities. Other uses along the trail, which will not substantially interfere with the nature and purposes of the trail, may be permitted by the Secretary charged with the administration of the trail. Reasonable efforts shall be made to provide sufficient access opportunities to such trails and, to the extent practicable, efforts shall be made to avoid activities incompatible with the purposes for which such trails were established. The use of motorized vehicles by the general public along any national scenic trail shall be prohibited and nothing in this chapter shall be construed as authorizing the use of motorized vehicles within the natural and historical areas of the national park system, the national wildlife refuge system, the national wilderness preservation system where they are presently prohibited or on other Federal lands where trails are designated as being closed to such use by the appropriate Secretary: Provided, That the Secretary charged with the administration of such trail shall establish regulations which shall authorize

the use of motorized vehicles when, in his judgment, such vehicles are necessary to meet emergencies or to enable adjacent landowners or land users to have reasonable access to their lands or timber rights: Provided further, That private lands included in the national recreation, national scenic, or national historic trails by cooperative agreement of a landowner shall not preclude such owner from using motorized vehicles on or across such trails or adjacent lands from time to time in accordance with regulations to be established by the appropriate Secretary. Where a national historic trail follows existing public roads, developed rights-of-way or waterways, and similar features of man's nonhistorically related development, approximating the original location of a historic route, such segments may be marked to facilitate retracement of the historic route, and where a national historic trail parallels an existing public road, such road may be marked to commemorate the historic route. Other uses along the historic trails and the Continental Divide National Scenic Trail, which will not substantially interfere with the nature and purposes of the trail, and which, at the time of designation, are allowed by administrative regulations, including the use of motorized vehicles, shall be permitted by the Secretary charged with the administration of the trail. The Secretary of the Interior and the Secretary of Agriculture, in consultation with appropriate governmental agencies and public and private organizations, shall establish a uniform marker, including thereon an appropriate and distinctive symbol for each national recreation, national scenic, and national historic trail. Where the trails cross lands administered by Federal agencies

such markers shall be erected at appropriate points along the trails and maintained by the Federal agency administering the trail in accordance with standards established by the appropriate Secretary and where the trails cross non-Federal lands, in accordance with written cooperative agreements, the appropriate Secretary shall provide such uniform markers to cooperating agencies and shall require such agencies to erect and maintain them in accordance with the standards established. The appropriate Secretary may also provide for trail interpretation sites, which shall be located at historic sites along the route of any national scenic or national historic trail, in order to present information to the public about the trail, at the lowest possible cost, with emphasis on the portion of the trail passing through the State in which the site is located. Wherever possible, the sites shall be maintained by a State agency under a cooperative agreement between the appropriate Secretary and the State agency.

(d) Use and acquisition of lands within exterior boundaries of areas included within right-of-way

Within the exterior boundaries of areas under their administration that are included in the right-of-way selected for a national recreation, national scenic, or national historic trail, the heads of Federal agencies may use lands for trail purposes and may acquire lands or interests in lands by written cooperative agreement, donation, purchase with donated or appropriated funds or exchange.

(e) Right-of-way lands outside exterior boundaries of federally administered areas; cooperative agreements or acquisition; failure to agree or acquire; agreement

or acquisition by Secretary concerned; right of first refusal for original owner upon disposal

Where the lands included in a national scenic or national historic trail right-of-way are outside of the exterior boundaries of federally administered areas, the Secretary charged with the administration of such trail shall encourage the States or local governments involved (1) to enter into written cooperative agreements with landowners, private organizations, and individuals to provide the necessary trail right-of-way, or (2) to acquire such lands or interests therein to be utilized as segments of the national scenic or national historic trail: Provided, That if the State or local governments fail to enter into such written cooperative agreements or to acquire such lands or interests therein after notice of the selection of the right-of-way is published, the appropriate Secretary may (i) enter into such agreements with landowners, States, local governments, private organizations, and individuals for the use of lands for trail purposes, or (ii) acquire private lands or interests therein by donation, purchase with donated or appropriated funds or exchange in accordance with the provisions of subsection (f) of this section: Provided further, That the appropriate Secretary may acquire lands or interests therein from local governments or governmental corporations with the consent of such entities. The lands involved in such rights-of-way should be acquired in fee, if other methods of public control are not sufficient to assure their use for the purpose for which they are acquired: Provided, That if the Secretary charged with the administration of such trail permanently relocates the right-of-way and disposes of all title or interest in the land, the original

owner, or his heirs or assigns, shall be offered, by notice given at the former owner's last known address, the right of first refusal at the fair market price.

(f) Exchange of property within the right-of-way by Secretary of the Interior; property subject to exchange; equalization of value of property; exchange of national forest lands by Secretary of Agriculture; tracts lying outside trail acquisition area

(1) The Secretary of the Interior, in the exercise of his exchange authority, may accept title to any non-Federal property within the right-of-way and in exchange therefor he may convey to the grantor of such property any federally owned property under his jurisdiction which is located in the State wherein such property is located and which he classifies as suitable for exchange or other disposal. The values of the properties so exchanged either shall be approximately equal, or if they are not approximately equal the values shall be equalized by the payment of cash to the grantor or to the Secretary as the circumstances require. The Secretary of Agriculture, in the exercise of his exchange authority, may utilize authorities and procedures available to him in connection with exchanges of national forest lands.

(2) In acquiring lands or interests therein for a National Scenic or Historic Trail, the appropriate Secretary may, with consent of a landowner, acquire whole tracts notwithstanding that parts of such tracts may lie outside the area of trail acquisition. In furtherance of the purposes of this chapter, lands so acquired outside the area of trail acquisition may be exchanged for any non-Federal lands or interests therein within the trail right-of-way, or disposed of in

accordance with such procedures or regulations as the appropriate Secretary shall prescribe, including: (i) provisions for conveyance of such acquired lands or interests therein at not less than fair market value to the highest bidder, and (ii) provisions for allowing the last owners of record a right to purchase said acquired lands or interests therein upon payment or agreement to pay an amount equal to the highest bid price. For lands designated for exchange or disposal, the appropriate Secretary may convey these lands with any reservations or covenants deemed desirable to further the purposes of this chapter. The proceeds from any disposal shall be credited to the appropriation bearing the costs of land acquisition for the affected trail.

(g) Condemnation proceedings to acquire private lands; limitations; availability of funds for acquisition of lands or interests therein; acquisition of high potential, route segments or historic sites

The appropriate Secretary may utilize condemnation proceedings without the consent of the owner to acquire private lands or interests therein pursuant to this section only in cases where, in his judgment, all reasonable efforts to acquire such lands or interests therein by negotiation have failed, and in such cases he shall acquire only such title as, in his judgment, is reasonably necessary to provide passage across such lands: Provided, That condemnation proceedings may not be utilized to acquire fee title or lesser interests to more than an average of one hundred and twenty-five acres per mile. Money appropriated for Federal purposes from the land and water conservation fund shall, without prejudice to

appropriations from other sources, be available to Federal departments for the acquisition of lands or interests in lands for the purposes of this chapter. For national historic trails, direct Federal acquisition for trail purposes shall be limited to those areas indicated by the study report or by the comprehensive plan as high potential route segments or high potential historic sites. Except for designated protected components of the trail, no land or site located along a designated national historic trail or along the Continental Divide National Scenic Trail shall be subject to the provisions of section 303 of Title 49 unless such land or site is deemed to be of historical significance under appropriate historical site criteria such as those for the National Register of Historic Places.

(h) Development and maintenance of national, scenic or historic, trails; cooperation with States over portions located outside of federally administered areas; cooperative agreements; participation of volunteers; reservation of right-of-way for trails in conveyances by Secretary of the Interior

(1) The Secretary charged with the administration of a national recreation, national scenic, or national historic trail shall provide for the development and maintenance of such trails within federally administered areas and shall cooperate with and encourage the States to operate, develop, and maintain portions of such trails which are located outside the boundaries of federally administered areas. When deemed to be in the public interest, such Secretary may enter written cooperative agreements with the States or their political subdivisions,

landowners, private organizations, or individuals to operate, develop, and maintain any portion of such a trail either within or outside a federally administered area. Such agreements may include provisions for limited financial assistance to encourage participation in the acquisition, protection, operation, development, or maintenance of such trails, provisions providing volunteer in the park or volunteer in the forest status (in accordance with section 102301 of Title 54 and the Volunteers in the Forests Act of 1972) to individuals, private organizations, or landowners participating in such activities, or provisions of both types. The appropriate Secretary shall also initiate consultations with affected States and their political subdivisions to encourage--

(A) the development and implementation by such entities of appropriate measures to protect private landowners from trespass resulting from trail use and from unreasonable personal liability and property damage caused by trail use, and

(B) the development and implementation by such entities of provisions for land practices, compatible with the purposes of this chapter, for property within or adjacent to trail rights-of-way. After consulting with States and their political subdivisions under the preceding sentence, the Secretary may provide assistance to such entities under appropriate cooperative agreements in the manner provided by this subsection.

(2) Whenever the Secretary of the Interior makes any conveyance of land under any of the public land laws, he may reserve a right-of-way for trails to the

extent he deems necessary to carry out the purposes of this chapter.

(i) Regulations; issuance; concurrence and consultation; revision; publication; violations; penalties; utilization of national park or national forest authorities

The appropriate Secretary, with the concurrence of the heads of any other Federal agencies administering lands through which a national recreation, national scenic, or national historic trail passes, and after consultation with the States, local governments, and organizations concerned, may issue regulations, which may be revised from time to time, governing the use, protection, management, development, and administration of trails of the national trails system. In order to maintain good conduct on and along the trails located within federally administered areas and to provide for the proper government and protection of such trails, the Secretary of the Interior and the Secretary of Agriculture shall prescribe and publish such uniform regulations as they deem necessary and any person who violates such regulations shall be guilty of a misdemeanor, and may be punished by a fine of not more than \$500, or by imprisonment not exceeding six months, or by both such fine and imprisonment. The Secretary responsible for the administration of any segment of any component of the National Trails System (as determined in a manner consistent with subsection (a)(1) of this section) may also utilize authorities related to units of the national park system or the national forest system, as the case may

be, in carrying out his administrative responsibilities for such component.

(j) Types of trail use allowed

Potential trail uses allowed on designated components of the national trails system may include, but are not limited to, the following: bicycling, cross-country skiing, day hiking, equestrian activities, jogging or similar fitness activities, trail biking, overnight and long-distance backpacking, snowmobiling, and surface water and underwater activities. Vehicles which may be permitted on certain trails may include, but need not be limited to, motorcycles, bicycles, four-wheel drive or all-terrain off-road vehicles. In addition, trail access for handicapped individuals may be provided. The provisions of this subsection shall not supersede any other provisions of this chapter or other Federal laws, or any State or local laws.

(k) Donations or other conveyances of qualified real property interests

For the conservation purpose of preserving or enhancing the recreational, scenic, natural, or historical values of components of the national trails system, and environs thereof as determined by the appropriate Secretary, landowners are authorized to donate or otherwise convey qualified real property interests to qualified organizations consistent with section 170(h)(3) of Title 26, including, but not limited to, right-of-way, open space, scenic, or conservation easements, without regard to any limitation on the nature of the estate or interest otherwise transferable within the jurisdiction where the land is located. The conveyance of any such interest in land in accordance

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with this subsection shall be deemed to further a Federal conservation policy and yield a significant public benefit for purposes of section 6 of Public Law 96-541.

**Weeks Act**

**16 U.S.C. §521**

Subject to the provisions of section 519 of this title the lands acquired under this Act shall be permanently reserved, held, and administered as national forest lands under the provisions of section 471 of this title and Acts supplemental to and amendatory thereof. And the Secretary of Agriculture may from time to time divide the lands acquired under this Act into such specific national forests and so designate the same as he may deem best for administrative purposes.