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December 1, 2022

**BY EMAIL**

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**Re: Request for Comprehensive Reevaluation of and Scoping Comments for the Mountain Valley Pipeline Project**

Dear Deputy Under Secretary Harrell, Chief Moore, Director Stone-Manning, State Director Leverette, Regional Forester Arney, Forest Supervisor Timm, and District Manager Swithers:

On behalf of our millions of members and supporters, we respectfully request that the U.S. Forest Service and the Bureau of Land Management (BLM) comprehensively reevaluate the Mountain Valley Pipeline's (MVP's) proposed crossing of the Jefferson National Forest in the upcoming Supplemental Environmental Impact Statement (SEIS) under the National Environmental Policy Act (NEPA).<sup>1</sup> This reevaluation should begin with a 30-day public scoping comment period due to the significant impacts already caused by the pipeline, substantial new information available since the previous invalidated SEIS was completed, and the threats the pipeline poses to the Jefferson National Forest and surrounding communities. In addition, we request a public scoping meeting in the region and a meeting with you to discuss our concerns.

**I. The Forest Service and the BLM Must Comprehensively Reevaluate the Proposed Mountain Valley Pipeline Project.**

We have serious concerns about the Mountain Valley Pipeline Project. MVP is already causing and would continue to cause significant and devastating impacts to the Jefferson National Forest and nearby communities. These and other impacts must be thoroughly evaluated and factor into any final decision on the project.

MVP is a proposed 303-mile fracked gas pipeline that would cross some of the steepest slopes in the Appalachian regions of Virginia and West Virginia, including the Jefferson National Forest. The project, originally projected to be in service by 2020, is years behind schedule, more than \$3 billion over budget, and, according to MVP's own filings, only 55.8% complete. Construction, which began in 2018, under now voided authorizations, has led to over 450 water-quality-related violations in Virginia and West Virginia.<sup>2</sup>

The Forest Service and the BLM must take the requisite hard look at MVP by carefully and comprehensively reevaluating the project in the SEIS and thoroughly considering real-world data on the pipeline's preexisting and ongoing impacts. Allowing construction within the Jefferson National Forest would significantly threaten the integrity of the forest and continue to

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<sup>1</sup> The Forest Service should apply the same level of NEPA analysis as required under the 1978 NEPA regulations in effect prior to the Council on Environmental Quality's (CEQ's) September 2020 revisions. The 2020 regulations state that "[a]n agency may apply the regulations in this subchapter to ongoing activities and environmental documents begun before September 14, 2020." 40 C.F.R. § 1506.13 (2020). As a supplement to the Federal Energy Regulatory Commission EIS and a reevaluation of the Forest Service's prior SEIS – both undisputedly subject to the 1978 regulations – the Forest Service should apply the level of NEPA analysis required under the 1978 regulations and expressly state that it is doing so in the SEIS. Additionally, CEQ has restored the NEPA "effects" definitions and "reasonable alternatives" definitions. *See* 87 Fed. Reg. 23,453, 23,469–23,470 (Apr. 20, 2022).

<sup>2</sup> Debra Ferrell, *Citizen Groups Challenge Virginia Approval for Mountain Valley Pipeline*, Star Tribune (Dec. 29, 2021), [https://www.chathamstartribune.com/news/article\\_186a457c-68ce-11ec-9892-f3759beb004c.html](https://www.chathamstartribune.com/news/article_186a457c-68ce-11ec-9892-f3759beb004c.html).

expose Virginia and West Virginia communities – and the water upon which they depend – to considerable environmental risks. Many of these risks were not properly evaluated in the agencies’ prior review.

We are deeply concerned that, in the November 17, 2022, Notice of Intent to prepare an SEIS, the Forest Service already has a thumb on the scales by proposing “to amend the Jefferson National Forest Land Management Plan as necessary to allow for the MVP to cross the Jefferson National Forest.”<sup>3</sup> This proposal is baffling given the project as proposed is clearly “inconsistent with several Land Management Plan standards”<sup>4</sup> and the U.S. Court of Appeals for the Fourth Circuit has now twice deemed unlawful and vacated amendment of the Jefferson National Forest Land Management Plan to allow the project (along with the BLM’s right-of-way and temporary use permit grants).<sup>5</sup> The Court’s recent ruling creates not only the opportunity but also the obligation for the Forest Service to adequately and fully reconsider and update its NEPA analysis, along with properly applying the 2012 Planning Rule’s requirements.<sup>6</sup>

If the Forest Service amends the Land Management Plan to allow MVP, it risks setting a precedent in applying the 2012 Planning Rule that completely undermines the intent of the Rule to impose “substantive requirements . . . to *maintain or restore* the ecological integrity of terrestrial and aquatic ecosystems and watersheds in the plan area.”<sup>7</sup> The Forest Service and the BLM thus maintain full authority to deny the pipeline from crossing the Jefferson National Forest. Indeed, if the Forest Service finds that amending the Land Management Plan is incompatible with the 2012 Planning Rule’s requirements – or any other law – the agencies must not allow the pipeline to cross the forest.

The Forest Service and the BLM should not consider themselves limited to evaluating only those issues specifically addressed by the Fourth Circuit. However, in the Notice of Intent, the Forest Service appears to be doing just that, stating that the “SEIS will focus on the topics identified by the Court”<sup>8</sup> and that:

[t]o resolve the issues identified by the Court, there is a need, at a minimum, to consider information about actual sedimentation and erosion impacts, consider FERC’s 2021 Environmental Assessment of the use of trenchless boring for crossing streams, and comply with the Forest Service 2012 Planning Rule soil and riparian resources requirements at 36 CFR 219.8.<sup>9</sup>

This language indicates that the Forest Service is limiting its obligations to consider MVP’s new application only to those “issues identified by the Court.” The Forest Service and the BLM must instead consider all issues relevant to their decision on whether to allow MVP to cross the forest,

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<sup>3</sup> 87 Fed. Reg. 68,996 (Nov. 17, 2022).

<sup>4</sup> *Id.*

<sup>5</sup> *Wild Va. v. United States Forest Serv.*, 24 F.4th 915, 932 (4th Cir. 2022); *Sierra Club, Inc. v. U.S. Forest Serv.*, 897 F.3d 582 (4th Cir. 2018).

<sup>6</sup> *See* 36 C.F.R. Part 219.

<sup>7</sup> *Wild Va.*, 24 F.4th at 931–32 (quoting 36 C.F.R. § 219.8(a)(1)) (emphasis in original) (internal quotation marks omitted).

<sup>8</sup> 87 Fed. Reg. at 68,997.

<sup>9</sup> *Id.* at 68,996.

including those outside the limited scope the agencies have preliminarily identified in the Notice of Intent. The Forest Service is proposing to make a new decision<sup>10</sup> in response to a new application from MVP, obligating the agency to consider all issues necessary to support its final decision.

As a starting place, the SEIS must address (among other issues) the fundamental deficiencies identified by the Fourth Circuit in vacating the previous SEIS. The Fourth Circuit held that the Forest Service and the BLM “inadequately considered the *actual* sedimentation and erosion impacts of the Pipeline . . . [and] prematurely authorized the use of the conventional bore method to construct stream crossings.”<sup>11</sup> These failings implicate the need to both properly analyze on-the-ground impacts and determine whether the sedimentation and erosion impacts – among the many other adverse project impacts – mean that the pipeline crossing is incompatible with the 2012 Planning Rule’s substantive requirements.

Importantly, the Court explicitly rejected any assumption that the Forest Service or the BLM must allow MVP to cross the Jefferson National Forest, explaining that, “[i]f the Forest Service could circumvent the requirements of the 2012 Planning Rule simply by passing project-specific amendments on an ad hoc basis[,] . . . the substantive requirements in the 2012 Planning Rule . . . would be meaningless.”<sup>12</sup> The Court thus concluded that the Forest Service “failed to comply with [its own] 2012 Planning Rule.”<sup>13</sup> We urge the agencies not to repeat this mistake in the evaluation of the project’s compatibility – or lack thereof – with the 2012 Planning Rule and the Land Management Plan for the Jefferson National Forest.

We are further concerned that the Forest Service is planning to evaluate only two alternatives: the no-action alternative and allowing MVP to cross the Jefferson National Forest.<sup>14</sup> The agencies must consider a range of reasonable alternatives consistent with the agencies’ broad authority to condition, restrict, and prohibit the pipeline within the forest.<sup>15</sup>

Moreover, since the agencies’ last review, new information has indeed come to light that the Forest Service must properly consider in its reevaluation of the project. The Notice of Intent acknowledges that “there may be relevant new information or changed environmental conditions to consider.”<sup>16</sup> But without a public scoping process, as urged below, it is unclear how the agencies intend to adequately identify new information and changed environmental conditions.

This new information includes, but is not limited to, additional sedimentation and erosion impacts (that FERC’s EIS predicted would not occur), additional failure of mitigation measures, and impacts to the tricolored bat, which is being considered for listing under the Endangered

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<sup>10</sup> See, e.g., Emily Hammond Mezell, *Deference and Dialogue in Administrative Law*, 111 Colum. L. Rev. 1722, 1738 (2011) (“When an agency action is vacated, it is essentially extinguished; if the agency wishes to try again, it must initiate procedures anew.”).

<sup>11</sup> *Wild Va.*, 24 F.4th at 931–32 (emphasis added).

<sup>12</sup> *Id.* at 931–32 (quoting *Cowpasture River Pres. Ass’n v. Forest Serv.*, 911 F.3d 150, 164 (4th Cir. 2018), *rev’d and remanded on other grounds*, 140 S. Ct. 1837 (2020)) (omissions in original).

<sup>13</sup> *Id.*

<sup>14</sup> 87 Fed. Reg. at 68,997.

<sup>15</sup> See 36 C.F.R. § 219.8(a)(1).

<sup>16</sup> 87 Fed. Reg. at 68,996.

Species Act, along with the latest data on and impacts to the Roanoke logperch and the candy darter. The agencies must not only comprehensively address new information, but also ensure that any analysis and decision are consistent with NEPA, the 2012 Planning Rule, the Endangered Species Act, the Clean Water Act, the National Forest Management Act, the Weeks Act, the Land Management Plan for the Jefferson National Forest, and climate imperatives.

## **II. The Forest Service and the BLM Should Ensure an Open Process by Holding a Public Scoping Comment Period and a Public Scoping Meeting in the Region.**

To ensure both a more efficient and robust NEPA review of MVP and an open process that allows adequate public participation, we strongly urge the Forest Service to hold a 30-day public scoping comment period and a public scoping meeting for communities in the affected region, along with allowing for pre-decisional administrative review. We are concerned that, in the Notice of Intent, the Forest Service is instead rushing forward with no scoping period, no public meetings, no pre-decisional review, and release of the draft SEIS in less than two months.<sup>17</sup>

The Forest Service states that “[s]coping will not be repeated” for the SEIS.<sup>18</sup> Though the Forest Service typically finds that “no scoping is required” when preparing an SEIS,<sup>19</sup> the unique circumstances of MVP support taking a different approach.

First, as outlined above, there are numerous demonstrable examples of the prior review’s deficiencies. Not only did the previous review fail to accurately assess the severity of the project’s environmental impacts, but, as the Fourth Circuit noted, the Forest Service also “failed to comply with [its own] 2012 Planning Rule.”<sup>20</sup> Second, the new SEIS will supplement a stale EIS prepared by the Federal Energy Regulatory Commission (FERC) in June 2017 – more than five years ago. And third, without a public scoping process, the Forest Service cannot adequately identify what new information and changed circumstances have arisen, which the Notice of Intent states the agency will consider. These special circumstances call for the Forest Service and the BLM to fully engage the public to help determine the proper scope of the SEIS on remand.

Holding public scoping and a public scoping meeting in the region would also produce a more efficient process. The Forest Service and the BLM decisions to approve MVP have twice been deemed unlawful. Communities in the region affected by MVP can provide to the agencies significant and critical information about the pipeline’s impacts that would inform the scope of issues necessary to consider in the SEIS. Without public scoping, the agencies risk, yet again, ignoring key issues. Indeed, the very purpose of scoping is for agencies to receive help identifying what is important to analyze in a NEPA analysis. The Forest Service’s plan to keep its task small will incentivize it to ignore vital issues in the SEIS, rendering a legally vulnerable decision. Public scoping could help the agencies avoid this problem.

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<sup>17</sup> 87 Fed Reg. at 68,996.

<sup>18</sup> *Id.* at 68,997.

<sup>19</sup> U.S. Forest Service, *NEPA (National Environmental Policy Act) NEPA and the Planning Process*, <https://www.fs.usda.gov/detail/ashley/landmanagement/planning/?cid=fseprd603975#:~:text=An%20agency%20may%20have%20to,that%20no%20scoping%20is%20required> (last visited November 11, 2022).

<sup>20</sup> *Wild Va.*, 24 F.4th at 932.

We are also concerned that – as it did under the Trump Administration – the Forest Service yet again plans to evade pre-decisional administrative review by designating the Under Secretary as the responsible official.<sup>21</sup> Project-specific forest plan amendments, as here, are typically subject to a pre-decisional review process.<sup>22</sup> This process is intended to have more eyes on a proposal to help ensure legally sound decision-making,<sup>23</sup> which ultimately leads to greater efficiency by creating more resilient, defensible decisions. The Forest Service should provide for this pre-decisional administrative review process.

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In sum, we strongly urge the Forest Service and the BLM to carefully and comprehensively reevaluate the SEIS on remand, to provide at least a 30-day public scoping comment period, to hold a public scoping meeting in the region, and to provide for a pre-decisional administrative review process. Lastly, we request a meeting with you to discuss our concerns and better understand the process the Forest Service and the BLM intend to follow regarding MVP.

We appreciate your timely consideration of these requests.

Respectfully,

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<sup>21</sup> 87 Fed. Reg. at 68,997.

<sup>22</sup> 36 C.F.R. Part 218.

<sup>23</sup> 77 Fed. Reg. 47,337, 47,342 (citing Consolidated Appropriations Act, 2012, 125 Stat 786 § 428 (December 23, 2011)).

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