RECORD NO. 17-2399(L), 18-1012

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

SIERRA CLUB, INC.; APPALACHIAN VOICES; WILD VIRGINIA, INC. THE WILDERNESS SOCIETY, PRESERVE CRAIG, INC., and SAVE MONROE, INC.

Petitioners,

v.

UNITED STATES FOREST SERVICE; UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondents,

MOUNTAIN VALLEY PIPELINE, LLC

Intervenor.

ON PETITION FOR REVIEW OF A DECISION BY THE UNITED STATES FOREST SERVICE

BRIEF OF CHEROKEE FOREST VOICES, THE CLINCH COALITION, GEORGIA FORESTWATCH, AND MOUNTAINTRUE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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

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

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 17-2399, 18-1012 Caption: Sierra Club, et al., v. United States Forest Service

Pursuant to FRAP 26.1 and Local Rule 26.1,

Cherokee Forest Voices
(name of party/amicus)

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

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

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

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

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

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

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

Signature: /s/ J. Patrick Hunter Date: 2/23/2018

Counsel for: Cherokee Forest Voices

CERTIFICATE OF SERVICE

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I certify that on 2/23/2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ J. Patrick Hunter (signature) 2/23/2018 (date)

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No. 17-2399, 18-1012 Caption: Sierra Club, et al., v. United States Forest Service

Pursuant to FRAP 26.1 and Local Rule 26.1,

The Clinch Coalition
(name of party/amicus)

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

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

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

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

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

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

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

Signature: /s/ J. Patrick Hunter Date: 2/23/2018

Counsel for: Clinch Coalition

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No. 17-2399, 18-1012 Caption: Sierra Club, et al., v. United States Forest Service

Pursuant to FRAP 26.1 and Local Rule 26.1,

Georgia ForestWatch
(name of party/amicus)

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

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

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

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

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

Signature: /s/ J. Patrick Hunter Date: 2/23/2018

Counsel for: Georgia ForestWatch

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/s/ J. Patrick Hunter
(signature)

2/23/2018
(date)

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No. 17-2399, 18-1012 Caption: Sierra Club, et al., v. United States Forest Service

Pursuant to FRAP 26.1 and Local Rule 26.1,

MountainTrue
(name of party/amicus)

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

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

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

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

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

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

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

Signature: /s/ J. Patrick Hunter Date: 2/23/2018

Counsel for: MountainTrue

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/s/ J. Patrick Hunter (signature) 2/23/2018 (date)

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STATEMENT OF COUNSEL

Amici submit this brief under Fed. R. App. P. 29(a). No party or their counsel in this litigation authored any part of the brief. No person other than *amici* and their undersigned counsel contributed money to fund preparing or submitting the brief.

IDENTITY AND INTEREST OF *AMICI CURIAE*

Cherokee Forest Voices, The Clinch Coalition, Georgia ForestWatch, and MountainTrue (collectively, "forest advocates") are forest-protection groups with missions to protect and promote national forests in four states.

Cherokee Forest Voices works to protect the Cherokee National Forest in Tennessee. Its mission is "the restoration and preservation of biodiversity, improved protection of fish, wildlife, plants, soil and water resources, an increase in the size of existing Wilderness Areas, designation of additional Wilderness Areas, increased availability of nature oriented recreation and the protection of scenic values."[1]

The Clinch Coalition advocates for protection of forest resources in the Jefferson National Forest in Virginia. Its mission is to "protect and preserve the

[1] Cherokee Forest Voices, Our Mission, http://cherokeeforestvoices.org/about-the-jcta.html (last visited February 21, 2018).

forest, wildlife, and watersheds of our National Forest and surrounding communities for present and future generations."[2]

Georgia ForestWatch works throughout Georgia's Chattahoochee-Oconee National Forest. Its mission is to "promote sustainable management that leads to naturally diverse and healthy forests and watersheds within the more than 867,510 acres of national forest lands in Georgia; to engage and educate the public to join in this effort; and to promote preservation of this legacy for future generations."[3]

MountainTrue's forest-protection program covers the Pisgah and Nantahala National Forests in North Carolina. MountainTrue's mission is to "champion[] resilient forests, clean waters and healthy communities in Western North Carolina."[4]

These forest advocates fulfill their missions by monitoring conditions on the ground, promoting awareness of issues related to management of national forests, collaborating with stakeholders and agency officials, participating in environmental review of agency decisions, and, at times, challenging activities that are inconsistent with relevant land and resource management plans ("forest plans")

[2] The Clinch Coalition, About TCC, https://www.clinchcoalition.net/about-tcc (last visited February 21, 2018).
[3] Georgia ForestWatch, Who We Are, http://gafw.org/who-we-are/ (last visited February 21, 2018).
[4] MountainTrue, About Us, https://mountaintrue.org/about-us/ (last visited February 21, 2018).

or other legal requirements. Each group has full-time staff dedicated to forest protection work. The groups advocate on behalf of members who share their values and vision for national forest management.

Forest advocates have a significant interest in the outcome of this case because the Court's decision on whether the Forest Service correctly applied the requirements for amending forest plans here will impact how forest plans are amended across a much larger area and for a broader set of issues. This appeal will decide, in a nationwide issue of first impression for appellate courts, whether piecemeal amendments to forest plans must comply with the substantive vision and ecological restoration mandate of the Forest Service's 2012 planning rule.

The National Forest Management Act, 16 U.S.C. § 1600 *et. seq.*, ("NFMA") requires each national forest to be governed by a forest plan. Congress sought to ensure that long-term stewardship of our national forests was driven by cohesive, long-term plans, not ad hoc project decisions. 16 U.S.C. § 1604(f)(1) (requiring "one integrated plan"). Any activity on the national forest "shall be consistent with the land management plans." *Id.* § 1604(i). Forest plans are to be reconsidered in their entirety, with a public stakeholder process, every fifteen years through plan "revision." *Id.* § 1604(f)(5). In practice, decades commonly pass between full revisions. The Cherokee, Jefferson, and Chattahoochee-Oconee forest plans were last revised in 2004; the Nantahala and Pisgah forest plan is currently undergoing

revision. Reconsideration of discrete aspects of a forest plan is handled through a plan "amendment," as opposed to complete revision.

Forest plans translate NFMA's substantive, resource-protection requirements into components[5] governing activities on each national forest. Forest advocates rely on these plan components to assure protections for resources such as soil, water quality, wildlife habitat, and native trees and plants. In the course of environmental review, forest advocates frequently ask the Forest Service to redesign projects, usually logging projects, to ensure the significant shared resources in the forest are protected, consistent with the agency's relevant forest plan requirements. Over decades, this has improved projects and better protected natural resources. When legal errors persist, forest advocates have engaged in the Forest Service's administrative objection process or litigation to ensure forest plan requirements are met. Ensuring the Forest Service abides by relevant plan requirements is at the heart of how forest advocates ensure protection of sensitive and special resources in national forests and the important values they serve, like providing recreation opportunities, wilderness and backcountry experiences, and clean water.

[5] There are multiple "components" to forest plans (e.g., plan objectives, goals, standards, etc.). *Amici* primarily focus on standards since that is what the Forest Service has amended here.

Because of the critical role plan components play in forest management, forest advocates work hard for protective standards during plan revisions. Including requirements in forest plans to protect natural resources is necessary to allow other multiple-use-driven objectives, such as timber harvesting, to occur without causing significant environmental damage.

As an example of how this works in practice, NFMA requires forest plans to ensure timber harvesting will not occur in areas where soils will be "irreversibly damaged." 16 U.S.C. § 1604(g)(3)(E)(i). The Chattahoochee-Oconee National Forest ("CONF") translated that requirement into a standard (among others) restricting certain equipment on steep slopes, which are more vulnerable to erosion: "[n]o mechanical site preparation equipment is permitted on sustained slopes over 35 percent." CONF Forest Plan 2-21, Forest-wide standard FW-058.[6] That standard was included to help "minimiz[e] impacts to soil resources." CONF Final Environmental Impact Statement, 3-23.[7] The Forest Service is required to follow that standard when designing and implementing timber sales and this, in turn, minimizes impacts to soil resources at risk of erosion on steeper slopes. 16 U.S.C. § 1604(i); 36 C.F.R. § 219.10(e) (1982); 36 C.F.R. § 219.15 (2012).

[6] The CONF Forest Plan is available at https://www.fs.usda.gov/detailfull/conf/landmanagement/planning/?cid=stelprdb5413247&width=full (last visited February 16, 2018).

[7] The CONF Final Environmental Impact Statement is available at the link provided in footnote 6.

Forest advocates are concerned the Forest Service's approach to plan amendments for the Mountain Valley Pipeline, if approved by this Court and propagated across the nation, would undermine the thoughtful, long-term approach to forest management mandated by Congress. Instead of complying with forest plan requirements needed to meet NFMA's requirements to protect soil and water, the agency could simply amend its forest plan on an ad hoc basis to allow activities that irreversibly damage soil and water in the project area and frustrate implementation of the priorities set in the long-term management plan. NFMA's unambiguous requirement that project decisions be "consistent" with forest plans would be rendered null, because each project could create its own loophole in the plan. The ability of forest advocates to fulfill their resource-protection missions would be harmed if forest plan requirements were so easily bypassed.

To be sure, the Forest Service has always been able to amend forest plans, but a plan, as amended, was still required to meet NFMA's requirements as interpreted by the relevant planning rule. A decision affirming the Forest Service's approach here would unhook the amended plan from NFMA's long-term management approach by authorizing the agency to exempt individual projects from plan requirements on a piecemeal basis (as is the case with the Mountain Valley Pipeline) without complying with the process or substantive requirements that guide choices about managing forest resources under current regulations.

This is particularly true when amending forest plans developed before 2012 (including those on *amici*'s forests), because those plans were developed under 30-year-old planning regulations (finalized in 1982), since replaced by a different planning rule (finalized in 2012) incorporating new, best available science. The Forest Service has recognized that plans under the 1982 rules "likely will not meet all of the substantive requirements" of the 2012 rule. 2016 Amendment to 2012 Forest Planning Rule, 81 Fed. Reg. 90723, 90724 (Dec. 15, 2016). Because decades often pass between forest plan revisions, the Forest Service has implemented its new planning direction by requiring that amendments to plans under the 1982 rule apply the substantive requirements of the 2012 rule, when the amendment overlaps an area addressed by the 2012 rule. Forests with 1982-rule plans are presented a choice: either (1) require all projects to comply with the requirements of their existing plan, or (2) if a project cannot comply with those requirements, consider a plan amendment, applying the substantive requirements of the 2012 rule, to the extent the rule and amendment overlap. The legal test for determining when plan amendments overlap the 2012 rule, and therefore require its application, is addressed below.

The Forest Service's erroneous approach here, which excuses a single project from plan requirements, creates a pathway for projects to avoid both the protective components of existing forest plans (developed under the substantive

requirements of the 1982 rule) *and* the substantive requirements of the 2012 planning rule. That approach, contrary to the requirements and purpose of the new planning rule and the cohesive management vision required by Congress, rewards agency decisionmakers for implementing piecemeal amendments to exempt favored projects from protective plan components. That would significantly harm *amici*'s ability to ensure forest resources are protected from myriad projects, including timber sales, road building, recreational site enhancements, and more. Moreover, in failing to apply the substantive provisions of either the 1982 or 2012 planning rules, the Forest Service cannot determine compliance with the underlying NFMA obligations that those rules implement.

That impact will not only be felt on *amici*'s forests, but may have national implications. As of December 2016, 127 forest plans nationwide were developed under the 1982 rule. 81 Fed. Reg. 90723, 90724. *Amici* understand this Court is the highest court to consider this issue. Its decision could impact how national forests are managed and how obligations to amend forest plans are applied nationwide.

If the procedural and substantive provisions of the 2012 rule do not have to be applied here, it is unclear if they ever must be applied in a plan amendment. Forest advocates respectfully request a ruling in favor of Petitioners and remand of

the Record of Decision, with instruction to apply the substantive provisions of the 2012 planning rule that are directly related to the plan amendments.

LEGAL BACKGROUND

I. THE NATIONAL FOREST MANAGEMENT ACT

The National Forest Management Act directs the Forest Service to "develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System." 16 U.S.C. § 1604(a). Forest plans do not authorize on-the-ground activities but provide a framework for where and how those activities will occur over the life of a forest plan. *See, e.g.*, *Sierra Club v. Robertson*, 28 F.3d 753, 758 (8th Cir. 1994). All "[r]esource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans." 16 U.S.C. § 1604(i).

NFMA describes the process for developing, revising, and amending forest plans, *see, e.g.*, 16 U.S.C. § 1604(d), and includes substantive minimum requirements. For instance, forest plans must "insure that timber will be harvested from National Forest System lands only where--soil, slope, or other watershed conditions will not be irreversibly damaged." 16 U.S.C. § 1604(g)(3)(E)(i); *see also* § 1604(g)(3)(A)-(B).

With NFMA, Congress also instructed the Forest Service to "promulgate regulations . . . that set out the process for the development and revision of the land management plans." *Id.* § 1604(g).

A. The 2012 Forest Planning Rule

The 2012 planning rule followed decades-long attempts by the agency to promulgate a revised rule. Initial regulations were issued in 1979 and superseded in 1982 (the "1982 rule"). In 2000, the agency issued another planning rule but ultimately amended the 2000 rule to allow continued use of the 1982 rule. Interim Forest Planning Rule, 67 Fed. Reg. 35431 (May 20, 2002). Additional efforts in 2005 and 2008 to promulgate a new rule were set aside by courts. *See Citizens for Better Forestry v. USDA*, 481 F. Supp. 2d 1059 (N.D. Cal. 2007) (2005 rule); *Citizens for Better Forestry v. USDA*, 632 F. Supp. 2d 968 (N.D. Cal. 2009) (2008 rule). Finally, in 2012 the agency issued a new planning rule (the "2012 rule") replacing the 1982 rule. 2012 Forest Planning Rule, 77 Fed. Reg. 21162 (April 9, 2012).

The 2012 rule guides forest plan revisions and amendments initiated at least since May 2015 and will do so until the agency revises the rule again. *See* 36 C.F.R. § 219.17(b)(2) (defining transition period for use of 2012 planning rule). "There are fundamental structural and content differences" between the 1982 rule and the 2012 rule. 81 Fed. Reg. 90723-24. As a result, "most 1982 rule plans will

not be consistent with all of the requirements of the 2012 planning rule." Proposed 2016 Amendment to 2012 Forest Planning Rule, 81 Fed. Reg. 70373, 70376 (Oct. 12, 2016). For example, the 2012 rule includes "[i]ncreased protections for water resources, watersheds, and riparian areas" as compared to the 1982 rule.[8]

The 2012 rule allows forest plans to be amended "at any time." 36 C.F.R. § 219.13(a). As first promulgated, the 2012 rule required amendments to occur "consistent with Forest Service and [National Environmental Policy Act ("NEPA")] procedures" but did not elaborate on those requirements. 36 C.F.R. § 219.13(b)(3) (2012).

B. The 2016 Revisions to the 2012 Rule

That lack of specificity led to "confusion about how responsible officials should apply the substantive requirements for sustainability, diversity, multiple use, and timber set forth in 36 CFR 219.8 through 219.11 when amending 1982 rule plans." 81 Fed. Reg. 70373. The confusion arose from two incorrect interpretations of the rule.

Some members of the public believed that all of the substantive provisions of 36 C.F.R. § 219.8-11 must be applied to every plan amendment. *Id.* Others argued the rule gave the Forest Service "discretion to selectively pick and choose

[8] Forest Service, How is the Final Planning Rule Different from the 1982 Rule Procedures, https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5359536.pdf (last visited February 21, 2018).

which, if any, provisions of the rule to apply, allowing the responsible official to avoid 2012 rule requirements" entirely. *Id.* The agency revised the portions of the rule applying to plan amendments "to clarify that neither of these interpretations is correct." *Id.*

The 2016 revision provides specific direction about how the agency uses the 2012 rule to amend plans developed under the 1982 rule. Now the Forest Service "shall" do the following for plan amendments:

> Determine which specific substantive requirement(s) within §§ 219.8 through 219.11 are *directly related* to the plan direction being added, modified, or removed by the amendment and *apply such requirement(s) within the scope and scale of the amendment*. The responsible official is not required to apply any substantive requirements within §§ 219.8 through 219.11 that are not directly related to the amendment.

36 C.F.R. § 219.13(b)(5) (emphasis added).

This is a two-step process. First, determine which substantive requirements[9] are "directly related." *Id*. Second, apply those requirements within the scope and scale of the amendment. *Id.*

The rule does not leave the "directly related" determination to guesswork. It turns on one of two factors: 1) "the purpose of the amendment," or 2) "the effects

[9] The "substantive requirements" of the 2012 rule (36 C.F.R. §§ 219.8-219.11) ensure the agency meets its statutory and regulatory obligations to manage for sustainability (social, economic, and ecological), diversity of plant and animal communities, and multiple use including timber. These requirements are the heart of the 2012 rule.

(beneficial or adverse) of the amendment." 36 C.F.R. § 219.13(b)(5)(i). Either factor invokes application of the 2012 rule:

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

81 Fed. Reg. 90723, 90731 (emphasis added); *see also* Mountain Valley and Equitrans Expansion Project, Final Environmental Impact Statement (June 2017), p 4-326 ("A proposed 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 . . .")(emphasis added); Forest Service, Record of Decision, Mountain Valley Project Land and Resource Management Plan Amendment for the Jefferson National Forest (December 2017), p 18 ("whether a rule requirement is directly related to an amendment is based upon the amendment's purpose *or* effect") (emphasis added) (hereafter "ROD").

The purpose of an amendment is determined by "the need to change the plan." *Id*.

When determining "directly related" provisions based on "adverse effects" of the amendment, the "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)(A) (emphasis added).

Once a "directly related" determination has been made, the responsible official must apply the substantive provisions of the 2012 rule to develop new plan components within the scope of the amendment that meet NFMA's substantive requirements. If the agency holds the amendment up to NFMA's requirements, as translated in the 2012 rule, and determines it does not comply, it cannot amend the plan as proposed. This is why the "directly related" determination is critical: it identifies the provisions of the 2012 rule with which an amendment must comply *at a minimum*; it provides the backstop to gauge NFMA compliance.

STATEMENT OF FACTS

The Forest Service amended the forest plan for the Jefferson National Forest to exempt the Mountain Valley Pipeline from applicable plan standards – because the project could not comply with those standards.

The Jefferson forest plan was revised in 2004 under the 1982 rule. The Forest Service's June 5, 2017 "Notice of Updated Information" unveiled twelve forest plan amendments and found each "likely to be directly related" to a

substantive provision of the 2012 rule. Notice of Updated Information, 82 Fed. Reg. 25761, 25763 (June 5, 2017).[10] The agency found that:

- Amendments to forest-wide standards[11] for utility corridor management (FW-247 and FW-248) were "likely to be directly related" to 36 C.F.R. § 219.10(a)(3);
- Amendments to forest-wide standards for soil productivity and riparian habitat (FW-5, FW-8, FW-9, FW-13, FW-14, and Management Prescription Area Standard 11-003) were "likely to be directly related" to 36 C.F.R. § 219.8(a)(2)(ii), 36 C.F.R. § 219.8(a)(2)(iv), and 36 C.F.R. § 219.8(a)(3)(i);
- Amendments to standards for old growth (Prescription Area Standards 6C-007 and 6C-026) were "likely to be directly related" to 36 C.F.R. § 219.8(a)(1) and 36 C.F.R. § 219.11(c);
- Amendment of Prescription Area Standard 4A-028, which applies to the Appalachian National Scenic Trail, was "likely to be directly related" to 36 C.F.R. § 219.10(b)(1)(vi); and

[10] The Forest Service must disclose which substantive requirements are "likely to be directly related" to the amendment in the initial notice of the amendment. 36 C.F.R. § 219.13(b)(2).

[11] Forest Plans divide forests into different "zones" similar to city zoning. The "zones" on the Jefferson National Forest are called "prescriptions." A "forest-wide" standard applies to the entire forest while a "prescription area standard" applies only to an individual prescription.

- Amendment of scenic integrity objectives (forest-wide standard FW-184) was "likely to be directly related" to 36 C.F.R. § 219.10(b)(1)(i).

Id. at 27562-64.

Soon after, the Forest Service reversed course. Its December 2017 ROD instead exempted the amendments for the pipeline from the 2012 rule, concluding that either the "substantive rule provisions are not directly related to the amendment" or "there is no need to analyze whether or not there are substantive rule provisions directly related to the amendment." ROD, 18.[12] Even in reversing itself, the agency conceded that all of the amendments were "relevant" to a substantive provision of the 2012 rule, but not "directly related." ROD, 18-25.

ARGUMENT

I. THE JEFFERSON FOREST PLAN AMENDMENTS ARE DIRECTLY RELATED TO SUBSTANTIVE PROVISIONS OF THE 2012 RULE

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

To determine whether the amendments are directly related to substantive provisions of the 2012 rule, this Court need look no further than their purpose. *See* 36 C.F.R. § 219.13(b)(5)(i). The purpose of an amendment is determined by "the need to change the plan." 81 Fed. Reg. 90723, 90731. In a section of the ROD aptly titled "Purpose of the Amendment," the Forest Service was strikingly clear:

[12] The Forest Service chose not to amend standard FW-247 in the ROD.

"The amendment[s] [are] needed because the MVP Project cannot achieve several Forest Plan standards that are intended to protect soil, water, riparian, visual, old growth, and recreational resources." ROD, 14. The 2012 planning rule includes substantive requirements related to these very purposes: "soil and soil productivity" (36 C.F.R. § 219.8(a)(2)(ii)); "water resources" (36 C.F.R. § 219.8(a)(2)(iv)); "the ecological integrity of riparian areas" (36 C.F.R. § 219.8(a)(3)(i)); "scenic character" (36 C.F.R. § 219.10(b)(1)(i)); "ecological integrity of terrestrial [ ] ecosystems" (36 C.F.R. § 219.8(a)(1)) and "timber harvest" including harvest of old growth (36 C.F.R. § 219.11(c); and "sustainable recreation" (36 C.F.R. § 219.10(b)(1)(i)) and "designated areas" such as the highly-used Appalachian Trail corridor (36 C.F.R. § 219.10(b)(1)(vi)). Here, the purpose of the amendments is to change forest plan requirements related to, and intended to protect, soil, water, riparian, visual, old growth, and recreational resources; the agency must apply the substantive provisions of the 2012 rule directly related to those purposes.

The overlap between the purpose of the amendments and the above substantive requirements of the 2012 rule is evident, even to the agency: these are the very sections of the 2012 rule identified in its June 2017 "Notice of Updated Information" as "likely to be directly related." 82 Fed. Reg. 25761-27564.

When it amended the 2012 rule, the agency provided a clarifying example of how to use the purpose standard that underscores the error it has now committed: "[i]f the scope of an amendment to a 1982 plan includes changes to plan direction for the *purpose* of . . . scenery management, then the responsible official *must apply* the 2012 rule requirement about scenic character to the changes being proposed." 81 Fed. Reg. 90723, 90725 (emphasis added). One of the amendments being proposed now is "needed because the MVP Project cannot achieve [ ] Forest Plan standards that are intended to protect . . . visual . . . resources." ROD, 14. That is, the plan amendment not only affects scenery management, it is *about* scenery management – its purpose is to amend the forest plan with respect to scenery management. Yet the Forest Service erroneously concluded that "further determination as to whether the rule requirement [protecting scenic character] is directly related to [the amendment] is not needed" and exempted the Mountain Valley Pipeline from scenery standards for five years. ROD, 10, 24.

This flies in the face of the 2012 rule and 2016 amendment. As discussed above, the rule sets forth a two-step process. *See* 36 C.F.R. § 219.13(b)(5). Step one requires the agency to determine which substantive requirements of the 2012 rule are directly related to proposed amendments. The agency has completely skipped that step, failing to identify which substantive parts of the 2012 rule, including, for example, those related to scenic character, are directly related (not

merely "likely to be directly related") to the project. Only once the agency identifies the parts of the 2012 rule directly related to the amendment can the agency then apply those directly related provisions to the amendment and ensure NFMA compliance.

To avoid that first step the agency points to mitigation measures, *see*, *e.g.*, ROD at 21, arguing that it is unnecessary to determine which provisions of the 2012 rule are directly related. But mitigation measures, even if they could mitigate the *impacts* of a project, do not negate the *purpose* of these plan amendments, which is to change plan standards that directly relate to the substantive provisions of the 2012 rule. For example, the 2012 rule requires "standards . . . to provide for . . . scenic character." *See* 36 C.F.R. § 219.13(b)(1)(i). The purpose of one of the amendments here is to exempt the project from scenery standards for five years. ROD, 10. The Forest Service may eventually decide, after competent process and analysis, that the substantive requirements of the 2012 planning rule are satisfied by the plan amendments adopted to allow the project's scenery impacts. But it cannot point to the promise of future mitigation to avoid asking that question. And identifying the "directly related" provisions of the 2012 rule is necessary to answer the question.

The agency attempts to evade the 2012 rule's requirements by stating that its provisions are merely "relevant" to the amendments, not "directly related." But

this is an empty exercise in semantics that underscores the arbitrary nature of the agency's decision. If something is "relevant" it is by definition "related." If anything, relevancy reveals a stronger connection. Something is "relevant" if it has a "significant and *demonstrable bearing* on the matter at hand," while something is "related" if it is only "connected by reason of an established or discoverable relation."[13] If provisions of the 2012 rule are "relevant," having a significant and demonstrable bearing on the amendments, they are certainly "related" to them.

Nor does the rule's use of "directly" grant the agency carte blanche discretion to cast aside its obligation to hold amendments up to the substantive requirements of NFMA as set forth in the 2012 rule. The 2016 amendment is plain that the revision clarified an incorrect interpretation of the rule requiring "all of the substantive provisions in §§ 219.8 through 219.11 be applied to every amendment." 81 Fed. Reg. 90723, 90725-26. "Directly" rebuts that prior misinterpretation: the responsible official need not apply every substantive provision to every amendment, only those that are *directly* implicated.

Critically, "the 2012 rule does not give a responsible official the discretion to amend a plan in a manner contrary to the 2012 rule by . . . avoiding altogether []

[13] Merriam-Webster Dictionary, Definition of relevant, https://www.merriamwebster.com/dictionary/relevant (emphasis added); Definition of related, https://www.merriam-webster.com/dictionary/related (last visited February 19, 2018).

substantive requirements within §§ 219.8 through 219.11 that are directly related to the changes being proposed." *Id.* at 90726. The 2016 amendment clarified that an interpretation allowing "the responsible official discretion to selectively pick and choose which, if any, provisions of the rule to apply, thereby allowing the responsible official to avoid 2012 rule requirements" *was wrong*. *Id.* at 90725. But that is what the Forest Service did here by substituting "relevant" for "directly related." The Forest Service has parsed these phrases to "avoid[] altogether" substantive requirements of the 2012 rule—the exact result the 2016 amendment prohibits.

B. The Adverse Impacts Authorized by the Amendments Are Directly Related to the Substantive Provisions of the 2012 Rule

A plan amendment also may be "directly related" to the substance of the 2012 planning rule, no matter the amendment's purpose, based on the "effects (beneficial or adverse) of the amendment." 36 C.F.R. § 219.13(b)(5)(i).

"The 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." *Id.* at § 219.13(b)(5)(ii)(A). Here, the NEPA effects analysis reveals substantial adverse effects overlapping the

provisions of the 2012 rule identified as "likely to be directly related" in the agency's June 2017 "Notice of Updated Information."

Use of "requirement" in 36 C.F.R. § 219.13(b)(5)(ii)(A) refers to the "specific substantive requirement[s]" of the 2012 rule. *Id.* The responsible official must determine that a substantive requirement is "directly related" if NEPA effects analysis shows an adverse impact associated with that requirement. For instance, the Forest Service has identified the 2012 rule requirement to maintain or restore "[s]oils and soil productivity" as "relevant" to the amendments of standards related to "soil productivity and riparian habitat" (standards FW-5, FW-8, FW-9, FW-13, FW-14, and 11-003). ROD, 19-21. If NEPA analysis reveals substantial adverse effects to "soils and soil productivity," the Forest Service must apply the rule's requirement to the amendments and create new forest plan components that may differ from the existing plan, but still protect the soil resource as NFMA requires.

Unquestionably, the project's NEPA analysis reveals substantial adverse effects to "soils and soil productivity": "Construction activities such as clearing, grading, trench excavation, backfilling, contouring, and the movement of construction equipment along the right-of-way would affect soil resources." Final Environmental Impact Statement, 4-81. Some impacts to soils would be "permanent." *Id.* at 4-87. The forest plan amendments related to soils are only necessary to allow "the MVP pipeline to exceed [ ] restrictions on soil conditions

and riparian corridor conditions." *Id.* at 4-328. The project's impacts exceed those allowed by the forest plan, developed under the 1982 rule. To depart from those requirements, the agency must now apply the substantive requirements of the 2012 rule to amend the forest plan.

The agency's effort to dodge application of the 2012 rule's substantive provisions by pointing to mitigation measures, which it claims will "minimize adverse impacts to soils and water resources and riparian areas," is also invalid. ROD, 21. Nothing in the agency's regulations allows it to avoid applying the substantive provisions of the 2012 rule to directly related amendments based on future mitigation. But that is how the agency misuses mitigation here: to create an end-run around the substantive requirements of the 2012 rule. *See* ROD, 9 (exempting project from soil and riparian habitat standards but requiring "mitigation measures").

The agency also cannot evaluate whether that mitigation is sufficient to ensure compliance with NFMA (as translated through the 2012 rule and ultimately the Jefferson forest plan) if it creates an "exception" to those standards for the Mountain Valley Pipeline. *Id.* The mitigation cannot be so successful that it obviates the need to apply the 2012 rule while also being insufficient to comply with the forest plan standard developed using the 1982 rule. The mitigation must be sufficient to avoid the need to amend the plan, or the agency must apply the

2012 rule to amend the plan. Using the latter approach, the Forest Service must create amended NFMA-compliant plan standards, using the 2012 rule, and then determine if the promised mitigation measures achieve compliance.

II. THE AGENCY'S INTERPRETATION CREATES AN IMPERMISSIBLE GAP WHERE NEITHER THE 1982 NOR 2012 REGULATIONS APPLY

The Court should reject the agency's interpretation because it creates a gap where neither the 1982 nor 2012 regulations apply, which the 2016 amendment clarified is expressly prohibited. *See* 81 Fed. Reg. 90723, 90726 ("Nor does the 2012 rule give responsible officials discretion to . . . use the amendment process to avoid both 1982 and 2012 rule requirements (§ 219.17(b)(2))"). Forest plans must be revised and amended according to NFMA and its implementing regulations. 16 U.S.C. § 1604(g). Those regulations set national policy for forest management and the stewardship of forest resources, to be implemented through the adoption, revision, and amendment of forest plans and projects developed pursuant to those plans. Whenever any portion of a forest plan is rewritten, either by revision or amendment, the rewrite must be tested against the agency's NFMA regulations. The 1982 rule, used to revise the Jefferson forest plan in 2004, can no longer be used to amend that forest plan. *See* 36 C.F.R. § 219.17(b)(2). Yet here the Forest Service has determined that the 2012 rule also "need not be applied" when amending plan standards related to soil and riparian resources and old growth

management. ROD, 21-22. This leaves the Forest Service in the impossible position of rewriting a portion of the Jefferson forest plan with no guiding regulations, as according to the agency, neither the 1982 nor 2012 rules apply.

III. THE AGENCY'S INTERPRETATION IS NOT ENTITLED TO DEFERENCE UNDER *AUER*

Pursuant to the Supreme Court's decision in *Auer v. Robbins*, 519 U.S. 452 (1997), an agency's interpretation of its own regulations is entitled to deference unless it is plainly erroneous or inconsistent with the regulation. *Id.* at 462. "But *Auer* deference is warranted only when the language of the regulation is ambiguous." *Christensen v. Harrison County*, 529 U.S. 576, 588 (2000). When the language is not ambiguous, deferring to the agency's interpretation "permit[s] the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Id*. The Forest Service's interpretation is not entitled to deference because the language in the 2012 rule, as amended, is not ambiguous. Even if it were, the Forest Service's inconsistent implementation in the face of any ambiguity is plainly erroneous and inconsistent with the regulation.

A. The "Directly Related" Standard is Not Ambiguous

The agency's interpretation rests on its reading of "directly related," but directly related is not ambiguous. "Related" must be given its plain meaning: "connected by reason of an established or discoverable relation." *See, supra*, footnote 13. By admitting that the forest plan amendments are "relevant" to

provisions of the 2012 planning rule, the agency cannot credibly contend they are not "related." "Directly" merely distinguishes a direct relation from an indirect relation, necessary in the rule's context because the agency recognized that "resources and uses within the plan area are often connected to one another." 81 Fed. Reg. 90723, 90731. Forest plan standards are all indirectly related in some sense because they form one integrated forest plan. The 2012 rule requires the agency to focus only on those requirements that are "directly" related. An example from the agency's 2016 rulemaking, distinguishing "directly" from "indirectly" related, proves the point:

> Soil and water resources are interrelated, but the responsible official can determine that for a plan amendment that has the purpose of changing standards and guidelines to protect a water body, the water requirements of § 219.8 are directly related, while that section's requirements for soil are not unless the amendment would affect the soil resource.

81 Fed. Reg. 90723, 90732. Especially in context, the term "directly" is unambiguous.

The agency's *ad hoc* reinterpretation of "directly related" for the benefit of this project creates a *de facto* new regulation as cautioned against in *Harrison County*. 529 U.S. at 588. For example, the Forest Service carves out a new exception for directly related amendments for projects which will be subject to "mitigation measures," even if those mitigation measures would not be adequate to ensure projects comply with existing forest plans that implement the 1982 rule.

See ROD, 21, 22. The text of the rule is unambiguous, and the intent behind it clear: agency staff must apply the substantive provisions of the 2012 rule to all "directly related" amendments, regardless of whether the project's effects will be subject to mitigation requirements.

B. The Agency's Interpretation is Plainly Erroneous and Inconsistent with the Regulation.

Even if the Court finds "directly related" to be ambiguous, the agency's interpretation is plainly erroneous and inconsistent with the regulation. As described in section I(A), the agency has completely ignored the "purpose" trigger for determining "directly related" amendments. The agency could not have been clearer in its environmental analysis and ROD that these plan amendments were required because the project cannot comply with resource protection standards. *See* ROD, 14. The purpose of the amendments was to exempt the project from these resource protection standards. To amend these forest plan standards for the pipeline, and comply with NFMA, the agency must apply the directly related provisions of the 2012 planning rule.

Second, the agency's conclusion that the amendments are "relevant" to provisions of the 2012 rule but not "directly related" is inconsistent with the regulation. The 2016 amendments clarified that, while the agency did not have to apply *all* of the substantive requirements of the 2012 rule when amending a plan, it could not completely avoid them. *See* 81 Fed. Reg. 90723, 90725-26. The

"directly related" standard only sorts out which parts of the rule apply. The semantic difference between "relevant" and "directly related" is not meaningful for purposes of determining which of the substantive provisions of the 2012 rule should be applied when amending 1982-regulation-era forest plans. To the extent "relevant" is used to avoid determining which parts of the 2012 rule to apply, it is inconsistent with the regulation.

Finally, if the proposed amendments to the Jefferson forest plan are not "directly related" to the substantive provisions of the 2012 planning rule identified by the agency in June 2017, it is unclear when 2012 rule requirements would be "directly related" to *any* amendment anywhere across the National Forest System. That is why forest advocates are concerned about this case. The Mountain Valley Pipeline cannot be constructed in compliance with the current forest plan standards – harmful impacts to natural resources will exceed current forest plan limits designed to protect those resources from exactly these kinds of harms. *See* 16 U.S.C. § 1604(g)(3) (requiring forest plans to protect natural resources). To facilitate construction of this project consistent with its plan, the Forest Service must rewrite portions of its forest plan through the amendment process, and develop new plan components that will protect natural resources. The agency must apply the substantive provisions of the 2012 rule whenever it rewrites "directly related" standards in its forest plan. If the agency cannot create plan components

that both protect resources and allow project implementation, then NFMA compels the agency to either abandon the project or alter the nature of the project to bring it into compliance with the forest plan (as amended or otherwise).

The agency's interpretation here would excuse it from any portion of the 2012 rule; indeed, no regulations would apply to ensure the amendments comply with NFMA. That approach is plainly erroneous and inconsistent with the 2012 rule and the 2016 amendment.

CONCLUSION

For the reasons discussed above, forest advocates respectfully request a remand of the Record of Decision, with instruction to apply the substantive provisions of the 2012 planning rule that are directly related to the plan amendments.

DATED: February 23, 2018

Respectfully Submitted,

By: /s/ J. Patrick Hunter

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This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because this brief contains 6,365 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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DATED: February 23, 2018

/s/ J. Patrick Hunter.
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