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Sent Via Email

RE: Monitoring Program Administrative Changes for George Washington and Jefferson National Forest Plans

Ms. Overcash:

I am submitting these comments on behalf of Wild Virginia, in response to notice of the referenced action dated March 30, 2016. Thank you for the opportunity to address these important issues.

#### NEPA Process for Proposed Plan Changes

The proposed changes to the Land and Forest Resource Management Plans (Forest Plans) for the George Washington and Jefferson National Forests are characterized as “Administrative Changes” that are intended to bring these plans into conformance with the 2012 Planning Rule at 36 C.F.R. Part 219 (the Rule). We assert that these changes must undergo the mandated processes for an Environmental Assessment (EA), in accordance with the National Environmental Policy Act (NEPA).

The Rule states that “[a]dministrative changes include . . . conformance of the plan to new statutory or regulatory requirements.” 36 C.F.R. § 219.13(c). As “administrative changes,” the monitoring plan changes proposed in this action “may be made only after notice to the public of the intended change and consideration of public comment.” However, this level of public involvement falls far short of that required for preparation of an EA. We believe that the greater level of public participation that would accompany the EA process is not only legally required in this case but would be very beneficial for management under the current Forest Plans.

Activities that require NEPA processing include federal actions with the potential for environmental impacts. Such actions may include adoption and approval of official policy, formal plans, programs, and specific Federal projects. 40 C.F.R. § 1508.18. There are just three circumstances under which such federal actions are exempted from preparation of an EA and/or an Environmental Impact Statement (EIS), including:

- Express Exemptions from Congress - Where Congress has clearly indicated in a statute that NEPA does not apply to a particular agency action.<sup>1</sup>
- Categorical Exemptions/Exclusions - Defined classes of relatively common actions an agency may take that have been deemed to have no significant impact on the environment and, therefore, not to require an EA or EIS. When an agency develops such an exclusion, rather than Congress, the Council on Environmental Quality (CEQ) must provide approval.<sup>2</sup>
- Implied Exemptions - Where a number of federal appeals courts have allowed agencies to bypass NEPA procedures based on findings that decision makers had no discretion in taking the actions at issue.<sup>3</sup>

There are no express statutory provisions exempting any aspect of Forest Plan preparations or changes from NEPA. At 16 U.S.C. § 1604(g), Congress required that the Secretary of Agriculture (the Secretary) promulgate regulations “to insure that land management plans are prepared in accordance with the National Environmental Policy Act of 1969.” If lawmakers had intended to exempt any Forest planning actions from NEPA, this section would have been the obvious place to define those exemptions.

Likewise, the plan changes for monitoring plan updates are not subject to any categorical exclusions or exemptions. None of the categories of actions listed at 7 C.F.R. § 1.1.b.3., for which the Secretary has created exemptions, cannot be construed to include the Forest Plan changes.

A form of “implied exemptions,” as noted above, has been defined through a series of federal appeals court rulings, though the U.S. Supreme Court has not ruled that such

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<sup>1</sup>See Jonathan M. Cosco, NEPA for the Gander: NEPA’s Application to Critical Habitat Designations and Other “Benevolent” Federal Action, 8 Duke Enviro. L. & Pol. For. 345, 353-54 (1998) (“Occasionally Congress will exempt specific federal actions from NEPA by clearly indicating its intent to do so in a subsequently enacted statute.”).

<sup>2</sup> See Robisch, Kyle, The NEPA Implied Exemption Doctrine: How a Novel and Creeping Common Law Exemption Threatens to Undermine the National Environmental Policy Act, Vt. J. Envtl. L. 173 (2014-2015).

<sup>3</sup> See, e.g., Sierra Club v. Hodel 848 F.2d 1068, 1089 (10th Cir. 1988) (“The EIS process is supposed to inform the decision-maker. This presupposes he has judgment to exercise. Cases finding ‘federal’ action emphasize authority to exercise discretion over the outcome.”).

exemptions are valid.<sup>4</sup> Even if this category is ultimately upheld for national application by the Supreme Court though, the standards laid down by the Circuit Courts would exclude the actions undertaken in these Plan changes. The operative question determined by the Appeals Courts in each case is whether the responsible official exercises discretion or whether the decisions to be made are so constrained by legislative directives as to be deemed “magisterial.”<sup>5</sup>

The requirements governing Forest Plan changes initiated to meet the requirements of 36 C.F.R. § 219.12, state that “the responsible official shall modify the plan monitoring program . . . to meet the requirements of this section.” The cited requirements include the command that each monitoring program contain “one or more monitoring questions and associated indicators addressing each of” eight listed categories of concern. 36 C.F.R. § 219.12 (a)(5). The regulation provides no specific wording or even broad guidelines for the content of the questions in each of the eight categories.

A change to Forest Plans that merely inserted wording to reflect a statutory change could be characterized as non-discretionary but, within the relatively broad boundaries of the eight categories defined by the Rule, the Forest Supervisor has significant discretion to pose questions, based on evidence gathered from the public, experts, or agency personnel and on professional and policy judgements within his area of expertise and authority. One might contrast the need for judgement in forming the monitoring questions with that involved in another category defined as an “administrative change” - “corrections of clerical errors to any part of the plan” 36 C.F.R. § 219.13(c) - which clearly calls for no significant judgement by the Supervisor.

The level of discretion at play is illustrated simply by comparing the monitoring questions proposed for the two National Forests addressed in this action. Understandably, the questions for the George Washington National Forest are different from those proposed for the Jefferson National Forest. The two Forests cover somewhat different landscapes, the uses and priority values protected in each are different, and the two Forests are covered by two distinctly different Forest Plans. Therefore, different questions are appropriate and; expert judgement and discretion must be exercised in developing Monitoring Questions. Further, the knowledge and experience of citizens and other agencies who may provide comments on these proposals creates the need for the Supervisor to discriminate between various interests and values.

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<sup>4</sup> Robisch, Kyle, *Supra*.

<sup>5</sup> See, Ruhl, J.B. and Kyle Robisch, Agencies Running From Agency Discretion, *William & Mary Law Review*, Vol. 58, No. 1, 2016 (“agencies . . . carry out a multitude of functions over which the have no discretion, merely serving as ministerial agents of legislatures”).

The reality that, nationally, the Forest Service has not acted earlier to meet the regulatory deadline for incorporating Monitoring Questions into Forest Plans, must not be the basis for bypassing NEPA procedures in a situations where no “implied exemption” is justified. Rather, the USFS should re-start this process and undertake a review that takes full advantage of the knowledge and involvement of citizens and others who could play very positive roles in a fuller public process. A process in which all parties have more more time and opportunity to exchange ideas than has been possible under the current process. Wild Virginia and other parties involved in Virginia National Forest cases have expressed the need for enhanced monitoring processes and through the full NEPA process this review of monitoring plans could serve a greater purpose than merely to respond to the four-year old regulation’s command.

### The Monitoring Questions

In general, we believe there are many good questions proposed for the two National Forests through this action. However, the complexity of documents and the differences in format between those proposed for each Forest made the task of understanding and forming useful comments very difficult, particularly in the limited time we were given to respond.

Simply matching the questions with the eight categories for which they are required to be developed has been nearly impossible. The documents should more explicit attribute specific monitoring questions and tasks to the various categories.

We do offer a few comments listed under categories from 36 C.F.R. § 219.12(a)(5), designated by the letters (i), (ii), . . . (viii):

#### (i) The status of select watershed conditions.

It is important to analyze watershed conditions on the Forests in the context of the larger watersheds in which these areas lie. We see no recognition through the questions for either Forest that this perspective is accounted for.

The best measures of water quality for waters in the Forests are the state water quality standards adopted as part of the states’ Clean Water Act (CWA) responsibilities. The questions and monitoring tasks should be expressed in these terms. Conformance with antidegradation provisions of the CWA standards are especially important for the Forests.

For the Jefferson NF, MQ 14 asks “Are watersheds maintained (and where necessary restored) to provide resilient and stable conditions to support the quality and quantity of water necessary to protect ecological functions and support intended beneficial uses?” The mention of the quantity of water in this questions seems to point to the assessment of changes in hydrologic cycles. We believe this perspective is especially

important and would like to see questions and monitoring tasks more explicitly aimed at assessing such aspects of watersheds.

(vi) Measurable changes on the plan area related to climate change and other stressors that may be affecting the plan area.

While questions posed address the relationships between the Forests and climate change patterns, we would like to see more specific questions that attempt to analyze the ways that the mix of management regimes on each forest can be correlated to the overall carbon sequestration potential of the forests in the context of the Appalachian Mountain region.

Thank you and we look forward to working with you further to improve monitoring systems in the National Forests.

Sincerely,

*/s/ David Sligh*

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David Sligh  
Conservation Director