UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re: White Forest Resources, Inc., *et al*., Debtors.[1]	Chapter 11 Case No. 25-10195 (TMH) (Jointly Administered) **Hearing Date: May 19, 2025 at 2:30 p.m. (ET)** **Objections Due: May 7, 2025 at 4:00 p.m. (ET)**

MOTION OF CENTER FOR BIOLOGICAL DIVERSITY, APPALACHIAN VOICES, GREENBRIER RIVER WATERSHED ASSOCIATION, KANAWHA FOREST COALITION, SIERRA CLUB, AND WEST VIRGINIA HIGHLANDS CONSERVANCY FOR ENTRY OF AN ORDER GRANTING RELIEF FROM THE AUTOMATIC STAY

The Center for Biological Diversity, Appalachian Voices, Greenbrier River Watershed Association, Kanawha Forest Coalition, Sierra Club, and West Virginia Highlands Conservancy (hereinafter, collectively, "Conservation Groups"), by and through their undersigned counsel, hereby move this court, pursuant to sections 362 and 1109 of the United States Bankruptcy Code, 11 U.S.C. §§ 101 *et seq*.(the "Bankruptcy Code"), Rule 4001 of the Federal Rules of Bankruptcy Procedure, and Rule 4001-1 of the Local Rules for the United States Bankruptcy Court for the District of Delaware, for entry of an order granting relief from the automatic stay to the extent necessary for the Conservation Groups to proceed with a Permit Challenge Action (as defined below) pending in the United States District Court for the Southern District of West Virginia (the "West Virginia District Court") with respect to a permit issued to Debtor South

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number are: White Forest Resources, Inc. (3764); Xinergy Corp. (3865); Xinergy of West Virginia, Inc. (2401); Shenandoah Energy, LLC (6770); South Fork Coal Company, LLC (3113); Bull Creek Processing Company, LLC (0894); Raven Crest Mining, LLC (0122); Brier Creek Coal Company, LLC (9999); Raven Crest Contracting, LLC (7796); Raven Crest Leasing, LLC (7844); and Raven Crest Minerals, LLC (7746). The Debtors' service address is 1295 Ashford Hill Rd., Ashford, WV 25009.

Fork Coal Company, LLC ("South Fork" or the "Debtor") by the United States Forest Service ("Forest Service").[2] In support thereof, the Conservation Groups respectfully aver as follows.

SUMMARY

In the Permit Challenge Action, the Conservation Groups challenge the Forest Service's issuance of a road use permit allowing South Fork to haul coal from its surface mine complex in Greenbrier County, West Virginia along two Forest Service roads that cross the Monongahela National Forest. The Conservation Groups allege, *inter alia*, that the Forest Service failed to perform necessary environmental analysis prior to issuing the road use permit to South Fork and this failure violated the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.,* and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4331. *et seq*. South Fork is involved in the Permit Challenge Action as an intervenor defendant.

The Conservation Groups respectfully submit the automatic stay does not apply to the Permit Challenge Action because the Conservation Groups do not assert claims against nor seek recovery from South Fork, nor do they seek to "exercise control over property of the estate" as contemplated by 11 U.S.C. § 362(a)(3). Rather their action seeks to determine the validity of the road use permit, which does not itself constitute property of the estate. *See Pai 'Ohana v. United States*, 875 F. Supp. 680, 699 (D. Haw. 1995) ("The law is settled that special use permits create no vested property rights."), *aff'd sub nom. Pai 'Ohana v. United States*, 76 F.3d 280 (9th Cir. 1996).

[2] A copy of the Complaint filed in the Permit Challenge Action is attached hereto as **Exhibit 1**. The Permit Challenge Action is captioned *Center for Biological Diversity v. U.S. Forest Serv*. It was originally filed in the United States District Court for the District of Columbia ("D.C. District Court") as Case No. 1: 24-cv-87, but, as discussed below, has been transferred to the West Virginia District Court, where it is captioned as Case No. 5:24-cv-00274. The Permit Challenge Action is currently stayed by order of that Court.

However, out of an abundance of caution, the Conservation Groups move this Court for relief from the automatic stay under section 362(a) of the Bankruptcy Code. To the extent the automatic stay applies, the Court should find cause exists for relief from the stay under the facts of this case because resolution of the Permit Challenge Action —which is necessary to vindicate Conservation Groups' members' federally protected interests—will not prejudice the Debtors nor will it diminish the assets available to satisfy the creditors' claims. To the contrary, resolving whether the road use permit South Fork holds was validly issued is a necessary prerequisite to the proper administration of the Debtor's estate and valuation of its assets.

JURISDICTION AND VENUE

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(G). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory bases for the relief requested herein are section 362 of the Bankruptcy Code, Bankruptcy Rule 4001, and Local Bankruptcy Rule 4001-1.

BACKGROUND

A. The Permit Challenge Action and Effect of the Automatic Stay

3. On June 15, 2021, South Fork applied for a commercial road use permit ("RUP") to use two gravel Forest Service roads, 249 ("FS249") and 223 ("FS223"), within the Monongahela National Forest to haul oversized coal loads from the Rocky Run Surface Coal Mine ("Rocky Run Mine") to a preparation plant in Clearco, West Virginia. West Virginia District Court ECF No. 59-1, *Ctr. for Biological Diversity v. U.S. Forest Serv.*, No. 5:24-CV-00274 (S.D. W. Va. Nov. 26, 2024)

4. As found by the West Virginia District Court in an opinion upholding the Conservation Groups' standing to bring the Permit Challenge Action, the area surrounding and affected by the National Forest roads used by South Fork —the Cherry River watershed— "consists of lush forests and vast, free-flowing rivers, including the North Fork Cherry River and South Fork Cherry River[, that] form an ideal habitat for endangered species, such as the candy darter, northern long-eared bat, and Indiana bat." *Ctr. for Biological Diversity v. v. U.S. Forest Serv*, 2025 WL 263294, at *2 (S.D. W. Va. January 22, 2025).

5. The Forest Service issued the road use permit on September 29, 2021, effective until September 1, 2031. *See* RUP FS-7700-41, attached as **Exhibit 2** to this motion**.** The RUP authorizes South Fork to haul oversized coal loads daily (36,000 tons per month) and conduct extensive road reconstruction work on FS249, including: installing, lengthening, and replacing drainpipes and culverts; grading and resurfacing the road; constructing sumps; clearing drainage ditches; placing riprap into receiving streams; and clearing vegetation and brush. *Id.* The RUP also authorizes South Fork to haul mining supplies and equipment, including fuel and explosives, on FS223. *Id.* The Conservations Groups allege the Forest Service did not conduct any environmental analysis under NEPA and did not consult with the United States Fish and Wildlife Service as Section 7 of the ESA requires of all federal actions that "may affect" listed species. *See* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

6. Soon after issuance of the RUP, South Fork's use of the roads began to cause substantial sedimentation issues that resulted in a "myriad of violation notices" from the West Virginia Department of Environmental Protection and the Forest Service. *Ctr. for Biological Diversity*, 2025 WL 263294, at *1, *7. Although remedial actions were ordered, the problems continued and new violation notices were issued in October and November 2023. *Id.* Those

activities adversely affect surrounding endangered species' habitat. *See Id.* at *5 ("It is quite reasonable to conclude that the extensive construction required to execute the permit caused pollution and disruption to the surrounding streams and forestry.").

7. On January 10, 2024, the Conservation Groups filed their permit challenge (the "Permit Challenge Action"). They initially filed in the U.S. District Court for the District of Columbia (the "D.C. District Court). Debtor South Fork intervened as a Defendant, and the Forest Service successfully moved to transfer the case to the West Virginia District Court pursuant to 28 U.S.C. § 1404(a), *id.*, D.C. District Court ECF Nos. 10, 31.

8. The Permit Challenge Action is now in an advanced stage in the West Virginia District Court. As noted above, South Fork previously filed a motion to dismiss the Permit Challenge Action, alleging the Conservation Groups lack standing, which motion was briefed and denied by the West Virginia District Court in a Memorandum Opinion and Order entered January 22, 2025. West Virginia District Court ECF No. 63; *Ctr. for Biological Diversity*, 2025 WL 263294. In its ruling, the West Virginia District Court found the Conservation Groups more than satisfied the requirements for Article III standing, noting, among other things, the groups have members that visit the Cherry River watershed for recreational and professional purposes, their "enjoyment of [the affected] waterways is diminished by pollution from sediment caused by the authorized [RUP] and its impacts on candy darters," and their interests in protected bat species are threatened by activities authorized by the RUP. *Ctr. for Biological Diversity*, 2025 WL 263294, at *5.

9. The West Virginia District Court further explained, "[i]t is quite reasonable to conclude that the extensive construction required to execute the permit caused pollution and disruption to the surrounding streams and forestry." *Id.* Those injuries are ongoing, are fairly

traceable to the Forest Service's issuance of and South Fork's activities authorized by the RUP, and are redressable. *See id.* at *7 (explaining how "daily, oversized vehicle coal hauling, road maintenance, and open-top coal hauling likely results in 'pollution, runoff, and sedimentation' threatening surrounding aquatic life," how "road work and increased noise likely disrupts bat roosting and foraging," and how the court could redress those injuries by vacating the RUP).

10. The Conservation Groups submitted a motion for summary judgment in the Permit Challenge Action on November 26, 2024 that remains pending. The Forest Service and South Fork's responses and cross-motions for summary judgment were originally due January 27, 2025, West Virginia District Court ECF No. 55, but the defendants received two extensions, the last of which, granted on February 4, 2025, established a February 24, 2025 deadline for defendants' responses. *Id.*, West Virginia District Court ECF Nos. 62, 64, 65.

11. However, on February 7, 2025, Debtor South Fork, as well as its parent company, White Forest Resources, Inc., and certain of its affiliates (collectively, the "<u>Debtors</u>,") filed voluntary petitions for relief under chapter 11 of the United States Bankruptcy Code with this Court.

12. On February 11, 2025, South Fork filed a Notice of Suggestion of Bankruptcy in the Permit Challenge Action, alleging that the Conservation Groups' permit challenge "constitutes an attempt to exercise control over the property of the Debtors' bankruptcy estates." West Virginia District Court ECF No. 66 at 3. The Conservation Groups filed a response to the notice in which they disputed the Permit Challenge Action seeks to control the property of the estate, West Virginia District Court ECF No. 71. In response, the West Virginia District Court entered an order staying the action, West Virginia District Court ECF No. 72. Significantly, the

West Virginia District Court declined to determine whether the automatic stay applied, instead finding that such a question was "best determined by the presiding bankruptcy judge." *Id.*

13. In accordance with the West Virginia District Court's ruling, to the extent applicable, the Conservation Groups seek relief from the automatic stay to permit their regulatory challenge against the Forest Service to proceed to a swift conclusion and thus provide clarity regarding the validity of the RUP and issues related to whether South Fork is permitted to continue to use the Forest Service roads.

ARGUMENT

I. Conservation Groups Have Standing to Pursue the Relief Requested

14. Section 1109(b) of the Bankruptcy Code provides that a "party in interest . . . may raise and may appear and be heard on any issue in a case under this chapter." 11 U.S.C. § 1109(b). More specifically, section 364(d) allows the Court to grant relief from the automatic stay "on request of a party in interest." *Id*, § 364(d). Under 1109(b), "anyone who has a legally protected interest that could be affected by the bankruptcy proceeding is entitled to assert that interest." *In re Weinstein Co. Holdings, LLC*, 595 B.R. 455, 463 (Bankr. D. Del. 2018) (quoting *In re James Wilson Assocs.*, 965 F.2d 160, 169 (7th Cir. 1992)); *see also In re Combustion Eng'g, Inc.*, 391 F.3d 190, 214 n. 21 (3d Cir. 2004) (noting that section 1109 "has been construed to create a broad right of participation in Chapter 11 cases.") (citations omitted); *In re Amatex Corp.*, 755 F.2d 1034, 1042 (3d Cir. 1985) (holding that "Section 1109(b) continues the pattern of permitting interested parties in bankruptcy cases the absolute right to be heard and to insure their fair representation"). The Bankruptcy Code does not define "party in interest," but the Third Circuit has explained that section 1109(b) "must be construed broadly to permit parties affected by a chapter 11 proceeding to appear and be heard," such that the "party in interest" test is

"effectively co-extensive" with the test for Article III constitutional standing. *In re Glob. Indus. Techs., Inc.*, 645 F.3d 201, 211 (3d Cir. 2011) (quoting *In re Amatex Corp.*, 755 F.2d at 1042).

15. As the West Virginia District Court found when it denied South Fork's motion to dismiss the Conservation Groups' Permit Challenge Action, the Conservation Groups—through their members—have established far more than the "identifiable trifle of injury," *id.* at 210, necessary to satisfy Article III's threshold. The Conservation Groups have thus satisfied Article III and established the requisite "legally protected interest" to qualify as "parties in interest" under section 1109(b) of the Bankruptcy Code. *In re Glob. Indus. Techs., Inc.*, 645 F.3d at 210–11; *see also In re Edison Mission Energy*, No. 12-49219, 2013 WL 6504710, at *2–3 (Bankr. N.D. Ill. Dec. 11, 2013) (finding that organization acting to enforce environmental laws had a legally protected interest in its regulatory proceeding that was adversely affected by the bankruptcy stay).

16. Federal law expressly provides affected parties like the Conservation Groups with an avenue of redress when their interests are injured by unlawful federal agency action. Specifically, the United States Administrative Procedure Act provides that any person who has suffered legal wrong because of agency action or who is adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review of that agency action. 5 U.S.C. § 702. The Act specifies that a reviewing court "shall hold unlawful and set aside agency action, findings, and conclusions found to be … not in accordance with law … [or] without observance of procedure required by law." *Id.* § 706(2)(A), (D). Additionally, the Endangered Species Act allows "any person [to] commence a civil suit … to enjoin any person, including the United States and any other governmental instrumentality or agency …, who is alleged to be in violation of any provision of this Act. . . ." 16 U.S.C. § 1540(g)(1)(A).

17. The Conservation Groups expended significant resources to protect their rights and were nearing resolution of their claims in the Permit Challenge Action. However, because of the stay issued in that action, the Conservation Groups are unable to obtain the statutory relief that they have spent over a year pursuing. *See In re Fowler*, 259 B.R. 856, 861 (Bankr. E.D. Tex. 2001) ("This matter cannot go forward in bankruptcy court and if the creditor is not granted relief from the stay, he is left with no remedy in any court. That simply does not comport with due process.").

18. At the same time, South Fork continues its operations and use of the Forest Service Roads pursuant to the challenged permit, which the Conservation Groups allege violates bedrock federal environmental laws and places perilously endangered species at further risk of extinction. The Conservation Groups respectfully submit the automatic stay, to the extent it applies to the Permit Challenge Action, was not intended to give (and does not give) the Debtor carte blanche with respect to environmental laws in this fashion. Accordingly, relief from this Court is appropriate to allow the Permit Challenge Action to proceed.

II. The Automatic Stay Does Not Apply Because Conservation Groups' Permit Challenge Does Not Seek to Exercise Control Over the Property of the Estate

19. In its Notice of Suggestion of Bankruptcy filed with the district court, South Fork asserts that Conservation Groups' permit challenge should be subject to the automatic stay because it "constitutes an attempt to exercise control over the property of the Debtors' bankruptcy estates," implicitly invoking 11 U.S.C. 362(a)(3), which extends the automatic stay to "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." *See* ECF No. 66 at 3, *Ctr. for Biological Diversity*, No. 5:24-CV-00274 (S.D.W. Va. Feb. 11, 2025). Conservation Groups, however, have not brought an action against South Fork, its property, or any other Debtor, nor do they seek

penalties that would deplete the assets of the bankruptcy estate. Rather, the Conservation Groups brought suit against the Forest Service to address its failure to comply with critical federal environmental laws when issuing the RUP. Their suit seeks only vacatur of that permit, as authorized by the Administrative Procedure Act. Because the RUP is not property of the estate, the permit challenge does not constitute an "act to . . . exercise control over property of the estate" and is thus not subject to the automatic stay.

A. The road use permit does not convey a property interest to South Fork

20. The Bankruptcy Code's definition of the property of the estate does not expressly include permits such as the RUP issued by the Forest Service. 11 U.S.C. § 541. In determining whether an interest qualifies as a "legal or equitable interests of the debtor in property" under section 541's catch-all definition, the analysis "must begin by focusing directly on the specific interests claimed to constitute the debtor's property." *Westmoreland Hum. Opportunities, Inc. v. Walsh*, 246 F.3d 233, 242 (3d Cir. 2001).

21. While bankruptcy law determines whether a pre-existing property interest is "property of the estate," it does not create property rights or determine their nature or extent. *Tyler v. DH Capital Mgmt., Inc.,* 736 F.3d 455, 461 (6th Cir. 2013) (citing *Raleigh v. Ill. Dep't of Revenue,* 530 U.S. 15, 20 (2000)). Rather, property rights are created and defined by applicable non-bankruptcy law. *See Butner v. United States*, 440 U.S. 48, 55 (1979) ("Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in bankruptcy proceedings."); *Padro v. Pacificare of Texas, Inc.,* 264 B.R. 344, 356 (Bankr. D. Del 2001) (concluding that the underlying law establishing property rights may be state or federal).

22. Any claim that South Fork has a property interest in the road use permit is belied by the permit itself. The permit expressly states that it does not convey any interest in real property. In Section IV, paragraph A, "Legal Effect of the Permit," it provides:

> This permit, which is revocable and terminable, is a federal license. This permit does not constitute a contract or lease for purposes of the Contract Disputes Act, 41 U.S.C. 601. **This permit is not real property,** ***does not convey any interest in real property,*** and may not be used as collateral for a loan.

Exhibit 2, p. 6 (emphasis added). The direct language of the permit itself is evidence that the permittee knew that it was not acquiring a property interest. *See United States v. 5.96 Acres of Land*, 593 F.2d 884, 888–89 (9th Cir. 1979) (finding that permits that expressly negate the conclusion that the property holder received any property right do not create vested property rights).

23. That conclusion is supported by federal jurisprudence, where the law is settled that special use permits such as the RUP create no vested property rights. *Pai 'Ohana*, 875 F. Supp. at 699 ("The law is settled that special use permits create no vested property rights."), *aff'd sub nom. Pai 'Ohana v. United States*, 76 F.3d 280 (9th Cir. 1996); *see also United States v. Fuller*, 409 U.S. 488, 492–93 (1973) (on governmental taking of private grazing land, Fifth Amendment required no compensation for any value added to land taken by revocable permits to graze adjacent federal lands, although permits enhanced value of land taken); *Pension Benefit Guar. Corp. v. Braniff Airways, Inc. (In re Braniff Airways, Inc.)*, 700 F.2d 935, 942 (5th Cir.1983) (holding that airport landing slots conferred by Federal Aviation Administration rules are not property); *In re Gammo, Inc.*, 180 B.R. 485, 487 (Bankr. E.D. Mich. 1995) (license to sell lottery tickets was not property of the estate, such that revocation of license for failure to pay fees did not violate automatic stay).

24. The Third Circuit has held that a contractual relationship with a federal agency does not necessarily create a property interest under the Bankruptcy Code where that agency retains significant oversight responsibility. *See Westmoreland*, 246 F.3d 233, 244 (3d Cir. 2001) ("A federal agency's retention of pervasive restrictions on a grantee's identity and manner of performance under a HUD-type grant program is inconsistent with the grantee's assertion of a property interest in the grant relationship"). "[P]ervasive[] government control," including restrictions on the "transferability and alienability," of rights granted under a federal contract "render[s] the grantee's interest essentially valueless" and counsels against finding that such a rights constitute "property of the estate." *Id.* at 244–45.

25. Likewise, the Fourth Circuit, which includes West Virginia, has consistently held that a person has a property interest in a permit conferred by a state or local agency *only when* the agency lacks *all* discretion to deny issuance of the permit or to withhold its approval. *See Gardner v. Balt. Mayor & City Council*, 969 F.2d 63, 68 (4th Cir. 1992). Any significant discretion conferred upon the agency defeats the claim of a property interest. *Id*. When an agency has discretion to deny or place conditions on a permit, no property interest exists. *Id.* (finding no property interest in receiving a public works agreement); *Scott v. Greenville County,* 716 F.2d 1409 (4th Cir. 1983) (finding a property interest in a building permit where commission lacked discretion to deny it); *United Land Corp. v. Clarke,* 613 F.2d 497 (4th Cir. 1980) (no property interest in soil erosion permit); *Lackawanna Transp. Co. v. Hughes*, Civil Action No. 5:16-CV-19, 2016 U.S. Dist. LEXIS 150467, at *26 (N.D. W. Va. Oct. 31, 2016) (no protected property interest in an amended certificate of need for a landfill); *Domestic Violence Survivors Support Grp., Inc. v. Crouch*, Civil Action No. 2:18-cv-00452, 2020 U.S. Dist. LEXIS 186065, at *53

(S.D. W. Va. Oct. 7, 2020) (no protected property interest in license to run domestic violence program).

26. The terms of the RUP make clear that the Forest Service retains "pervasive control" over activities carried out pursuant to the permit. For example, the RUP is not renewable (§I, paragraph D, "Renewal"), is for non-exclusive use of the road (§I, paragraph G, "Non-Exclusive Use,"), is not assignable or transferrable (§I, paragraph H, "Assignability"), and the Forest Service retains discretion to amend, revoke, or suspend the RUP (§VII, "Revocation, Suspension, and Termination"). These provisions are not characteristic of ownership and further support the conclusion that the RUP does not confer any property interest. *See Hage v. United States*, 35 Fed. Cl. 147, 168–71 (1996) (use permit issued for grazing on Forest Service lands lacked characteristics of private property and did not confer any property interest).

27. Moreover, the Forest Service had the discretion to grant or deny the RUP. It is a special use permit issued pursuant to the National Forest Roads and Trails Act, 16 U.S.C. § 535 and § 537. *See* Exhibit 1, p.1. The Forest Service's permitting discretion is part of its broader ability to grant or restrict use of National Forest roads as an exercise of its statutory authority to control access to National Forest lands, which is established by 16 U.S.C. § 535. Congress, by enacting this provision, has authorized the Department of the Secretary of Agriculture, through the Forest Service, to:

> provide for the acquisition, construction, and maintenance of forest development roads within and near the national forests and other lands administered by the Forest Service in locations and according to specifications which will permit maximum economy in harvesting timber from such lands tributary to such roads and at the same time meet the requirements for protection, development, and management thereof, and for utilization of the other resources thereof.

16 U.S.C. § 535.

28. The delegation of these powers is inherently discretionary. As one court explained, "this statutory provision does not mandate any discrete action by the Forest Service. While it authorizes the Secretary to build and maintain roads, it does not require him or her to do so in any particular way, place or time frame." *Shawnee Trail Conservancy v. Nicholas,* 343 F. Supp. 2d 687, 712 (S.D. Ill. 2004). Similarly, § 537 provides that that the Forest Service "*may require* the user or users of a road under the control of the Forest Service" to maintain or reconstruct them. 16 U.S.C. § 537 (emphasis added). Neither §535 nor § 537 contains the type of mandate that would give rise to a property interest.

29. Likewise, the federal regulations codified at 36 C.F.R. § 261 *et seq.*, "National Forest System roads and trails," which govern the use of National Forest roads, grant the Forest Service considerable discretion. Section 261.1a confers the authority to issue road use permits. That section provides, "The Chief, each Regional Forester, each Forest Supervisor, and each District Ranger or equivalent officer *may issue* special-use authorizations, award contracts, or approve operating plans authorizing the occupancy or use of a road, trail, area, river, lake, or other part of the National Forest System in accordance with authority which is delegated elsewhere in this chapter or in the Forest Service Manual." 36 C.F.R. § 261.1a (emphasis added). The significant discretion conferred upon the Forest Service defeats South Fork's claim of a property interest. *Gardner,* 969 F.2d at 68.

30. A permittee's "expectation that the permit was issued correctly is simply an expectation and assumption" which cannot bind the agency or a court to "maintain the permit, wrongly issued." *Ohio Valley Environmental Coalition v. Bulen*, 410 F. Supp. 450, 464 (S.D. W. Va. 2004), *aff'd in pertinent part,* 429 F.3d. 493, 504–05. To recognize a property interest in the RUP at issue would be to grant South Fork greater rights than those possessed by permittees

outside of chapter 11 proceedings, which is contrary to the policy of the Bankruptcy Code. *See In re Prof'l Sales Corps.*, 56 B.R. 753, 764 (N.D. Ill 1985) (bankruptcy court order enjoining revocation of EPA interim status hazardous waste permit exceeded the court's power by expanding the debtor's property rights beyond what they would have been outside of chapter 11); *see also In re Gull Air, Inc.* 890 F.2d 1255, 1261 (1st Cir. 1989) ("The Bankruptcy Code does not create or enhance property rights of a debtor."); *In re Island Helicopters, Inc.,* 211 B.R. 453, 464 (Bankr. E.D. N.Y. 1997) ("The filing of a bankruptcy petition does not expand the debtor's rights against others more than they exist at the commencement of the case.").

31. Because South Fork has no property interest in the RUP, it is not part of the bankruptcy estate. 11 U.S.C. § 541(a)(1). And, because the permit is not property of the bankruptcy estate, Conservation Groups' permit challenge does not seek to "exercise control over property of the estate" and is not subject to the automatic stay provisions of 11 U.S.C. § 362(a)(3).

B. The alleged inability to operate the Rocky Run Mine without the RUP does not turn the permit challenge into an action to exercise control over the estate's property

32. Perhaps recognizing the law establishing that it has no property interest in the RUP itself—which is the sole target of Conservation Groups' permit challenge—South Fork in its filing with the West Virginia District Court suggested that the challenge seeks to obliquely "control" its property interest in the Rocky Run Mine because, South Fork alleges, it "would be unable to operate the Rocky Run Mine (its only active mining operations in the area) without the use of the roads that are authorized for use by the RUP." *See* ECF No. 66 at 3, *Ctr. for Biological Diversity*, No. 5:24-CV-00274 (S.D.W. Va. Feb. 11, 2025).

33. South Fork cannot manufacture a property right by alleging that it would be unable to operate the Rocky Run Mine without the use of the RUP, the issuance of which,

Plaintiffs maintain, was in violation of the ESA and NEPA. Plaintiffs' action is not aimed at South Fork or the Rocky Run Mine, but at the Forest Service's unlawful issuance of the RUP. *See Stih v. Rockaway Farmers Mkt., Inc.*, 656 B.R. 308, 312 (E.D.N.Y. 2024) ("[W]here the non-debtor's liability rests upon his own breach of duty, a stay clearly cannot be extended to the non-debtor."). And an action does not seek to "exercise control" over estate property merely because it would have some indirect impact on that property. *See In re Heritage Vill. Church & Missionary Fellowship, Inc.*, 87 B.R. 401, 404–05 (D.S.C.), aff'd, 851 F.2d 104 (4th Cir. 1988) (holding that debtor's tax exemption was not property of the estate, such that revocation of the exemption did not implicate the automatic stay, despite the fact that the exemption affects the debtor's ability to acquire property); *In re Riverwood Gas & Oil, LLC*, 601 B.R. 685, 692–93 (Bankr. C.D. Cal. 2019) (revocation of oil and gas leases was not an action to exercise control over estate property, despite the fact that debtor had a contractual right with lessee to operate the leases for profit).

34. Critically, a debtor is not excused from complying with the law by virtue of its bankruptcy. *See United States v. Hansen*, 262 F.3d 1217, 1238 (11th Cir. 2001) ("Bankruptcy does not insulate a debtor from environmental regulatory statutes."); *Matter of Kennise Diversified Corp.*, 34 B.R. 237, 245 (Bankr. S.D.N.Y. 1983) ("The provisions of the Bankruptcy Code do not and are not intended to provide an automatic mechanism for relieving property owners of the unpleasant effects of valid local laws embodying police and regulatory provisions."); *In re Roman Cath. Church of Archdiocese of New Orleans*, 653 B.R. 524, 534–37 (E.D. La. 2023) (holding that suits seeking cessation of ongoing unlawful behavior are not subject to automatic stay because they do not seek to control property of the estate), *aff'd sub nom. Matter of Roman Cath. Church of Archdiocese of New Orleans*, No. 23-30565, 2024 WL

3440466 (5th Cir. July 17, 2024); *Larami Ltd. v. Yes! Ent. Corp.*, 244 B.R. 56, 60 (D.N.J. 2000) ("Section 362(a)(3) was intended to prevent interference with a bankruptcy court's orderly disposition of the property of the estate, it was not intended to preclude post-petition suits to enjoin unlawful conduct. If this section were read to prevent the injunctive relief sought here, bankrupt businesses which operated post-petition could violate [others'] rights with impunity."); *United States v. Inslaw, Inc.,* 932 F.2d 1467, 1473 (D.C. Cir. 1991) ("The object of the automatic stay provision is essentially to solve a collective action problem—to make sure that creditors do not destroy the bankrupt estate in their scramble for relief. Fulfillment of that purpose cannot require that every party who acts in resistance to the debtor's view of its rights violates § 362(a) ....") (citation omitted); *In re Steenes*, 918 F.3d 554, 558 (7th Cir. 2019) ("The Bankruptcy Code cannot reasonably be read to enlist the judiciary's aid in permitting debtors to violate the law.").

35. Indeed, 28 U.S.C. § 959(b) requires that a trustee, including a debtor in possession, operate its property in compliance with state laws, including environmental laws. *See Wilner Wood Prods. Co. v. State of Me., Dep't of Env't Prot.*, 128 B.R. 1, 2 (D. Me. 1991) (overturning stay of state regulatory action to rescind air emissions permit). Although Section 959(b) applies on its face only to state law, courts, including the Third Circuit, have recognized that debtors in bankruptcy must comply with federal as well as state law. *See United States v. Wheeling-Pittsburgh Steel Corp.*, 818 F.2d 1077, 1086 (3d Cir. 1987) (holding that chapter 11 debtor was obligated to comply with the Clean Air Act during bankruptcy); *see also Safety-Kleen, Inc. (Pinewood) v. Wyche*, 274 F.3d 846, 864-66 (4th Cir. 2001) (holding that chapter 11 debtor could not avoid enforcement of the Resource Conservation and Recovery Act during bankruptcy); *In re Commonwealth Oil Ref. Co.*, 805 F.2d 1175, 1185-86 (5th Cir. 1986) (same).

36. Here, Conservation Groups allege that the Forest Service's issuance of the RUP violated the ESA and NEPA, and that the adverse impacts of those violations are ongoing. Nonetheless, South Fork asks the courts to ignore these legal violations by allowing it to continue to make use of the RUP during the pendency of its bankruptcy litigation to the detriment of federally protected species and Conservations Groups' members' interests therein.

37. South Fork, however, cannot assert any legitimate property right in continuing to operate its Rocky Run Mine if operation of that mine requires the use of Forest Service roads in violation of the ESA and NEPA. Conservation Groups' permit challenge is thus not an "act to . . . exercise control over property of the estate" under 11 U.S.C. 362(a)(3).

III. Cause Exists Under Section 362(d) to Modify the Automatic Stay to Permit Conservation Groups' Permit Challenge to Proceed

38. Notwithstanding the Debtor's apparent lack of a property interest in the permit at issue in the Permit Challenge Action, to the extent the Court finds the automatic stay provisions of 11 U.S.C. § 362(a)(3) applicable, it should grant relief from the stay pursuant to section 362(d). That section directs that "[o]n request of a party in interest and after notice and a hearing, the court shall grant relief" from the automatic stay "for cause, including the lack of adequate protection of an interest in property of such party in interest." 11 U.S.C. § 362(d)(1).

39. Courts are accorded flexibility in determining whether cause exists to lift the automatic stay. *In re Irish Bank Resol. Corp. Ltd.*, No. BR 13-12159-CSS, 2019 WL 4740249, at *6 (D. Del. Sept. 27, 2019) (citing *In re Mirant Corp.*, 440 F.3d 238, 253 (5th Cir. 2006)). Although § 362(d) does not define "cause," the Third Circuit has held that courts should consider "the totality of the circumstances in each particular case." *Baldino v. Wilson (In re Wilson),* 116 F.3d 87, 90 (3d Cir. 1997). The legislative history accompanying section 362 indicates that "cause" may be established by a single factor such as a lack of any connection with or

interference with the pending bankruptcy case. *In re Irish Bank Resol. Corp. Ltd.*, 2019 WL 4740249, at *6.

40. Courts in this District have applied a hardship balancing test to assess whether "cause" exists to lift the stay. *In re Aleris Intern., Inc.*, 456 B.R. 35, 47 (Bankr. D. Del. 2011) (citing *In re The SCO Group, Inc.,* 395 B.R. 852, 856 (Bankr. D. Del. 2007)). "The three prongs of the balancing test are (1) whether any great prejudice to either the bankrupt estate or the debtor will result from lifting the stay; (2) whether the hardship to the non-bankrupt party by the maintenance of the stay considerably outweighs the hardship to the debtor if the stay is lifted; and (3) whether it is probable that the creditor will prevail on the merits of its case against the debtor." *Id.* (citing *In re Downey Fin. Corp.,* 428 B.R. 595, 609 (Bankr. D. Del. 2010)).

41. Here, the balancing test plainly weighs in favor of allowing the Conservation Groups' Permit Challenge Action to proceed to a swift resolution to determine the validity of the RUP issued by the Forest Service to South Fork.

42. First, lifting the stay will not cause any prejudice to the bankruptcy estate or any of the Debtors. Conservation Groups do not seek any penalties from South Fork nor do they seek possession of any of the Debtors' property nor to collect on any claim. The estate's assets will not be diminished in any way by resolution of the Permit Challenge Action, which does not require South Fork's presence. *See Dine Citizens Against Ruining Our Env't*, 676 F. Supp. 2d at 1216–17 (explaining that, because the permit holder "plays no role in [the agency's] permitting decisions or related NEPA review except that of commentator," its inclusion as a party is not necessary for the court to resolve a permit challenge).

43. Even if South Fork chooses to continue participation in the Permit Challenge Action, that participation is limited to summary judgment briefing—the deadline for which was

less than two weeks away when South Fork filed its Notice of Suggestion of Bankruptcy—and appearing at a summary judgment argument, if one is held. That level of participation, and the minimal legal fees associated therewith, do not threaten the assets of the bankruptcy estate. *See In re Beker Indus. Corp.*, 57 B.R. 611, 631 (Bankr. S.D.N.Y. 1986) (holding that requiring a debtor to defend an action seeking an injunction against ongoing unlawful actions, which could require legal fees of over $100,000, did not threaten the assets of the estate); *In re Edison Mission Energy*, 2013 WL 6504710, at *6 (lifting the automatic stay to allow regulatory proceeding despite debtor's objection that the proceeding would "divide the Debtors' attention" and jeopardize a pending transaction); *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1, 24(1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.").

44. Nor would resolution of the permit challenge frustrate any of the core goals of the Bankruptcy Code generally and the automatic stay specifically. Lifting the stay as to the permit challenge will not result in any "race to the courthouse" or otherwise disrupt the "orderly liquidation procedure designed to treat all creditors equally." *United States v. Nicolet, Inc.,* 857 F.2d 202, 207 (3d Cir. 1988) (discussing "Congress' recognition that enforcement of the environmental protection laws merits a higher priority than the debtor's rights to a 'cease fire' or the creditors' rights to an orderly administration of the estate"). The automatic stay's "breathing spell," *id*., is not intended to shield a debtor from all litigation, but rather to "stop[ ] all collection efforts, all harassment, and all foreclosure actions." *In re Smith,* 876 F.2d 524, 525 (6th Cir. 1989) (*quoting* S.Rep. No. 989, 95th Cong., 2d Sess. 54). Allowing Conservation Groups' permit challenge to proceed would not frustrate the automatic stay's goal of "enabl[ing] debtors to resolve their debts in a more orderly fashion . . . and at the same time safeguard[ing] their

creditors by preventing different creditors from bringing different proceedings in different courts, thereby setting in motion a free-for-all in which opposing interests maneuver to capture the lion's share of the debtor's assets." *See In re Soares*, 107 F.3d 969, 975 (1st Cir. 1997) (internal quotation marks and citations omitted); *In re Edison Mission Energy*, 2013 WL 6504710, at *7 ("Allowing the IPCB Proceeding to proceed to resolution will likely benefit MWG and the Debtors because, as explained above, environmental concerns will be addressed by the Debtors through a plan of reorganization, or by their successors in interest. . . . Thus, allowing the IPCB Proceeding to continue will not conflict with the Bankruptcy Code's objective of preserving the bankruptcy estate.") (citing *Penn Terra Ltd. v. Dep't of Envtl. Res.,* 733 F.2d 267, 278–79 (3d Cir.1984)).

45. The Debtors and the estate will in fact benefit from resolution of the permit challenge. Determining whether South Fork has a valid permit will help establish the value of South Fork's assets, as will be required for liquidation and/or reorganization. And if the West Virginia District Court finds in Conservation Groups' favor, the Debtor's estate will not be without recourse; rather, it can apply for a new RUP from the Forest Service, which could then comply with the requirements of the ESA and NEPA in a new permitting process. Courts regularly grant relief from the stay under such circumstances. *See In re Edison Mission Energy*, 2013 WL 6504710, at *5 ("Allowing the [regulatory] Proceeding to continue will require [debtors'] compliance with environmental regulations that will still be in effect when [the debtor] emerges from bankruptcy," such that "[r]equiring [the debtor] to take immediate action to address alleged environmental violations will be beneficial to the Debtors' estates and their successors, including the prospective purchasers."); *In re Kish*, 41 B.R. 620 (Bankr. E.D. Mich. 1983) (allowed a citizen suit under a state environmental statute to proceed against a chapter 11

debtor, notwithstanding the automatic stay); *In re Revere Copper & Brass, Inc.,* 32 B.R. 577, 583 (Bankr. S.D.N.Y. 1983) (allowing district court action to proceed and explaining that "[d]ue to the significance of the 1980 contract to the reorganization plan, it is essential that Revere be permitted to obtain a prompt judicial determination of the validity of that contract . . . ."); *In re Fowler*, 259 B.R. 856, 861 (Bankr. E.D. Tex. 2001) ("This Court, like all bankruptcy courts, routinely lifts the stay to allow tort suits to go forward in state court to determine the liability, if any, of the Debtor.") (cited with approval in *In re Irish Bank Resol. Corp. Ltd.*, 2019 WL 4740249, at *6).

46. On the other side of the scale, Conservation Groups suffer significant ongoing harm from imposition of the stay. Their members use and enjoy the areas adversely impacted by activities conducted pursuant to the RUP. Conservation Groups spent over a year in litigation seeking to protect their interests in those fragile lands and wildlife and were on the threshold of relief when South Fork's bankruptcy halted their progress. Allowing the stay to remain in place allows South Fork to continue activities that threaten harm to multiple perilously endangered species absent compliance with any of the review processes established by Congress to protect those species and their habitat. The prejudice to Conservation Groups' interests thus far outweighs any possible prejudice to the Debtors or their estates. *See In re Edison Mission Energy*, 2013 WL 6504710, at *5 ("Considering the environmental and ecological concerns raised in the Complaint, any hardship to MWG will be *de minimus* in comparison to the hardship to the ELPC and the people of Illinois were the automatic stay to remain in effect.").

47. The final prong of the balancing test employed in this District—"whether it is probable that the creditor will prevail on the merits of its case against the debtor"—does not apply to the instant motion because Conservation Groups are not creditors and do not have a case

against any Debtor, only against the Forest Service. To the extent that the prong applies, Conservation Groups are likely to succeed on the merits of their permit challenge. *American Airlines, Inc. v. Continental Airlines, Inc. (In re Continental Airlines, Inc.)*, 152 B.R. 420, 426 (D. Del. 2006) ("[E]ven a slight probability of success on the merits" may satisfy the standard.). In this case, the Conservation Groups' well-pled allegations in the Permit Challenge Action that the Forest Service did not perform any analysis under NEPA or the ESA when issuing the RUP more than satisfy the standard. Indeed, the threshold for triggering the ESA consultation requirement is particularly low: any action that "may affect" listed species or their critical habitat requires the action agency to consult with the U.S. Fish and Wildlife Service. 50 C.F.R. § 402.14(a).[3] An action agency must consult with the Fish and Wildlife Service about "[a]ny possible effect, whether beneficial, benign, adverse, or of an undetermined character." *Nat'l Parks Cons. Assoc. v. Jewell*, 62 F. Supp. 3d 7, 13 (D.D.C. 2014); *see also Ctr. for Biological Diversity v. U.S. Mar. Admin.*, No. 4:21-cv-00132, 2023 WL 2746028, at *36 (E.D. Va. Mar. 31, 2023) ("The threshold to trigger consultation under the ESA is low.").

48. The West Virginia District Court, in its order denying South Fork's motion to dismiss for lack of standing, found that South Fork's activities pursuant to the RUP have in fact already adversely affected endangered species habitat. *See Ctr. for Biological Diversity*, 2025 WL 263294, at *5 ("It is quite reasonable to conclude that the extensive construction required to execute the permit caused pollution and disruption to the surrounding streams and forestry."); *id.* at *7 (discussing the "myriad of violation notices South Fork received from the WV DEP and Forest Service for its failure to properly maintain the permit roads, resulting in sedimentation,"

[3] An "action" means "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies," including "granting . . . permits," such that the Forest Service's issuance of the RUP is undoubtedly an agency action within the meaning of the ESA. *See* 50 C.F.R. § 402.02.

how "oversized vehicle coal hauling, road maintenance, and open-top coal hauling likely results in 'pollution, runoff, and sedimentation' threatening surrounding aquatic life," and how "road work and increased noise likely disrupts bat roosting and foraging"). Those findings indicate that the West Virginia District Court is very likely to find that the issuance of the RUP exceeded the low "may affect" threshold, such that ESA consultation was required. Conservation Groups are thus likely to succeed on the merits of their claims that the Forest Service's failure to perform any environmental analysis or engage in consultation with the Fish and Wildlife Service violated the ESA and NEPA.

49. Debtors engaged in such ongoing, unlawful, harmful activities should not be able to hide "behind the shield of the automatic stay." *Seiko Epson v. Nu-Kote Int'l. Inc.*, 190 F.3d 1360, 1365 (Fed. Cir. 1999). The validity of the RUP will have to be determined at some point. No party is helped by indefinitely putting off that day of reckoning. The Debtors and the estate will in fact benefit from resolving the uncertainty around the permit, allowing them to begin the permitting process for a new RUP as swiftly as possible if necessary. For all the foregoing reasons, the Court should thus find cause to lift the automatic stay under 11 U.S.C. § 362(d)(1).

NOTICE

50. Notice of this Motion has been provided to (i) counsel to the Debtors, (ii) counsel to the Official Committee of Unsecured Creditors, (iii) the U.S. Trustee and (iv) those persons who have requested notice pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested herein, the movants submit that no other or further notice is required.

WHEREFORE, for the foregoing reasons, Conservation Groups request that the Court enter an order (i) granting relief from the automatic stay to the extent necessary to allow

Conservation Groups to proceed with the Permit Challenge Action, and (ii) granting such other and further relief as this Court deems appropriate.

Dated: April 23, 2025

Respectfully submitted,

ASHBY & GEDDES

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And

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(304) 873-6080
Email: bluckett@appalmad.org

Attorneys for the Conservation Groups

Exhibit 1

(Permit Challenge Action Complaint)

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

<table>
<tr>
<td>
CENTER FOR BIOLOGICAL DIVERSITY,
378 North Main Avenue
Tucson, AZ 85701,

APPALACHIAN VOICES,
589 West King Street
Boone, NC 28607,

GREENBRIER RIVER WATERSHED ASSOCIATION,
120 Washington Street, No. 3
Lewisburg, WV 24901,

KANAWHA FOREST COALITION,
P.O. Box 722
Charleston, WV 25323,

SIERRA CLUB,
2101 Webster Street, Suite 1300
Oakland, CA 94612,

and

WEST VIRGINIA HIGHLANDS CONSERVANCY,
P.O. Box 306
Charleston, WV 25321,

Plaintiffs,

v.

UNITED STATES FOREST SERVICE,
1400 Independence Avenue, SW
Washington, D.C. 20250,

RANDY MOORE, in his official capacity as Chief of the Forest Service,
1400 Independence Avenue, SW
Washington, D.C. 20250,

and
</td>
<td>
Case No. 1:24-cv-87

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
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JASON HATTERSLEY, in his official capacity as
Gauley District Ranger of the Forest Service,
932 Northfork Cherry Road
Richwood, WV 26261,

Defendants.

INTRODUCTION

1. Plaintiffs Center for Biological Diversity, Appalachian Voices, Greenbrier River Watershed Association, Kanawha Forest Coalition, Sierra Club, and West Virginia Highlands Conservancy (collectively "Conservation Groups") challenge the failure of Defendants United States Forest Service ("Forest Service"), Randy Moore, Chief of the Forest Service, and Jason Hattersley, Gauley District Forest Service Ranger, to comply with the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531–1544, National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321–4370, and Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706, when issuing Road Use Permit FS-7700-41 ("Permit") to allow private mining company South Fork Coal Company ("Applicant") to use Forest Service roads in the Monongahela National Forest ("NF") to haul coal and coal mining equipment and supplies within the Cherry River watershed.

2. The Cherry River watershed is an area with exceptional ecological value and biodiversity that lies within and adjacent to the Monongahela NF. The Cherry River watershed, which includes South Fork Cherry River, North Fork Cherry River, Laurel Creek, and Cherry River, is a stronghold of the endangered candy darter—a vibrant freshwater fish known as the "underwater rainbow" that is on the knife's edge of extinction. The stream corridors and mixed conifer and red spruce forests of the Cherry River watershed also provide ideal summer roosting and foraging habitat for two endangered bats: the northern long-eared bat and the Indiana bat.

3. In September 2021, the Forest Service issued the Permit authorizing the Applicant to use Forest Service Road 249 ("FS 249") to haul oversized coal loads from Rocky Run Mine—a surface coal mine on adjacent private lands—on a gravel road on the Monongahela NF that is upslope of and runs along South Fork Cherry River; to conduct extensive road grading, clearing, and reconstruction work to make FS 249 usable for daily oversized coal hauling, including constructing ditches and installing culverts on direct tributaries to South Fork Cherry River to prevent sediment from entering the stream; and to use Forest Service Road 223 ("FS 223"), a gravel road that runs along a tributary to North Fork Cherry River, to haul coal-mining equipment and supplies—including fuel and explosives—back and forth to Rocky Run Mine.

4. These authorized activities are likely to cause lasting harm to the Cherry River watershed and its resident endangered species. Daily heavy coal truck traffic damages gravel roads and, together with the actions required to improve and maintain the haulroad, can cause increased delivery of fine sediments to streams, destroying and forever altering the candy darter's stream habitat and the landscape. Harmful coal dust can escape from open-top coal trucks as they drive, polluting the surrounding air and water with toxic chemicals and heavy metals, including arsenic, selenium, cadmium, and mercury, threatening aquatic life, and contaminating drinking water sources. Coal trucks can also spill large quantities of coal through accidents, presenting a serious risk to the candy darter and the rivers. Road work, vegetation clearing, tree cutting, and heavy truck traffic can also disturb roosting bats and disrupt bat foraging, and the use of herbicides to maintain roadways can lethally contaminate surface and ground waters, harming all species that depend on clean water for survival.

5. Without the Forest Service's authorization of the Permit, the Applicant would not be able to operate Rocky Run Mine. Surface coal mining operations, such as Rocky Run Mine,

can cause significant environmental damage, including erosion, sedimentation, pollution of ground and surface waters, contamination of soils, loss of habitat, and loss of biodiversity.

6. Despite the many harms to the endangered species that inhabit the Cherry River watershed from coal hauling, road work, and related activities, the Forest Service did not consult with the U.S. Fish and Wildlife Service ("FWS") to ensure that authorization of the Permit is not likely to jeopardize the species' continued existence or destroy or adversely modify critical habitat, in violation of section 7(a)(2) of the ESA. 16 U.S.C. § 1532(a)(2). By issuing the Permit without completing section 7(a)(2) consultation, the Forest Service has irretrievably committed resources and foreclosed the formulation or implementation of any reasonable and prudent alternative measures, in violation of section 7(d) of the ESA. 16 U.S.C. § 1532(d).

7. The Forest Service also did not conduct any environmental analysis prior to issuing the Permit, in violation of NEPA. 42 U.S.C. § 4332. The Forest Service's failure to comply with NEPA constitutes agency action unlawfully withheld or unreasonably delayed, in violation of the APA. 5 U.S.C. § 706(1). In addition, the Forest Service failed to follow procedures required by law, 5 U.S.C. § 706(2), and its actions are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, in violation of the APA. 5 U.S.C. § 706(2)(A).

8. Accordingly, Conservation Groups respectfully request this Court to declare that Defendants are in violation of the ESA, NEPA, and the APA; vacate and set aside the Forest Service's Permit; order the Forest Service to complete consultation with FWS that complies with section 7 of the ESA; order the Forest Service to complete an environmental review that complies with NEPA and the APA; and enjoin the Forest Service from authorizing the use of Forest Service roads on the Monongahela NF until the agency fully complies with these laws.

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JURISDICTION AND VENUE

9. This action arises under the laws of the United States, including the ESA, NEPA, and the APA.

10. Plaintiffs provided notice to Defendants of the violations described herein over 60 days prior to filing this Complaint, by letter dated April 25, 2023, pursuant to the citizen suit provision of the ESA, 16 U.S.C. § 1540(g). Defendants have not taken action to remedy the continuing violations of the ESA by the date of this Complaint's filing.

11. An actual, justiciable controversy exists between Plaintiffs and Defendants, and the requested relief is therefore proper under 16 U.S.C. 1540(g), 28 U.S.C. §§ 2201-02, and 5 U.S.C. §§ 701-06.

12. Venue in this court is proper under 28 U.S.C. § 1391 because Defendants Forest Service and Randy Moore, Chief of the Forest Service, reside in this district.

PARTIES

13. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY ("Center") is a nonprofit organization dedicated to the protection of imperiled species and their habitats. The Center is based in Tucson, Arizona, with staff and offices throughout the country. The Center has more than 87,000 members throughout the United States and the world, including numerous members who live and recreate in West Virginia. The Center's members include those who have viewed and otherwise appreciated the endangered species that may be adversely affected by the activities authorized by the Permit; who live near these species, habitats, and ecosystems; who recreate in the Monongahela NF and Cherry River watershed and have an interest in the area affected by the Permit; and who intend to visit these areas and enjoy these species, habitats, and ecosystems in the future. Because the Center values endangered, threatened, and critically imperiled species

and their critical habitats, the Center places high priority on protecting and recovering these species across their ranges.

14. Plaintiff APPALACHIAN VOICES is a North Carolina non-profit 501(c)(3) corporation committed to protecting the land, air, and water of the central and southern Appalachian region. The organization’s staff and members have long focused on reducing the negative impacts of coal mining on the environment within the region, including impacts to species listed under the ESA. Appalachian Voices has more than 1,000 members, the majority of whom live in the Appalachian states of Virginia, West Virginia, and North Carolina. It maintains two permanent offices in Virginia and one in North Carolina and has remote staff living and working in both West Virginia and Tennessee. Its staff and volunteers routinely conduct water quality monitoring across the central Appalachian coalfield region, including within the Cherry River watershed. Among the organization’s members are West Virginia residents who have enjoyed fishing, boating, and hiking in the Cherry River and downstream watersheds, and who hope to return and continue enjoying these activities into the future.

15. Plaintiff GREENBRIER RIVER WATERSHED ASSOCIATION is a non-profit organization based in Lewisburg, West Virginia, with a mission to promote the preservation, protection, and restoration of the ecological integrity of the Greenbrier River and its watershed. The Greenbrier River Watershed Association accomplishes its mission through education, involvement in special projects, and monitoring of potentially threatening human and environmental health issues.

16. Plaintiff KANAWHA FOREST COALITION is a local community organization based in Charleston, West Virginia, that works to protect the mountains, streams, and

communities of Appalachia from the devastating impacts of strip mining and mountaintop removal coal mining.

17. Plaintiff SIERRA CLUB is a nonprofit corporation incorporated in California, with more than 683,000 members and supporters nationwide, including approximately 2,240 members who reside in West Virginia and belong to its West Virginia Chapter. Sierra Club is dedicated to exploring, enjoying, and protecting the wild places of the Earth; to practicing and promoting the responsible use of Earth's resources and ecosystems; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. Sierra Club's concerns encompass the exploration, enjoyment, and protection of forests and surface waters in West Virginia.

18. Plaintiff WEST VIRGINIA HIGHLANDS CONSERVANCY is a nonprofit organization that has been incorporated in West Virginia since 1967. Its volunteer board of directors and approximately 1,500 members work for the conservation and wise management of West Virginia's natural resources. As one of West Virginia's oldest environmental activist organizations, the West Virginia Highlands Conservancy is dedicated to protecting clean air, clean water, forests, streams, mountains and the health and welfare of the people that live in the Mountain State and those who visit to recreate.

19. Plaintiffs bring this action on behalf of their adversely affected members.

20. Plaintiffs' members have recreated in, visited, studied, and worked to protect the Cherry River watershed and surrounding environment, which is significantly impacted by the Forest Service's authorization of the Permit. The interests of Plaintiffs' members in the health of the environment and ecosystems in this area is diminished and impaired by the Forest Service's failure to comply with environmental laws when it issued the Permit.

21. Plaintiffs' members have researched, studied, observed, and sought protection for the endangered species and critical habitats that are likely to be adversely affected by the Forest Service's authorization of the Permit. Plaintiffs' members have visited and observed, or sought out, the endangered species that are harmed by the Forest Service's failure to comply with environmental laws, and Plaintiffs' members intend to continue to visit and observe, or attempt to visit and observe, these species in the near future. Plaintiffs' members derive scientific, recreational, conservation, and aesthetic benefits from these species' existence in the wild, and their interest in maintaining the species inhabiting the rivers and forests of areas affected by coal hauling and mining is entirely dependent on the continued existence of healthy, sustainable, and accessible ecosystems, habitats, and populations. Any action that destroys, degrades, or diminishes these areas, or that kills, injures, harms, harasses, or displaces populations of listed species interferes with Plaintiffs' members' use and enjoyment of the areas and species.

22. For instance, Tierra Curry is a member and a senior scientist at the Center who lives in eastern Kentucky. She petitioned the FWS to protect the candy darter under the ESA in 2010. Ms. Curry enjoys wading and swimming in rivers and creeks in West Virginia and walking on the banks to look for fish, salamanders, and mussels. Ms. Curry visited North Fork Cherry River, South Fork Cherry River, Cranberry River, and Williams River in the summers of 2021 and 2022 to enjoy the scenery and to look for wildlife, and she plans to return to these areas in the summer of 2024. Ms. Curry's enjoyment of these waterways is diminished by pollution from sediment which smothers the habitats of the animals she loves, including the candy darter.

23. In addition, Appalachian Voices' member and Central Appalachian Field Coordinator Willie Dodson has worked for years to protect ESA-listed fish and has conducted stream water monitoring in candy darter critical habitat to monitor for pollutants that may be

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harmful to the species and to attempt to observe the candy darter. Specifically, Mr. Dodson has conducted water quality monitoring in South Fork Cherry River of West Virginia, in designated critical habitat for the candy darter, and plans to return to the area in the coming months to continue this water quality monitoring and to look for candy darters. FS 249 runs along South Fork Cherry River, Rocky Run Mine drains directly into South Fork Cherry River, and Mr. Dodson's interests in protecting and viewing candy darters and their habitat in South Fork Cherry River are thus threatened by sedimentation and pollution from the activities the Forest Service authorized under the Permit, from Rocky Run Mine, and from Defendants' failures to comply with the ESA, NEPA and the APA when the agency issued the Permit. Mr. Dodson plans to periodically return to the Cherry River watershed and South Fork Cherry River to conduct further water quality testing and to attempt to observe candy darters on an ongoing basis.

24. In addition, Doug Wood is a retired aquatic ecologist who lives near Charleston, West Virginia, and is a member of the Center, West Virgina Highlands Conservancy, and Kanawha Forest Coalition. Mr. Wood majored in wildlife management in college and worked for many years in water resource management in West Virginia before he retired. Mr. Wood is keenly interested in bats—specifically the endangered northern long-eared bat and Indiana bat—and he has participated in numerous mist net surveys for these bats in West Virginia in an effort to protect bat maternity colonies in the summer from harmful effects of mining, roads, logging, and other activities that can disturb and cause harm to bats. Mr. Wood helped with a bat mist net survey in April 2015 in the Kanawha State Forest, during which his team caught a northern long-eared bat in the mist net. Mr. Wood is aware that many northern long-eared bats have maternity colonies and hibernacula in West Virginia and that Indiana bats use the forests in West Virginia to form maternity colonies and forage in the summer, and he is concerned that disturbance to

their roosting and foraging habitat in the forests and stream corridors of the Cherry River watershed could harm the bats and cause them to disappear from the area forever. Mr. Wood intends to return to the Cherry River watershed in the summer of 2024 to look for bats and fish on South Fork Cherry River, North Fork Cherry River, and Cranberry River. The Forest Service's failure to follow the ESA and NEPA procedures that would protect candy darters, northern long-eared bats, and Indiana bats and their habitats in the Cherry River watershed detract from and diminish his ability to enjoy the area.

25. Activities that the Forest Service authorized under the Permit directly and irreparably injure Plaintiffs' members' interests. The Forest Service's failure to comply with the ESA and NEPA when it authorized the Permit avoids and undermines protections that are necessary to protect Plaintiffs' members' interests in the existence of the candy darter and its critical habitat, the northern long-eared bat, and the Indiana bat.

26. Plaintiffs' members' injuries are a result of Defendants' failure to follow the procedures mandated by the ESA and NEPA, which include analysis of the impacts of its action on the environment and listed species, when it issued the Permit. These procedural violations injure Plaintiffs' members' substantive conservation, recreational, scientific, and aesthetic interests. Plaintiffs' members rely on Defendants to comply with the requirements of the ESA and NEPA and to prepare adequate environmental analyses as required by these statutes. Plaintiffs rely on these analyses to monitor the impacts of coal hauling, roads, and mining on listed species; monitor legal compliance concerning species' management; educate members, directors, staff, and the public about species management and the state of the environment; and advocate for policies that protect wildlife and habitat. Defendants' actions and failures to act harm and threaten future harm to the concrete interests that Plaintiffs' members have in the fish,

wildlife, and ecosystems that reside in and depend on the Cherry River watershed and Monongahela NF.

27. The interests of Plaintiffs' members are directly and irreparably injured by Defendants' violations of law as described in this Complaint. Unless this Court grants the requested relief and orders Defendants to comply with the ESA, NEPA, and the APA, harm to protected species and their habitats will continue to accrue, and Plaintiffs' members' aesthetic, recreational, educational, professional, scientific, spiritual, and conservation interests will continue to be adversely affected. These are actual, concrete injuries to Plaintiffs, caused by the Forest Service's failure to comply with the ESA, NEPA, the APA, and the statutes' implementing regulations. The relief requested will directly redress Plaintiffs' injuries.

28. Defendant UNITED STATES FOREST SERVICE is a federal agency within the U.S. Department of Agriculture. The Forest Service is responsible for the management of National Forests, including the Monongahela NF. Among its management responsibilities, the Forest Service must ensure that the activities it authorizes, including activities in the Monongahela NF, comply with governing federal environmental statutes, including the ESA and NEPA. The Forest Service issued the Permit challenged in this case.

29. Defendant RANDY MOORE, Chief of the Forest Service, is sued in his official capacity. The Chief of the Forest Service has the authority under 36 C.F.R. § 212.6 to grant private parties access to lands administered by the Forest Service and intermingled and adjacent private and public lands for the use and development of resources within or adjacent to National Forest lands.

30. Defendant JASON HATTERSLEY is the Gauley District Ranger of the Forest Service and is sued in his official capacity. The Gauley District Ranger signed the Permit at

issue, authorizing the Applicant to use and conduct extensive maintenance and construction work on Forest Service roads on the Monongahela NF to haul coal, mining supplies, and equipment.

STATUTORY AND REGULATORY BACKGROUND

I. Endangered Species Act

31. The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). In enacting the ESA "Congress intended endangered species to be afforded the highest of priorities." *Id.* at 174.

32. The ESA "provide[s] a program for the conservation of … endangered species and threatened species" and "a means whereby the ecosystems upon which [such] species depend may be conserved." 16 U.S.C. § 1531(b).

33. Consistent with this purpose, the ESA proclaims that it is "the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act." 16 U.S.C. § 1531(c)(1).

34. The ESA assigns responsibility to implement the ESA to the Secretaries of the Departments of Commerce and the Interior, who in turn have delegated responsibility to the National Marine Fisheries Service ("NMFS") and FWS, respectively. 50 C.F.R. § 402.01(b).

35. The ESA defines "conservation" as "the use of all methods and procedures, which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary." 16 U.S.C. § 1532(3). To those ends, section 7 of the ESA requires all federal agencies to work to recover listed species and contains procedural and substantive requirements to do so.

36. Substantively, section 7(a)(2) of the ESA requires federal agencies to ensure that "any action authorized, funded, or carried out" is not "likely to jeopardize the continued existence" of any endangered or threatened species or "result in the destruction or adverse modification" of critical habitat. 16 U.S.C. § 1536(a)(2). To "jeopardize" means "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02. "Destruction or adverse modification" means "a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species." *Id.*

37. To carry out section 7(a)(2)'s substantive mandate, regulations implementing section 7 of the ESA's consultation process set forth mandatory procedures requiring any federal agency proposing an action (*i.e.*, the "action agency") to consult with an expert agency—FWS for terrestrial and freshwater species or NMFS for marine species and anadromous fish—to determine whether the action is likely to jeopardize any listed species or destroy or adversely modify critical habitat and, if so, to identify ways to modify the action to avoid that result. 50 C.F.R. §§ 402.10–402.17

38. The regulations require a federal agency to initiate consultation with FWS and/or NMFS whenever the agency undertakes an "action" that "may affect" a listed species or critical habitat. 50 C.F.R. § 402.14(a).

39. The threshold for a "may affect" determination and the required section 7 consultation is low. *See* 51 Fed. Reg. 19926, 19949 (June 3, 1986) ("Any possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the formal consultation requirement"); *see also* U.S. Fish & Wildlife Serv. & Nat'l Marine Fisheries Serv.,

Endangered Species Consultation Handbook, at xvi (1998) (defining "may affect" as "the appropriate conclusion when a proposed action may pose *any* effects on listed species or designated critical habitat."). An agency may be relieved of the obligation to consult only if the action will have "no effect" on listed species or critical habitat.

40. ESA regulations broadly define the scope of agency "actions" requiring section 7 consultation to include "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies," including "granting … easements, rights-of-way, [and] permits," and any "actions directly or indirectly causing modifications to the land, water, or air." 50 C.F.R. § 402.02.

41. An agency satisfies its substantive duties under section 7 of the ESA only by satisfying the consultation requirements set forth in section 7 of the ESA, 16 U.S.C. § 1536, and the implementing regulations, 50 C.F.R. §§ 402.10–402.16, and only after the agency lawfully complies with these requirements may an action that "may affect" a protected species go forward, *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1055-57 (9th Cir. 1994).

42. A federal agency must review its actions at "the earliest possible time" to determine whether an action "may affect" listed species or critical habitat in the "action area." 50 C.F.R. § 402.14(a).

43. In section 7 consultation, the action agency must first determine, including by asking FWS and/or NMFS (collectively, the "Services"), whether any ESA-listed or proposed-to-be-listed species may be present in the action area. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12. The "action area" includes "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." 50 C.F.R. § 402.02.

44. If the action agency finds that listed species may be present in the action area, the action agency must prepare a "biological assessment" to determine whether the proposed action is likely to adversely affect the listed species. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12.

45. The biological assessment must include, among other things, "[a]n analysis of the effects of the action on the species and habitat, including consideration of cumulative effects, and the results of any related studies." 50 C.F.R. § 402.12(f)(4).

46. Effects of the action include "all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action" and that "may occur later in time" or "outside the immediate area involved in the action." *Id.* § 402.02. The action "causes" a consequence if it "would not occur but for the proposed action and it is reasonably certain to occur." *Id.*

47. Cumulative effects of the action are the "effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation." *Id.*

48. If the action agency determines the action "may effect" but "is not likely to adversely affect" listed species or critical habitat, and the Services concur in writing, the regulations permit less comprehensive "informal consultation" to satisfy section 7 consultation obligations. *Id.* § 402.14(a), (b).

49. If the Services do not concur with the action agency's "not likely to adversely affect" determination, or if the action agency determines that the action is "likely to adversely affect" listed species or critical habitat, the action agency must engage in "formal consultation" with the Services, as outlined in 50 C.F.R. § 402.14. *Id.* §§ 402.02, 402.14(a).

50. Formal consultation is "a process between the Service[s] and the Federal agency that commences with the Federal agency's written request for consultation under section 7(a)(2) of the [ESA] and concludes with the Service[s'] issuance of the biological opinion under section 7(b)(3) of the [ESA]." 50 C.F.R. §§ 402.02, 402.14(c)(1).

51. In formal consultation, the Services must "evaluate the effects of the action and cumulative effects on listed species and critical habitat," added to the "environmental baseline" and "in light of the status of the species and critical habitat," to determine whether the action is likely to jeopardize listed species or destroy or adversely modify critical habitat. 50 C.F.R. § 402.14(g)(3)-(4). The "environmental baseline" must include the past and present impacts of all federal and nonfederal actions in the action area, including those that have already undergone consultation with the Services under section 7 of the ESA. *Id.* § 402.02.

52. At the conclusion of formal consultation, the Services must issue a "biological opinion" that "detail[s] how the agency action affects the species," 16 U.S.C. § 1536(b)(3)(A), and sets forth the Services' opinion as to whether the action is "likely to jeopardize" the continued existence of listed species or destroy or adversely modify critical habitat, 50 C.F.R. § 402.14(h)(1)-(3).

53. The determination of whether the action is likely to jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat must be based solely on "the best scientific and commercial data available," 16 U.S.C. § 1536(a)(2), and the Services must use the best available science to formulate the biological opinion and approve any incidental take. 50 C.F.R. § 402.14(g)(8).

54. If the Services determine that the action will incidentally "take" a listed species but *is not* likely to jeopardize the species or destroy or adversely modify critical habitat, the

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Services must provide an "incidental take statement" ("ITS"). *Id.* § 402.14(g)(7). The ITS must quantify the take allowed for each listed species, specify the impact of the incidental take on the species, set forth any "reasonable and prudent measures" ("RPMs") that are necessary or appropriate to minimize the impact from take, and provide "terms and conditions" that the action agency must comply with to implement the RPMs and avoid jeopardy to the species. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).

55. If the Services determine that the action *is* likely to jeopardize listed species or destroy or adversely modify critical habitat, the biological opinion must offer "reasonable and prudent alternatives" ("RPAs") that would reduce the action's impacts so that the action agency may avoid jeopardizing listed species or destroying or adversely modifying critical habitat. 16 U.S.C. § 1536(b)(3)(A).

56. It is illegal to engage in any activity that "takes" an endangered species absent valid take coverage under section 7 of the ESA or, in the case of actions with no federal agency involvement, section 10 of the ESA. *Id.* §§ 1538(a)(1)(B), 1536(b)(4), 1539.

57. The ESA defines "take" broadly to encompass all manner of harm and harassment, including direct injury or mortality and any acts or omissions that disrupt or impair significant behavioral patterns. *Id.* § 1532(19); 50 C.F.R. § 222.102. The term "take" is defined in the "broadest possible manner to include every conceivable way" in which a person could harm or kill wildlife. *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 704 (1995). The ESA's implementing regulations define "harm" in the context of take as including "significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering." 50 C.F.R. § 222.102.

58. Persons subject to the prohibition on take include individuals and corporations, as well as "any officer, employee, agent, department, or instrumentality of the Federal Government … [or] any State." 16 U.S.C. § 1532(13).

59. The ESA requires formal consultation to conclude within 90 days of the date that consultation was initiated unless the Services and the action agency agree to extend the consultation for a specified time period. *Id.* § 1536(b)(1)(A); 50 C.F.R. § 402.14(e).

60. Federal actions that "may affect" listed species or critical habitat may not proceed unless and until the federal action agency ensures, through completing the section 7 consultation process, that the action is not likely to cause jeopardy to the species or destroy or adversely modify critical habitat. 16 U.S.C. § 1536(a); 50 C.F.R. §§ 402.13, 402.14.

61. To maintain the status quo until consultation is complete, section 7(d) of the ESA requires that during consultation, action agencies "shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any [RPMs or RPAs]" necessary to avoid jeopardizing the species. 16 U.S.C. § 1536(d). This prohibition remains in force during the consultation process and continues until the requirements of section 7(a)(2) are satisfied. 50 C.F.R. § 402.09.

II. National Environmental Policy Act

62. NEPA is the nation's charter for the protection of the environment. Congress enacted NEPA to "declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation." 42 U.S.C. § 4321.

63. To these ends, NEPA requires all federal agencies to prepare environmental documents that analyze and disclose the reasonably foreseeable effects of their actions and ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. *Id.* § 4332(C); 40 C.F.R. § 1500.1.

64. The Council on Environmental Quality ("CEQ") promulgated NEPA regulations that are binding on all federal agencies, 40 C.F.R. §§ 1500-1508, and are primarily intended to "ensure Federal agencies consider the environmental impacts of their actions in the decision-making process," *Id.* § 1500.1.

65. The threshold for determining whether NEPA applies is whether there is a proposed federal agency action that is not otherwise exempt or excluded from NEPA. 42 U.S.C. § 4336; 40 C.F.R. § 1501.1.

66. NEPA requires all federal agencies to prepare an environmental impact statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C); 40 C.F.R. § 1500.1. To comply with NEPA's procedures, a federal agency "shall" prepare an EIS for any proposed agency action that has "a reasonably foreseeable significant effect on the quality of the human environment." 42 U.S.C. § 4336(b)(1).

67. When the effects of a federal agency action are less than significant, or to determine whether the effects are significant and warrant preparation of the more detailed EIS, NEPA requires federal agencies to prepare an environmental assessment ("EA"), which is a "concise public document prepared by a Federal agency to set forth the basis of such agency's finding of no significant impact or determination that an environmental impact statement is necessary." *Id.* § 4336(b)(2); 40 C.F.R. § 1508.1.

68. NEPA requires the action agency to "succinctly describe the environment of the area(s) to be affected or created by the alternative under consideration." 40 C.F.R. § 1502.15. NEPA regulations also require the action agency to evaluate a reasonable range of alternatives including a "no action" alternative when analyzing environmental impacts of the proposed action. *Id.* § 1502.14.

69. The action agency must set an appropriate baseline detailing the nature and extent of the environmental resources in the area. *Id.* § 1502.15. "The concept of a baseline against which to compare predictions of the effects of the proposed action and reasonable alternatives is critical to the NEPA process." CEQ, Considering Cumulative Effects under the National Environmental Policy Act, at 41 (Jan. 1997).

70. NEPA regulations define the "effects" or "impacts" of an action interchangeably as the reasonably foreseeable "changes to the human environment from the proposed action," including all "effects on natural resources and on the components, structures, and functioning of affected ecosystems," as well as the "aesthetic, historic, cultural, economic, social or health [effects]." 40 C.F.R. § 1508.1(g), (g)(4).

71. An agency's NEPA analysis must consider the proposed agency action's direct, indirect, and cumulative effects. *Id.* § 1508.1(g). Direct effects are caused by the proposed action and occur at the same time and place. *Id.* § 1508.1(g)(1). Indirect effects are caused by the action and occur later in time or father removed in distance. *Id.* § 1508.1(g)(2). Cumulative effects result when the "incremental effects of the action" are "added to the effects of other past, present, and reasonably foreseeable actions" undertaken by any person or agency and "can result from individually minor but collectively significant actions taking place over a period of time." *Id.* § 1508.1(g)(3).

72. To determine whether the effects of a federal action are significant and warrant preparation of a more detailed EIS, agencies must also consider the effects of connected actions, including actions that "[c]annot or will not proceed unless other actions are taken previously or simultaneously; or are interdependent parts of a larger action and depend on the larger action for their justification." *Id.* § 1501.9(e)(1).

III. <u>The Administrative Procedure Act</u>

73. The APA provides that any person who has suffered legal wrong because of agency action or who is adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review of that agency action. 5 U.S.C. § 702.

74. Under the APA, a reviewing court "shall compel agency action unlawfully withheld or unreasonably delayed." *Id.* § 706(1).

75. The APA specifies that a reviewing court "shall hold unlawful and set aside agency action, findings, and conclusions found to be … without observance of procedure required by law." *Id.* § 706(2)(D).

76. The APA also specifies that a reviewing court "shall hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A).

77. An agency's action is arbitrary and capricious if it relied on factors that Congress did not intend 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 the agency's expertise. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

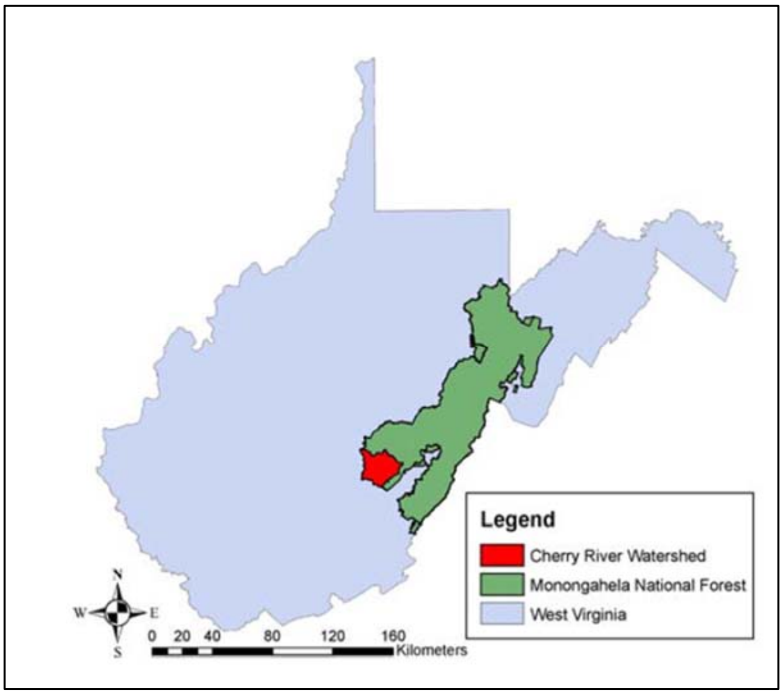
FACTUAL BACKGROUND

I. The Cherry River Watershed

78. The Cherry River watershed is known for its outstanding biodiversity and ecological value. It provides some of the best remaining habitat for many critically imperiled animals that depend on clean water, free-flowing rivers, intact forests, and pristine habitat.

79. The Cherry River watershed lies within the Upper Gauley River portion of the Kanawha River basin, which eventually feeds into the Mississippi River through the Ohio River.

80. Portions of the Cherry River watershed are within the Monongahela NF.



Map showing location of Cherry River Watershed and Monongahela NF in West Virginia.

81. The Cherry River's headwaters begin as two separate rivers, North Fork Cherry and South Fork Cherry, each rising in southeastern Pocahontas County, West Virginia, and flowing generally west-northwest across northern Greenbrier County before converging in Nicholas County at the city of Richwood, West Virginia, where they become the Cherry River.

The Cherry River watershed is within the Upper Gauley River basin, and also includes Laurel Creek, Cranberry River, and Williams River.

82. Forests in the Cherry River watershed consist of mixed hardwood and conifer stands, including the treasured red spruce forest ecosystem that is of high conservation value.

83. Many species that are listed as endangered or threatened under the ESA reside in the streams and forests within the Cherry River watershed.

II. <u>Endangered and Threatened Species in the Cherry River Watershed</u>

A. <u>The Endangered Candy Darter</u>

84. The candy darter (*Etheostoma osburni*) is a small, brightly colored freshwater fish that is often called the "underwater rainbow" due to its vibrant blue-green, red, and orange stripes. The candy darter is incredibly rare and exists in only a handful of streams in the Upper Gauley River basin in Virginia and West Virginia, including South Fork Cherry River, North Fork Cherry River, and Laurel Creek.

85. Candy darters are habitat specialists. They require cold, clean, and quick streams with complex coarse substrates (gravel, cobble, rocks, and boulders) that provide shelter areas, and exposed patches of pebbles and gravel between shelter rocks where female candy darters lay their eggs when spawning and where the vibrantly colored males perform their specialized egg-sheltering behavior, shown in the image below. Spawning typically occurs between April and June.

Two views of adult male candy darters sheltering eggs among rocky bottom substrate.

86. Historically, the candy darter occurred in 35 populations across the Bluestone, Lower New River, Upper Gauley, Lower Gauley, and Middle New watersheds in the Appalachian Plateaus physiographic province and the Upper New River and Greenbrier watersheds in the Valley and Ridge physiographic province.

87. The candy darter has been extirpated from nearly half of its historical range, with the total loss of 17 of 35 known populations due to harm to the fish's stream habitat—including from coal mining, logging, roads, and displacement by the introduced variegate darter.

88. As a result of threats facing the species, and given how few populations remain, FWS listed the candy darter as an endangered species in 2018 and proposed 370 stream miles of critical habitat in West Virginia and Virginia. 83 Fed. Reg. 58747 (Nov. 21, 2018).

89. FWS issued its final rule designating critical habitat for the candy darter in 2021. 86 Fed. Reg. 17956 (Apr. 7, 2021). Critical habitat Unit 5F is comprised of streams in the Cherry River watershed, including South Fork Cherry River, North Fork Cherry River, Laurel Creek, and Cherry River—all four are considered occupied by the candy darter. 86 Fed. Reg. at 17966.

90. Sedimentation is one of the primary threats to the candy darter's survival. Sedimentation refers to the process whereby fine soil particles (*e.g.*, sands, silts, clays) are

delivered to streams, harming stream habitats by causing increased turbidity, reduced light penetration, shallower depths, and warmer temperatures and by limiting the interstitial spaces among coarse rocky substrates. Excess sedimentation can cause streams to become “embedded” when sediment settles into the spaces between larger cobbles, gravels, rocks, and boulders, which become surrounded by or buried in sediment. As a result, excess sediment harms the candy darter by damaging its sheltering and breeding habitat and smothering its food sources.

91. Sedimentation is typically caused by erosion from upland activities, such as agriculture, logging, mining, use and maintenance of unpaved roads, and road construction, as well as activities that directly destabilize stream channels, like constructing culverts, crossings, or other instream structures.

92. Industrial-scale coal mining, logging, agriculture, and sewage and chemical discharges have caused widespread harm to many streams in West Virginia where the candy darter lives by causing sedimentation and increases in stream temperature and chemical toxicity.

93. The Cherry River watershed is a stronghold for the species—it is considered the most secure habitat for candy darters based on its high percentage of forest cover (indicating low levels of sedimentation and stream embeddedness), absence of variegate darters, and high degree of connectivity among populations due to the absence of major dams and impoundments.

94. The candy darter population in the Cherry River includes four subpopulations: South Fork Cherry River, North Fork Cherry River, Laurel Creek, and Cherry River. All four Cherry River subpopulations are critically important for the candy darter’s recovery because they are among the most genetically pure remaining populations.

95. Studies have shown that the approximate peak spawning time for candy darters in South Fork Cherry River is April 21.

B. <u>The Endangered Northern Long-Eared Bat</u>

96. As its name suggests, the northern long-eared bat (*Myotis septentrionalis*) is distinguished by its long ears, as compared to other bats in the *Myotis* genus, which usually have small, mouse-like ears. The northern long-eared bat is medium to dark brown on its back, with dark brown ears and wings, and tawny to pale-brown fur on its underside. The bat is about three inches long with a wingspan of 9 to 10 inches and weighs approximately 5 to 8 grams.

97. Northern long-eared bats depend on intact forest habitat, unfragmented by roads or large clearings, for roosting and foraging, and they prefer to roost and forage near rivers and stream corridors. The bat's low length-to-width wing ratio allows it to maneuver well in forests, and it is well adapted to coniferous forests of red spruce and pine. In addition to foraging on the wing, northern long-eared bats can detect insects within trees and on branches. Northern long-eared bats typically live in colonies of 30 to 100 bats in cave hibernacula and often utilize mines and culverts for hibernacula and roosting sites. Females produce at most one pup per year.

Northern Long-Eared Bat. Photo courtesy of U.S. Fish and Wildlife Service.

98. In the past two decades, the northern long-eared bat has faced a steep and sudden population crash due to habitat loss and disease. The bat's abundance, number of occupied hibernacula, spatial extent, and summer habitat occupancy across the range are all decreasing.

99. FWS first listed the northern long-eared bat as threatened in 2015 but recently reclassified the bat as endangered due to significant declines. 88 Fed. Reg. 4908 (Jan. 26, 2023).

100. The bat's low reproductive output of one pup per year and its high site fidelity make it especially vulnerable to catastrophic events and habitat disturbance.

101. White-nose syndrome is a primary threat to the bat, and human disturbance is responsible for the spread of white nose syndrome. The disease manifests as a white fungus that colonizes the bat's skin and disrupts its hibernation, resulting in excess activity and energy expenditure during winter months. The infected bats' more frequent arousals during hibernation usually lead to starvation and death. In parts of its range, the northern long-eared bat has declined by 99 percent from pre-white-nose syndrome levels. White nose syndrome has been identified in most West Virginia hibernacula.

102. West Virginia has one of the largest remaining populations of northern long-eared bats in the United States, and more than 100 known hibernacula remain across the state. Male northern long-eared bats have large foraging home range territories, and in West Virginia the foraging range for an individual male northern long-eared bat averages around 152 acres.

103. The mixed conifer and red spruce forests of the Cherry River watershed provide ideal foraging habitat conditions, and the forested areas around the stream corridors, the Forest Service roads impacted by the Permit, and Rocky Run mine site contain potential summer foraging and roosting habitat that has been deemed suitable for the northern long-eared bat.

104. Construction, modification, heavy truck traffic, and use of gravel roads along the Cherry River tributaries and within the adjacent mixed conifer-red spruce forest pose a significant threat to northern long-eared bats and their summer foraging and roosting habitat.

C. <u>The Endangered Indiana Bat</u>

105. The Indiana bat (*Myotis sodalis*) is a small migratory bat that hibernates colonially in caves and mines in winter, and roosts and forages in forests. Indiana bats have small, mouse like ears that are characteristic of other bats in the *Myotis* genus.

106. Indiana bats require intact forests for foraging and roosting and are found in forested areas in the eastern half of the United States, including West Virginia. Indiana bat roosting habitat is in forested areas with woody vegetation that is typically less than 30 meters from a stream bank and connected to an associated floodplain forest.

107. During autumn, when Indiana bats swarm and mate at hibernacula, male bats roost in nearby trees during the day and fly to the cave at night. During September in West Virginia, male Indiana bats roost in trees near ridgetops and often switch roost trees each day.

108. In winter, Indiana bats hibernate in caves and mines. The 2019 winter census estimated that the population consisted of 537,297 bats occurring within 223 hibernacula in 16 states, including West Virginia.

Indiana Bat. Photo courtesy of the U.S. Forest Service.

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109. The Indiana bat was originally listed as a species in danger of extinction under the ESA's predecessor statute, the Endangered Species Preservation Act of 1966, and the bat is currently listed as endangered under the ESA.

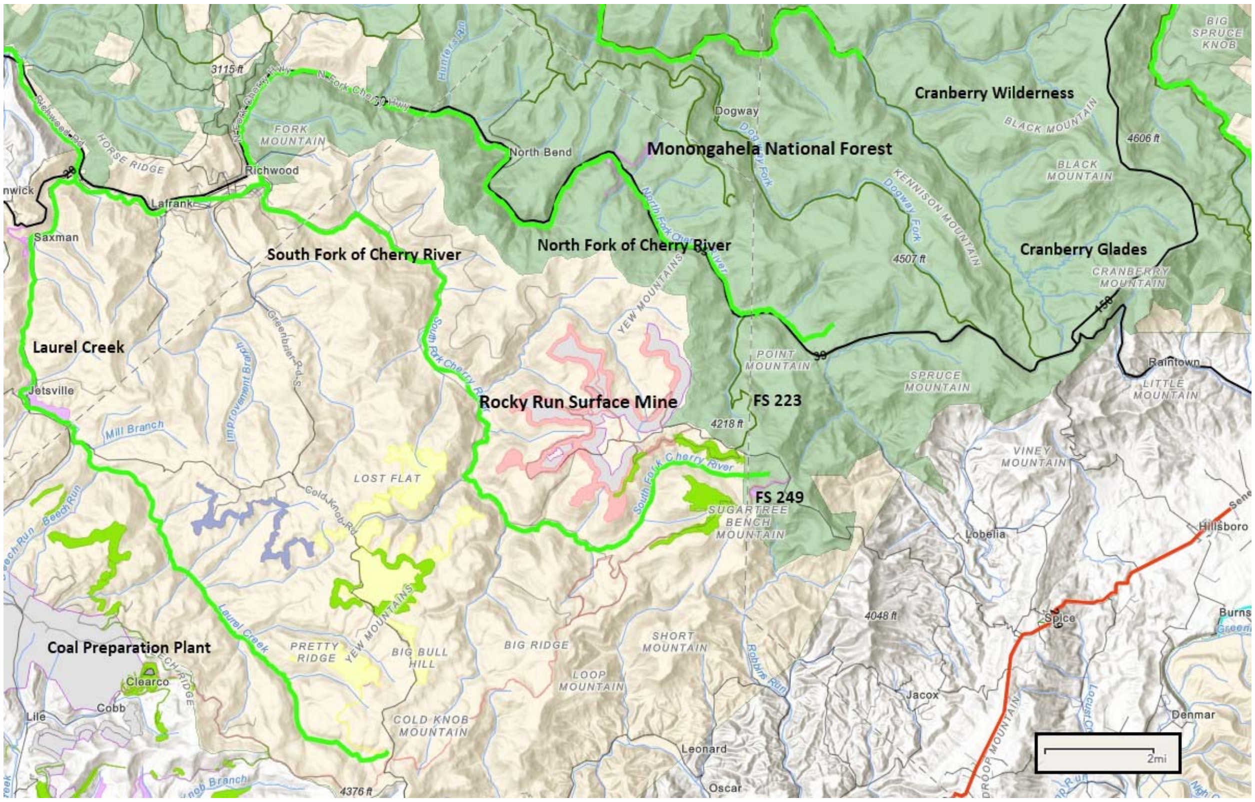
110. Since the Indiana bat was listed, its population has declined by more than half. Threats to the bat include loss of summer roosting and foraging habitat, pesticides and other contaminants, human disturbance, and most recently, white-nose syndrome, which has reduced the population by 19 percent since the disease arrived in North America in 2007. Over the past decade, as significant population declines related to white-nose syndrome have occurred, there has also been a substantial reduction in the distribution and abundance of occupied hibernacula.

111. Continued declines of the Indiana bat, despite the protection of winter cave hibernacula, suggest that the protection and preservation of summer foraging and roosting habitat is critical to prevent further declines of the species.

112. The stream corridors and the forested areas around the Forest Service roads impacted by the Permit and Rocky Run Mine contain summer foraging and roosting habitat that has been deemed suitable for the Indiana bat.

III. <u>The Forest Service's Issuance of the Road Use Permit</u>

113. In June 2021, the Applicant applied to the Monongahela NF for a commercial Forest Service road use permit to haul coal from Rocky Run Mine along FS 249 and to haul coal mining equipment and supplies on FS 223.



Map of Coal Mining Activities and Haulroad in Cherry River Watershed; Candy Darter Critical Habitat Shown in Bright Green. Available at https://conservation-abra.hub.arcgis.com/pages/south-fork-cherry

114. Rocky Run Mine is a surface coal mine located on private lands adjacent to the Monongahela NF that is expected to disturb approximately 1,122 acres of forest lands within the Cherry River watershed and deliver runoff and sediments into “receiving streams” that feed directly into South Fork Cherry River, including Rough Fork, Little Rocky Run, Blizzard Run, and Little Blizzard Run. The Applicant has described the area affected by Rocky Run Mine as “Rough Fork of/and Rocky Run, Little Rocky Run, Little Blizzard Run and Blizzard Run,” and “all of South Fork of Cherry River of Cherry River of Gauley River of the Kanawha River watersheds[, which] may be temporarily affected during the surface mining operation, but should settle back to pre-disturbance conditions shortly after completion of mining and reclamation.”

115. FS 249 begins in the Monongahela NF on a slope above the origin of South Fork Cherry River, which flows south-westerly between FS 249 and Rocky Run Mine. FS 249 follows

along and above South Fork Cherry River for 1.24 miles before exiting the Monongahela NF, where it becomes Sugartree Road. On its way to the coal preparation plant in Clearco, West Virginia, Sugartree Road connects with a ridge along and above the headwaters of Laurel Creek.

116. FS 223, also known as Bear Run Road, runs north from Rocky Run Mine through the Monongahela NF for 3.81 miles along Bear Run (a direct tributary to North Fork Cherry River) and connects to Highland Tree Road, which runs along North Fork Cherry River.

117. The Permit authorizes the Applicant to use FS 249 for daily hauling of heavy, oversized coal loads—36,000 tons per month—from Rocky Run Mine; to use FS 223 to haul equipment and supplies—including fuel, parts, and explosives—to Rocky Run Mine; and to close FS 249 to the public for the Permit's duration.

118. The Permit also authorizes and requires the Applicant to conduct extensive road work and maintenance on FS 249, including installing pipes and culverts, constructing ditches and in-line sumps, placing straw bales in ditch lines, placing rip rap into receiving streams, grading and resurfacing the roadway, mowing and brushing to clear vegetation from the road prism, and cutting trees around the roadway.

119. Without the Permit, the Applicant would not be able to haul coal from Rocky Run Mine to the coal preparation plant in Clearco, West Virginia, and would not be able to haul coal mining supplies and equipment to the mine.

120. The Forest Service issued the Permit on September 29, 2021, and the Permit remains in effect for ten years until September 1, 2031.

IV. <u>Harmful Effects of the Forest Service's Authorization of the Permit</u>

121. The Forest Service's authorization of the Permit is a federal agency action that requires consultation with FWS under section 7 of the ESA and a major federal action for the

purposes of NEPA that is likely to have significant adverse effects on the environment, irreparably alter the landscape, and cause lasting harm to endangered species and their habitats.

122. The Applicant began road reconstruction work and coal hauling immediately upon receipt of the Permit.

123. Daily oversized coal hauling and heavy truck traffic damages gravel roads and—together with the road clearing work required under the Permit as necessary to improve and maintain FS 249 as a coal haulroad—are likely to cause pollution, runoff, and sedimentation, and will otherwise harm aquatic and upland forest habitat for the endangered species that reside in the Cherry River watershed.

124. Maintaining coal haulroads by using herbicides can pollute and contaminate both surface and ground waters, harming imperiled species and all species that depend on clean water for survival.

125. As open-top coal haul trucks drive, harmful coal dust can escape and pollute the surrounding air and water with toxic chemicals and heavy metals, including arsenic, selenium, cadmium, and mercury, threatening aquatic life and contaminating drinking water sources.

126. During any accident or collision, coal trucks can also spill large quantities of coal, presenting a serious risk to the candy darter, the rivers, and the surrounding environment.

127. Road work, vegetation clearing, tree cutting, and heavy coal truck traffic can also disturb bats roosting in trees, disrupt bat foraging along stream and forest corridors, and remove trees and vegetation necessary for roosting and foraging bats.

128. When crushed rock and aggregate from coal-mining activities is spread onto road surfaces, it can cause lasting contamination and forever alter the chemical composition of water.

129. Not long after the Forest Service issued the Permit, sedimentation issues arose on FS 249 and FS 233 as a result of actions authorized by the Permit, as well as actions determined to result from Permit violations.

130. On March 3, 2022, the West Virginia Department of Environmental Protection ("WV DEP") cited the Applicant for failing to properly maintain FS 249, noting "multiple sections of the ditch are full of sediment, most of the sumps are full of sediment, many areas do not have a durable rock surface, and multiple areas are rutted, causing drainage issues."

131. At a follow-up inspection on March 9, 2022, WV DEP ordered the Applicant to cease all coal hauling because "site conditions [were] worsening," there were "potential off-site impacts … with each precipitation event," and the Applicant had put down non-durable material on the roadway, which was "creating additional problems."

132. A Forest Service employee inspected the site on March 16, 2022 and found that the Applicant was out of compliance with the Permit on FS 249. The inspection report noted that substantial spring rainfall, coupled with typical freeze-thaw conditions for the area, had caused FS 249 to become muddy and show signs of heavy rutting, and caused sedimentation to fill areas at the ends of culverts. The report noted that the Applicant had used crushed aggregate and "shot rock" from one of its mines in the area, essentially spreading coal waste rock and gravel onto the roadway and using the material to fill areas that drain off the road into South Fork Cherry River. In the inspection report, the Forest Service noted that certain road-fill work on FS 249 was necessary to bring the Applicant back into compliance with the Permit.

133. The Forest Service's March 16, 2022 inspection report also noted issues observed on FS 223. A culvert at the intersection of FS 223 and State Route 39 ("SR 39") that empties into North Fork Cherry River was crushed due to the Applicant's use of FS 233 in winter and early

spring and the heavy truck traffic that failed to properly turn from SR 39 onto FR 223. The report noted that a series of culverts on FS 233 had failed and overflowed, causing the road surface to wash out and the fill-slope soil to fail and sending sediment off the roadway. The report specified that the repair and maintenance of these culverts should be completed by the Forest Service, not the Applicant, under the Permit.

134. Forest Service employees performed another site inspection on April 28, 2022, and identified "several areas of concern and potential non-compliance" with the Permit.

135. At an on-site inspection with the Applicant on May 2, 2022, a Forest Service employee confirmed several Permit violations and additional issues on FS 249, including sedimentation escaping beyond sediment control devices; evidence of pipes in multiple locations starting to misshape and crush under the existing load stresses; evidence of base failures, rutting, and improper shaping of the roadway; failure to clear the roadway of mud and erodible material; and failure to properly remove brush from the road area. The employee also confirmed several Permit violations and issues on FS 223, including the crushed culvert at the intersection of FS 223 and SR 39; ditch lines filled with sediment; and improper grading and winter plowing activities that had caused the loss of stone from the road prism.

136. Inspections by WV DEP in late October 2023 discovered additional violations, including evidence that the Applicant had allowed non-durable and toxic material to spill on the coal haulroad and, specifically, that trucks had spilled raw coal on to the surface of the haulroad in several locations. A follow-up inspection by WV DEP on November 3, 2023, confirmed that raw coal remained on the haulroad and indicated that sediment sump clearing had begun.

137. These conditions are indicative of the myriad harmful effects of the activities authorized by the Permit on the environment and on endangered species and critical habitat.

138. The activities authorized by the Permit result in sedimentation impacting the endangered candy darter and its critical habitat.

139. Noise disturbance from coal hauling, increased truck traffic, and extensive road work, along with vegetation and tree clearing activities, are also likely to disturb and harm bats.

140. The surface mining activities at Rocky Run Mine, which would not occur but for the authorization of the Permit, are also likely to have significant harmful impacts on the environment, including on endangered species and their habitats in the Cherry River watershed.

141. Despite the numerous likely adverse effects to endangered species and candy darter critical habitat from the activities authorized by the Permit, the Forest Service did not consult with FWS under section 7 of the ESA to ensure that its action is not likely to jeopardize listed species or destroy or adversely modify designated critical habitat.

142. The Forest Service also did not conduct any environmental analysis under NEPA.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF
Violation of Section 7(a)(2) of the ESA and, in the alternative, the APA

143. Plaintiffs reallege and incorporate by reference all allegations contained in the preceding paragraphs as though fully set forth below.

144. Section 7(a)(2) of the ESA requires the Forest Service to consult with FWS to ensure that "any action authorized, funded, or carried out … is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S.C. § 1536(a)(2).

145. The ESA's implementing regulations require the Forest Service to initiate consultation whenever a proposed action "may affect" listed species, 50 C.F.R. § 402.14(a).

146. The Forest Service's authorization of the Permit allowing the Applicant to haul coal and coal mining supplies and equipment on Forest Service roads is an agency action within the meaning of the ESA.

147. The Forest Service's authorization of the Permit may affect—and indeed is likely to adversely affect—ESA-listed species or destroy or adversely modify critical habitat.

148. The Forest Service violated section 7(a)(2) of the ESA's procedural requirement to initiate and complete consultation before issuing the Permit.

149. The Forest Service violated section 7(a)(2) of the ESA's substantive requirement to ensure that the Forest Service's authorization of the Permit does not jeopardize listed species or destroy or adversely modify critical habitat.

150. The Forest Service's failure to initiate and complete consultation before issuing the Permit violates section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), the ESA's implementing regulations, 50 C.F.R. § 402.14, and the APA, 5 U.S.C. § 706(1), (2)(A), (2)(D).

SECOND CLAIM FOR RELIEF
Violation of Section 7(d) of the ESA and, in the alternative, the APA

151. Plaintiffs reallege and incorporate by reference all allegations contained in the preceding paragraphs as though fully set forth below.

152. Section 7(d) of the ESA requires that once an agency initiates section 7(a)(2) consultation, the agency "shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2)." 16 U.S.C. § 1536(d). The purpose of section 7(d) is to preserve the status quo and prevent harm to listed species and critical habitat during section 7(a)(2) consultation.

153. This prohibition "continues until the requirements of section 7(a)(2) are satisfied." 50 C.F.R. § 402.09.

154. The Forest Service issued the Permit to the Applicant before satisfying section 7(a)(2)'s procedural and substantive requirements.

155. By issuing the Permit before completing section 7(a)(2) consultation with FWS, which allowed the Applicant to begin activities significantly impacting endangered species and the candy darter's critical habitat, the Forest Service foreclosed itself from formulating or implementing reasonable and prudent alternative measures to avoid jeopardizing listed species and destroying or adversely modifying critical habitat—measures that could have prevented the harmful conditions on the Forest Service roads and their likely effects on endangered and threatened species and critical habitat.

156. The Forest Service's irretrievable commitment of resources in a manner that foreclosed the formulation or implementation of RPMs or RPAs to protect listed species and critical habitat violates section 7(d) of the ESA, 16 U.S.C. § 1536(d), its implementing regulations, 50 C.F.R. § 402.09, and the APA, 5 U.S.C. § 706.

THIRD CLAIM FOR RELIEF
Violation of NEPA and the APA

157. Plaintiffs reallege and incorporate by reference all allegations contained in the preceding paragraphs as though fully set forth below.

158. NEPA requires federal agencies to take a hard look at the environmental effects of proposed actions. 42 U.S.C. § 4332(2)(C).

159. NEPA requires federal agencies to consider the effects of each "major [f]ederal action[] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The effects analysis must examine not only the direct impacts of a proposed action, but also the

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indirect and cumulative impacts, and impacts of connected actions. 40 C.F.R. §§ 1508.1(g), 1501.3(b), 1501.9(e)(1)(i)–(iii).

160. The Forest Service's issuance of the Permit is a major federal action within the meaning of NEPA. 40 C.F.R. § 1508.1.

161. The Forest Service's issuance of the Permit is a final agency action within the meaning of the APA. 5 U.S.C. § 704.

162. The Forest Service failed to conduct any analysis pursuant to NEPA regarding the significant effects the Forest Service's issuance of the Permit would have on the environment.

163. The Forest Service's failure to follow procedures required by NEPA, 42 U.S.C. § 4332, constitutes agency action unlawfully withheld or unreasonably delayed, 5 U.S.C. § 706(1), is without observance of procedure required by law, 5 U.S.C. § 706(2)(D), and is, alternatively, arbitrary, capricious, and otherwise not in accordance with law, 5 U.S.C. § 706(2)(A).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request this Court to enter judgment for Plaintiffs and provide the following relief:

1. Declare that Defendants are in violation of the ESA, NEPA, and APA as alleged herein;
2. Vacate and set aside the Forest Service's Permit;
3. Order the Forest Service to complete consultation with FWS that complies with the ESA;
4. Order the Forest Service to complete an environmental review that complies with NEPA;
5. Enjoin the Forest Service from authorizing the use of Forest Service roads on the Monongahela NF until it fully complies with the ESA, NEPA, and the APA;

6. Award Plaintiffs their reasonable attorneys' fees and costs pursuant to the ESA, 16 U.S.C. § 1540(g)(4), Equal Access to Justice Act, 28 U.S.C. § 2412, and Fed. R. Civ. P. 54(d), as applicable; and
7. Grant Plaintiffs such other relief as the Court deems just and proper.

DATED: January 10, 2024

Respectfully submitted,

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Counsel for Plaintiffs

Exhibit 2

(Road Use Permit)

USDA Forest Service
FS-7700-41 (v07/2013)
OMB No. 0596-0016 (exp. 07/31/2016)

U.S. DEPARTMENT OF AGRICULTURE
FOREST SERVICE

NON-FEDERAL COMMERCIAL ROAD USE PERMIT

AUTHORITY:

Section 4 and Section 6 of the National Forest Roads and Trails Act
16 U.S.C. 535 and 537

South Fork Coal Company, LLC; 1295 Ashford Hill Road, Ashford, WV 25009 (the holder), is hereby granted use of the following roads or road segments and related transportation facilities (hereinafter "roads") on the [Gauley Ranger District, Monongahela National Forest, for commercial hauling, subject to the terms and conditions of this permit:

FR 223 (Bear Run) from its beginning at the intersection with State Route 55 to intersection with County Route 39/4 (total length of 3.81 miles)
FR 249 from intersection with County Route 29/4 to terminus (total length 1.2 miles)

APPENDICES

A – Annual Operating Plan
B – Reconstruction Schedule
C – Reconstruction Plans and Specifications
D – Commensurate Share Calculation
E – Maintenance Requirements

TERMS AND CONDITIONS

I. GENERAL TERMS

A. AUTHORITY. This permit is issued pursuant to the National Forest Roads and Trails Act, 16 U.S.C. 535 and 537, and 36 CFR Part 212, Subpart A, as amended, and is subject to their provisions.

B. RESPONSIBLE OFFICIAL. The responsible official is the Gauley district ranger or a subordinate officer with delegated authority.

C. TERM. This permit shall expire at midnight on September 1, 2031, 10 years from the date of issuance. Expiration of this permit shall not require notice, a decision document, or any environmental analysis or other documentation.

D. RENEWAL. This permit is not renewable. Prior to expiration of this permit, the holder may apply for a new permit that would renew the use authorized by this permit. Renewal of the use shall be at the sole discretion of the responsible official.

E. AMENDMENT. This permit may be amended in whole or in part by the Forest Service when, at the discretion of the responsible official, this action is deemed necessary or desirable to incorporate new terms that may be required by law, regulation, directive, the applicable land 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, including state traffic laws, 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 authorized by this permit is not exclusive. The Forest Service reserves the right to use the roads authorized by this permit and to allow others to use them at any time. The holder shall use the roads authorized by this permit in a manner that will not unreasonably or unnecessarily interfere with their use by others, including the Forest Service. Except for any restrictions that the holder and the Forest Service agree are necessary to protect public safety and road investments, the roads authorized by this permit shall remain open to the public for all lawful purposes.

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

II. OPERATIONS

A. **ANNUAL OPERATING PLAN**. The holder shall prepare and annually revise by August 15th, an operating plan. The annual operating plan shall be prepared in consultation with the responsible official or the responsible official's designated representative and shall cover all operations authorized by this permit. At a minimum, the annual operating plan shall specify the date the use authorized by this permit will commence, the duration and extent of the use, the products that will be hauled, a traffic control plan per clause II.C, the names of the holder's employees, contractors, and subcontractors who will use the roads authorized by this permit on behalf of the holder, and any other information regarding the authorized use deemed necessary by the responsible official. The annual operating plan shall be submitted by the holder and approved by the responsible official or the responsible official's designated representative prior to commencement of commercial hauling under this permit and shall be attached to this permit as Appendix A. If there is any material change in the information contained in the annual operating plan, the holder shall notify the responsible official promptly in writing of the change.

B. **HOLDER'S REPRESENTATIVE**. The holder shall designate a representative for purposes of administration of this permit and shall notify the responsible official in writing who the holder's representative will be.

C. **USE RECORDS**. Every quarter (3 months) during periods the holder is conducting commercial hauling on the roads covered by this permit, the holder shall provide scale or other records acceptable to the responsible official that document the quantity hauled, calculated in the unit of measure (e.g., thousands of board feet, tons, cubic yards, or vehicle units) used to determine payments in lieu of performance under clause III.E or the holder's investment share under section V.

D. **PUBLIC SAFETY**. When the holder is engaged in commercial hauling adjacent to or on National Forest System roads or National Forest System trails open to public travel, the holder shall provide users with adequate warning of hazardous conditions associated with the holder's operations. A traffic control plan for each commercial hauling project shall be approved by the responsible official in writing before commercial hauling commences. Warning devices shall be appropriate for current conditions and shall be covered or removed when not needed. Flags and other warning devices shall comply with the Manual on Uniform Traffic Control Devices for Streets and Highways (MUTCD) and any specifications attached to this permit.

E. **TRAFFIC RULES AND USE RESTRICTIONS**

1. The holder and its agents, employees, and contractors shall comply with all traffic rules and use restrictions imposed by the Forest Service, including:

a. Road closures or use restrictions prompted by weather conditions, a fire hazard, or road construction or maintenance.

b. Traffic rules for safe and effective use of roads.

c. Regulation of the number of vehicles using a road to prevent traffic congestion.

2. Unless specified in this permit or approved in writing by the responsible official, use of motor vehicles by the holder or its agents, employees, or contractors must be in accordance with the applicable motor vehicle use map (36 CFR 261.13).

3. Temporary traffic control signs, flagging, and warning devices for road construction, operation, or maintenance conducted under this permit shall comply with Part 6 of the MUTCD.

4. The holder shall not load logs on trucks parked on a road, except to recover lost logs.

5. The holder shall not operate vehicles or equipment with cleats or other tracks that will injure the road surface.

6. FR 249 - the holder shall not operate dump trucks more than 12 feet wide, more than 56 feet long, or with a gross weight and load of more than 112 tons.

7. FR 223 – the holder shall not operate any vehicle in excess WVDOT of standard legal load limits (i.e. wider than 10 ft. or weighing more than 44 tons).

F. REQUIREMENT TO CARRY A COPY OF THE PERMIT. Drivers of all vehicles operating under this permit shall have a copy of the first sheet of this permit in their vehicle. The copy will be presented, on request, to any Forest Service officer.

G. LOAD MARKING. Unless otherwise approved in writing by the responsible official, when hauling wood products under authority of this permit, a 6" minimum size red letter "P" shall be painted on three or more ends of logs visible from the front and on three or more ends of logs visible from the back of the load.

III. PERFORMANCE AND COST RECOVERY

A. RECONSTRUCTION REQUIRED TO ACCOMMODATE USE. The holder shall perform any road reconstruction required to accommodate the holder's use under this permit, or deposit funds sufficient to cover the cost of the reconstruction, before the holder's use commences.

B. RECONSTRUCTION SCHEDULE, PLANS, AND SPECIFICATIONS. To accommodate the authorized use, the holder shall perform the road reconstruction described in the attached schedule (Appendix B), in accordance with that schedule and the attached plans and specifications (Appendix C).

C. COMMENSURATE SHARE

1. The holder shall perform maintenance, or deposit funds sufficient to cover the cost of maintenance, commensurate with the holder's use of the roads authorized by this permit (the holder's commensurate share), measured, e.g., in thousand board feet, cubic yards, or vehicle units. The holder shall be entirely responsible for maintenance that is necessitated by the holder's use, i.e., maintenance which would not be necessary if the holder's use did not occur. The holder shall be proportionately responsible with other users of the roads authorized by this permit for maintenance not necessitated by traffic, i.e., maintenance that is necessary due to natural causes such as rain, wind, rock fall, and growth of brush. Maintenance that could be required or for which payment could be required by this clause includes, at a minimum, work addressed in section IV of this permit.

2. The initial calculation of the holder's commensurate share, including the maintenance made necessary by the authorized use and the cost of the maintenance, is shown in Appendix D. The value of the holder's commensurate share for the use authorized by this permit is $4,539.08, provided that the rate shall be revised upward or downward on the anniversary date of this permit, based on estimated costs and anticipated use of the roads authorized under this permit. If the value of the holder's commensurate share exceeds the cost of maintenance that is performed on the roads authorized by this permit, the difference between the value of the holder's commensurate share and the cost of the maintenance performed shall be deposited in cash, as provided in clause III.E.

D. PERFORMANCE BOND FOR ROAD MAINTENANCE. As a further guarantee of the holder's commensurate share obligation, the responsible official may require the holder to furnish a surety bond or other security.

1. As a further guarantee of compliance with the holder's commensurate share obligation, 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 $100,000. The responsible official 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 responsible official, 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 responsible official. 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 responsible official certifies that the obligations covered by the bond or other security are met and (b) the holder establishes to the satisfaction of the responsible official that all claims for labor and material for the secured obligations have been paid or released.

IV. REQUIREMENTS FOR CONDUCTING MAINTENANCE

A. IN GENERAL. When maintenance is performed, it shall be conducted in accordance with the following requirements and the requirements in Appendix E:

1. The holder shall perform maintenance on the roads authorized by this permit that is necessary to protect and repair the roadbed, road surface, and associated transportation facilities.

2. The holder shall resurface the roads authorized by this permit to the extent loss of surfacing is caused by the use authorized by this permit.

3. If other commercial haulers are operating on the roads authorized by this permit, the holder and those commercial haulers shall enter into an agreement for performance of maintenance on these roads. If conflicts arise regarding responsibility for the maintenance, commercial hauling on these roads shall cease until the conflicts are resolved.

B. SNOW REMOVAL. Snow removal shall be conducted in a manner that protects roads, ensures safe and efficient transportation of materials, and prevents erosion damage to roads, streams, and adjacent lands. The holder shall:

1. Remove snow from the entire width of the road surface, including turnouts.

2. Remove snow slides, earth slides, fallen timber, and boulders that obstruct the road surface.

3. Remove snow, ice, and debris from ditches and culverts so that the drainage system will function efficiently at all times.

4. Deposit all debris, except snow and ice, removed from the road surface and ditches at locations approved by the responsible official and away from stream channels.

5. Blades used to remove snow shall be equipped with skid shoes to prevent loss of surfacing and damage to the road. A minimum of 2 (two) inches of snow must be left to protect the road.

6. Restore any damage resulting from snow removal (including replacement of lost stone) in a timely manner.

7. Ensure that snow plowing is conducted in accordance with the traffic control plan required under clause II.C.

The holder shall not:

8. Undercut constructed slopes or remove gravel or other surfacing material from the road surface.

9. Leave snow berms on the road surface. Berms on the shoulder of the road shall be removed or drainage holes shall be opened and maintained. Drainage holes shall be spaced as necessary to obtain satisfactory surface drainage without discharge on erodible fills.

10. Use equipment with cleats or other tracks to plow snow without prior written approval of the responsible official.

11. The holder shall not use any agents, chemical or physical, to aid in the removal of snow.

V. INVESTMENT SHARING (applicable to FR 249 only). The holder is hauling non-federal forest products from land tributary to roads authorized under this permit and, is therefore subject to investment sharing under 16 U.S.C. 535. The holder and the responsible official have entered into a cooperative agreement for the agency to recoup the holder's share of the construction costs for roads authorized under this permit that have been borne by the agency (the holder's investment share). The holder may contribute funds or may perform maintenance or reconstruction required to accommodate the holder's use to satisfy the holder's investment sharing obligation.

The user agrees to perform and assume all reconstruction and maintenance cost required on FR 249, for the duration of this permit.

Required maintenance on FR 249 for the duration of the permit shall include, but is not limited to:

1) MAINTAIN POSITIVE DRAINAGE
- **a. Clean/install/replace culverts as needed to allow for proper drainage**
- **b. Clean and maintain all ditches to allow for proper drainage**
- **c. Maintain crown or super on roadway to allow water to freely flow to ditches quickly without flowing or ponding in the traveled way**

2) GRADING
- **a. Maintain traveled way to promote proper drainage**
- **b. Remove ruts, potholes and irregularities in surface as needed**
  - **i. Ruts and potholes shall be scarified to a depth equal to a minimum of 1" below bottom and reworked to establish a stable surface at the proper road grade elevation.**
    - **1. Holder shall provide durable, non-erodible material as needed to repair roadway in these areas.**

3) MOWING
- **a. Remove all brush from road prism and edges from top of cut to a minimum of 6 ft below top of fill slope**
  - **i. Removal of trees greater than 5" DBH shall be done between the dates of November 15th and March 31st.**

4) RESURFACING
- **a. The contractor shall supply crushed aggregate (or other durable surface as approved by the U.S. Forest Service) as needed to provide a stable traveled way without allowing damage to the road base.**
- **b. Provide and place materials as needed to replace aggregate lost through use associated with this permit.**

Upon completion of the permit and prior to the U.S. Forest Service resuming maintenance responsibilities for FR 249, the contractor shall:

1) reworked road prism to create a properly shaped, smooth surfaced travel way approximately 16 ft wide, sloped to drain, with a minimum of 3" of crushed aggregate surfacing.
- **a. areas outside 16 ft travel width shall be sloped away from road**

2) Mow the entire length of roadway from top of cut to a minimum of 6 ft below the top of fill.

3) Inspect all culverts and clean or replaced as needed to ensure proper drainage.
- **a. Damaged, undersized, or compromised culverts shall be replaced.**

4) Seed/mulch all disturbed areas with a Forest Service approved seed mix/mulching material.

VI. RIGHTS AND LIABILITIES

A. LEGAL EFFECT OF THE PERMIT. This permit, which is revocable and terminable, is a federal license. This permit does not constitute a contract or lease for purposes of the Contract Disputes Act, 41 U.S.C. 601. This 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 OUTSTANDING RIGHTS. This permit is subject to all valid outstanding rights.

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. RISK OF LOSS. The holder assumes all risk of loss associated with use of the roads authorized by this permit, 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 acts of God.

E. 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, damage to government improvements covered by this permit, and 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. For purposes of this clause, "hazardous material" shall mean any hazardous substance, pollutant, contaminant, hazardous waste, oil, and/or petroleum product, as those terms are defined under any federal, state, or local law or regulation.

1. 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, while conducting commercial hauling under this permit. If the environment or any government property covered by this permit becomes damaged during the holder's use under this permit, the holder shall immediately repair the damage or replace the damaged items to the satisfaction of the responsible official and at no expense to the United States.

2. The holder shall be liable for all injury, loss, or damage, including fire suppression, or other costs in connection with rehabilitation or restoration of natural resources associated with the use 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.D.

3. 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 VI.E.1.

F. HEALTH, SAFETY, AND ENVIRONMENTAL PROTECTION. The holder shall promptly abate as completely as possible and in compliance with all applicable laws and regulations any activity or condition arising out of or relating to use of the roads authorized by this permit that causes or threatens to cause a hazard to public health or the safety of the holder's employees or agents or harm to the environment (including areas of vegetation or timber, fish or other wildlife populations, their habitats, or any other natural resources). The holder shall immediately notify the responsible official of all traffic accidents and any other serious accidents that occur in connection with the authorized use. The responsibility to protect the health and safety of all persons affected by use of the roads authorized by this permit is solely that of the holder. The Forest Service has no duty under the terms of this permit to inspect the roads authorized by this permit or authorized activities of the holder for hazardous conditions or compliance with health and safety standards.

G. COMPLIANCE WITH ENVIRONMENTAL LAWS. The holder shall in connection with use of the roads 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.*, the Comprehensive Environmental Response, Compensation, and Liability Act (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.*

H. 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 or the holder's employees, contractors, or subcontractors in connection with use of the roads 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, or contractors in connection with use of the roads 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, and including but not limited to those environmental laws listed in clause V.G of this permit; (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 substance, pollutant, contaminant, oil in any form, or petroleum product into the environment. The responsible official 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.

I. INSURANCE

1. The holder or the holder's employees, contractors, or subcontractors shall have in force automobile insurance covering losses associated with the use authorized by this permit in at least the amount of $100,000.00 for injury or death to one person, $300,000.00 for injury or death to two or more persons, and $100,000.00 for property damage. Minimum amounts of coverage and other insurance requirements are subject to change at the sole discretion of the responsible official on the anniversary date of this permit.

2. 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 clause VI.I. The policies also shall specify that the insurance company shall give 30 days prior written notice to the responsible official of cancellation of or any modification to the policies.

3. The holder shall furnish proof of insurance, such as a certificate of insurance, to the responsible official prior to issuance of this permit and each year thereafter that this permit is in effect. The Forest Service reserves the right to review and approve the insurance policy prior to issuance. The holder shall send an authenticated copy of any insurance policy obtained pursuant to clause VI.I to the responsible official immediately upon issuance of the policy. The certificate of insurance, the authenticated copy of the insurance policy, and written notice of cancellation or modification of insurance should be sent to [address of responsible official].

VII. REVOCATION, SUSPENSION, AND TERMINATION

A. REVOCATION AND SUSPENSION. The responsible official may revoke or suspend this permit in whole or in part for:

1. Noncompliance with federal, state, or local law.
2. Noncompliance with the terms of this permit.
3. Abandonment or other failure of the holder to exercise the privileges granted.

Prior to revocation or suspension, other than immediate suspension under clause VII.B, the responsible official shall give the holder written notice of the grounds for revocation or suspension and a reasonable time, typically not to exceed 90 days, to cure any noncompliance. Revocation or suspension of this permit shall not give rise to any claim for damages by the holder against the Forest Service.

B. IMMEDIATE SUSPENSION. The responsible official may immediately suspend this permit in whole or in part when necessary to protect public health or safety or the environment. The suspension decision shall be in writing.

C. TERMINATION. This permit shall terminate when by its terms a fixed or agreed upon condition, event, or time occurs without any action by the responsible official, such as expiration of the permit by its terms on a specified date or with the consent of the holder. Termination of this permit shall not give rise to any claim for damages by the holder against the Forest Service.

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 responsible official shall keep each other informed of current mailing addresses, including those necessary for payment of the holder's commensurate or investment share.

C. SUPERSEDED PERMIT. This permit supersedes a road use permit issued to [holder] dated - N/A.

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.

THIS PERMIT IS ACCEPTED SUBJECT TO ALL ITS TERMS AND CONDITIONS.

BEFORE ANY PERMIT IS ISSUED TO AN ENTITY, DOCUMENTATION MUST BE PROVIDED TO THE RESPONSIBLE OFFICIAL OF THE AUTHORITY OF THE SIGNATORY FOR THE ENTITY TO BIND IT TO THE TERMS AND CONDITIONS OF THE PERMIT.

ACCEPTED:

J A Wilson — August 19, 2021

Jeffrey A. Wilson, Manager South Fork Coal Co., LLC — SIGNATURE — DATE

APPROVED:

acting for — Jane Bard — Sept. 29, 2021

Richard Raione, Gauley District Ranger — SIGNATURE — DATE

According to the Paperwork Reduction Act of 1995, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 0596-0016. The time required to complete this information collection is estimated to have no associated burden per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The U.S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on the basis of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, and marital or family status. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at 202-720-2600 (voice and TDD).

To file a discrimination complaint write USDA, Director, Office of Civil Rights, 1400 Independence Avenue, SW, Washington, DC 20250-9410 or call (800) 975-3272 (voice) or (202) 720-6382 (TDD). USDA is an equal opportunity provider and employer.

The Privacy Act of 1974 (5 U.S.C. 552a) and the Freedom of Information Act (5 U.S.C. 552) govern the confidentiality to be provided for information received by the Forest Service.

APPENDIX A

ANNUAL OPERATING PLAN

South Fork Coal Company, LLC
Rocky Run Surface Mine - DEP Permit #S-3012-19

Annual Operating Plan – USDA FS # 223

Permit Start Date: September 1, 2021 (or sooner)

Projected End Date: August 31, 2029

Authorized Usage: Hauling Mine Supplies and Employee Access
Mine supplies will be hauled daily (6 am – 6pm)

Trucking Contractor: See attached PO list for vendors and various supplies

Traffic Control Plan: A Guard Station will be established at the top of FS 223,
Check in and Hazard Training are required, No Public access,
No hindrance to USDA employees, WVDEP, WVDNR, or others authorized by Weyerhaeuser. Speed limits will be posted (25 MPH), location markers, and CB Radio Channels will be posted.

Road Closed signs will be place at 500 ft and 1000 ft in advance of the intersection with CR 39/4 and 29/4
The following permit signs as required by WV State Law will be provided at the intersection of CR39/4 and CR 29/4
Authorized Personnel Only – will be posted
Speed Limit signs - will be posted
Trucks have right of way – will be posted
Slow Moving Trucks
Every person entering the mine property will be hazard trained

Equipment List: CAT Graders, Cat Excavators 315 to 336, Dump Trucks

South Fork Coal Company, LLC
Haul Road #2 - DEP Permit #S-3022-11
Annual Operating Plan – USDA FS # 249
Authorized Usage: Hauling Coal (est. 36,000 clean tons/month)
Coal Hauling will be performed daily
Trucking Contractor: Webster Trucking, Inc.
PO Box 811
Summersville, WV 26651
Traffic Control Plan: Road Closed signs will be place at 500 ft and 1000 ft in advance of the

intersection with CR 39/4 and 29/4
The following permit signs as required by WV State Law will be provided at the intersection of CR39/4 and CR 29/4
Authorized Personnel Only – will be posted
Speed Limit signs - will be posted
Trucks have right of way – will be posted
Slow Moving Trucks
Every person entering the mine property will be hazard trained

APPENDIX B

RECONSTRUCTION SCHEDULE

South Fork Coal Company, LLC
Haul Road #2 - DEP Permit #S-3022-11
Annual Operating Plan – USDA FS # 249
Permit Start Date: August 23, 2021
Projected End Date: August 31, 2029
Construction Plan: We will begin upon construction immediately upon issuance of the USDA Forest Service Usage Permit. The existing road was originally constructed and permitted as a coal haul road with an adequate sub-base of shot rock during previous mining and requires no additional work.
We will begin immediately placing crushed limestone aggregate 57's for a durable surface, and any soft areas may require #3's. The Stone will be placed by "tailgating" method and spread in a thin layer using a Komatsu 655 Grader by our contractor HunHar Excavating, and compacted by a smooth drum vibratory roller. Upon completion of the durable stone surfacing the road will be certified by a PE and submitted to the WVDEP. A video recording documenting the current condition of the road has been done and will be provided to USDA FS. Another video will be recorded documenting the durable surface upon completion of stone placement. We expect to begin this work August 23 and complete by September 13, 2021. Beyond this date work will consist of routine grading, watering, maintenance, and snow removal. Any culvert replacement or other significant work will be discussed with the USDA FS before initiating any disturbance.

APPENDIX C

RECONSTRUCTION PLANS

Culvert Installation: We will inspect the road daily, as required the Mine Safety and Health Administration (MSHA) and document in the Pre-shift inspection Record Book. If it is necessary to replace a culvert, we will utilize Corrugated Smooth Wall HDPE and install in accordance with USDA Publication EM 7720-100, "Forest Service Specifications for Roads & Bridges. We will also adhere to these specifications upon completion of the mining process.
Road Maintenance: Stone surfacing, grading, and/or watering for dust control will be a daily part of our work activities. We may also be using a plow throughout the winter as the mine will operate both a day shift and night shift, working 24 hours per day, approximately 5 to 6 days per week.
Equipment List: See Attached Equipment list with details

We will remove any overhanging branches or fallen trees creating a hazard to the truck drivers. The current existing steel culverts or of adequate length, but may be lengthened in the future. The existing ditches are initially adequate but will need to be graded to maintain positive drainage. We will begin immediately placing crushed limestone aggregate 57's for a durable surface, and any soft areas may require #3's. The Stone will be placed by "tailgating" method and spread in a thin layer using a Komatsu 655 Grader by our contractor HunHar Excavating, and compacted by a smooth drum vibratory roller. Upon completion of the durable stone surfacing the road will be certified by a PE and submitted to the WVDEP. A video recording documenting the current condition of the road has been done and will be provided to USDA FS. Another video will be recorded documenting the durable surface upon completion of stone placement. We expect to begin this work August 23 and complete by September 13, 2021. Beyond this date work will consist of routine grading, watering, maintenance, and snow removal. Any culvert replacement or other significant work will be discussed with the USDA FS before initiating any disturbance.

____
Bobby E Hypes, Jr.

South Fork Coal Co., LLC

APPENDIX D

COMMENSURATE SHARE CALCULATION

COMMENSURATE SHARE					
ROAD NO.	**ROAD NAME**	**MILES**	**ANTICIPATED ANNUAL TONS**	**COST PER TON/MILE**	**TOTAL MAINTENANCE COST PER ROAD**
223	Bear Run	3.81	7008	$ 0 .17	$ 4,539.08
249	Sugar Tree	1.24	N/A	N/A	All associated cost
				TOTAL MAINTANCE COST FOR ALL ROADS	$ 4,539.08

NOTE: As per Forest Service Handbook 7709.59 Chapter 60 section 63.26, due to use of off highway vehicles to haul material off site utilizing FR 249, the holder shall be responsible for all reconstruction cost and maintenance cost on FR 249 for the length of the permit.

The Holder shall also be responsible for creating and preparing FR 249 for introduction back into the Forest Road system, prior to maintenance being resumed by the Forest Service, as outlined in section V. of this permit.

FSH 7709.59, Chapter 60, section 63.26
Limit sharing of road maintenance costs to that associated with standard highway load traffic. Except for unusual situations, the Forest Service does not share in maintenance costs attributable to Off-Highway Haul (OHH) (FSM 7730.5). Assign all maintenance costs attributable to OHH to the user.

APPENDIX E

ROAD MAINTENANCE REQUIREMENTS

(FR 223 and as applicable to FR 249)

All traveled way widths (aggregate surface) shall be perpetuated as existing. Turnouts and intersections shall be considered as part of the traveled way. Dips and swales used to control drainage with the traveled way shall be maintained.

A final pass shall be made with a York Rake, or equal, to assure all material is evenly distributed and all berms, rocks, etc., are removed from the roadbed.

NORMAL SEASONAL CLEANUP

Permittee shall perform normal seasonal cleanup including removing bank slough, minor slides, and fallen timber, replacing material washed out of fill slopes, and cleaning out drainage ditches and culverts.

CLEAN AND RESHAPE DITCHES

Maintenance Requirements

All ditches specified shall be maintained in their original location to the shape and grade to ensure proper drainage of the roadway. Cut slopes shall not be undercut. Ditches shall be free draining. Drainage structures and road appurtenances shall not be damaged during this operation. Handwork required to properly connect ditch flow lines to drainage structures is considered a part of this activity.

Road Ditches

The intent of this activity is to remove any rocks (larger than three (3) inches), sediment, wood debris (larger than 1 ½ inches diameter and 18 inches long), leaves and other debris in the ditch line without unnecessarily disturbing the grass or other erosion-controlling vegetation growing in ditches or along ditch slopes.

Ditch line work is to be completed once the road surface is conditioned but before the final grading. The ditches will be pulled away from the pipe inlets. In a through-cut section when a ditch is present on both sides of the road, both ditches shall be pulled in accordance with these requirements (see Exhibit D). Wet or unstable surfaces shall be pulled <u>without grader tires entering the ditch line</u>.

All suitable material; i.e., having the same character as the road surface, excavating through this activity shall be reclaimed and used with the traveled way. Unsuitable material shall be wasted beyond and below the outside edge of the road shoulder and away from drainage courses. Grass and leaves may be spread over the road surface as long as the piles do not exceed six (6) inches in height and do not interfere with surface drainage.

Leadoff Ditches

Leadoff ditches shall be opened as needed to provide drainage away from the roadway. No material excavated from these structures shall be reclaimed onto the roadbed.

CLEANING AND INSPECTING CULVERTS

Maintenance requirements

Cleaning culverts is the removing of silt, slough, and debris with hand tools in order to restore positive drainage. Culverts requiring cleaning shall be completed after initial preparation of the roadbed but prior to final surface blading.

Clean the culvert interior a minimum of three (3) feet each end of the culvert, pipe pockets, inlet ditches a minimum of three (3) feet each side of inlet, and outlet ditches a minimum of five (10) feet beyond the outlet. Inlet and outlet ditches must be of sufficient length to prevent backwater problems. Any handwork needed to clean the drainage ditch from the roadside ditch to the inlet pipe pocket shall be included. This is necessary to assure proper flow to, through, and away from the culvert. Material removed from the culvert and pipe pockets shall be disposed of on the fill side of the roadway immediatley adjacent to the area from which it was removed, and shaped to blend into the existing ground surface. This material will not be deposited in any drainage structure.

All weeds, briers, brush, and other vegetation in the vicinity of the culvert inlet and outlet which have the potential of interfering with the intended drainage pattern, shall be cut.

VISIBILITY Permittee shall remove overhanging brush, tree growth, or other obstruction to visibility. Permittee shall mow permitted roads a minimum of 1 time per year in order to prevent brush encroachment and visability restrictions along the road prism. Vegetation shall be cut from top of cut slope of the road to a minimum of 6 ft beyond road edge on fill side of raodway.

PREVENTATIVE MAINTENANCE

Permittee shall perform preventative maintenance at any break in hauling, lasting or anticipated to last more than 30 days, to prevent erosion damage during the non-hauling period. This includes cross-ditching, blading to remove ruts or other surface irregularities and cleaning of ditches and culverts.

SAFETY AND EFFICIENCY
Equipment Minimum Standards:

Road grader(s) shall be diesel powered, tandem drive, a minimum weight of 25,000 pounds, a minimum SAE horsepower of 125, and a moldboard of not less than 12 feet and not more than 14 feet in length. The moldboard shall have a vertical, tilt, and rotational capabilities and be extendable to the side. The grader shall be equipped with a scarifier (minimum of 4 teeth) in good condition and a fire extinguisher. All equipment shall have a Rollover Protective Structure (ROPS).

APPENDIX E

ROAD MAINTENANCE REQUIREMENTS

ATTACHED EXHIBITS

EXHIBIT A – Road Structure Terms

EXHIBIT B – Typical Section (No Ditch)

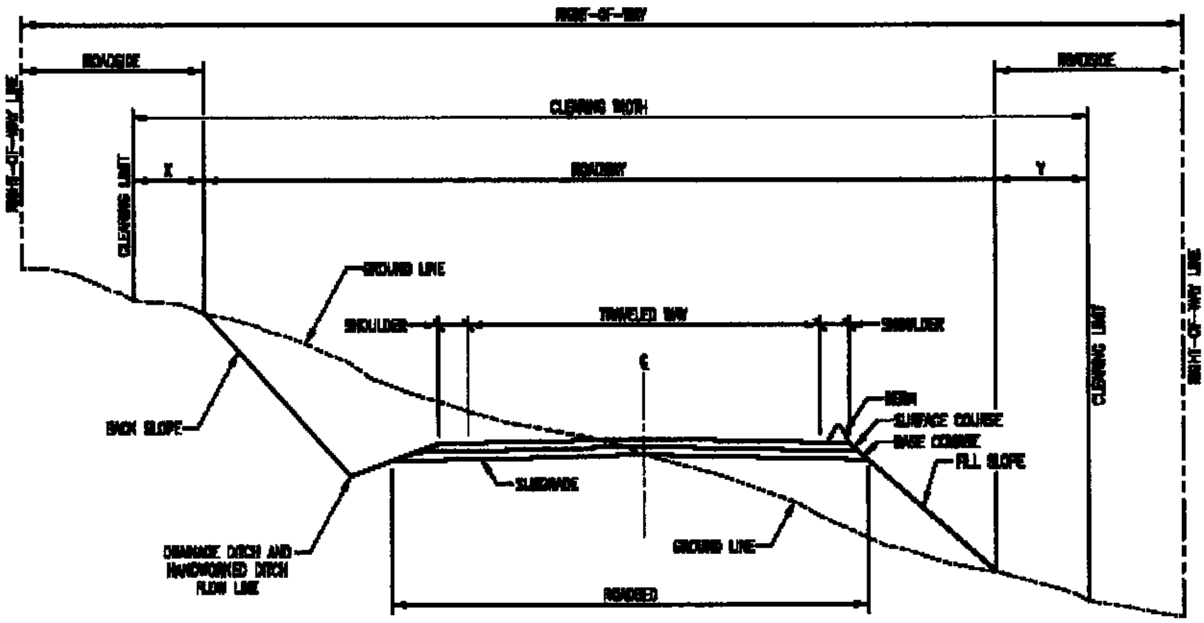
EXHIBIT C – Typical Section (Single Ditch)

EXHIBIT D – Typical Section (Through Cut)

EXHIBIT E – Typical Section (Scarifying)

APPENDIX E

EXHIBIT A



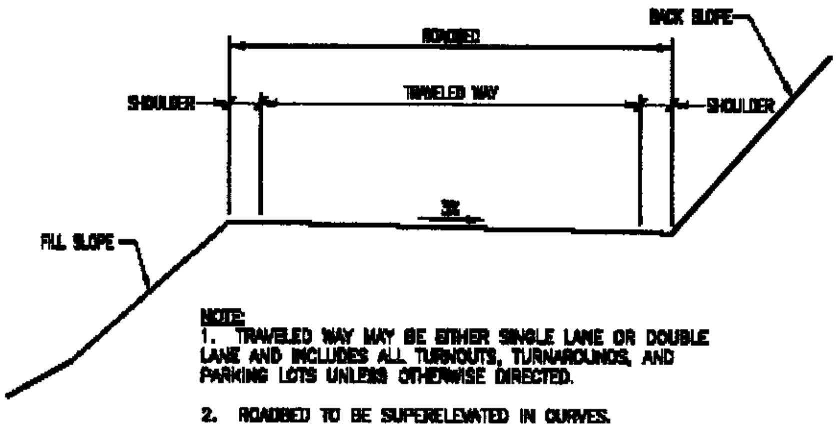
NOTE:
SHAPES AND DIMENSIONS WILL VARY TO FIT LOCAL CONDITIONS. SEE DRAWINGS FOR TYPICAL SECTIONS.
X AND Y DENOTE CLEARING OUTSIDE OF ROADWAY.

ILLUSTRATION OF ROAD STRUCTURE TERMS
NOT TO SCALE

EXHIBIT A

APPENDIX E

EXHIBIT B

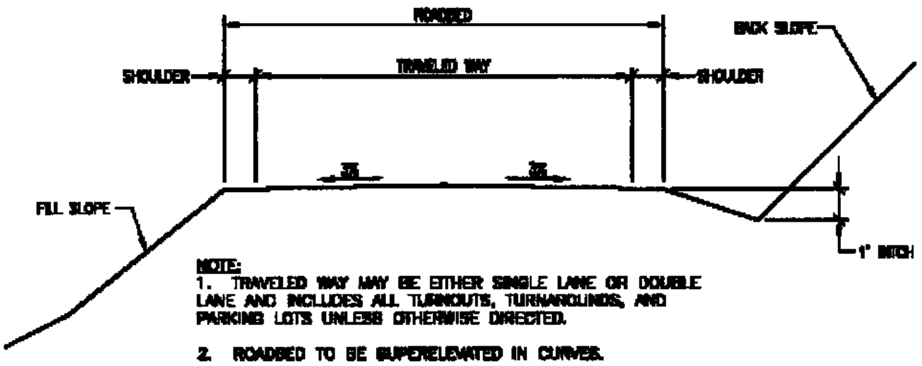


TYPICAL SECTION – NO DITCH ROADBED
NOT TO SCALE

EXHIBIT B

APPENDIX E

EXHIBIT C

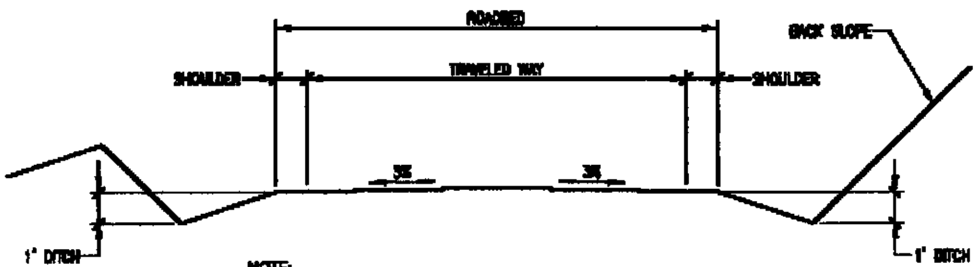


TYPICAL SECTION – DITCHED ROADBED
NOT TO SCALE

EXHIBIT C

APPENDIX E

EXHIBIT D



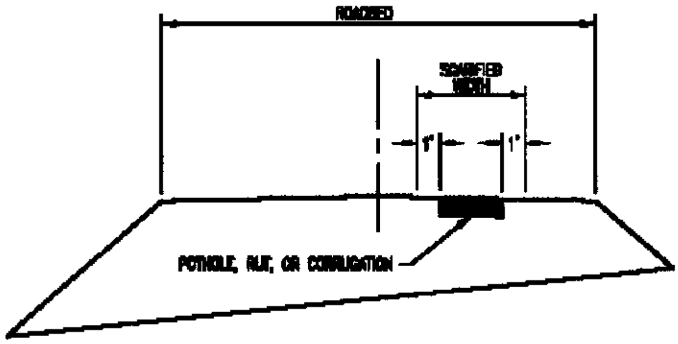
NOTE:
1. TRAVELED WAY MAY BE EITHER SINGLE LANE OR DOUBLE LANE AND INCLUDES ALL TURNOUTS, TURNAROUNDS, AND PARKING LOTS UNLESS OTHERWISE DIRECTED.
2. ROADBED TO BE SUPERELEVATED IN CURVES.

TYPICAL SECTION – DITCHED ROADBED
NOT TO SCALE

EXHIBIT D

APPENDIX E

EXHIBIT E



NOTE:
SCARIFICATION DEPTH SHALL EQUAL OR EXCEED DEPTH OF POTHOLE, RUT, OR CORRUGATION.

TYPICAL SECTION – SCARIFYING
NOT TO SCALE

EXHIBIT E

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re: White Forest Resources, Inc., *et al*., Debtors.[1]	Chapter 11 Case No. 25-10195 (TMH) (Jointly Administered) **Related D.I.**

ORDER APPROVING MOTION OF CENTER FOR BIOLOGICAL DIVERSITY, APPALACHIAN VOICES, GREENBRIER RIVER WATERSHED ASSOCIATION, KANAWHA FOREST COALITION, SIERRA CLUB, AND WEST VIRGINIA HIGHLANDS CONSERVANCY FOR ENTRY OF AN ORDER GRANTING RELIEF FROM THE AUTOMATIC STAY

Considering the Motion of The Center for Biological Diversity, Appalachian Voices, Greenbrier River Watershed Association, Kanawha Forest Coalition, Sierra Club, and West Virginia Highlands Conservancy (hereinafter, collectively, "Conservation Groups") for Entry of an Order Granting Relief from the Automatic Stay (the "Motion");[2] and the Court finding good cause exists for the relief requested; and after hearing objections, if any, to the Motion; and due and adequate notice having been given:

IT IS HEREBY ORDERED, that the Motion is GRANTED as set forth herein.

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number are: White Forest Resources, Inc. (3764); Xinergy Corp. (3865); Xinergy of West Virginia, Inc. (2401); Shenandoah Energy, LLC (6770); South Fork Coal Company, LLC (3113); Bull Creek Processing Company, LLC (0894); Raven Crest Mining, LLC (0122); Brier Creek Coal Company, LLC (9999); Raven Crest Contracting, LLC (7796); Raven Crest Leasing, LLC (7844); and Raven Crest Minerals, LLC (7746). The Debtors' service address is 1295 Ashford Hill Rd., Ashford, WV 25009.

[2] To the extent not otherwise defined, capitalized terms herein shall have the meaning ascribed in the Motion.

IT IS FURTHER ORDERED, that the automatic stay under 11 U.S.C. §362(a) is hereby terminated, annulled and modified as necessary to allow the Conservation Groups to proceed with the Permit Challenge Action, captioned as *Ctr. for Biological Diversity v. U.S. Forest Serv*., *et al*., Pending in the United States District Court for the Southern District of West Virginia, Case No. 5:24-cv-00274, to judgment or other resolution.

IT IS FURTHER ORDERED this Order shall become effective immediately upon entry by the Court and is not subject to the fourteen-day stay provided in Rule 4001(a)(4) of the Federal Rules of Bankruptcy Procedure.

IT IS FURTHER ORDERED this Court shall retain jurisdiction with respect to all matters arising from or related to the implementation of this Order.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
White Forest Resources, Inc., *et al.*,	Case No. 25-10195 (TMH) (Jointly Administered)
Debtors.[1]	**Hearing Date: May 19, 2025 at 2:30 p.m. (ET)** **Objections Due: May 7, 2025 at 4:00 p.m. (ET)**

NOTICE OF MOTION OF CENTER FOR BIOLOGICAL DIVERSITY, APPALACHIAN VOICES, GREENBRIER RIVER WATERSHED ASSOCIATION, KANAWHA FOREST COALITION, SIERRA CLUB, AND WEST VIRGINIA HIGHLANDS CONSERVANCY FOR ENTRY OF AN ORDER GRANTING RELIEF FROM THE AUTOMATIC STAY

PLEASE TAKE NOTICE that, on April 23, 2025, Center for Biological Diversity, Appalachian Voices, Greenbrier River Watershed Association, Kanawha Forest Coalition, Sierra Club and West Virginia Highlands Conservancy ("Movants") filed the *Motion of Center for Biological Diversity, Appalachian Voices, Greenbrier River Watershed Association, Kanawha Forest Coalition, Sierra Club and West Virginia Highlands Conservancy for Entry of An Order Granting Relief from the Automatic Stay* (the "Motion") with the United States Bankruptcy Court for the District of Delaware.

PLEASE TAKE FURTHER NOTICE that objections, if any, to the Court's approval of the Motion must be (a) in writing and served on or before **May 7, 2025 at 4:00 p.m. (ET)** (the "Objection Deadline"); (b) filed with the Clerk of the United States Bankruptcy Court for the

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number are: White Forest Resources, Inc. (3764); Xinergy Corp. (3865); Xinergy of West Virginia, Inc. (2401); Shenandoah Energy, LLC (6770); South Fork Coal Company, LLC (3113); Bull Creek Processing Company, LLC (0894); Raven Crest Mining, LLC (0122); Brier Creek Coal Company, LLC (9999); Raven Crest Contracting, LLC (7796); Raven Crest Leasing, LLC (7844); and Raven Crest Minerals, LLC (7746). The Debtors' service address is 1295 Ashford Hill Rd., Ashford, WV 25009.

District of Delaware, 824 N. Market Street, 3rd Floor, Wilmington, DE 19801; and (c) served as to be received on or before the Objection Deadline by the undersigned attorneys.

PLEASE TAKE FURTHER NOTICE THAT A HEARING ON THE MOTION WILL BE HELD ON **MAY 19, 2025 AT 2:30 P.M.** BEFORE THE HONORABLE THOMAS M. HORAN, UNITED STATES BANKRUPTCY JUDGE FOR THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE, 824 N. MARKET STREET, 3RD FLOOR, COURTROOM #7, WILMINGTON, DE 19801.

The hearing date may be a preliminary hearing or may be consolidated with a final hearing, as determined by the Court.

The attorneys for the parties shall confer with respect to the issues raised by the Motion in advance for the purposes of determining whether a consent judgment may be entered and/or for the purpose of stipulating to relevant facts such as the value of the property, and the extent and validity of any security instrument.

IF YOU FAIL TO RESPOND IN ACCORDANCE WITH THIS NOTICE, THE COURT MAY GRANT THE RELIEF REQUESTED IN THE MOTION WITHOUT FURTHER NOTICE OR HEARING.

Dated: April 23, 2025

Respectfully submitted,

ASHBY & GEDDES

/s/ Benjamin W. Keenan

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Benjamin W. Keenan (#4724)
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And

APPALACHIAN MOUNTAIN
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CERTIFICATE OF SERVICE

I, Benjamin W. Keenan, hereby certify that on April 23, 2025, I caused one copy of the *Motion of Center for Biological Diversity, Appalachian Voices, Greenbrier River Watershed Association, Kanawha Forest Coalition, Sierra Club and West Virginia Highlands Conservancy for Entry of An Order Granting Relief from the Automatic Stay* to be served upon (i) all parties of who registered to receive notice pursuant to Rule 2002 via CM/ECF; and (ii) the parties on the attached service list via electronic mail, unless otherwise indicated.

Dated: April 23, 2025

/s/ Benjamin W. Keenan
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