



April 2, 2021

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Mary Yonce, District Ranger  
North River Ranger District  
George Washington and Jefferson National Forest

Submitted via online portal

Re: Scoping Comments, VDOT - Route 33 Rawley Pike Road Improvement

Dear Ranger Yonce:

*Board of Directors:*

I am submitting these comments in response to the scoping notice (Notice) dated March 22, 2021 for the referenced project. We understand that the activities proposed and described in the notice are considered to be necessary to enhance public safety and we endorse that purpose. However, we believe it is necessary and appropriate, from both legal and practical perspectives, to conduct a full review under the National Environmental Policy Act (NEPA).

Unlawful Categorical Exclusion

The Notice states that the Forest Service (Service) anticipates the project to be covered under a categorical exclusion (CE), allowing the Service to forego additional public involvement and documentation of any analysis through an Environmental Assessment (EA) or Environmental Impact Statement (EIS). We are concerned that the Forest Service proposes to use an unlawful CE here and object to that approach.

The Notice describes a proposal to grant a 17.3 acre easement to the Virginia Department of Transportation (VDOT) using CE 3, stating that this CE applies to “[a]pproval, modification, or continuation of minor special uses of National Forest System lands that require less than twenty acres of National Forest Systems land.” Notice at 2. As an initial matter, the scoping notice misquotes CE 3, which is not limited to minor special uses. See 36 C.F.R. § 220.6(e)(3).

CE 3 is one of several new CEs that the Forest Service issued via rulemaking in late 2020. That rulemaking was unlawful, and Wild Virginia is suing to vacate the rule—including CE 3—in *The Clinch Coalition v. United States Forest Service*, W.D. Va. Civil Case No. 2:21-cv-003-JPJ-PMS.

In addition, CE 3 and the other new CEs are based in part on a weakened standard for CEs in a rule that the Council on Environmental Quality (CEQ) issued to overhaul NEPA. The CEQ overhaul was unlawful in its own right, and Wild Virginia is challenging it both in *The Clinch Coalition* and in *Wild Virginia v. Council on Environmental Quality*, W.D. Va. Civil Case No. 3:20-cv-0045-JPJ-PMS.

*Bette Dzamba*  
*Leigh Kirchner*  
*Kate Mallek*  
*Allison McClure*  
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*Jamie Trost*  
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In addition to these court challenges, CEQ is now considering whether to repeal or amend the rulemaking that provided the foundation for the Forest Service's new CEs, which may well fatally undermine CE 3. This proposal would not have qualified for the precursor to CE 3, because that CE was limited to minor special uses that would occupy only 5 contiguous acres or less. See 85 Fed. Reg. at 73,625 (Nov. 19, 2020). In contrast, VDOT's easement would be for 17.3 acres.

We understand that CE 3 is currently in effect and the Forest Service is not prohibited from using it, but doing so under the circumstances—CE 3 is on shaky ground and may be undone before this project is complete—just risks unnecessary delay and complication. Preparing an EA instead likely would not be an onerous task and would eliminate the risk of having the rug pulled out from under this proposal.

#### Additional Analysis and Public Involved Needed

In addition to the fact that the CE the Service has cited is unlawful, we assert that environmental factors in the areas to be affected may make the use of a CE unlawful. And, if not unlawful, we believe these factors justify additional explanation and a chance for the public to comment, through preparation and noticing of a draft EA.

Parts of the proposed project fall within the Shenandoah Mountain Crest Management Prescription Area (8E7). Notice at 1. That area includes habitat for the Cow Knob salamander (*Plethodon punctatus*) and is to be "managed to protect and/or enhance habitat for the Cow Knob salamander and for other outstanding natural biological values. The protection, maintenance and restoration of species, natural communities and ecological processes are the primary objectives." *Environmental Impact Statement for the Revised Land and Resource Management Plan, George Washington National Forest*, U.S. Department of Agriculture, November 2014, at 4-113.

The Cow Knob salamander has been designated a Forest Service Sensitive Species, Id. 2-313, and nominated for protection under the Endangered Species Act. Based on these factors or others that may be identified, the Service must determine whether an Extraordinary Circumstance exists, in accordance with the Service's National Environmental Policy Handbook, FSH 1909.15., Chapter 30, Section 31.2. If so, the Service must determine "the degree of the potential effects on the listed resources" and "[i]f the degree of potential effect raises uncertainty over its significance, then an extraordinary circumstance exists, precluding use of a categorical exclusion." Id.

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The existing road addressed in this proposal likely presents a barrier to passage of wildlife species by disconnecting native habitats. In an EA, the Service should describe the nature of any such impacts and the degree to which the project might further affect connectivity. The EA should include descriptions and analyses of potential improvements that might be incorporated as part of the road widening effort or ways to mitigate unavoidable conditions.

Thank you for considering our concerns.

Sincerely,

/s/ David Sligh

David Sligh

Conservation Director