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(Submitted via email to: SM.FS.GWJNF-PA@usda.gov)

The DSEIS Fails to Assess Cumulative Impacts of the MVP Project on the Critical Habitat of the Candy Darter, a Federally Listed Endangered Species

CRITICAL HABITAT OF THE CANDY DARTER: The 2021 designation of Stony Creek as critical habitat for the endangered candy darter creates renewed attention to the requirement to evaluate cumulative effects of sedimentation resulting from pipeline construction both on and off Jefferson National Forest land on Peters Mountain in Virginia.

1. CANDY DARTER AND CRITICAL HABITAT

Timeline of events:

- In 2017 when the FERC issued the FEIS, MVP was certificated to use a combination of Pocahontas Road and Rogers Road to access the pipeline ROW that crossed Peters Mountain (bore) on the Virginia side. (The use of “Rogers Road” refers to Rogers Road and a complex of other small public roads in the approach to MVP’s ROW near Kimballton, Virginia.) FERC FEIS Appendix B shows that the upper section of the pipeline construction would have been accessed from Pocahontas Road and the lower section by Rogers Road.
- On November 21, 2018 the candy darter (*Etheostoma osburni*) was federally listed as an endangered species.
- In the 2021 Record of Decision, the JNF eliminated the use of Pocahontas Road and Mystery Ridge Road as access roads to the MVP pipeline construction. In doing so they shifted all access to the pipeline located above Stony Creek to the Rogers Road route.

- Candy darter Final Critical Habitat in Stony Creek within Giles County, subunit 2b was designated on May 7, 2021.¹ This Critical Habitat includes an impact area within Stony Creek at the confluence with Kimballton Branch as identified in the 2020 Biological Opinion by the USFWS.²
- On January 26, 2023 the FERC maintained the designation of “Project May Affect, and is Likely to Adversely Affect” the candy darter and its critical habitat in Stony Creek.³

Characteristics and Vulnerabilities of the Candy Darter: According to the USFWS 2020 Biological Opinion:

- The Candy Darter populations in Stony Creek and the Gauley River “are considered to be among the most genetically pure populations....This gives added importance to these particular populations for the future conservation and recovery of the species.”
- The characteristics of the Candy darter make it especially susceptible to increased sedimentation/turbidity and increased embeddedness will, or is expected to occur as a result of MVP construction activities such as clearing, grading, trenching, access roads and right of way repairs and will affect Stony Creek.
- Candy Darters “are generally intolerant of excessive stream sedimentation and resulting cobble embeddedness” and “have a relatively short life cycle, reaching sexual maturity by age 2 and often dying their third year” putting them more at risk for sedimentation caused by the MVP route.
- According to the BiOp, even under the best of circumstances, pipeline construction will result in an increase in sedimentation with potential effects on the population of Candy Darters as the FWS “assumes effects to benthic invertebrates in aquatic areas that receive significant increased sedimentation as a result of the MVP will persist for up to 4 years.”

Pipeline construction on the Virginia side of Peters Mountain will increase sediment and construction pollutants in the candy darter Stony Creek critical habitat.

Candy Darter Critical habitat: Candy darter (*Etheostoma osburni*) Final Critical Habitat in Stony Creek within Giles County was designated on May 7, 2021. Surveys documented candy darters at multiple locations within this unit. Unit2b is the most robust population in Virginia and contributes

¹ Federal Register / Vol. 86, No. 65 / Wednesday, April 7, 2021. “Unit 2b consists of approximately 31.1 skm (19.3 smi) of Stony Creek from the confluence with White Rock Branch, downstream to the confluence with the New River.... Approximately 16.1 skm (10.0 smi) of Unit 2b is within the George Washington and Jefferson National Forest, with the remainder adjacent to almost entirely private land, except for a small amount that is publicly owned in the form of bridge crossings, road easements, and the like. Surveys documented candy darters at multiple locations within this unit. Unit2b is the most robust population in Virginia and contributes to the representation and redundancy of the species (Service 2018, p. 28).”

² Mountain Valley Pipeline Project, New Information and Changed Condition Assessment (*Aquatic Biological Resources, including Fisheries and Aquatic TES; September 29, 2022*), Dawn M. Kirk, Forest Fisheries Biologist, September 29, 2022. Accessed at <https://usfs-public.app.box.com/v/PinyonPublic/file/1119646414197>

³ FERC Letter to Cindy Schulz, USFWS. Subject: Updated Effects Determination for MVP. CP16-10 Accession No. 20230126-3024

to the representation and redundancy of the species This Critical Habitat includes an impact area within Stony Creek at the confluence with Kimballton Branch as identified in the 2020 Biological Opinion by the USFWS.⁴

Kimballton Branch runs from its headwater tributaries close to MVP's bore pit atop Peters Mountain at MP 196.4, down the mountain and under Rogers Road before entering Stony Creek. According to the *Fisheries and Aquatic Resources Specialist Report*⁵ prepared for the Forest Service, a mixing zone on private land at the confluence of Kimballton Branch and Stony Creek was identified to have **suspended sediment concentrations above the threshold for adverse impacts. Actions on NFS lands would contribute to sedimentation and related effects on candy darter habitat in this mixing zone.** (emphasis added)

A tributary of Stony Creek, Kimballton Branch flows from its headwaters close to the MVP bore pit atop Peters Mountain at MP 196.4, to its run next to and under Rogers Road before entering Stony Creek. Indirect sedimentation effects in Stony Creek are anticipated from runoff via Kimballton Branch which itself is not currently to support candy darter populations.⁶

2. CUMULATIVE EFFECTS:

The construction of the MVP pipeline on Peters Mountain in Virginia is regulated by two separate agencies – US Forest Service and the FERC. In 2017 both the FERC FEIS and the USFS ROD authorized MVP to build its pipeline on Peters Mountain in Virginia and designated Pocahontas Road and Rogers Road as access roads. The JNF ROD regulates all activity on JNF property (ROW from MP196.4 – MP197.9, and the Pocahontas Road access road) and the FERC FEIS regulates all activity that was off the JNF lands on Peters Mountain ROW from MP197.9 – MVP 198.9 and the Rogers Road access). Each agency is responsible for protecting the candy darter habitat from sediment and other pollutants that are produced in their respective areas.

In the 2021 Record of Decision, the Forest Service prohibited all future MVP vehicle use of Pocahontas and Mystery Ridge Roads. By doing so, MVP was forced to shift all access to the on-JNF lands ROW be via the off-JNF ROW and Rogers Road. **That decision could affect the critical candy darter habitat on Stony Creek.**

Both agencies are required to consider the cumulative effects of their actions on the darter habitat.

⁴ Mountain Valley Pipeline Project, New Information and Changed Condition Assessment (*Aquatic Biological Resources, including Fisheries and Aquatic TES; September 29, 2022*), Dawn M. Kirk, Forest Fisheries Biologist, September 29, 2022. Accessed at <https://usfs-public.app.box.com/v/PinyonPublic/file/1119646414197>

⁵ Copperhead. 2022, Mountain Valley Pipeline Project Supplemental Biological Evaluation for Forest Service Sensitive Species, Mountain Valley Pipeline, Jefferson National Forest, Eastern Divide Ranger District p.10. Accessed from USFS at <https://usfs-public.app.box.com/v/PinyonPublic/file/1119665014334>. This Stony Creek/Kimballton Branch mixing zone is on private lands and consists of 1,000 meters of Stony Creek, or approximately 2.92% of all potential candy darter habitat within Stony Creek

⁶ DSEIS, p.51.

The Forest Service is required to consider cumulative effects of their actions on lands inside and outside the forest boundary:

- The DSEIS states that the candy darter is within the cumulative effects area of the MVP pipeline projects.⁷
- “Watersheds relevant to the plan should include those lands outside the National Forest System that contribute surface or subsurface water flows to the plan area, and those that receive surface and subsurface water from the plan area. Groundwater-dependent ecosystems should also be considered.” This directive further states: “The Interdisciplinary Team should pay particular attention to the influence on aquatic species at risk and human population centers in proximity to the area of analysis.”⁸
- The Revised JNF LRMP lists Stony Creek in its discussion of Aquatic Habitat Areas in the JNF. Its description of Desired Conditions includes: “Forest management activities within these areas are designed to protect habitat for threatened, endangered, and sensitive fish and mussels in streams adjacent to, or immediately downstream from, National Forest System lands.”⁹

The FERC is required to consider cumulative effects of its actions and is the lead agency in the MVP project. The FERC FEIS states that it assesses “the cumulative impacts of the projects added to other known actions within the same geographic area and in the same timeframe.”¹⁰

While the 2021 ROD prohibited MVP from using the Pocahontas Road, it does not appear that the FERC has taken any action to require MVP to modify its activities on Peters Mountain.

3. CUMULATIVE EFFECTS ANALYSIS

The Forest Service errs by ignoring its duty to assess cumulative effects: Lack of data coupled with a lack of valid sedimentation modeling prevents the JNF from analyzing the environmental effects of the on-JNF sections of the ROW and former access roads. Nevertheless, in the absence of data, suppositions abound in the 2020 DEIS which stated: “Removing Pocahontas and Mystery Ridge roads from the proposed action is a reduction of 12 stream crossings compared to the FERC FEIS (FERC FEIS Table 4.3.2-9).¹¹ This changed condition would eliminate project-related effects on water resources from the use of NFS roads and result in a reduction of hydrological effects compared to those identified and analyzed within the FERC FEIS.”

Despite lack of data to support this claim, the 2020 DSEIS comment continued: “*Therefore, further assessment of project access roads is not considered to be necessary.*” (emphasis added) The Forest

⁷ 2022 DSEIS, p. 181. Table D-1, Endangered Species List Species and Regional Forester Sensitive Species, lists the candy darter as “suspected downstream of project/activity area and within the cumulative effects area.”

⁸ FSH 1909/12 – Land Management Planning Handbook, Chapter 10 – the Assessments: 12.23 – Assessing Watersheds and Water Resources.

⁹ JNF Land Resource Management Plan, Chapter 3 9A4 – Aquatic Habitat Areas (revised JNF LRMP p. 3-163).

¹⁰ FERC FEIS, Section 4.13

¹¹ 2020 DSEIS, p. 68.

Service decision to substitute a public road/private land access route for Pocahontas Road does not eliminate impacts. It merely shifts them to an area barely outside the JNF boundary but not outside the JNF's shared watersheds and under its sphere of influence.

Neither the Forest Service nor the FERC has the data to perform a cumulative effects analysis of the MVP on Peters Mountain in Virginia since such an analysis must include a consideration of the effects of individual actions, their effects on each other, and the total effect when examined as a whole. In the case of the MVP project, lack of data, flawed modeling of impacts on water resources, and disregard of inspection reports, and violations. There appears to be nothing in the public record indicating that FERC has analyzed the major increase in negative environmental impacts on Kimballton Branch resulting from the increase of ROW and Rogers Road access traffic.

The MVP ROW and access routes on both JNF and off-JNF lands will result in negative environmental impacts to the critical habitat of the candy darter.

4. ABSENCE OF AVAILABLE DATA: The DSEIS fails to include evidence to validate its modeling of impacts of pipeline construction on Peters Mountain. The US Court of Appeals, 4th Circuit remanded the Forest Service "to consider USGS data and other relevant information indicating that the modeling used in the EIS may not be consistent with data about the actual impacts of the Pipeline and its construction." However, neither the JNF SDEIS nor information provided by the FERC fulfills this requirement on the Peters Mountain segment of the pipeline route:

- No USGS station on Stony Creek or Kimballton Branch appears in on the DSEIS USGS station location map.¹² A USGS station on Stony Creek performed field measurements from 1993 to 9/8/1997 and once more on 6/27/2000. It has been inactive since 6/27/2000.¹³
- MVP Monitoring station information is not available to the public because information in Appendix L of the 2022 SBA has been redacted and therefore not available for independent public analysis and comment. On January 17, 2023 Indian Creek Watershed Association sent a FOIA request to the US Forest Service requesting: *A non redacted copy of "Mountain Valley Pipeline Updated Supplement to the Biological Assessment, December 2022.* On February 6, 2023 we received an letter via email denying our request: "A reasonable search was conducted by the FOIA staff at this office, and we have determined that all responsive records are being withheld in full in accordance with 5 U.S.C. §552(b)(4)."
- VDEQ in-stream water quality monitoring receives its information from USGS monitoring stations in three paired locations. Again, there is no monitoring of Stony Creek which will be directly affected by the pipeline on Peters Mountain. The purpose of the VDEQ

¹² DSEIS, Appendix B. USGS Water Quality Monitoring Station

¹³ <https://maps.waterdata.usgs.gov/mapper/index.html>

monitoring is to “direct inspection resources as appropriate,” an after-the-pollution-fact result.

- MVP claims suspended sediment monitoring and conclusions. However, during the time period, construction was halted and there had been no construction except for cutting of trees.
- Embeddedness – No analysis of embeddedness (e.g., pebble count) has been conducted for sections of Stony Creek that are directly upstream and downstream of the Kimballton Branch confluence. According to the JNF, “Baseline field embeddedness surveys were completed on multiple streams in March and April 2020 to ground truth the RUSLE2 sedimentation model predictions. **The validity of these baseline embeddedness surveys was questioned as the current condition is not a “baseline” with the understanding that construction had already occurred and contributed sedimentation to the stream.**¹⁴ (emphasis added)

5. Cumulative Action: Construction of the MVP on Peters Mountain presents a classic example of the importance federal agencies engaging in cumulative action. And the failure to do so having a negative impact on the environment of an endangered species. Both the JNF ROD and the FERC FEIS were issued in 2017—before the candy darter was listed as an endangered species, and before the MVP was designated as “may affect and is likely to adversely affect” critical habitat of Stony Creek.

The impact on the Forest Service of prohibiting access through Pocahontas Road:

Inspection reports informed the JNF that there was too much sedimentation resulting from construction and use of Pocahontas Road. Admirably, in 2020, with a new DEIS it prohibited further use of Pocahontas Road as an access road to the ROW. Basically it issued a “No More Action Alternative” which will *eventually* decrease sediment load from the JNF to Kimballton Branch and Stony Creek.

Sometimes in the hand-off you drop the ball: In a Hail Mary, the JNF tossed the ball, filled with sediment, off its own property and onto private land where the MVP is regulated by the FERC. There is nothing in the FERC docket that indicates that the JNF alerted the FERC to prepare for what was coming.

The impact of the action on the responsibility of the FERC: The FERC issued the MVP FEIS in 2017. The FERC should issue a DSEIS to address the environmental effects of the major change in use of both the off-JNF ROW and the Rogers Road access — a change that may affect and is likely to adversely affect the critical habit of the Candy Darter¹⁵.

Section 7 Consultation: Stony Creek was designated as a critical habitat for the candy darter in 2021. Some of the necessary conditions for reinitiating ESA consultation apply in the case of the candy darter: The closing of Pocahontas Road will negatively affect the candy darter by increasing

¹⁴ Copperhead. 2022. Mountain Valley Pipeline Project Supplemental Biological Evaluation for Forest Service Sensitive Species, Mountain Valley Pipeline, Jefferson National Forest, Eastern Divide Ranger District. p.2

¹⁵

sediment in its critical habitat to an extent not previously considered in the current biological opinion or written concurrence. Since the JNF DSEIS is silent on the topic of increased sediment from off-JNF land; and since there is no indication that the FERC has knowledge that there will be an increase in sediment caused by increased use of the off-JNF ROW and Rogers Road; it is not clear whether the USFWS is considering those changed circumstances as it generates the new Biological Opinion expected to be issued in 2023.

6. A CAUTIONARY TALE: Failure of E&S controls on Pocahontas and Mystery Ridge Road warn of what will happen if MVP is permitted to construct on Peters Mountain. Even the best of monitoring systems will not be able to trigger a “stop sedimentation order”. They can only trigger a “stop work order” which in the case of Pocahontas Road has not been enough to prevent unacceptable levels of sediment from escaping through E&S controls on a continuing basis.

Environmental conditions resulting from construction on the steep ROW will be much worse given the activity necessary to build the pipeline and to support boring that will continue for at least 10 weeks. If the JNF grants a permit to MVP, the problems along the route on Peters Mountain in Virginia make it certain that too much sediment will accumulate in Kimballton Branch before reaching Stony Creek.

In the SDEIS, the Forest Service expresses confidence that “we’ll do better next time”:

The analysis in this DSEIS acknowledges the Fourth Court’s February 3, 2022 vacatur and that the FWS is anticipated to issue a new BO in early 2023 that will contain mitigation measures to reduce potential effects to Threatened and Endangered species. These mitigation measures are mandatory nondiscretionary items that Mountain Valley must implement. The Forest Service will require implementation of all mandatory measures from the 2023 BO applicable to species and habitat on NFS land as a condition of approving the Plan amendment and concurring with the ROW grant. Therefore, the project, and all activities on NFS lands, would be compliant with the ESA. (DSEIS p.50).

This optimism of this statement is contradicted by evidence that MVP has not adhered to the less stringent *existing* measures. Moreover, these Forest Service future requirements for implementation of new mandatory measures will be issued after the end of the public comment period of this DSEIS; therefore, the public will be deprived of the opportunity to comment on the new measures.

7. THE NO ACTION ALTERNATIVE: When the JNF observed the actual sedimentation that resulted from MVP’s construction and use of Pocahontas Road, the Forest Service chose a “No More Action Alternative for Pocahontas Road”. Importantly, up until the time of its decision the excessive sedimentation resulting from failure of E&S controls had been exclusively a result of MVP truck traffic to support tree felling on the Pipeline ROW. MVP had not been allowed to perform any other construction in that section of the JNF since the vacatur of Forest Service permits by the Fourth Circuit. When the JNF contemplated the further increase in traffic that would be necessary for actual pipeline construction including grubbing, trenching, stringing,

burying, covering, etc., the agency said NO MORE ACTION ALLOWED and TERMINATED ACTION on all JNF land that served as access points.

The Forest Service decision to substitute a public road/private land access route for Pocahontas Road does not eliminate impacts. It shifts them to an area barely outside the JNF boundary but not outside the JNF's shared watersheds with their sphere of influence. The FS has an obligation to undertake an exhaustive cumulative analysis of those impacts in determining whether its decision to permit the pipeline will increase the project related effects on Kimballton Branch, Stony Creek and other water resources.

The US Court of Appeals, 4th Circuit required the JNF to be consistent with its modeling and the real-world data of the effects of pipeline construction. No amount of modeling can override the real-world evidence that construction on Pocahontas Road led to unacceptable sedimentation. No amount of modeling can discount the hundreds of environmental violations committed by MVP in both Virginia and West Virginia in similar terrain with steep slopes.

It is disingenuous for the Forest Service to continue the charade that a new permit would force MVP to prevent sediment from entering the waters of the United States. The JNF was fooled once when it granted a permit for access by Pocahontas Road, so it retracted that permission. The JNF must follow its own example and choose the NO ACTION ALTERNATIVE. To do otherwise jeopardizes the future existence of the candy darter.

Sincerely,

Indian Creek Watershed Board of Directors

Howdy Henritz, President; Scott Womack, Vice President;

Judy Azulay, Treasurer; Nancy Bouldin, Secretary