

Friends of Blackwater Canyon

December 13, 2011

Regional Director, Midwest Region
Attn: Lisa Mandell
U.S. Fish and Wildlife Service
Ecological Services
5600 American Blvd, West
Suite 990
Bloomington, MN 55437-1458

permitsR3ES@fws.gov

**Re: TE02636A - Comments on the Draft Environmental Impact Statement (EIS),
Multi-Species Habitat Conservation Plan (MSHCP) and Application for
Incidental Take Permit (ITP) for NiSource, Inc.**

Dear Ms. Mandell,

Please accept these comments on the U.S. Fish and Wildlife Service (FWS or Service) and cooperating agencies' [Federal Energy Regulatory Commission (FERC), U.S.D.A. Forest Service (FS), U.S. Army Corps of Engineers (COE) and National Park Service (NPS)] Draft Environmental Impact Statement (EIS), and the NiSource, Inc. Multi-Species Habitat Conservation Plan (MSHCP) and Application for Incidental Take Permit (ITP), on behalf of the Friends of Blackwater (FOB), the West Virginia Highlands Conservancy (WVHC) and the Allegheny Highlands Alliance (AHA). Fed. Reg., Vol. 76, No. 134, pgs. 41288-41293 and Fed. Reg., Vol. 76, No. 199, pg. 63950.

FOB has had a long-standing interest in the management of public lands in West Virginia and in actions affecting the West Virginia northern flying squirrel (WVNFS or flying squirrel) and its habitat, as well as other threatened and endangered species and their habitat in the state. Friends of Blackwater is a plaintiff in the lawsuit against the U.S. Fish and Wildlife Service (FWS) over the delisting of the squirrel. In addition, FOB has had a long-standing interest and involvement in oil and gas development in the state, filing comments with the Forest Service and

protests with the Bureau of Land Management (BLM) to stop or modify unwarranted oil and gas development.

Friends of Blackwater (FOB) is a not-for-profit West Virginia membership organization devoted to preserving wilderness and wildlife; protecting West Virginia's forests, parks, rivers, wild lands, unique habitats and endangered species; and fostering a West Virginia land preservation ethic. FOB has over 10,000 members and supporters. FOB also has a long-standing interest in the West Virginia northern flying squirrel, *Glaucomys sabrinus fuscus*. FOB has supported studies of the flying squirrel; staff of FOB has communicated with scientists from a number of states and Canada on the squirrel's natural history and status and collected a large library of information on this squirrel. FOB also works to protect West Virginia's endangered bats both on and off the Monongahela National Forest. Finally, FOB works to protect all threatened and endangered species, as well as newly discovered species, in West Virginia. We educate our 10,000 members and supporters about these issues through newsletters, our website and comments to the press.

The West Virginia Highlands Conservancy also has a long-standing interest in the management of public and private lands in West Virginia. The purposes of the Conservancy are to promote encourage, and work for the conservation and appreciation of the natural resources of West Virginia and the Nation, and especially of the Highlands Region of West Virginia, for the cultural, social, educational, physical, health, spiritual, and economic benefit of present and future generations of West Virginians and Americans. The WVHC has 1,500 members and conducts outreach to over 3,000 people through our monthly newsletter and website.

Overall, we have a number of issues and concerns with the DEIS, MSHCP and application for ITP. First of all, we agree with and incorporate by reference the comments of Earthjustice and the Center for Biological Diversity. Secondly, we believe the scope, scale and timeframe of the proposed action and action alternative are excessive and the Service and cooperating agencies cannot possibly adequately disclose the effects or significance of the proposed action and action alternative. We believe the EIS has been cast as programmatic in nature when it should have been site-specific. Given this, and the lack of detailed plans from the applicant, the proposed activities are likely not ripe for analysis under the National Environmental Policy Act (NEPA). The DEIS should be withdrawn, a shorter time period proposed and site-specific impacts disclosed in a new DEIS.

Finally, the DEIS, MSHCP and ITP failed to accurately include the West Virginia northern flying squirrel in the analysis, despite the fact that it is a listed endangered species with habitat and known occurrences in the footprint of the one mile-wide corridor and gas field counties. This must be corrected.

Each of our issues and concerns with the DEIS, MSHCP and ITP are detailed in the pages that follow.

Scope, Scale and Timeframe of the Proposed Action

First of all, we believe the scope, scale and timeframe of the proposed action and action alternative are too large and too long. The proposal covers 15,562 miles of right-of-way. DEIS, pg. 1-7. For comparison purposes, the distance from New York City to Los Angeles, CA is 2,443 miles as the crow flies. The proposed NiSource right-of-way is over six times longer than the distance from New York to LA. The controversial Keystone Pipeline is 3,204 miles long. The NiSource right-of-way is almost five times longer than the Keystone Pipeline. The Keystone Pipeline is yet to be built, but both would be subject to similar concerns over leaks, appropriate maintenance (which are even greater for NiSource's older infrastructure) and the determination of cumulative effects.

The NiSource project area covers 14 states and 9,783,200 acres. Fed Reg, Vol. 76, pg. 63950. This is an incredibly large area over which to determine cumulative impacts, especially given the programmatic nature of this EIS, as we discuss further below. In addition, this ITP is meant to cover either 50 years (proposed action) or 10 years (action alternative). While both periods are too long given the programmatic nature of the EIS, the request for a fifty-year permit is far too long given the uncertainty over numerous impacts, including most importantly, climate change, and the impediment for significant adjustment brought about by the inclusion of the "no surprises" clause (also discussed further below). As a point of comparison, national forests create land management plans that guide forest activities for 10-15 year periods. The NiSource ITP would cover a time period equivalent to more than three and up to five Forest Plan periods. Given the extensive nature of NiSource right-of-way acreage on National Forest System (NFS) lands, this would lock in certain management options in these areas for many plans into the future. This might be acceptable, if more was known of NiSource plans and their site-specific impacts. But these facets are not known.

In addition, acceptance of the MSHCP and issuance of the ITP will result in the approval of activities many of which over the course of the permit will almost certainly be based on stale scientific information and have unforeseen adverse effects. This is especially true since this programmatic EIS is meant to suffice for the Service's decision for the next 50 years. The courts have found that, "Reliance on stale scientific evidence is sufficient to require re-examination of an EIS. *Seattle Audubon Society v. Espy*, 998 F.2d 699, 704-705 (9th Cir.1993)." *City of Carmel-by-the-Sea v. U.S. Dept of Transportation*, 95 F.3d 892, 900 (9th Cir. 1995). Lands

Council v. Powell, 379 F.3d 738 (9th Cir. 2004), as amended (9th Cir. 01/24/2005) No. 03-35640
- 6-year-old species survey not good enough -- "stale habitat data" -- citing SAS.

As the CEQ has stated:

“As a rule of thumb, if the proposal has not been implemented, or if the EIS concerns an ongoing program, EISs that are more than 5 years old should be carefully reexamined to determine if the criteria in Section 1509.2 compel preparation of an EIS supplement.

If an agency has made a substantial change in a proposed action that is relevant to environmental concerns, or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed ... impacts, a supplemental EIS must be prepared for an old EIS so that the agency has the best possible information to make any necessary substantive changes in its decisions regarding the proposal.”

46 Fed. Reg 18026, 18036 (March 23, 1981).

Obviously, this is even more true of an EIS that is over 10 years old (let alone up to 50 years old). *See Oregon Natural Resources Council Action v. U.S. Forest Service*, 445 F. Supp. 2d 1211, 1232 (D. Or. 2006) (finding this provision particularly applicable when dealing with EAs over ten years old, *citing, inter alia*, the CEQ language above); *see also Portland Audubon Society v. Espy*, 998 F.2d 699, 70304 (9th Cir. 1993) (overturning decision which "rests on stale scientific evidence”).

The Decision is Not Ripe under NEPA

The Applicant Should Be Able to Disclose Activities and Projects

NiSource has professed to be unable to provide details on its future plans and the location of its activities. This is curious, as it would seem any expansion plans would have to be part of some kind of capital improvement plan in order to plan for their funding, obtain financing and take advantage of cost accounting and depreciation and other tax advantages. Does NiSource have no expansion plans over the next five or ten years? Over the next fifty? Are its assets, including the current pipeline and associated equipment, of new enough age that their value (over every mile) has not fully depreciated and is not in need of replacement? It would seem that

if the applicant can't disclose its specific plans over even a five-year period that a decision is not ripe under NEPA.

Programmatic vs. Site-Specific Analysis: The DEIS is Insufficient

This DEIS is presented as programmatic in nature. "Impacts in this programmatic EIS are, by necessity, discussed at a regional scale." DEIS, pg. 1-7. The DEIS discusses the ways in which the cooperating agencies might use the information in this EIS to tier to their own, later, site-specific analysis under NEPA. But we believe this EIS should be site-specific, rather than programmatic. First of all, the scope of an EIS does not excuse the agency from conducting a careful analysis. Where the Forest Service undertook an EIS of its efforts to inventory and allocate 62 million acres of the National Forest System among three planning categories, for instance, the reviewing court emphasized:

NEPA contains no exemptions for projects of national scope. Having decided to allocate simultaneously millions of acres of land to nonwilderness use, the Forest Service may not rely upon forecasting difficulties or the task's magnitude to excuse the absence of a reasonably thorough site-specific analysis of the decision's environmental consequences.

California v. Block, 690 F.2d 753, 765 (9th Cir. 1982) (citations omitted).

Although we recognize that the EIS here is presented as a programmatic document and that later site-specific review will be undertaken, this EIS nevertheless must contain sufficient analysis to inform the Service's decision whether and in what form to grant the ITP and to reassure the public that the Service has examined and disclosed the impacts of the action it is proposing to undertake. To serve these purposes, the EIS should include at least an analysis of direct, indirect and cumulative impacts that takes a hard look at (1) the impacts of the underlying Covered Activities, derived from a detailed and quantified analysis of impacts from similar past activities, (2) the impacts of the proposed HCP, including the AMMs, mitigation measures, and adaptive management strategies and 3) the reasonably foreseeable (current) and future actions in the project area which together with the applicant's actions inform the analysis and disclosure of cumulative effects. Without such analysis, the EIS fails to meet NEPA's requirements.

We do not believe this DEIS and associated documents meet the test of including sufficient analysis to inform the Service's decision, nor do we believe that the Service has examined and disclosed the impacts of the action it is proposing to undertake.

NEPA requires that agencies consider a full range of environmental impacts, including “ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, [and] cultural” impacts, “whether direct, indirect, or cumulative.” 40 C.F.R. § 1508.8. Cumulative impacts are:

impact[s] on the environment which result[] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

Id. at § 1508.7.

The Council on Environmental Quality (“CEQ”) has emphasized that cumulative effects analysis includes a “[f]ocus on truly meaningful effects” of “past, present, and future actions” as well as “all federal, nonfederal, and private actions.”¹ The Service acknowledges that the Covered Activities to be undertaken by NiSource are “reasonably certain to occur.” EIS at 1-9.

An EIS must include a “useful analysis” that “analyze[s] the combined effects of the actions in sufficient detail to be ‘useful to the decisionmaker in deciding whether, or how, to alter the program to lessen cumulative impacts.’” *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 810 (9th Cir.1999) (citation omitted). Consideration of cumulative effects pursuant to NEPA therefore requires “some quantified or detailed information,” because “[w]ithout such information, neither the courts nor the public, in reviewing the [agency’s] decisions, can be assured that the [agency] provided the hard look that it is required to provide.” *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1379 (9th Cir. 1998); *see also Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 993–94 (9th Cir. 2004) (“A proper consideration of the cumulative impacts of a project requires some quantified or detailed information; general statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided.”) (internal quotation marks and citations omitted). A mere listing of impacts without discussion of the underlying environmental data does not suffice. *See Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150 (9th Cir.1998). A cumulative impact analysis must, moreover, be timely. “It is not appropriate to defer consideration of cumulative impacts to a future date when

¹ Council on Envntl. Quality, Considering Cumulative Effects Under the National Environmental Policy ACT vii (1997), available at <http://ceq.hss.doe.gov/nepa/ccenepa/ccenepa.htm>.

meaningful consideration can be given now.” *See Neighbors of Cuddy Mountain*, 137 F.3d at 1380.

The cumulative impact analysis in this EIS is inadequate because it attempts to avoid a meaningful review by deferring analysis to later NEPA processes; presents only general, conclusory statements that are unsupported by detailed information; and illogically equates unknown or uncertain impacts with *no* impacts. The root of these flaws appears to be the Service’s conflation of the cumulative impacts of its proposed action to issue the ITP with the cumulative impacts of NiSource’s Covered Activities. The Service concludes that because:

no ground disturbance or construction activity is directly authorized or included as part of the Service’s issuance of the ITP and approval of the HCP; therefore *the Service’s action (Issuing an ITP or approving the HCP) would not have significant cumulative impacts upon resources within the NCL area.*

EIS at 5-1 (emphasis added).

The Service appears to rely on the same rationale to conclude that NiSource’s Covered Activities likely also will have no cumulative impacts:

No current or future ground disturbance or construction activity is directly authorized by the Service via selection of the Proposed Action (Service’s issuance of the ITP and approval of the HCP) or any of the Action Alternatives. As such, all future construction activities will be subject to future NEPA analysis and cumulative effects analysis by FERC at the time authorization for a project is sought. *NiSource’s Covered Activities are not expected to contribute cumulatively to loss of physical resources*

EIS at 5-10 (emphasis added); *see also id.* at 5-13, 5-15 (relying on the same language and rationale to conclude that NiSource’s Covered Activities are not expected to have cumulative impact on biological resources and social resources)

This logic does not withstand scrutiny. Just because the Service’s issuance of an ITP would not directly authorize immediate construction of Covered Activities does not mean that issuance of the ITP, and implementation of the HCP, would not have cumulative impacts. As is detailed in Section I.A., *supra*, implementing the HCP and its associated AMMs, mitigation measures, and other HCP provisions will have impacts on the environment that have not been examined in

the EIS. These impacts can and should be viewed cumulatively with the impacts of other past, present, and reasonably foreseeable future actions. Without having undertaken such an analysis, the Service has no reasoned basis for its conclusion that issuing the ITP and approving the HCP would have no significant cumulative impacts.

Moreover, just because NiSource's Covered Activities will be subject to future NEPA analysis in no way leads to the conclusion that "NiSource's Covered Activities are not expected to contribute cumulatively to loss of . . . resources." EIS at 5-10. Here, the EIS contradictorily attempts to defer the cumulative impacts analysis to the action agency's future NEPA review and to conclude that the Covered Activities likely will not have cumulative impacts. The Service cannot have it both ways. The Service may not defer the cumulative impacts analysis to a future time "when meaningful consideration can be given now." *See Neighbors of Cuddy Mountain*, 137 F.3d at 1380. Here, no attempt at meaningful consideration has even been made. Although the Covered Activities include projects as large as the installation of multiple compressor station additions and the construction of a 200 mile pipeline in a new right-of-way, *see* HCP App. A at 6-7, for instance, the EIS breezily concludes that "future construction projects . . . would be *relatively small efforts*" that would "still be subject to future NEPA analysis." EIS at 5-1 (emphasis added).

Reasonably Foreseeable Actions and Cumulative Impacts Can Be Known

The Service must also take account of other actions in the project area that may have direct, indirect or cumulative effects on listed (and candidate) species in the area. While many of these actions over a fifty-year period cannot be known at this time, many can. "Cumulative impacts are defined in 40 CFR 1508.7 to mean 'the impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable actions *regardless of what agency (federal or non-federal) or person undertakes such other actions.*'" DEIS, pg. 5-1, emphasis added. The DEIS goes on to describe a few past projects approved by FERC, a cooperating agency. But the DEIS fails to rely on the expertise and knowledge of the other cooperating agencies in analyzing and disclosing the impacts of their past, present and reasonably foreseeable actions.

Our analysis reveals that even with a quick search online, many more past, present and reasonably foreseeable actions that contribute to cumulative impacts should have been included and disclosed. We use a quick analysis of Forest Service activities on two national forests (the Allegheny and the Monongahela National Forests) as an example of the material that should have been gathered and analyzed. Some of the projects overlap the NiSource right-of-way. Others are in close enough proximity to contribute to cumulative effects on listed species. In at least one case, the Service is in active Section 7 consultation to determine impacts and necessary

terms and conditions (the Upper Greenbrier Project on the Monongahela NF). Project information is gathered from each National Forest’s Schedule of Proposed Actions (SOPA), available online at <http://www.fs.fed.us/sopa/>. This sort of information should have been gathered and analyzed from all the cooperating agencies. [A table for each forest with applicable projects is presented as well as a map for those projects with specific boundaries.]

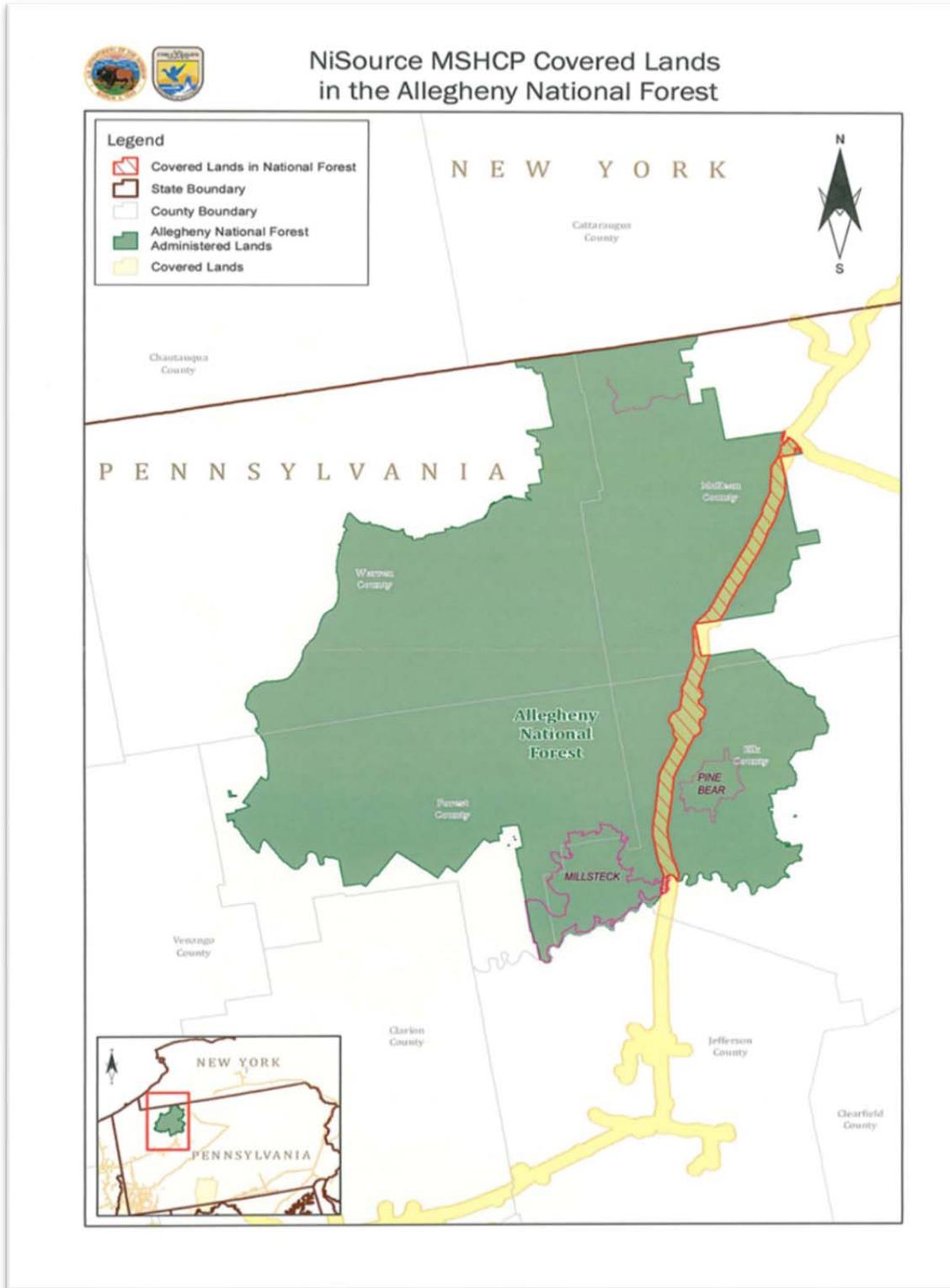
| Allegheny National Forest | | | | |
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| Project Name | Project Purpose | Project Description | Project Location | Expected Decision |
| Allegheny National Forest Reserved and Outstanding Oil and Gas Design Criteria | Land management planning | Design Criteria in the Allegheny National Forest 2007 Forest Plan will be applied to reserved and outstanding oil and gas development. This proposal responds to the 2/15/08 Forest Plan Appeals Decision made by the Chief of the Forest Service. | UNIT - Allegheny National Forest All Units. STATE - Pennsylvania. COUNTY - Elk, Forest, McKean, Warren. Allegheny National Forest - Northwest Pennsylvania - Eastern Region Nine | N/A |
| Transition EIS | Minerals and Geology | The Forest Service is proposing to authorize reasonable access for site-specific proposals to develop reserved and outstanding mineral rights within the Allegheny National Forest, with provisions to mitigate impacts to surface resources. | UNIT - Allegheny National Forest All Units. STATE - Pennsylvania. COUNTY - Elk, Forest, McKean, Warren. LEGAL - Warren, Forest, Elk and McKean counties, Pennsylvania Forest wide | N/A |

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| Bullis Hollow Trail | Recreation management | Construct 8.3 miles of pedestrian trail on National Forest Land to connect Bradford, PA (Marilla Spring Trail System), Tracy Ridge Trail System, the North Country Trail, and the Allegany State Park in NY (Blacksnake Trail). | UNIT - Bradford Ranger District. STATE - Pennsylvania. COUNTY - McKean. Corydon Township, McKean County | Expected: 01/2012 |
| Clarion Wild and Scenic River Comprehensive River Management Plan | Land management planning, Watershed Management, Recreation management | Develop Comprehensive River Management Plan for the Clarion Wild and Scenic River to protect the natural condition and free-flowing state of the river and provide a management strategy for all public lands within the wild and scenic river corridor. | UNIT - Marienville Ranger District. STATE - Pennsylvania. COUNTY - Clarion, Elk, Forest, Jefferson. The 51.7-mile segment of the Clarion River from the ANF/SGL #44 boundary to an unnamed tributary in the backwaters of Piney Dam. | Expected: 12/2011 |

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| <p>Pipeline Renewals</p> | <p>Minerals and Geology, Special Use</p> | <p>Renew special use permits for 10 existing oil and gas pipelines and associated facilities. These are in various locations across the Bradford Ranger District.</p> | <p>UNIT - Bradford Ranger District. STATE - Pennsylvania. COUNTY - Warren. LEGAL - Lots 461, 470, 487, 507, 508 in Pleasant Twp, Lots 517, 518, 519 in Watson Twp., Warren County, PA Lots 461, 470, 487, 507, 508 in Pleasant Twp, Lots 517, 518, 519 in Watson Twp., Warren County, PA</p> | <p>N/A</p> |
| <p>Southern Allegheny Reservoir Enhancement Project (SAREP)</p> | <p>Wildlife, Fish, Rare plants, Forest products, Facility management, Vegetation management (other than forest products), Watershed management, Heritage resource management, Recreation management</p> | <p>Enhance recreation opportunities in the area around the Kinzua Bay of the Allegheny Reservoir through management activities that include scenery, recreation, heritage, vegetation and wildlife activities.</p> | <p>UNIT - Bradford Ranger District. STATE - Pennsylvania. COUNTY - McKean, Warren. LEGAL - Mead Township in Warren County and Hamilton Township in McKean County, PA Management Areas 7.1 and 2.2 lands surrounding the Kinzua Bay of the Allegheny Reservoir.</p> | <p>Expected: 03/2012</p> |

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| <p>Millsteck</p> | <p>Forest products, vegetation management (other than forest products), Watershed management, Road management</p> | <p>Proposed management activities include vegetation treatments, including timber harvesting, wildlife habitat improvements, NNIP species treatments, transportation activities, and recreational improvements.</p> | <p>UNIT - Marienville Ranger District. STATE - Pennsylvania. COUNTY - Elk, Forest. Barnett and Jenks Townships, Forest County and Millstone and Spring Creek Townships, Elk County</p> | <p>Expected: 06/2012</p> |
| <p>Pine Bear</p> | <p>Watershed management, Road management, Vegetation management (other than forest products), Forest products</p> | <p>Proposed activities include vegetation, wildlife habitat, non-native invasive plant species, transportation, and soil and water management. Oil and gas development is ongoing within the project area.</p> | <p>UNIT - Marienville Ranger District. STATE - Pennsylvania. COUNTY - Elk. Warrants 1464, 1465, 1776, 1778, 1783, 1799, 1831, 1858, 1863, 2032, 2033, 2034, 3655, 3656, 3657, 3776, Highland Twnshp; Warrants 3252, 4846, Jones Twnshp; and Warrant 4846, Ridgway Twnshp</p> | <p>Expected: 01/2012</p> |

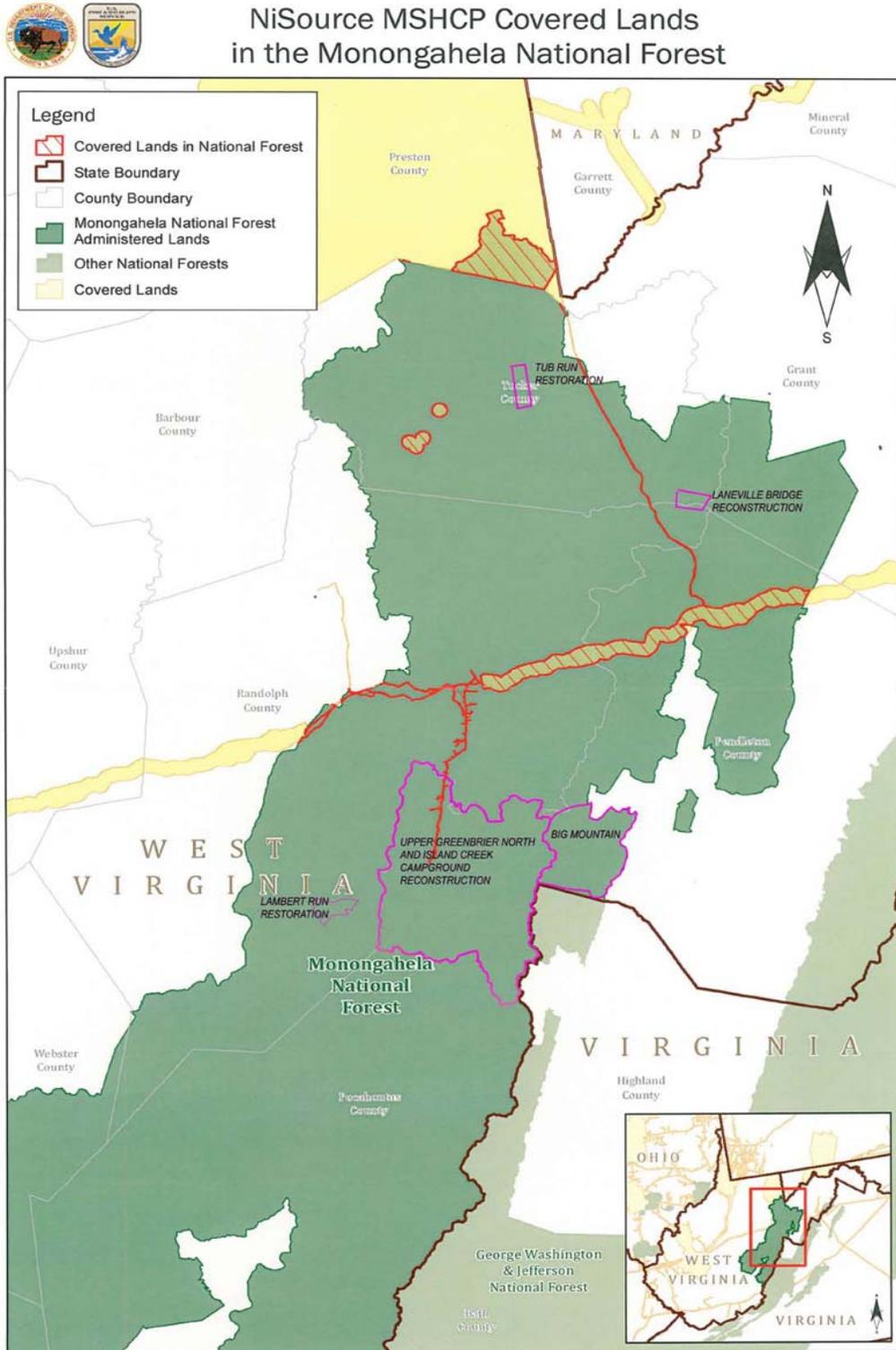
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| Salmon East | Wildlife, Fish, Rare plants, Road management, Watershed management, Recreation management, Vegetation management (other than forest products) | Proposed activities include vegetation management, wildlife habitat improvements, non-native invasive plant species treatments, transportation activities, recreation enhancements, and soil and water improvements. | UNIT - Marienville Ranger District. STATE - Pennsylvania. COUNTY - Elk, Forest. Jenks and Howe Townships, Forest County | Expected: 04/2015 |
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| Monongahela National Forest, Forestwide (excluding Projects occurring in more than one Forest) | | | | |
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| Project Name | Project Purpose | Project Description | Project Location | Expected Decision |
| Expiring Permits Proposed for Renewal | - Special use management | Proposals to renew existing permits for cultivation, migratory bird research, boat rental, road rights-of-way, porch encroachment, septic, cemetery, and recreation events. | UNIT - Monongahela National Forest All Units. STATE - West Virginia. COUNTY - Greenbrier, Nicholas, Pendleton, Pocahontas, Preston, Randolph, Tucker, Webster. Various US Tracts across the Forest | Expected : 11/2011 |
| Wildlife Openings | Wildlife, Fish, Rare plants, Vegetation management (other than forest products) | This proposal will address maintenance of wildlife openings across the Forest through mowing, prescribed fire, herbicide, and other treatments, and will include long-term strategies for determining, prioritizing, and treating existing and new areas. | UNIT - Monongahela National Forest All Units. STATE - West Virginia. COUNTY - Grant, Greenbrier, Nicholas, Pendleton, Pocahontas, Preston, Randolph, Tucker, Webster. Openings are scattered across the Forest in Grant, Greenbrier, Nicholas, Pendleton, Pocahontas, Preston, Randolph, Tucker, and Webster Counties, WV | Expected : 12/2012 |
| Spruce Knob Seneca Rocks Telephone Fiber Optic Right-of-Way in Pendleton and Pocahontas County, WV | - Special use management | Proposal to install and maintain aerial and buried fiber optic communication lines in Pendleton and Pocahontas County, WV to provide broadband service to local residents and businesses. | Greenbrier Ranger District, Potomac Ranger District. STATE - West Virginia. COUNTY - Pendleton, Pocahontas. Elk Mountain along FR 112; from Elk Mountain south to Bartow, WV paralleling Hwy 28; East of Cass, WV along Hwy 66 | Expected : 11/2011 |
| Tub Run Abandoned Coal Mine Restoration | Minerals and Geology, Watershed management, Road management | Authorize WV DEP to do restoration work on abandoned coal mine. Work includes reshaping land, covering acidic spoils, planting trees and herbaceous vegetation, decommissioning roads, and establishing drainage controls. | UNIT - Cheat Ranger District. STATE - West Virginia. COUNTY - Tucker. The project is located about 4 miles southwest of Thomas, in Tucker County, West Virginia, on the northern rim of Blackwater Canyon on the Cheat Ranger | Expected : 03/2012 |

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| | | | District of the Monongahela National Forest | |
| Lambert Restoration Project | Minerals and Geology, Watershed management, Road management | This mine restoration project emphasizes improving watershed conditions, wildlife habitat, and restoration of native communities, the creation of early successional habitat, and long-term succession towards a spruce-northern hardwood ecosystem. | UNIT - Greenbrier Ranger District. STATE - West Virginia. COUNTY - Randolph. The project area is located in Randolph County, an estimated 5 miles northwest of Durbin, West Virginia. The project area is 2,667-acres, and includes the abandoned Lambert Run Strip coal mine. | Expected : 12/2011 |
| Upper Greenbrier North | Recreation management, Forest products, Watershed Management, Road Management, Vegetation management, Wildlife, Fish, Rare plants | This project proposal includes: commercial timber harvest; timber stand improvement; spruce restoration; road decommissioning, riparian improvement, trail relocation, culvert replacement, and dispersed recreation site management. | UNIT - Greenbrier Ranger District. STATE - West Virginia. COUNTY - Pocahontas. Upper Greenbrier Watershed. Durbin, Frank, + Bartow are at south end ; Shavers Mt is west, and WV/VA state line is east. | Expected : 12/2011 |
| Island Campground Reconstruction | - Recreation management | Relocate Island Campground out of the 100-year floodplain for safety. | UNIT - Greenbrier Ranger District. STATE - West Virginia. COUNTY - Pocahontas. Off of WV State Route 28, approximately 5 miles north and east of Bartow, WV. | Expected : 02/2012 |
| Big Mountain | Wildlife, Fish, Rare plants, Road management, Vegetation management (other than forest products), forest | Improve oak regeneration and stand structural and age diversity, and increase mast for wildlife through a variety of methods, including commercial and noncommercial treatments. Enhance wildlife and aquatic habitats for a number of species. | UNIT - Potomac Ranger District. STATE - West Virginia. COUNTY - Pendleton. Southeast part of Cheat Potomac RD. North Fork South Branch Potomac watershed. South of Spruce Knob, North of Virginia State Line. | Expected : 04/2012 |

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| | products, Watershed management | | | |
| Laneville Bridge Replacement | - Road management | Replace the Laneville bridge. Construct short sections of new access roads and rehabilitate existing access roads. | UNIT - Potomac Ranger District. STATE - West Virginia. COUNTY - Randolph. East of Laneville, at the beginning of FR 19, over Red Creek. Near the southwest border of the Dolly Sods Wilderness. | Expected : 01/2012 |



In order to make a decision on the amount and extent of take to be accorded NiSource, the Service must also consider the cumulative impact of all impacts on that species. By failing to take reasonably foreseeable future actions into account, the Service has failed to include sufficient information to adequately analyze and disclose cumulative impacts and to make an informed decision under NEPA. The DEIS must be corrected.

The Service Appears to Be Making a Final Decision that Will Affect Site-Specific Areas and Listed Species without Benefit of Site-Specific Analysis and Disclosure

The Service is proposing to make a decision on the amount and extent of take to be allowed in an incidental take permit that will in two important ways represent a final agency decision despite all the subsequent site-specific NEPA analysis that will have to be undertaken in the future. First of all, the Service's "no surprises" policy, provides an ITP applicant with assurances that, "even if circumstances subsequently changed in a such a way as to render the HCP inadequate to conserve listed species, the Services would not impose additional conservation and mitigation requirements that would increase costs or further restrict the use of natural resources beyond the original plan." *Sage Council v. Norton*, 294 F. Supp. 2d 67, 77 (D.D.C. 2003); *see also* 50 C.F.R. §§ 17.22(b)(5), 17.32(b)(5). Therefore, despite the lack of meaningful site-specific analysis and absent specific action proposals, the Service would grant NiSource an ITP without the ability to require additional conservation or mitigation requirements in the future should the proposed measures prove insufficient. This is the equivalent of a free pass, when the Service and the cooperating agencies have done very little to analyze and disclose any cumulative effects and nothing to address site-specific effects. This is especially troubling when climate change is added to the equation. The "no surprises" policy then essentially is saying that the Service (as the signatory on the Record of Decision and the ITP) has adequately analyzed the direct, indirect and cumulative effects of climate change on listed species sufficient to set now and for 50 years into the future the necessary conservation and mitigation requirements for a selected group of species to a level sufficient to account for all the listed species in the project area (though not all are addressed in the MSHCP). This is even more suspect when the fact that NiSource proposes to complete mitigation for the 50-year period in the first seven years. This is unfathomable. Clearly, the Service has not completed the analysis necessary to make such a decision in an informed manner under NEPA. The programmatic nature of this DEIS is insufficient to make what will in effect be a site-specific and binding decision (across more than 15,500 miles).

Secondly, though the cooperating agencies are unlikely to sign the Record of Decision (according to the DEIS), the Forest Service appears to be a separate and special case as to the effect the Service's decision here would have on their Section 7 consultation responsibilities.

The DEIS at pg. 1-24 notes that “[i]t is the Service’s and the USFS intent that NiSource’s receipt of an ITP, and their compliance with the HCP, will *satisfy* USFS’s regulatory obligations under NEPA, specific to Section 7 of the ESA, for purposes of formal consultation on permitted activities under USFS authorities”(emphasis added). This agreement between the Service and the Forest Service then cements the Forest Service’s analysis of cumulative effects as it pertains to listed species, including due to climate change over a 50-year period, removes the requirement for formal consultation on as yet undefined activities by the applicant NiSource and essentially guts the ability of the Forest Service to demand more of the applicant to mitigate effects or even to restrict NiSource’s activities if analysis shows adverse impacts to listed species. All without any specific proposals or any site-specific analysis. There is very little in the DEIS and supporting documents to support this kind of agreement between the Service and the Forest Service. It must be dropped from the DEIS and subsequent Record of Decision.

NEPA and Cooperating and Lead Agencies

NEPA encourages agencies to work together to meet their obligations under the Act by conducting the analysis in such a way as to be sufficient for all lead and cooperating agency decisions. The NEPA and the Council on Environmental Quality’s 40 Most Asked Questions addresses this issue in more detail. The answer to questions 14a and 14b are instructive:

14a:

After discussions with the candidate cooperating agencies, the lead agency and the cooperating agencies are to determine by letter or by memorandum which agencies will undertake cooperating responsibilities. To the extent possible at this stage, responsibilities for specific issues should be assigned. The allocation of responsibilities will be completed during scoping. Section 1501.7(a)(4).

Cooperating agencies must assume responsibility for the development of information and the preparation of environmental analyses at the request of the lead agency. Section 1501.6(b)(3). Cooperating agencies are now required by Section 1501.6 to devote staff resources that were normally primarily used to critique or comment on the Draft EIS after its preparation, much earlier in the NEPA process -- primarily at the scoping and Draft EIS preparation stages. If a cooperating agency determines that its resource limitations preclude any involvement, or the degree of involvement (amount of work) requested by the lead agency, it must so inform the lead agency in writing and submit a copy of this correspondence to the Council. Section 1501.6(c).

14b:

A lead agency, of course, has the ultimate responsibility for the content of an EIS. But it is supposed to use the environmental analysis and recommendations of cooperating agencies with jurisdiction by law or special expertise to the maximum extent possible, consistent with its own responsibilities as lead agency. Section 1501.6(a)(2).

If the lead agency leaves out a significant issue or ignores the advice and expertise of the cooperating agency, the EIS may be found later to be inadequate. Similarly, where cooperating agencies have their own decisions to make and they intend to adopt the environmental impact statement and base their decisions on it, one document should include all of the information necessary for the decisions by the cooperating agencies. Otherwise they may be forced to duplicate the EIS process by issuing a new, more complete EIS or Supplemental EIS, even though the original EIS could have sufficed if it had been properly done at the outset. Thus, both lead and cooperating agencies have a stake in producing a document of good quality. Cooperating agencies also have a duty to participate fully in the scoping process to ensure that the appropriate range of issues is determined early in the EIS process.

Much of the merge team (lead and cooperating agency) process for this project is unknown. What is very clear is that the Service and it must be assumed the cooperating agencies agreed to this, left a great deal of site-specific analysis for the future. Analysis which we believe should have been performed now; or absent sufficient detail, the application by NiSource should have been rejected until such time as details on projected activities were provided. Yet the issuance of an ITP and the acceptance of the MSHCP will significantly limit the decision space of the cooperating agencies when it comes to impacts on listed species on their lands. This is especially true for the Forest Service as detailed above.

To understand better what has transpired in this process between the lead and cooperating agencies, we would like copies of any agreements made between the Service and the FERC, the FS, the NPS and the COE. We would like to know if any other agencies were asked to participate and declined. Which agency was responsible for which specific parts of the analysis? Were there any disagreements as to whether this one EIS should include all of the information necessary for the decisions by the cooperating agencies? It is particularly surprising to us given NEPA's encouragement that one analysis and one document be sufficient for all agency decisions that so much NEPA analysis is left for the future. We would like to understand more clearly how this occurred.

The Public's Right to Meaningful Public Involvement under NEPA has Been Denied

One of the purposes of NEPA is to “insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken”. 40 CFR 1500.1(b). We believe two critical pieces of information are missing that are most relevant to our legal right to meaningful participation under NEPA.

First of all, the implementing agreement discussed in the DEIS that has yet to be written or signed (to our knowledge) should have been completed and released to the public concurrent with the DEIS and other supporting documents. If the implementing agreement is meant to spell out how future NEPA analysis is to be undertaken and how the Service's role under its Section 7 responsibilities are to be performed, that information is relevant to the DEIS (and its lack of specific details). The public is currently left to trust and to try to deduce how the necessary site-specific analysis will be conducted and how the “programmatic” information in the DEIS will be used. Should the eventual agreement reveal details affecting these elements, the public's one chance for meaningful comment at the DEIS stage will have passed.

Similarly, the Service is required to issue a Biological Opinion (BO). The agency acknowledges this and their unusual inter and intra-agency role in this process. In similar situations where the Service must issue a BO to another agency, we often must make the argument that absent the issued BO with its terms and conditions, the acting agency is asking the public to comment on whether their own guesses as to what the BO will require are correct, and what their impact will be. (This most often happens when the Forest Service guesses as to what a BO issued by the Service will say and asks the public to comment on those guesses. They have often been wildly wrong, necessitating a revised environmental assessment (EA) or EIS and a new opportunity for the public to comment.) This case presents a similar though unusual situation. The public is being asked to comment on a “programmatic” EIS lacking in detailed analysis, a MSHCP that does not address all listed species in the analysis area and an application for an ITP. There are no clear indications as to what terms and conditions the Service's own analysis might require, especially of cooperating agencies, yet the public is being asked to comment absent this information. Since the BO and the Record of Decision (ROD) are two separate documents from two separate processes it seems possible to issue the one (BO) and seek comment without making the decision on the second (the ROD) a foregone conclusion.

The Documentation, Including the DEIS, MSHCP and the Application for ITP Failed to Adequately Address the WV Northern Flying Squirrel, a Listed Endangered Species

The West Virginia northern flying squirrel inhabits the high elevation mountains of West Virginia. Flying squirrel habitat is located along the NiSource pipeline on both public and private land. See Monongahela NF maps available from the Forest Service showing flying squirrel habitat and known locations in the NiSource right-of-way. (These maps are not submitted here in order to keep protected endangered species locations out of the public domain.) The habitat needs of the West Virginia northern flying squirrel (WVNFS) described in Appendix F of the Draft Environmental Impact Statement are not correct. As experts in the field have stated this endangered species lives in the ecotone between older northern hardwoods and conifers at high elevations. Older growth characteristics such as downed and rotting tree branches and a moist forest floor are necessary for the growth of fungus that is a key part of the flying squirrel’s diet. Beech, yellow birch and other northern hardwood species are part of the squirrel’s habitat. The squirrel’s habitat is not improving; to the contrary it is threatened by climate change, logging, and construction. Logging in the northern flying squirrel’s habitat continues on both private and public lands. These factors must be addressed in the DEIS, the NiSource MSHCP and application for ITP.

Addressing the needs of the squirrel brings up a critical point. We fail to understand how the Service can issue an ITP for selected species in the project area without addressing all listed species. Actions allowed under the ITP for one species may have a significant adverse impact on other species not addressed in the ITP. A limited ITP will either 1) not adequately protect all listed species; 2) only obligate NiSource to mitigate effects to some, but not all, impacted species; or 3) cause NiSource to continue to have to seek FWS Section 7 concurrence for all of its actions in order to address all impacted species, thus failing to address the reasons for which they sought the ITP and prepared the MSHCP in the first place.

We look forward to continued discussion of the DEIS, MSHCP and application for ITP, as well as the implementing agreement, Service-issued Biological Opinion and the myriad subsequent site-specific analyzes under NEPA and the ESA, necessary to disclose the effects of and approve any NiSource activities. We would like to be kept informed of the progress of these efforts and any opportunities to comment on these proposals and documents. We request to be placed on all lead and cooperating agency mailing lists concerning NiSource, and request email notification when any aspects of this proposal and associated analysis are underway. Please do not hesitate to contact us. Thank you for your time and consideration.

Sincerely,



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"Judy Rodd"
<info@saveblackwater.org>
12/13/2011 08:33 PM

To <Lisa_Mandell@fws.gov>
cc
bcc
Subject Nisource comments addendum

History:  This message has been replied to.

Lisa, could Heartwood be added to the Friends of Blackwater comments sent earlier today? See below.

Judith Rodd, Director
Friends of Blackwater
501 Elizabeth St.
Charleston, WV 25311
304-345-7663
<http://www.saveblackwater.org>

Charleston Office Fax 304-345-3240
Preston County (weekends) 304-265-0018
Northfork Watershed Office 304-259-5600
Cell 304-552-7602

From: lec@wildvirginia.org [<mailto:lec@wildvirginia.org>]
Sent: Tuesday, December 13, 2011 4:15 PM
To: Judy Rodd
Subject: Nisource comments
Importance: High

We are interested in signing on to Judy's letter

Heartwood
Ernie Reed, Heartwood Council Chair
P. O. Box 538
Gosport, IN 47433

and here is some text...

"Heartwood is a cooperative network of grassroots groups, individuals, and businesses working to protect and sustain healthy forests and vital human communities in the nation's heartland and in the central, eastern and southern Appalachians. Heartwood, Heartwood members and member groups regularly use the George Washington, Monongehela, Allegheny, Buckeye, Mark Twain, Shawnee, Hoosier, Pisgah and Cherokee National Forests and our concerns for impacts to flora, fauna, water resources and recreation inform these comments."

Ernie