

# SOUTHERN ENVIRONMENTAL LAW CENTER

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May 21, 2018

*Via First Class U.S. Mail and FERC Docket*

Kimberly D. Bose, Secretary  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Washington, DC 20426

Re: Vacatur of Incidental Take Statement for the Atlantic Coast Pipeline  
Dockets CP15-554 et seq. & CP15-555 et seq.

Dear Secretary Bose:

On May 15, 2018 the Fourth Circuit Court of Appeals vacated the Fish and Wildlife Service's Incidental Take Statement for the Atlantic Coast Pipeline. We notified FERC on May 16, 2018, that the project lacked a key approval necessary to proceed with construction. Without that approval, FERC must not allow pipeline construction to continue. This is because, as we previously noted, having a valid incidental take statement, which both limits take and provides a shield from liability under the Endangered Species Act, is a required condition of FERC's approval of the pipeline and two other federal agency approvals.

Foremost, the Commission's October 13, 2017 Order Issuing Certificates (161 FERC ¶ 61,042) (hereafter "FERC Order") authorizing this project, requires a valid biological opinion *and* incidental take statement for work to proceed. Condition No. 54 of the FERC Order prohibits Atlantic from beginning any construction until "the FERC staff complete any necessary section 7 consultation with the FWS." FERC Order, Condition No. 54, p. 146. Elsewhere in its Order, FERC explains what this requirement means: "Environmental Condition 54 in the appendix to this order stipulates that construction cannot begin until after staff completes the process of complying with the Endangered Species Act." FERC Order, ¶ 243, p. 96.

On October 16, 2017, Atlantic accepted the terms of FERC's Order. *See* Letter from Matthew Bley to Kimberly Bose (October 16, 2017). That acceptance is conditioned on Atlantic's "compliance with the environmental conditions listed in Appendix A to this order," which includes Condition No. 54. FERC Order, p. 129.

As it stands, FERC's consultation obligations under Section 7 of the Endangered Species Act are incomplete. As part of consultation, the Fish and Wildlife Service (FWS) must provide "a statement concerning incidental take, if such take is reasonably certain to occur," which is

included with the biological opinion. 50 C.F.R. § 402.14(g)(7); *see also* § 402.14(i). FWS has confirmed that take is reasonably certain to occur, but the incidental take statement attached to the project's biological opinion is now invalid. FERC does not have the "statement concerning incidental take" necessary to complete Section 7 consultation.<sup>1</sup>

To fulfill Section 7 consultation requirements and move forward with this project, FERC must obtain a valid incidental take statement through consultation with FWS. To be clear, this is not a situation where the limits of a valid incidental take statement have been exceeded, requiring FERC to reinitiate previously completed Section 7 consultation. Here, the underlying incidental take statement has been vacated, and consultation is incomplete. FERC's Order prohibited commencement of construction before obtaining its first, now invalid, incidental take statement; it likewise does not allow that construction would continue in the absence of an incidental take statement.

Other conditions in FERC's Order also bar construction absent a valid incidental take statement. Condition No. 10 of FERC's Order requires Atlantic to "file with the Secretary documentation that it has received all applicable authorizations required under federal law" before commencing construction of any project facilities. FERC Order, Condition No. 10, p. 137. An incidental take statement is an "applicable authorization required under federal law" for this project. Atlantic can no longer make the requisite showing because it lacks a valid incidental take statement. The face of FERC's Order does not allow the possibility that construction would continue in the absence of such an authorization required under federal law.

Other agency approvals also require Section 7 consultation to conclude, with production of a valid incidental take statement, before construction can begin. The Forest Service's Record of Decision and Special Use Permit "require[s] measures from the [biological opinion] that are applicable to species and habitat on [national forest] land as a condition of approval in the Forest Service special use permit." Forest Service, Record of Decision, p. 46; *see also id.*, p. 13 (incorporating these same measures as conditions for special use). Several endangered and threatened species and their habitat are present on national forest system land. The limitations on take provided in an incidental take statement are applicable to those species. Now that those limits have been invalidated, the conditions necessary for approval of the special use permit are unfulfilled.

Similarly, impacts to waterbodies along the pipeline route are authorized under Army Corps of Engineers' Nationwide Permit No. 12. Term and Condition No. 18 of the nationwide permit provides that "[n]o activity is authorized under any [nationwide permit] which 'may affect' a listed species or critical habitat, unless ESA section 7 consultation addressing the effects

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<sup>1</sup> FWS need not allow incidental take in every instance it is requested but still must include a statement concerning take – setting an enforceable limit on it, or disallowing it.

of the proposed activity has been completed.” Army Corps, Nationwide Permit No. 12, General Term and Condition No. 18. Without a valid incidental take statement, Section 7 consultation has not been completed for any part of this project.

Moreover, FERC is also not in compliance with Term and Condition No. 18 of the nationwide permit because it has not undertaken formal consultation for the yellow lance, an obligation we brought to FERC’s attention on April 30, 2018. Yellow lance is a threatened mussel which “occurs in the ACP project area.” Final Environmental Impact Statement, 4-303. “Presence of the yellow lance is assumed in Nottoway River (both crossings) in Virginia, and in Swift Creek, Tar River, Fishing Creek, and Little River in North Carolina.” *Id.* at 4-307. The pipeline crosses those waterbodies and their tributaries. Those crossings may introduce sediment or other chemicals into the waterbodies affecting (and potentially taking) yellow lance. When an “action may affect listed species . . . formal consultation is required” under Section 7. 50 C.F.R. § 402.14(a). That consultation has not occurred in violation of Term and Condition No. 18.

Allowing Atlantic to proceed with pipeline construction also risks running afoul of the Endangered Species Act’s prohibition on “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” after initiation of consultation. 16 U.S.C. § 1536(d). FERC should not allow Atlantic to encroach upon the edge of habitat for endangered and threatened species in an effort to secure its preferred pipeline route, foreclosing alternative routes or other measures FWS determines necessary to protect those species.

The extent of what FWS must do to issue a valid and enforceable incidental take statement for the project, besides renew consultation, is unclear, particularly as the parties await the Fourth Circuit’s opinion. It is entirely possible that to develop enforceable limits on take, FWS may have to allow take of a larger number of individuals than was anticipated as the “small percent” in its original biological opinion and incidental take statement. In that instance, FWS may have to revisit its jeopardy analysis for some or all of these species. Its revisited jeopardy analysis could require route modifications as a reasonable and prudent alternative to affecting the species. Additionally, if FWS is unable to develop enforceable take limits for inclusion in an incidental take statement, it may require the pipeline to simply avoid certain species.

The habitat for several species covers significant portions of the current pipeline route. Potential Madison Cave isopod habitat covers nearly 267,000 surface acres in western Virginia. October 16, 2017 Biological Opinion, 22. Of the 11,776 acres of land that will be disturbed by pipeline construction (*id.* at 7), at least 4,448 of those acres are Indiana bat habitat (*id.* at 24). If FWS were to require route modifications as part of its new incidental take analysis, those modifications could be significant.

FERC also should not assume that it knows what remedy the court will order, nor FWS's response to it. For instance, FERC cannot know if FWS will have to consider additional habitat areas not assessed in the original biological opinion and incidental take statement in order to comply with the court's opinion. FERC puts itself at considerable risk by assuming it or Atlantic can predict what the court will order and how that will play out on the ground.

Allowing pipeline construction to proceed outside areas Atlantic identified as used by endangered species could dangerously lock FERC and Atlantic into a pipeline route that FWS's analysis may require it to change. That is part of the reason the ESA prohibits "any irreversible or irretrievable commitment of resources" during consultation – to ensure the action agency does not wed itself to a proposal that it ultimately cannot complete. FERC should not assume that it is going to be allowed to take species or impact habitat until FWS shows it can issue a valid biological opinion and incidental take statement for this project. As it stands today, this project could not be completed as planned.

A piecemeal approach to constructing a 600-mile pipeline makes even less sense because of the substantial but ultimately unnecessary costs Atlantic could incur if consultation with FWS requires a significant route change. If FWS requires a pipeline reroute to avoid or minimize take, Atlantic and its contracted shippers, primarily regulated power-generation utilities in Virginia and North Carolina, would be on the hook for constructing a pipeline in its original path, then excavating that pipeline and rehabilitating the land, and later constructing the pipeline anew in a different location. The utility shippers may then seek to pass these costs through to their customers in Virginia and North Carolina, putting the burden on ratepayers to pay for unnecessary and unreasonably incurred expenses. Setting legal concerns aside, the far more prudent approach is to wait and determine if this pipeline route is still viable.

There is no apparent reason to rush this project forward with one key approval invalidated and challenges to several others pending. Undoubtedly, Atlantic wants to move forward with construction because the fundamental problem with the pipeline – that it is not a public necessity – is becoming more obvious with time. The demand for new electric power generation in Virginia and North Carolina is not growing and existing pipelines and other existing gas infrastructure can meet the demand that does exist much more cost effectively than a new, greenfield project. FERC should not be concerned that a stay of pipeline construction will harm utility customers in Virginia and North Carolina. That alarmist message from Atlantic is unfounded.

Allowing construction to proceed also risks exposing FERC and Atlantic to criminal and civil penalties under the ESA. *See* 16 U.S.C. § 1540. Take of even a single protected individual is prohibited under the Act. 16 U.S.C. § 1538(a); 50 C.F.R. § 17.31. When a federal agency

such as FERC authorizes an action that results in take of species, that federal agency can be held liable for any unauthorized take. *See Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997). Take is broadly defined to include killing, injuring, harming, and harassing species, or modifying their habitat in a way that harms wildlife by disrupting behavior patterns. *Id.* at § 1532(19); 50 C.F.R. § 17.3. We are aware of no map that guarantees take will not, or likely will not, occur, as Atlantic seems to envision by suggesting it can provide FERC a map of areas to avoid. And such a map would have zero legal effect, in any event. The ESA does not contemplate a process by which a developer can say where and when its project goes forward—that obligation rests with FWS and is accomplished through consultation, the process uncompleted here. Atlantic’s acoustic surveys for Indiana bats detected bats in West Virginia, Virginia, and North Carolina. FEIS, 4-263. FWS determined that take of bats was only likely in West Virginia and Virginia and provided the safe harbor of an incidental take statement to shield Atlantic and FERC from that incidental take. But that shield no longer exists. Without a valid incidental take statement, pipeline construction cannot cause take of a single animal, anywhere along the pipeline route, without risking serious penalties.

Requiring FWS approval as a prerequisite to FERC’s approval is a logical, commonsense approach. Undoubtedly that is why it is included in FERC’s Order. FERC would never allow construction of a natural gas pipeline to begin in North Carolina with instructions to the pipeline developer to attempt to determine a viable route to West Virginia while construction is underway. FERC’s approval, and the analysis supporting that approval, must be for a specific, pre-planned and viable pipeline route. The route chosen by Atlantic is currently in question; without approval from FWS it cannot be completed, as planned. FERC must enforce the terms of its order and prohibit pipeline construction until FWS approves of the pipeline route by completing Section 7 consultation and issuing a statement concerning incidental take.

Sincerely,



Patrick Hunter  
Gregory Buppert  
Southern Environmental Law Center

*On behalf of Cowpasture River Preservation Association, Defenders of Wildlife, Friends of Buckingham, Chesapeake Bay Foundation, Highlanders for Responsible Development, Jackson River Preservation Association, Potomac Riverkeeper, Inc., Shenandoah Riverkeeper, Shenandoah Valley Battlefields Foundation, Shenandoah Valley Network, Sierra Club, Virginia*

*Wilderness Committee, Sound Rivers, and Winyah Rivers  
Foundation*

s/ Benjamin Lockett

Benjamin Lockett  
Appalachian Mountain Advocates

*On behalf of Appalachian Voices, Chesapeake Climate Action  
Network, Sierra Club, and Wild Virginia*

cc: Ken Arney, Acting Regional Forester, Southern Region, U.S. Forest Service  
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