

# The Recorder

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## Endangered bee believed in pipeline path

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The Southern Environmental Law Center said data concerning the threatened Madison Cave Isopod in this region is flawed in research about the proposed Atlantic Coast Pipeline. (Photo courtesy FWS)

MONTEREY — Back to the drawing board.

The Southern Environmental Law Center last week demanded more environmental data from proposed Atlantic Coast Pipeline planners and federal regulators before construction begins.

Now that a federal appeals court opinion is pending, after invalidating the project's incidental take statement, the U.S. Fish and Wildlife Service must finish surveys of project impact on vulnerable species including Indiana bat, rusty patched bumble bee, Madison Cave isopod, clubshell and yellow lance mussels, SELC attorneys said.

An incidental take statement is an estimate of the “take” of a threatened or endangered species that is likely to result from an action by a federal agency.

“Take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect or to attempt to engage in any such conduct. Incidental take statements are produced as part of a biological opinion resulting from consultations with the federal agencies under the Endangered Species Act.



Surveys conducted on May 3 by Dominion consultants documented 56 clubshell. (Photo courtesy FWS)

Last week’s SELC filing publicly unrolled legal arguments surrounding the U.S. Fourth District Court of Appeals ruling to vacate the FWS incidental take statement in mid-May.

With respect to the critically endangered rusty patched bumble bee, the law firm asserts ACP managing partner Dominion Energy must reroute the project.

“One thing is immediately clear,” SELC attorneys Austin Gerken and Gregory Buppert said a letter to Cindy Schulz, field supervisor of Virginia Ecological Services for the U.S. Fish and Wildlife Service, which was posted by the Federal Energy Regulatory Commission. “FERC and FWS must reopen consultation for the ACP because of the absence of a valid incidental take statement.”

### **Take statement invalidated**

FWS confirmed that take is reasonably certain to occur, but the incidental take statement attached to the project’s biological opinion is now invalid. Without a valid incidental take statement, consultation is incomplete and must be reopened, SELC said.



The Southern Environmental Law Center argued the U.S. Fish and Wildlife Service must determine where rusty patched bumble bees are present along the proposed pipeline path and require a project rerouting as necessary. (Photos courtesy USFWS)

“Atlantic and FWS appear to be aware of this requirement. Atlantic’s public statements following the Court’s decision confirm its expectation that FERC would reopen consultation with FWS.”

With no incidental take statement in place, any construction activity that causes take of threatened or endangered species will exceed the limits of the (nonexistent) incidental take statement, SELC said.

“Atlantic has asserted in disclosures to FERC that it intends to proceed with construction outside of areas it considers to be habitat for protected species. Atlantic has not disclosed to the public the areas in which it intends to work, but its public statements that only a few miles of construction affect protected species cannot be squared with FWS’s analysis for the project,” SELC asserted.

“More specifically, potential Madison Cave isopod habitat covers nearly 267,000 surface acres in western Virginia,” SELC said. “The pipeline right of way crosses approximately 159 miles of Indiana bat habitat in West Virginia and Virginia. Of the 11,776 acres of land that will be disturbed by pipeline construction, at least 4,448 of those acres are Indiana bat habitat. The service’s findings conflict with Atlantic’s assertion that incidental take coverage is necessary for only 100 miles of the pipeline right of way in West Virginia and Virginia.”



In Virginia, the yellow lance is known to occur in the Cowpasture River, Nottoway River, Meherrin River, Sturgeon Creek and the James River. (Photo courtesy U.S. Fish and Wildlife Service)

### **New data**

“Atlantic’s theory that it can proceed appears to be based on the argument that it can continue with construction activity in Indiana bat habitat without the protection of an incidental take statement, provided it does not cut trees,” SELC said. “Atlantic’s apparent position is inconsistent with the final Environmental Impact Statement for this project, which acknowledges and confirms take of Indiana bat through all stages of construction, not only tree clearing. As examples, the project will impact Indiana bat, potentially resulting in take, through removal of habitat, blasting during trenching, which could impact hibernacula or roost trees, burning cleared vegetation, and impacts from noise and lights associated with nighttime construction.

“The biological opinion analyzed impacts to species, including the risk of jeopardy, subject to the assumption that Atlantic was bound by the terms and conditions, monitoring and reporting requirements, and conservation recommendations embodied in the incidental take statement,” SELC argued. “Without those conditions in place, the identified action is modified from the mitigated project the (FWS) evaluated in its biological opinion, requiring FWS to reinitiate consultation.

“The service must reinitiate consultation because new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered. The original biological opinion and incidental take statement assessed impacts to species assuming that only a ‘small percent’ in a certain area would be banned by the project.

“At oral argument before the Fourth Circuit Court of Appeals, the service took the position that in fact all individuals within the specified area could be harmed. That assertion does not reflect the consideration of impacts to species in the biological opinion,” SELC contended.

SELC said if the U.S. Fish and Wildlife Service is authorizing “take” of all species in the affected habitat, rather than an undefined small percent of them, “it must revisit its jeopardy analysis for those species ... New survey data has become available since the service issued its biological opinion in October of last year and the service must request FERC to collect more ... The service must revisit its biological opinion because a new species has been listed that may be affected by the identified action, the yellow lance mussel.”

### **Update needed**

SELC said that when formal consultation between FERC and Dominion concluded, no population survey data was produced — data the USFWS said was necessary to have an informed opinion. “The service nonetheless issued its biological opinion without that data available, and authorized take without information needed to evaluate its scope,” SELC said. “With consultation now reopened, the service must take this opportunity to update its analysis with newly available data and to advise FERC and Atlantic that such data must be submitted before the service can authorize take of these affected species.”

SELC noted ACP had proposed a two-phase plan to survey Indiana bat habitat. In phase one, ACP would locate potential hibernacula. In phase two, ACP would determine whether the bats existed at those hibernacula.

In March 2017, the USFWS warned Dominion about a large area in West Virginia where the survey for portals and caves had not been completed, SELC noted, and that Dominion could not complete its analysis without the missing surveys.

“At the time that FWS closed formal consultation, ACP still had not completed phase two at several sites and had not even begun phase one at 33 sites,” SELC said.

Also, SELC said, when the USFWS produced its biological opinion, several acoustic surveys promised by Dominion had not been completed.

“In filings before FERC, Atlantic has represented it has robust capabilities to carry out biological monitoring surveys ahead of construction. Monitoring for individuals and affected habitat should be required at each step of the project for protected species,” SELC said, adding that in prior biological opinions and incidental take statements for the Indiana bat, the USFWS required construction crews survey report dead bats.

### **Endangered bee disregarded**

SELC added, “Most alarmingly, at no point did Atlantic or FERC conduct a single competent survey for the critically endangered rusty patched bumble bee.”

As of October 2016, SELC asserted, Dominion’s draft biological assessment for the bee said the pipeline project passes through the historic range for the bee, but there were no known

occurrences in the counties where the project crosses. Consequently, Dominion did not address the bee further.

SELC said when the USFWS issued its final ruling listing the bee as endangered, on Jan. 11, 2017, Dominion agreed to add a discussion about it. But, citing a FWS communication from Jan. 6, 2017, Dominion relayed its understanding no surveys for the bee would be required in Virginia.

However, SELC pointed out, on June 6, 2017, an entomologist contracted by Dominion documented the rusty patched bee in Bath County while conducting a survey for other species in the George Washington National Forest.

That conflicts with the record, SELC argued, when the USFWS said construction activities associated with the pipeline are not expected to impact individual rusty patched bumblebees and that none were found.

Although the forest service raised concerns about the lack of disclosure, SELC said, FERC declined to update the document, saying it was too late to make changes. SELC said the agency's position "may have been in part attributable" to Dominion's failure to formally notify FERC about the bee's discovery until July 14, 2017, a month after it was found but just days before the final Environmental Impact Statement was published. SELC asserted that in part, the USFWS lacked survey data because Dominion didn't collect it in a timely basis.

"Without survey data, FWS based its analysis, jeopardy determination, and take limits on a desktop habitat analysis only," SELC said. "Moreover ... the FWS, lacking any real survey data for the (bee), assumed a substantial population of 27,000 bees that would be unaffected by any of the substantial construction activity planned for this high potential zone.

"In truth, the service cannot issue a valid incidental take statement for the rusty patched bumblebee; it certainly cannot do so without a single competent survey from which to evaluate the affected population."

### **Crushing colonies**

SELC said "there is no question" pipeline construction will impact the bees' potential habitat in the vicinity of where the bee was documented in June 2017.

"The forest service biologist who surveyed the area after the (bee) was discovered on the forest noted that "we suspect the bees are using the road corridor itself extensively for foraging and could be nesting either in the road or adjacent to the road. If this is used as an access road by the proposed ACP project, the entire road segment would have to be extensively opened, widened, and bulldozed to make it usable."

SELC quoted Dominion saying, "The proposed access road where the rusty patched bumble bee was found would be used for construction, operation, and maintenance of the project pipeline. This section of the pipeline is ... scheduled for site preparation and tree clearing in fall 2018 with

construction beginning in April 2019. Proposed road improvements would be carried out beginning as early as fall 2018 and would include road widening of 15 feet and graveling.

“During construction, vehicles carrying pipe and personnel would be anticipated to use the road on a daily basis for the duration of the construction season. During operation and maintenance, road traffic would be infrequent and intermittent, and used for inspections and maintenance.”

Dominion had noted the USFWS acknowledged the project would have negative effects on the bee, including “reduced reproductive success of queens as a result of removal of spring ephemerals and other floral resources, and injury or death of individual workers or queens during the active season as a result of crushing by machinery during vegetation removal and construction in the construction right of way.”

Ground disturbance would take place during the active foraging season, so the worker bees “are expected to be crushed by machinery,” reducing resources available to the colony, “resulting in reduced survival of individual workers and reduced reproductive capacity of the queen.”

SELC said without actual population data, the USFWS dismissed these impacts, and that the USFWS assumed the observation of a single bee was indicative of a colony, which USFWS assumed to consist of 100 to 1,000 worker bees. “The service further assumed that single colony was part of a population of multiple colonies dispersed across the landscape,” SELC said.

### **Unsupported assumption**

“Based on those wildly optimistic and unsupported assumptions, incorporating numbers only appropriate for a robust, healthy population of the rusty patched bumblebee, and data extrapolated from other non-endangered bees,” SELC said, “FWS assumed this single confirmed bee was one of up to 27,000 in the immediate vicinity of the project and thus, that any impacts expected from the project would not undermine the success of that sizable population.”

In other words, SELC said, based on finding only one bee, the USFWS assumed no other bees were present along the 600-plus mile pipeline route, except within 0.8 km of where the single bee was found. SELC said that assumption was unsupported by any survey data or research.

Furthermore, SELC said, it contradicts the USFWS’ own findings that most known populations for the rusty patched bumblebee are likely small and not healthy.

“The service concluded ... that its dire projection that the species is critically endangered was nonetheless ‘optimistic’ because ‘some of the remaining populations are almost certain to be imperiled if not quasi-extinct (given that most populations are documented by one or a few individuals).’ In short, the service’s own assessment of the best available science refutes the assertion in the biological opinion, SELC said.

SELC said if the USFWS’ assumptions are correct, this bee population would be “globally significant and likely the highest concentration of the rusty patched bumblebee found anywhere throughout its range.”

According to the service's own listing rule, "the risk of extinction is currently high because the number of remaining populations is small, most of those populations are extremely small in size," SELC noted.

### **'Extreme stress'**

"The service's extrapolation from a single bee to a robust population that can successfully weather any impacts caused by construction of the ACP is contrary to the best available science documented by the service's own status assessment," SELC said. "To the contrary, documentation of a single bee in the project area is likely indicative of a population under extreme stress and highly vulnerable to additional stressors, not a robust, resilient, and concentrated population of tens of thousands of unobserved (bees)."

The USFWS concluded that to increase the bees' viability, "it is necessary to ... prevent further declines by protecting the remaining populations and sufficient habitat to support them (this is paramount)," SELC said.

"The service recognized that the rusty patched bumble bee is so imperiled that remaining population is important for the continued existence of the species," SELC said, adding the loss of this population of to pipeline construction will reduce the reproduction, numbers, and distribution of the bees, and appreciably reduce the likelihood of recovery or survival. "Moreover, neither FERC nor Atlantic has demonstrated that impacts to this confirmed (bee) habitat cannot be avoided," SELC said.

### **Isopod data updated**

SELC further asserted that Dominion failed to complete surveys for the Madison Cave isopod before issuing a final opinion, but recent statements by Dominion's counsel as represented to the Fourth Circuit Court suggest this data is now available.

SELC noted that, in response to a question from the court, "Are you going to do sample borings to see if you killed crustaceans that are subterranean?" Dominion's attorney responded that "indeed the FERC order requires that," that "you have to do it as part of construction," and "before you start the construction."

However, SELC said, that data is not in the record for the project.

"The service must update its analysis to reflect that survey information," SELC said. "That survey data should help resolve other flaws in the agency's Oct. 16, 2017 biological opinion."

For instance, SELC said, the opinion discloses that 1,974 surface acres of potential Madison Cave isopod habitat will be directly impacted by the project, but purported to authorize take only in an 11.2-acre subset of that area. "What is the service relying on to conclude that isopods in the 1,962.8 surface acres where take was theoretically prohibited will not be harmed or killed?"

If the USFWS cannot determine the presence of isopods through surveying or reliance on models, SELC said, it must assume isopods across the entire 1,974 surface acre area, plus the 0.5



mile buffer from the impacted area the service has already deemed appropriate, will be taken by the project, SELC said.

### **‘Silent sentinels’**

Freshwater mussels are referred to as “silent sentinels” in streams and rivers, SELC explained. “Their abundance indicates water quality is good, while their decline or absence sends an alarm that something in the ecosystem is seriously wrong.”

The clubshell recovery plan requires “viable populations” of clubshell – populations with “sufficient numbers of reproducing individuals to maintain a stable or increasing population” that includes “as many subpopulations as possible to maintain whatever fraction of the original genetic variability” remains — at 10 separate drainages to ensure species recovery, SELC said.

However, SELC asserted, the USFWS issued its opinion and incidental take statement for clubshell without data confirming the size of the affected population.

“But there is no question that it is possible to collect that data,” SELC noted. “Population surveys are conducted in Hackers Creek and other watersheds on a regular basis. Indeed, recent surveys conducted as part of mussel relocation efforts identified 56 clubshell in Hackers Creek, as disclosed in June 1, 2018 correspondence from FERC to the service. Clearly this information is available. The service must collect it and incorporate it into its analysis.”

SELC said the USFWS must also reinitiate consultation to consider impacts to the newly listed yellow lance mussel, noting the service ruled April 3, 2018, that the yellow lance was threatened under the Endangered Species Act.

And again, SELC argued the USFWS failed to analyze impacts or “take” coverage for the mussel, even though the pipeline will cross its habitat.

In Virginia, the yellow lance is known to occur in the Cowpasture River, Nottoway River, Meherrin River, Sturgeon Creek and the James River, according to the EIS.

“The ACP is proposed to cross each of these waterbodies and multiple of their tributaries,” SELC said, noting Dominion proposes to use dry construction for some of the crossings, where that may require in-stream blasting, and other waterbodies will be crossed by horizontal directional drilling. These activities may kill, harm, harass, or otherwise result in take of yellow lance at the crossing site or downstream, according to the EIS. Timbering is also a threat to the species.