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June 1, 2018

Via U.S. Mail to:

William T. Walker, Chief
U.S. Army Corps of Engineers
Norfolk District
Fort Norfolk
803 Front Street
Norfolk, VA 23510-1011

Henry Wicker, Deputy Chief
U.S. Army Corps of Engineers
Wilmington District
69 Darlington Avenue
Wilmington, NC 28403-1343

Teresa Spagna, Chief
U.S. Army Corps of Engineers
Huntington District
502 Eighth Street
Huntington, WV 25701-2070

**Re: Vacatur of Incidental Take Statement for the Atlantic Coast Pipeline
NWP 12 Verification No. NAO-2014-1749 (Norfolk)
NWP 12 Verification No. LRH-2014-00484-GBR (Huntington)
NWP 12 Verification No. SAW-2014-01558 (Wilmington)**

Dear Chief Walker, Chief Spagna, and Deputy Chief Wicker:

We are writing on behalf of our clients, listed below, to request that you immediately notify Atlantic Coast Pipeline, LLC (“Atlantic”) that authorization for construction of river, stream, and wetland crossings for the Atlantic Coast Pipeline under the Corps’ Nationwide Permit 12 is suspended pending the reinitiation and completion of Section 7 consultation under the Endangered Species Act (“ESA”).

On May 15, 2018, the Fourth Circuit Court of Appeals vacated the U.S. Fish and Wildlife Service’s incidental take statement for the Atlantic Coast Pipeline. A copy of the Court’s order is attached. As a result of the Court’s action, the Corps’ consultation obligations for the project under Section 7 of the Endangered Species Act are incomplete, and construction must not proceed until the defects of the incidental take statement are resolved. Moreover, the Service listed a new freshwater mussel species—the yellow

lance—as threatened on April 3, 2018.¹ This species occurs in rivers that the pipeline will cross, and the Corps must reinitiate Section 7 consultation as a result of this listing.²

Atlantic continues to make public statements and filings to FERC indicating that it is pushing forward with pipeline construction. Therefore, prompt action by the Corps to suspend Nationwide Permit 12 authorization is necessary to meet the requirements of the ESA, the Corps’ regulations, and Nationwide Permit 12, and to prevent illegal harm to listed species. Should the Corps ignore these requirements and allow Atlantic to proceed with pipeline construction, the agency risks running afoul of the ESA’s prohibition on the “irreversible or irretrievable commitment of resources” during consultation and incurring civil and criminal liability should listed species be taken.³

A valid incidental take statement is an integral requirement of Section 7 consultation under the ESA. As part of consultation for the Atlantic Coast Pipeline, the Fish and Wildlife Service must provide to the Corps and other consulting federal agencies “a statement concerning incidental take, if such take is reasonably certain to occur,” with its biological opinion.⁴ This statement must “specif[y] those reasonable and prudent measures . . . necessary or appropriate to minimize” the take of listed species.⁵ The Service’s biological opinion for the Atlantic Coast Pipeline confirmed that take of listed species is reasonably certain to occur, but the incidental take statement included with the opinion is now invalid. Thus, the Corps does not have a “statement concerning incidental take,” and Section 7 consultation is not complete.

The Corps’ nationwide permit regulations and the terms of Nationwide Permit 12 prohibit pipeline construction before the completion of Section 7 consultation and issuance of a valid incidental take statement. The Corps’ nationwide permit regulations establish that a permittee who wishes to proceed under a nationwide permit “will not begin work under authority of the NWP until notified by the district engineer that the requirements of the Endangered Species Act have been satisfied.”⁶ For projects requiring formal Section 7 consultation like the Atlantic Coast Pipeline, the Corps may “[i]nitiate

¹ Endangered and Threatened Wildlife and Plants; Threatened Species Status for Yellow Lance, 83 Fed. Reg. 14,189 (Apr. 3, 2018).

² 50 C.F.R. § 402.16(d).

³ *See* 16 U.S.C. §§ 1536(d); 1540(a)-(b).

⁴ 50 C.F.R. § 402.14(g)(7); *see also id.* § 402.14(i).

⁵ *Id.* § 402.14(i)(1)(ii).

⁶ 33 C.F.R. § 330.4(f)(2).

section 7 consultation and then, *upon completion*, authorize the activity under” a nationwide permit.⁷

And Nationwide Permit 12 itself requires that the Corps complete ESA consultation before Atlantic is authorized to proceed with pipeline construction. As required by the Corps’ regulations, Term and Condition 18 of Nationwide Permit 12 specifies 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 of the proposed activity has been completed.”⁸

In May, the Fourth Circuit determined that the original incidental take statement the Corps relied on to verify Nationwide Permit 12 was invalid. Therefore, it necessarily follows that pipeline construction cannot commence or, where construction has already started, it cannot continue under Nationwide Permit 12 until the Corps obtains a valid incidental take statement.

To be clear, this is not a situation in which the project developer has exceeded the limits of a valid incidental take statement and the Corps is thus required to reinitiate a previously completed Section 7 consultation. Instead, the Court here has vacated the incidental take statement because it did not satisfy the requirements of the ESA, effectively reopening the initial consultation process. The Fish and Wildlife Service must now revisit its prior statement and, if possible, issue a new statement that remedies the defects of the vacated statement before the Section 7 consultation process is complete and construction can proceed.

Atlantic’s own statements appear to concede that consultation is incomplete,⁹ as further confirmed by a May 21, 2018, letter from the Fish and Wildlife Service to FERC effectively reopening consultation by requesting additional project including information about species’ locations and surveys.¹⁰ The Corps’ nationwide permit regulations and the terms of Nationwide Permit 12 prohibited commencement of pipeline construction before

⁷ *Id.* § 330.4(f)(2)(i) (emphasis added).

⁸ Issuance and Reissuance of Nationwide Permits, 82 Fed. Reg. 1,860, 1,999 (Jan. 6, 2017).

⁹ JoAnn Snoderly, *Atlantic Coast Pipeline Construction to Halt in Areas with Endangered Species, Impact on W.Va. Uncertain*, The State Journal (May 21, 2018), https://www.wvnews.com/statejournal/energy/atlantic-coast-pipeline-construction-to-halt-in-areas-with-endangered/article_3f27b3ce-3019-53f4-8f9c-79a4f32a8438.html (“The company plans to consult with the U.S. Fish and Wildlife Service . . .”).

¹⁰ Letter from Cindy Schulz, U.S. Fish & Wildlife Serv., to Kimberly Bose, FERC (May 21, 2018), FERC eLibrary No. 20180531-3109.

the agency obtained its first, now invalid, incidental take statement. Now, after the Court's decision, it does not follow that pipeline construction should continue in the absence of an incidental take statement.

Activities authorized by Nationwide Permit 12 will impact listed species underscoring the need to conclude the consultation process before further activity is authorized. Madison cave isopod, potentially present across 1,974 surface acres in the current pipeline route, may be taken as the result of "culvert installation" and "wetland crossings."¹¹ Similarly, clubshell may be taken as a result of crossing six tributaries of Hackers Creek.¹² Atlantic can only undertake these activities pursuant to a permit from the Corps.

The Corps must also reinitiate consultation with the Fish and Wildlife Service to address the listing of the yellow lance, a threatened mussel which "occurs in the ACP project area."¹³ "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."¹⁴ The pipeline crosses these waterbodies and their tributaries and may introduce sediment or other pollutants affecting and potentially taking yellow lance. The Corps is required to reinitiate consultation "[i]f a new species is listed . . . that may be affected by" the Atlantic Coast Pipeline—the listing of the yellow lance in waterbodies that will be crossed by the pipeline satisfies this requirement.¹⁵ As things stand, the Corps has authorized construction under Nationwide Permit 12 that will impact yellow lance habitat and potentially take yellow lance without the safe harbor of an incidental take statement.

The requirements of the Corps' nationwide permit regulations, the terms of Nationwide Permit 12, and the mandatory duty to reinitiate consultation when a new species is listed all exist to ensure that the Corps achieves the important purpose of the ESA to protect and recover endangered and threatened species.

Thank you for your prompt attention to this important issue.

¹¹ U.S. Fish & Wildlife Serv., Biological Opinion for the Atlantic Coast Pipeline 33 (Oct. 16, 2017).

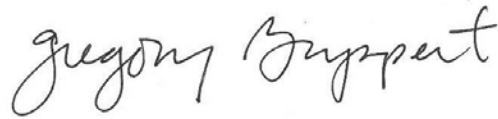
¹² *Id.* at 30.

¹³ Final Environmental Impact Statement for the Atlantic Coast Pipeline and Supply Header Project under CP-15-554 et al. 4-303 (July 21, 2017) (eLibrary No. 20170721-4000).

¹⁴ *Id.* at 4-307.

¹⁵ 50 C.F.R. § 402.16(d).

Sincerely,



Gregory Buppert
Patrick Hunter
Southern Environmental Law Center

On behalf of Cowpasture River Preservation Association, Defenders of Wildlife, Friends of Buckingham, 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



Benjamin Lockett
Appalachian Mountain Advocates

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



Jon Mueller
Chesapeake Bay Foundation

On behalf of Chesapeake Bay Foundation, Inc., Jeanne Hoffman, and Robert Whitescarver

cc: Members of the Virginia State Water Control Board
David Paylor, Director, Virginia Department of Environmental Quality
David Grandis, Virginia Office of the Attorney General