

Nos. 18-1082 (L), 18-1083

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

DEFENDERS OF WILDLIFE; SIERRA CLUB; THE VIRGINIA WILDERNESS
COMMITTEE,

Petitioners,

v.

NATIONAL PARK SERVICE *et al.*,

Respondents,

and

ATLANTIC COAST PIPELINE, LLC,

Intervenor.

On Petition for Review

PETITIONERS' MOTION FOR INJUNCTION

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Pursuant to Federal Rule of Appellate Procedure and Local Rule 27, Defenders of Wildlife, Sierra Club, and Virginia Wilderness Committee (“Conservation Groups”) seek an order enjoining Atlantic Coast Pipeline, LLC (“Atlantic”) from constructing the Atlantic Coast Pipeline until the Fish and Wildlife Service (“FWS”) complies with the Court’s forthcoming opinion in this case. On May 15, 2018, this Court vacated the Incidental Take Statement issued by FWS authorizing “take” of species protected under the Endangered Species Act (“ESA”). Despite that ruling, Atlantic is racing ahead with construction, including within habitat of endangered species. An injunction is necessary to stop the potential take of species and to prevent foreclosure of reasonable and prudent alternatives that FWS may require to satisfy its ESA obligations, following the Court’s opinion. An injunction will ensure FWS can appropriately respond to this Court’s instructions and will prevent unnecessary, imminent, and irreparable harm.

Pursuant to Local Rule 27(a), counsel for Conservation Groups informed the other parties of the intent to file this motion. FWS and Atlantic oppose the motion.

I. BACKGROUND

The Atlantic Coast Pipeline is a 600-mile natural gas pipeline. JA0234. Pipeline installation will require clearing a 125-foot right-of-way for most of that distance. JA0553. Construction across the rugged Appalachian mountains will

require blasting and flattening of ridgelines to create sufficient flat work space to bury the 3.5-foot diameter pipeline. JA0566, 0568.

Construction will “adversely affect” at least eight species protected by the ESA. *See* JA0414–0425. On October 13, 2017, FWS issued a Biological Opinion (“BiOp”) and Incidental Take Statement (“ITS”) limiting “take” of six of those species: Roanoke logperch, Clubshell, Rusty patched bumble bee, Madison Cave isopod, Indiana bat, and Northern long-eared bat. JA0440–0443. Assuming only a small number of individual animals would be taken, FWS also determined the project was not likely to jeopardize the continued existence of the six species. *See, e.g.*, JA0431 (Clubshell jeopardy analysis assumes “mortality of a few individuals”); JA0436 (Indiana bat jeopardy analysis assumes “a small number of [Indiana bats]” with decreased survival odds).

Conservation Groups challenged the BiOp and ITS on January 19, 2018, alleging the limits set in the ITS were fatally vague. This Court heard oral argument on May 10, 2018, and vacated the ITS on May 15, 2018, indicating an opinion would follow.

Despite the Court’s ruling, the next day Atlantic announced publicly that it “will continue to move forward with construction as scheduled.”¹ Atlantic has

¹ Atlantic News Release, U.S. Fourth Circuit Court of Appeals Response (issued May 16, 2018), <https://atlanticcoastpipeline.com/news/2018/5/16/us-fourth-circuit-court-of-appeals-response.aspx> (last visited July 2, 2018).

begun construction activity for the pipeline in Indiana Bat habitat in West Virginia,² as confirmed by recent aerial photography. Decl. of James R. Webb, attached as Exhibit 1.

Construction of each pipeline segment is independently authorized via a “notice to proceed” (to, for example, clearcut trees or construct roads) issued by the Federal Energy Regulatory Commission (“FERC”). FERC has issued such notices within a day of receiving a request from Atlantic.³ To date, FERC has authorized pipeline construction through parts of West Virginia. Atlantic has requested, but not yet received, notices to proceed with pipeline construction in North Carolina.

Proceeding with construction now flies in the face of FERC’s Certificate of Convenience and Necessity (“Certificate”) authorizing the pipeline. Condition 54 of that Certificate is clear that “Atlantic and DETI shall not begin construction...until...the FERC staff complete any necessary section 7 consultation with the FWS.” JA0379. In the same Certificate, FERC explains that “Condition 54...stipulates that construction cannot begin until after staff completes

² The BiOp assessed impacts to Indiana Bat where the pipeline route intersects the bat’s Appalachian Mountain Recovery Unit. JA0412. That Recovery Unit covers the entire state of West Virginia and portions of western Virginia. *See* Indiana Bat Range/Recovery Units, <https://www.fws.gov/midwest/endangered/mammals/inba/rangemapinba.html> (last visited July 2, 2018).

³ *See* Partial Notice to Proceed (Feb. 16, 2018) (FERC Accession No. 20180216-3053) at FERC Docket Nos. CP15-554, CP15-555. FWS incorporated by reference those dockets into the administrative record. *See* Certified List of Administrative Record, Entry 1 (Case No. 18-1083, ECF No. 39).

the process of complying with the [ESA].” JA0329. This condition is necessary, in part, because FERC is prohibited from authorizing any action that is likely to jeopardize the continued existence of any protected species. *See* 16 U.S.C. § 1536(a)(2). FWS makes that determination as part of the consultation process.

Atlantic and FERC no longer meet the condition requiring completion of “necessary section 7 consultation with the FWS.” Formal consultation terminates with issuance of a valid biological opinion, 50 C.F.R. § 402.14(l), which in cases where take is allowed, *must* include an ITS, *id.* § 402.14(i)(1). *See also Bennett v. Spear*, 520 U.S. 154, 158 (1997) (“[T]he Service must provide the agency with a written statement (known as the Incidental Take Statement).”). Without a valid ITS, consultation is incomplete. Reopening consultation is necessary to develop appropriate ITS limits and, as explained below, determine if doing so requires reconsideration of FWS’s original no-jeopardy findings.

FWS knows as much. On May 21, 2018, it wrote FERC asking for additional information in “anticipation of the need to revise the Incidental Take Statement.” Exhibit 3.⁴ The information FWS requested largely tracks the kind of information that must be provided to initiate formal consultation. *Compare* 50 C.F.R. § 402.14(c) *with* May 21, 2018 Letter. FWS’s letter does not use the word

⁴ Attached to this motion as Exhibits 2 –9 are a declaration and copies of letters referenced herein, downloaded from FERC’s public document repository for the Atlantic Coast Pipeline. Conservation Groups learned of FWS’s May 21 letter when it was later posted to FERC’s website on May 31, 2018. *See* Exhibit 2.

“consultation,” but that omission does not allow it to escape the fact that consultation is now incomplete.

Also on May 21, 2018, Conservation Groups notified FERC of their concerns regarding construction while consultation duties are outstanding. *See* Exhibit 4. On June 7, Conservation Groups advised FWS of the obligation to reopen consultation with FERC, collect and reanalyze updated survey information for species at issue, reevaluate jeopardy for several species, and analyze jeopardy for the newly-listed yellow lance mussel. Exhibit 5. On June 11, Conservation Groups asked FERC to hold a rehearing on the Notice to Proceed it previously issued to Atlantic authorizing construction in endangered species habitat in West Virginia, in light of this Court’s order. Exhibit 6.

Despite the clear wording of Condition 54, FERC has not enforced it. Although FERC has not yet acted on Conservation Groups’ June 11 request for rehearing, on June 25, 2018, it issued a variance requested by Atlantic to deviate from its initial work plan in West Virginia, in which FERC volunteered its view that “Atlantic and DETI have received all federal authorizations applicable for the work activities requested.” Exhibit 7.

FERC also still has not granted or denied the November 2017 petition to rehear FERC’s Certificate filed by several petitioners here, effectively blocking

direct judicial review of FERC's authorization. Meanwhile, FERC has allowed construction to proceed

In response to this Court's Order, but without the Court's opinion, Atlantic unilaterally determined that vacatur of the ITS is relevant for only "a small portion of the 600 mile route."⁵ According to Atlantic, a 79-mile span in Virginia and 21-mile span in West Virginia are the only areas where compliance with the ESA is a concern. *See id.* These areas appear to have been identified solely by Atlantic, without the concurrence of FWS – the agency charged with protecting endangered species. The areas carved out by Atlantic stand in contrast to analysis in FWS's October 2017 BiOp. For example, Atlantic asserts that endangered species concerns are relevant only for 21 of the dozens of miles of the pipeline route in West Virginia, but FWS determined Indiana bats would be impacted across their designated Appalachian Recovery Unit, *which covers all of West Virginia*.⁶

II. STANDARD OF REVIEW

The Natural Gas Act vests this Court with "original and exclusive jurisdiction" in this action. 15 U.S.C. § 717r(d)(1). The Court's original jurisdiction includes the inherent power to grant injunctive relief. "When Congress entrusts to an equity court the enforcement of prohibitions contained in a

⁵ Atlantic News Release, Supplemental Filing to FERC (issued May 22, 2018), <https://atlanticcoastpipeline.com/news/2018/5/22/supplemental-filing-to-ferc.aspx> (last visited July 2, 2018).

⁶ *See supra* note 2.

regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in the light of statutory purposes.”

Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 291–92 (1960); *Culpepper v. Reynolds Metals Co.*, 421 F.2d 888, 894 (5th Cir. 1970) (“[f]ederal courts have an inherent power to grant appropriate relief” including injunctions), *abrogated in part on other grounds by Del. State Coll. v. Ricks*, 449 U.S. 250 (1980).

Moreover, the Court has authority under the All Writs Act to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” 28 U.S.C. § 1651(a); *see also Cole v. United States*, 657 F.2d 107, 110 (7th Cir. 1981) (“Ancillary relief to preserve and protect a prior judgment is eminently proper....”); *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1099 (11th Cir. 2004) (authorizing writs to protect “already-issued orders and judgments”).

This Court’s injunctive power in a case reviewing agency action includes third party intervenors whose activities are governed by an erroneous agency decision. *See e.g. W. Va. Highlands Conservancy v. Island Creek Coal Co.*, 441 F.2d 232 (4th Cir. 1971) (enjoining timber cutting and mining on Monongahela National Forest pending resolution of APA challenges); *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1216 (9th Cir. 1998) (extending

preliminary injunction “for all future logging, road building and other ground disturbing activities” post judgment until the Forest Service satisfies NEPA); *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 160 (D.C. Cir. 1985) (enjoining university experiment funded by NIH where NIH failed to complete NEPA first).

A party seeking an injunction must demonstrate: “(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.” *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391(2006).⁷ Conservation Groups meet all four factors.

III. ARGUMENT

A. The Public Interest and Balance of Equities Tip Sharply in Conservation Groups’ Favor

“[W]hen evaluating a request for injunctive relief to remedy an ESA procedural violation, the equities and public interest factors *always* tip in favor of the protected species.” *Cottonwood Env’tl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d

⁷ Because the Court already vacated the ITS, Conservation Groups seek permanent, rather than preliminary, relief. But this motion would meet either test. *See Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546, n.12 (1987) (“The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.”).

1075, 1091 (9th Cir. 2015) (emphasis added) (citing *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978), *cert. denied*, 137 S. Ct. 293 (2016)); *see also Strahan v. Coxe*, 127 F.3d 155, 160 (1st Cir. 1997) (“Under the ESA, however, the balancing and public interest prongs have been answered by Congress’ determination that...[they] tip[] heavily in favor of protected species.”) (internal quotations omitted).

At most, Atlantic may argue that delaying construction will result in economic harm, but temporary harm to economic interests is outweighed by irreparable harm to endangered and threatened species. When courts “weigh the benefits” to species near or threatened with extinction, “whose loss will be incalculable, against the temporary economic harm” to companies and consumers, “the balance must be struck in favor of the overwhelming need *to devote whatever effort and resources [are] necessary* to avoid further diminution of national and worldwide wildlife resources.” *Am. Rivers v. U.S. Army Corps of Eng’rs*, 271 F. Supp. 2d 230, 261 (D.D.C. 2003) (emphasis and alteration in original, internal quotations omitted); *see also League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 766 (9th Cir. 2014) (finding one-year delay resulting in economic harm to ski resort developer did not outweigh irreparable environmental harm faced by plaintiffs); *Bair v. Cal. Dep’t of Transp.*, No. C 10-04360 WHA, 2011 WL 2650896, at *8 (N.D. Cal. July 6, 2011)

(determining irreparable harm to redwoods outweighed cost of delaying the project for a year); *Idaho Sporting Cong., Inc. v. Alexander*, 222 F.3d 562, 569 (9th Cir. 2000) (finding irreparable harm of cutting old growth trees outweighed financial harm).

Whether the pipeline is in the public interest at all is an open question. Several groups here petitioned FERC nearly eight months ago to reconsider its Certificate. *See* Request for Rehearing (Nov. 13, 2017). As required by law, FERC responded within 30 days, but only by “tolling” its consideration of the request until an undisclosed time. *See* FERC Tolling Order (Dec. 11, 2017).⁸ FERC still has not ruled on the petition, blocking direct judicial review of the necessity for the pipeline while pipeline construction moves full steam ahead.

Finally, Conservation Groups have narrowly tailored their request to enjoin project activities only until FWS issues a valid BiOp and ITS consistent with this Court’s opinion. FWS should be given an opportunity to meaningfully correct its analysis and ITS. Atlantic is foreclosing that opportunity by building the pipeline up to each place on the ground it has decided, unilaterally, endangered species concerns become relevant. This risks committing the pipeline to its current path and constraining the options available to avoid impacts to endangered species –

⁸ The Request for Rehearing and Tolling Order are available on FERC Docket Nos. CP15-554 (FERC Accession Nos 20171113-5367, 20171211-3013) and CP15-555. *See supra* note 3.

options that may be necessary to prevent jeopardy once the analysis is corrected. If construction continues but FWS's new analysis and ITS requires Atlantic to reroute portions of its pipeline to avoid taking species, Atlantic will argue, undoubtedly, that it is impractical to move sections already constructed. Atlantic should not be able to preclude that possibility by rushing forward with pipeline construction now.

In light of the ESA's conservation mandate, and the fact that none of the parties yet have the benefit of the Court's opinion or FWS's response to it, the balance of harms and the public interest demonstrate that Conservation Groups' requested injunction should be granted.

B. Conservation Groups Have Suffered an Irreparable Injury

Construction of the ACP will cause significant and permanent injury to the aesthetic and recreational interests of Conservation Groups' members in viewing endangered and threatened wildlife. Once this harm occurs, it cannot be undone.

"In light of the stated purposes of the ESA in conserving endangered and threatened species and the ecosystems that support them, establishing irreparable injury should not be an onerous task for plaintiffs." *Cottonwood*, 789 F.3d at 1091; *see also Animal Welfare Inst. v. Beech Ridge Energy LLC*, 675 F. Supp. 2d 540, 581 (D. Md. 2009), amended, No. 09-1519 (RWT), 2010 WL 11484179 (D. Md.

Jan. 26, 2010) (enjoining construction of wind turbines due to take of Indiana Bat in West Virginia).

A plaintiff's aesthetic and recreational interests are harmed by actions that impair his or her enjoyment of the environment. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 995–96 (8th Cir. 2011). Thus, a plaintiff is harmed by actions that impair his or her ability to enjoy wildlife in its natural environment. *See Humane Soc'y of the U.S. v. Hodel*, 840 F.2d 45, 52 (D.C. Cir. 1988) (finding harm where action would “deplet[e] the supply of animals and birds that refuge visitors seek to view”); *see also Alaska Fish & Wildlife Fed'n & Outdoor Council v. Dunkle*, 829 F.2d 933, 937 (9th Cir. 1987) (finding decrease in migratory birds due to unlawful killing “has injured those who wish to hunt, photograph, observe, or carry out scientific studies on the migratory birds”).

Conservation Groups' member Rick Lambert, for example, has a lifelong passion of observing bats in Virginia and West Virginia, including Indiana Bat, as well as exploring and viewing creatures in karst caves. Rick Lambert Dec., ¶¶ 3, 7 (Case No. 18-1082(L), ECF No. 73 at 135-146). Lambert goes caving frequently looking for endangered bats and other species and plans to continue doing so. *Id.* ¶ 9. Lambert believes construction and operation of the pipeline will adversely affect bats, making it more difficult, or impossible, for him to view bats in certain areas

and pass on his love of monitoring and caring for bats to his children and grandchildren. *Id.* ¶¶ 14, 15.

Harm to bats and other listed animals has occurred and is ongoing. FWS determined that Indiana bat will be impacted where the pipeline route crosses the Indiana Bat Appalachian Recovery Unit. This unit covers all of West Virginia and much of western Virginia.⁹ Significant portions of the pipeline route through the Appalachian Recovery Unit have been deforested – injuring bats, in part, by eliminating their habitat (JA0604), concomitantly harming Lambert’s interest in viewing and protecting bats. None of that activity would have occurred had the now-vacated ITS not issued, and it is unclear if impacts exceed the indeterminate take levels set in the faulty ITS.

Indiana bats also will be impacted through blasting during trenching that could impact “hibernacula or roost trees” (JA0605), burning cleared vegetation (JA0606), and impacts from “noise and lights associated with nighttime construction” (*id.*). Some of those activities are actively occurring, and others imminent, in West Virginia. *See* Exhibit 1.

⁹ *See supra* note 2.

Endangered and threatened species have been harmed, and that harm is ongoing, resulting in irreparable injury to Conservation Groups' members' interest in viewing and protecting rare wildlife.¹⁰

C. Remedies Available at Law Are Inadequate

“Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.” *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987), *abrogated in part on other grounds by Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008). In other words, whether sufficient remedies at law are available “is generally not at issue in environmental cases.” *Cottonwood*, 789 F.3d at 1090. Congress has declared preserving endangered and threatened species has “incalculable value.” *Tenn. Valley Auth.*, 437 at 188 (quotation omitted). “It is the incalculability of the injury that renders the remedies available at law, such as monetary damages...inadequate.” *Cottonwood*, 789 F.3d at 1090 (citation and quotations omitted).

There is no remedy at law available to compensate for take of endangered and threatened species and the resultant harm to Conservation Groups' members' interest in viewing and protecting those species. An injunction is more necessary

¹⁰ See also Declarations of Mark Miller, Kelly Martin, and Jason Rylander (Case No. 18-1082(L), ECF No. 73 at 147-159).

here because Atlantic is *actively foreclosing* FWS's ability to meaningfully remediate its now-invalidated ITS.

This Court vacated the ITS because “the limits set by the agency are so indeterminate that they undermine the Incidental Take Statement’s enforcement and monitoring function.” Case No. 18-1082(L), ECF No. 82. The Court’s reasoning is “to be more fully explained in a forthcoming opinion.” *Id.*

Instead of waiting on instruction from the Court, Atlantic is rapidly moving forward with construction, assuming the Court’s opinion is only relevant for 100 miles of the pipeline route. Atlantic is proceeding as if it knows exactly what the Court and FWS will require.

That assumption is wrong for at least two reasons. First, it is not Atlantic’s role to unilaterally determine when and where endangered species may be affected. That determination is made by FWS as part of the consultation process which is now reopened.

Second, developing new, defensible ITS limits may require revisiting FWS’s jeopardy analysis for several species. Reassessed jeopardy determinations may demand pipeline reroutes to avoid take of species.

Federal agencies such as FERC “*shall*...insure that any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered species or threatened species.” 16 U.S.C. §

1536(a)(2) (emphasis added). “Jeopardize the continued existence of means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02. “Recovery means improvement in the status of listed species to the point at which listing is no longer appropriate.” *Id.*

FWS’ original BiOp concluded the pipeline was not likely to jeopardize the continued existence of any species. The key assumption underlying that analysis was that only a small number of individual animals would be taken.

Conservation Groups continue to believe that it is practical to set a numeric limit on take for these species. Case No. 18-1082, ECF No. 48, at 38–42.

But FWS appears to disagree. At oral argument counsel for FWS represented that “some of the forms of take...are simply impossible to monitor in terms of individuals,” Oral Argument at 23:01, Case No. 18-1082, <http://coop.ca4.uscourts.gov/OAarchive/mp3/18-1082-20180510.mp3>, and FWS “could do surveys from here to the end of time but that wouldn’t change the fact that they are going to have to use a surrogate.” *Id.* at 24:09. Counsel also represented that within surrogate areas “there is no limit” on take; *all* individuals within the habitat surrogate could be taken without exceeding take limits. *Id.* at 27:06.

If, after evaluating the Court's opinion, FWS attempts to develop a habitat surrogate allowing take of all individuals within the surrogate area, it would drastically change the assumptions underlying its original jeopardy analysis. For example, FWS's original analysis assumed only a small number of Indiana bats would be taken as a result of the project. But, according to FWS's counsel, if it uses a habitat surrogate it may allow take of *all bats across 4,447 acres*. *See id.* That could result in a different outcome on the question of jeopardy.

The same is true for Rusty patched bumble bee ("RPBB"). The agency's original jeopardy analysis assumed up to one colony of RPBBs would be killed. JA0441. But if the agency attempts to develop a habitat surrogate for RPBB, allowing take of all bees within the surrogate area even if it exceeds one colony, FWS will have to reevaluate its jeopardy determination. FWS's February 2018 Survey Protocols for RPBB concede that "the rusty patched bumble bee is so imperiled that *every remaining population is important for the continued existence of the species*." FWS, Survey Protocols for RPBB (June 6, 2017), 1, (emphasis added)[FWS-21650].

The same is also true for Clubshell. FWS authorized take of Clubshell in Hackers Creek assuming that the population was small—19 or fewer Clubshell. Case No. 18-1082, ECF No. 58, at 21–22. Assuming the population was small, FWS determined preservation of the population was not necessary to comply with

the Clubshell recovery plan.¹¹ But those facts have changed. FWS required Atlantic to survey for Clubshell (though it did not numerically limit take of Clubshell) on three different occasions prior to commencing construction in the Hackers Creek watershed. Exhibit 8 at pdf p. 26. The first of those scheduled surveys took place only days before this Court invalidated the ITS. That survey documented 56 Clubshell. *Id.* The population appears to be much more robust than FWS assumed and may be one of the few populations of Clubshell successfully reproducing in the wild. *See* JA0432.

If FWS changes the assumptions underlying its jeopardy analysis, allowing take of more species in order to develop enforceable take limitations, it may determine that the pipeline will jeopardize the continued existence of several species. In that instance, FWS “shall suggest those reasonable and prudent alternatives which [it] believes would not [lead to jeopardy].” 16 U.S.C. § 1536(b)(3)(A). Reasonable and prudent alternatives could include route modifications to avoid impacting species and therefore avoid jeopardizing their continued existence.

That is not a hypothetical concern. Atlantic has already had to reroute its pipeline once—by 90 miles—to avoid impacting rare species. Exhibit 9; JA0538.

¹¹ The recovery plan requires establishing viable populations in eight specific drainages and two wildcard drainages. JA0431. Hackers Creek is not one of the eight named drainages, and FWS stated that it was “not likely” to be one of the two wildcard drainages. JA0432.

New analysis from FWS may require another reroute to avoid jeopardizing species. Atlantic is actively working to foreclose that possibility by locking in its preferred pipeline route regardless of the impacts to protected species. An injunction is necessary to preserve Conservation Groups' ability to obtain (and FWS's ability to grant) an adequate remedy.

D. The Endangered Species Act Calls for Ongoing Construction to Stop in This Circumstance

Stopping construction is required when consultation is incomplete. ESA Section 7(d) precludes “any irreversible or irretrievable commitment of resources...which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures” to avoid jeopardy “[a]fter initiation of consultation.” 16 U.S.C. § 1536(d). This requirement applies “[a]fter initiation or reinitiation of consultation.” 50 C.F.R. § 402.09. “This prohibition is in force during the consultation process and continues until the requirements of section 7(a)(2) are satisfied.” *Id.* Violation of that provision “requires that the Project be enjoined until consultation has been completed.” *All. for Wild Rockies v. Marten*, 253 F. Supp. 3d 1108, 1113 (D. Mont. 2017).

“Section 7(d) was enacted to ensure that the status quo would be maintained during the consultation process, to prevent agencies from sinking resources into a project in order to ensure its completion regardless of its impacts on endangered species.” *Wash. Toxics Coal. v. Env'tl. Prot. Agency*, 413 F.3d 1024, 1034–35 (9th

Cir. 2005) (recognizing an “appropriate remedy for violations of the ESA consultation requirements is an injunction pending compliance with the ESA”) *abrogated in part on other grounds by Winter*, 555 U.S. 7; *see Oceana v. Bureau of Ocean Energy Mgmt.*, 37 F. Supp. 3d 147, 176 (D.D.C. 2014) (“The purpose of § 7(d) is to...avoid...a large-scale commitment of resources...made during the consultation process, which resources cannot be diverted or redirected to other productive uses if the outcome of consultation is that the project would violate the ‘no jeopardy’ requirement.”) (internal quotations and citation omitted).

Section 7(d) requires project activities to stop when 1) there is an irreversible or irretrievable commitment of resources, 2) that forecloses formulation or implementation of reasonable and prudent alternatives, 3) after consultation has been initiated or reinitiated. All three factors are met in this instance.

First, clearing land, blasting through bedrock, and burying a large pipeline is undoubtedly an “irreversible and irretrievable commitment of resources.” Once impacted for pipeline construction, the natural environment cannot be returned to its pre-construction state. Impacts to forests, soils, water, and, most importantly here, species are by definition irretrievable and irreversible. Destroyed Indiana bat habitat cannot be put back in place.

Courts have found similar activities constitute irreversible and irretrievable commitments of resources. *See Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1057 (9th Cir. 1994) (“[T]imber sales constitute *per se* irreversible and irretrievable commitments of resources under § 7(d).”); *Mass. v. Andrus*, 481 F. Supp. 685, 691 (D. Mass.), *aff’d sub nom. Conservation Law Found. of New England, Inc. v. Andrus*, 623 F.2d 712 (1st Cir. 1979), *amended*, (1st Cir. Feb. 22, 1980) (“an irretrievable or irreversible commitment would obviously be made within the meaning of the statute if...subsequent drilling actually began”).

Second, ongoing pipeline construction will foreclose formulation or implementation of reasonable and prudent alternatives, including potential route modifications. Atlantic plans to construct its pipeline right up to the place where it has unilaterally decided there are relevant endangered species concerns.

Theoretically, there will be two sections of completed pipeline, adjoining a stretch of uncompleted pipeline, with the plain intent to connect the two sections, no matter the cost to endangered and threatened species. Congress enacted Section 7(d) to avoid precisely this scenario: “prevent[ing] agencies from sinking resources into a project in order to ensure its completion regardless of its impacts on endangered species.” *Wash. Toxics*, 413 F.3d at 1034–35. Even if Atlantic were required to dig its pipeline out of the ground and reconstruct it in a new location to avoid impacts to endangered and threatened species, many of those impacts from

initial construction (and potential relocation), and concurrent harms to Conservation Groups' members, would be irreversible.

Third, consultation has been reopened or reinitiated.¹² The Section 7(d) prohibition applies until “the requirements of section 7(a)(2) are satisfied.” 50 C.F.R. § 402.09. Section 7(a)(2) requires federal agencies to “insure that any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered species or threatened species.” 16 U.S.C. § 1536(a)(2). FWS has not made that finding with respect to the new limits it must set in its ITS. As explained above, if those limits change, FWS will have to reconsider and change or reconfirm its jeopardy analysis. Until that happens, the purpose of Section 7(a)(2) consultation has not been satisfied.

¹² Section 7(d) applies “[a]fter initiation or reinitiation of consultation.” 50 C.F.R. § 402.09. The vacating of the ITS effectively *reopened* Section 7 consultation on the ACP because the required result of that consultation was vacated. *See* 50 C.F.R. § 402.14(g); JA0449 (issuance of the valid BiOp and ITS “concludes formal consultation”). Additionally, FWS must *reinitiate* formal consultation with Atlantic. Reinitiation is required where formal consultation has concluded but a new species is listed that may be affected by the action. JA0449; *see* 50 C.F.R. § 402.16. Reinitiation is required because the yellow lance mussel was recently listed by FWS as threatened. *See* Exhibit 5; Yellow Lance Listing, 83 Fed. Reg. 14,189 (April 3, 2018). In the project area “[p]resence 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.” JA0612. FWS did not assess impacts to yellow lance or provide incidental take coverage for yellow lance during formal consultation. FWS therefore must reinitiate formal consultation to consider and limit impacts to yellow lance.

Moreover, to conclude consultation under Section 7(a)(2) “the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that specifies the impact of such incidental taking on the species,” *i.e.*, an ITS. 16 U.S.C. § 1536(b)(4)(C)(i). Atlantic and FERC no longer have a valid ITS. Consultation must be reopened or reinitiated to conclude the process.

Enjoining construction fulfills Congress’ intent of maintaining the status quo for species until Section 7 consultation duties are complete.

IV. CONCLUSION

Conservation Groups respectfully request that this Court enjoin Atlantic from construction activities until FWS issues a new BiOp and ITS consistent with the Court’s forthcoming opinion. In compliance with ESA § 7(d), an injunction will ensure the status quo is maintained until FWS determines if developing enforceable take limits in a new and valid ITS will require revisiting its jeopardy determinations.

Dated: July 5, 2018,

Respectfully submitted,

/s/ J. Patrick Hunter

J. Patrick Hunter (N.C. Bar No. 44485)
Austin D. Gerken, Jr. (N.C. Bar No. 32689)
Amelia Y. Burnette (N.C. Bar No. 33845)
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*Counsel for Defenders of Wildlife, Sierra Club and
The Virginia Wilderness Committee*

CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because this motion contains 5,199 words, excluding the parts of the motion exempted by Fed. R. App. P. 27(d)(2) and Fed. R. App. P. 27(a)(2)(B).
2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

Dated: July 5, 2018

/s/ J. Patrick Hunter

J. Patrick Hunter

CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2018, I electronically filed the foregoing Motion for Injunction on behalf of Petitioners with the Clerk of Court using the CM/ECF System, which will automatically send e-mail notification of such filing to all counsel of record.

Avi Kupfer
U.S. Department of Justice
P.O. Box 7415
Washington, D.C. 20044

Brooks Smith
Andrew Wortzel
Troutman Sanders LLP
1001 Haxall Point, Suite 1500
Richmond, VA 23219

/s/ J. Patrick Hunter

Counsel for Petitioners

EXHIBIT 1

Nos. 18-1082 (L), 18-1083

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DEFENDERS OF WILDLIFE, *et al.*,
Petitioners,

v.

NATIONAL PARK SERVICE, *et al.*,
Respondents,

and

ATLANTIC COAST PIPELINE, LLC
Intervenor.

DECLARATION OF JAMES R. WEBB

1. My name is James R. Webb, and I go by Rick. I am over 18 and competent to make this declaration.
2. I retired as a Senior Scientist from the University of Virginia in 2014. My professional work as a scientist required proficiency with Geographic Information System (“GIS”) technology, satellite images, and topographic maps, and I have worked with all three routinely since the 1980s.

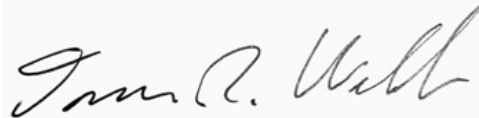
3. In June 2018, I helped arrange and was a passenger on two flights over the corridor of the proposed Atlantic Coast Pipeline in West Virginia, the first on June 8 and the second on June 28. The flight on June 8 covered approximately four-miles of the corridor in Upshur County, West Virginia. The flight on June 28 covered a longer section of the corridor through Harrison, Lewis, Upshur, Randolph, and Pocahontas Counties in West Virginia. The pilot for each flight was Jefferson Shingleton, and we flew in a two-seater IPC Savannah S plane.
4. We took multiple steps to ensure that each flight did in fact fly over the corridor of the proposed Atlantic Coast Pipeline. First, we created the flight plan for the June 8 and June 28 flights using a digital GIS map of the pipeline route which we entered into flight navigation software. Second, once we reached the location of the proposed pipeline, the corridor was clearly visible from the air. I could see sections of the corridor where Atlantic had felled trees and other sections where land clearing, grading, and other construction was underway. Finally, we confirmed our location using other available landmarks and features visible from the air, including roads, rivers, and communities.
5. On each flight, I photographed pipeline construction activity along the corridor through the window of the plane using a Canon EOS 7D Mark II camera. The camera records latitude and longitude coordinates for each photograph. After each flight, I downloaded the photos to my computer and compared the

camera's geo data with satellite images and topographic maps to confirm the location of each picture.

6. I compiled a representative collection of photographs that I took from the June 8 and June 28 flights in **Attachment A**. These photographs show construction activity in the pipeline corridor and accurately depict what I observed on each flight. I included a short caption identifying the date and location by ACP Milepost and county for each photograph. It is my intent that **Attachment A** is fully incorporated into this declaration.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on July 5, 2018



James R. Webb

ATTACHMENT A

Photo: June 8 – No. 1 ACP construction near Milepost 32 in Upshur County, West Virginia. The Buckhannon River is in the foreground.



Photo: June 8 – No. 2 ACP construction near Milepost 34 in Upshur County, West Virginia. The construction corridor crosses Route 22.



Photo: June 8 – No. 3 ACP construction near Milepost 34 in Upshur County, West Virginia.



Photo: June 8 – No. 4 ACP construction near Milepost 35 in Upshur County, West Virginia. The construction corridor crosses Railroad Grade Road (CR-22/3) and Grassy Run.



Photo: June 8 – No. 5 ACP construction near Milepost 35 in Upshur County, West Virginia.



Photo: June 28 – No. 1 ACP construction near Milepost 32 in Upshur County, West Virginia.



Photo: June 28 – No. 2 ACP construction near Milepost 36 in Upshur County, West Virginia. The Buckhannon River is below the construction corridor to the right.



Photo: June 28 – No. 3 ACP construction near Milepost 37 in Upshur County, West Virginia. Laurel Run Road (CR-24) is in the foreground.



Photo: June 28 – No. 4 ACP construction near Milepost 60 in Randolph County, West Virginia. The construction corridor crosses Route 15.



Photo: June 28 – No. 5 ACP construction near Milepost 60 in Randolph County, West Virginia.

EXHIBIT 2

Nos. 18-1082 (L), 18-1083

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

DEFENDERS OF WILDLIFE *et al.*,
Petitioners,

v.

NATIONAL PARK SERVICE *et al.*,
Respondents,

and

ATLANTIC COAST PIPELINE, LLC
Intervenor.

DECLARATION OF PATRICK HUNTER

1. My name is Patrick Hunter. I am over 18 and competent to make this declaration.
2. I am an attorney with the Southern Environmental Law Center representing Petitioners in these cases.
3. My office obtained the following documents from the publicly available, electronic docket maintained by the Federal Energy Regulatory Commission (“FERC”) for this project, FERC Docket No. CP15-554:

- a. **Exhibit 3:** Letter from Cindy Schulz, Fish and Wildlife Service, to Kimberly Bose, Federal Energy Regulatory Commission (May 21, 2018).
My office first learned of this letter when it was posted to the FERC docket on May 31, 2018 (FERC Accession No. 20180531-3109).
- b. **Exhibit 4:** Letter from Patrick Hunter, Southern Environmental Law Center, to Kimberly Bose, Federal Energy Regulatory Commission (May 21, 2018) (FERC Accession No. 20180522-5057).
- c. **Exhibit 5:** Letter from Austin DJ Gerken, Southern Environmental Law Center, to Cindy Schulz, Fish and Wildlife Service (June 7, 2018) (FERC Accession No. 20180614-0008).
- d. **Exhibit 6:** Request for Rehearing and Motion to Stay May 11, 2018 Notice to Proceed Authorizing Commencement of Full Construction for the 2018 Construction Spreads in West Virginia by Defenders of Wildlife, Sierra Club, and Virginia Wilderness Committee (June 11, 2018) (FERC Accession No. 20180611-5183).
- e. **Exhibit 7:** FERC Notice to Proceed with Construction and Approval of Variances (June 25, 2018) (FERC Accession No. 20180625-3036).
- f. **Exhibit 8:** Letter from David Swearingen, Federal Energy Regulatory Commission, to Cindy Schulz, Fish and Wildlife Service (June 1, 2018), with attachments (FERC Accession No. 20180601-3042).

g. **Exhibit 9:** Letter from Kathleen Atkinson, U.S. Forest Service, to Leslie Hartz, Atlantic Coast Pipeline, LLC (January 19, 2016) (FERC Accession No. 20160121-5029).

4. The documents attached to Petitioners' Motion for Injunction as Exhibits 3 through 9 are true and accurate copies of the foregoing documents obtained from FERC's electronic docket.

I declare under penalty of perjury under the laws of the United States of America that, to the best of my knowledge, the foregoing is true and correct.

Executed on July 5, 2018.

/s/ Patrick Hunter

Patrick Hunter

EXHIBIT 3



MEMORANDUM

From:	Kevin Bowman, Office of Energy Projects
To:	Public File
Subject:	Correspondence from the U.S. Fish and Wildlife Service: Request for Information
Dockets:	CP15-554-000, CP15-554-001, and CP15-555-000

Attached to this memorandum is correspondence from the U.S. Fish and Wildlife Service requesting information in reference to the Atlantic Coast Pipeline and Supply Header Projects.



United States Department of the Interior

FISH AND WILDLIFE SERVICE



Virginia Field Office
6669 Short Lane
Gloucester, VA 23061

May 21, 2018

Ms. Kimberly Bose, Secretary
Federal Energy Regulatory Commission
888 First Street NE, Room 1A
Washington, D.C. 20426

Attn: David Swearingen, Branch Chief

Re: Atlantic Coast Pipeline, LLC,
Atlantic Coast Pipeline; Dominion
Energy Transmission, Inc., Supply
Header Project; Docket Numbers
CP15-554-000, CP15-554-001,
CP15-555-000; Project #05E2VA00-
2016-F-1219, #05E2WV00-2014-F-
0832, #05E2PA00-2016-TA-0960,
#04EN2000-2017-I-0738

Dear Ms. Bose:

On October 16, 2017, the U.S. Fish and Wildlife Service (Service) provided our biological opinion (Opinion) on the referenced project in accordance with Section 7 of the Endangered Species Act (16 U.S.C. 1531-1544, 87 Stat. 884), as amended. On May 15, 2018, the U.S. Court of Appeals for the Fourth Circuit issued an order vacating the Opinion's Incidental Take Statement.

In anticipation of the need to revise the Incidental Take Statement, we are requesting the following:

- A detailed description of any modifications to the proposed action made since the issuance of the Federal Energy Regulatory Commission's July 2017 Atlantic Coast Pipeline and Supply Header Project Final Environmental Impact Statement.
- A summary of any changes or modifications to the various construction and restoration plans listed in table 2.3.1-1 of the Federal Energy Regulatory Commission's July 2017 Atlantic Coast Pipeline and Supply Header Project Final Environmental Impact Statement.

Ms. Bose

Page 2

- Listed species survey results/reports completed since October 16, 2017.
- A detailed description of any portion of the referenced action (as described in the Federal Energy Regulatory Commission's July 2017 Atlantic Coast Pipeline and Supply Header Project Final Environmental Impact Statement) completed or partially completed. For partially completed actions, provide a description of what portion of the action has been completed and is yet to be completed. Include a map delineating each area described.
- A detailed description of completed or partially completed Terms and Conditions included in the October 16, 2017 Opinion. For partially completed Terms and Conditions, provide a description of what portion of the Terms and Condition has been completed and is yet to be completed. Include a map delineating each area described, as appropriate.

Please provide the requested items to Troy Andersen of this office no later than 14 calendar days from the date of this letter.

If you have any questions, please contact Troy Andersen at (804) 824-2428 or via email at Troy_Andersen@fws.gov.

Sincerely,

Cindy Schulz
Field Supervisor
Virginia Ecological Services

cc: Corps, Norfolk, VA (Attn: William Walker)
FERC, Washington, DC (Attn: Kevin Bowman)
Service, Elkins, WV (Attn: John Schmidt)
USFS, Atlanta, GA (Attn: Timothy Abing)
USFS, Elkins, WV (Attn: Jennifer Adams)
USFS, Roanoke, VA (Attn: Connie Jankowiak)
ACP, Richmond, VA (Attn: Spencer Trichell)

Document Content(s)

CP15-554 MEMORANDUM.PDF.....1-1

CP15-554 attachment to memo.PDF.....2-3

EXHIBIT 4

SOUTHERN ENVIRONMENTAL LAW CENTER

Telephone 828-258-2023

48 PATTON AVENUE, SUITE 304
ASHEVILLE, NC 28801-3321

Facsimile 828-258-2024

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.¹

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

¹ 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
Kathleen Atkinson, Regional Forester, Eastern Region, U.S. Forest Service
Teresa Spanga, Chief, U.S. Army Corps of Engineers, Huntington District
William T. Walker, Chief, U.S. Army Corps of Engineers, Norfolk District
Henry Wicker, Deputy Chief, U.S. Army Corps of Engineers, Wilmington District
Avi Kupfer, U.S. Department of Justice

Document Content(s)

Letter to FERC re Vacatur of Incidental Take Statement.PDF.....1-6

EXHIBIT 5

SOUTHERN ENVIRONMENTAL LAW CENTER

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48 PATTON AVENUE, SUITE 304
ASHEVILLE, NC 28801-3321

Facsimile 828-258-2024

June 7, 2018

Via First Class U.S. Mail and Electronic Mail

Cindy Schulz
Field Supervisor
Virginia Ecological Services
United States Fish and Wildlife Service
6669 Short Lane
Gloucester, VA 23061
cindy_schulz@fws.gov

ORIGINAL

FILED
SECRETARY OF THE
COMMISSION
JUN 14 P 2:32
FEDERAL ENERGY
REGULATORY COMMISSION

Re: Atlantic Coast Pipeline, Fish and Wildlife Service's Incidental Take Statement and Biological Opinion, FERC Docket # CP15-554 et. seq. and CP15-555 et. seq.

Dear Ms. Schulz:

On May 15, 2018, the United States Fourth Circuit Court of Appeals vacated the Fish and Wildlife Service's (FWS) Incidental Take Statement for the Atlantic Coast Pipeline (ACP). The Court has not yet issued an opinion stating its reasoning and neither we nor the agency can know what measures will be required by the Court.

One thing is immediately clear, however: FERC and FWS must reopen consultation for the ACP because of the absence of a valid incidental take statement. Because consultation must be reopened and because that process cannot fruitfully be completed until the Court issues its full opinion, FWS must: (1) require completion of survey work it has already identified as necessary to an informed decision, (2) update its analysis to account for newly available information including new survey data, (3) revisit its erroneous no jeopardy determination for the Rusty Patched Bumble Bee and Clubshell, and (4) complete consultation for the newly-listed Yellow Lance mussel.

I. FWS Must Reopen Consultation

As part of consultation, 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 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.

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.¹ That expectation appears to have been fulfilled. On May 21, 2018, FWS wrote FERC, effectively reopening consultation by acknowledging the incidental take statement was invalid and requesting additional project and species information including more recent survey data.

Indeed, each of the conditions ordinarily requiring the Service to reinitiate consultation under its own regulations has been triggered for the ACP:

Reinitiation of formal consultation is required and shall be requested by . . . the Service:

- (a) If the amount or extent of taking specified in the incidental take statement is exceeded;
- (b) If 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;
- (c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or
- (d) If a new species is listed or critical habitat designated that may be affected by the identified action.

50 C.F.R. § 402.16.

First, 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. 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. More specifically, potential Madison Cave isopod habitat covers nearly 267,000 surface acres in western Virginia. October 16, 2017 Biological Opinion, 22 (hereafter "BiOp"). The pipeline right of way crosses approximately 159 miles of Indiana bat habitat in West Virginia and Virginia. *Id.* at 23. 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). 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.

¹ 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-tohalt-in-areas-with-endangered/article_3f27b3ce-3019-53f4-8f9c-79a4f32a8438.html ("The company plans to consult with the U.S. Fish and Wildlife Service . . .").

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. Atlantic's apparent position is inconsistent with the Final Environmental Impact Statement (FEIS) 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 (FEIS, 4-266), blasting during trenching which could impact "hibernacula or roost trees" (FEIS, 4-267), burning cleared vegetation (FEIS, 4-268), and impacts from "noise and lights associated with nighttime construction" (FEIS, 4-268).

Second, 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. Without those conditions in place, the "identified action" is modified from the mitigated project the Service evaluated in its Biological Opinion, requiring FWS to reinitiate consultation. 50 C.F.R. § 402.16(c).

Third, 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." 50 C.F.R. § 402.16(b). The original Biological Opinion and Incidental Take Statement assessed impacts to species assuming that only a "small percent" in a certain area would be harmed 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.² That assertion does not reflect the consideration of impacts to species in the Biological Opinion. If the Service is authorizing take of all individuals within the affected habitat, rather than only an undefined small percent, it must revisit its jeopardy analysis for those species. Furthermore, as discussed below, 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.

Fourth, as discussed below, 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.

II. FWS Must Require FERC to Conduct Surveys For an Updated Biological Opinion

At the close of formal consultation, FERC and Atlantic failed to produce population survey data FWS had recognized as necessary to an informed biological opinion. The Service nonetheless issued its biological opinion without that data available and authorized take without information needed to evaluate its scope. With consultation now reopened, the Service must take

² The audio of the recording of argument in cases 18-1082 and 18-1083 is available on the Fourth Circuit Court of Appeals website: <http://coop.ca4.uscourts.gov/OAarchive/mp3/18-1082-20180510.mp3>

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.

a. Indiana Bat

Atlantic proposed a two-phase plan to survey potential hibernacula for Indiana bats. In phase one, ACP would locate potential hibernacula. In phase two, ACP would determine the presence or absence of bats at those hibernacula. In March 2017, FWS warned Atlantic that “there is a large area in West Virginia that the survey for portals and cave has not been complete” and that it 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 thirty-three sites. Additionally, when FWS produced the biological opinion, several of the acoustic surveys promised by Atlantic had not been completed. At the close of consultation, the Service erroneously authorized take without data it identified as necessary to an informed decision.

Atlantic, on its prior schedule, should have completed more surveys by this time.

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. Furthermore, in prior biological opinions and incidental take statements for the Indiana bat, the Service has required that construction crews survey for and report dead individuals in order to assess compliance with the limits of an incidental take statement. Similar measures should be required for the ACP if, after obtaining necessary survey data, the Service concludes that it will authorize take of Indiana bat by this project.

b. Clubshell

The Service issued its biological opinion and incidental take statement for Clubshell without survey data confirming the size of the affected population. But there is no question that it is possible to collect that data. 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.

c. Rusty Patched Bumble Bee

Most alarmingly, at no point did Atlantic or FERC conduct a single competent survey for the critically endangered Rusty Patched Bumble Bee (RPBB).

As of October 2016, Atlantic’s Draft Biological Assessment for RPBB had only this to say: “Based on the range map from the Species Status Assessment dated June 2016, the Project

passes through historic range for [rusty patched bumble bee] and there are no known occurrences in the counties crossed by the Project; therefore, the rusty patched bumble bee is not addressed further in this BA.” Draft Biological Assessment, 52.

The Service published its final rule listing RPBB as endangered on January 11, 2017. 82 Fed. Reg. 32,186 (Jan. 11, 2017). Atlantic agreed to add discussion of RPBB to its BA, but, citing a January 6, 2017 communication from FWS, related its understanding that “no surveys would be required for the species in Virginia.” Atlantic Supplemental Filing February 24, 2017 Appendix L Response to Fish and Wildlife Service, 5.

On June 6, 2017, however, a contract entomologist with Atlantic documented a RPBB in Bath County while conducting a survey for other species in the path of the ACP across the George Washington National Forest. See Email from Rob Jean to Sumalee Hoskin et al (June 7, 2017). He followed that finding with “an hour of additional sampling in the area surrounding the capture location” and found no other RPBBs. See Email from Sara Thronson to Kent Karriker et al (June 8, 2017).

Despite this, FWS’ EIS for the project, issued after RPBB was documented in the project area, misstates the record: “Construction activities associated with ACP and SHP are not expected to impact individual rusty patched bumble bees. No current records for the species are found within the ACP and SHP project areas.” FEIS 4-314 (emphasis added). Although the Forest Service raised concerns about the lack of disclosure in the FEIS of RPBB discovery in the project area, FERC declined to update or supplement its draft EIS, asserting that it was too late in their process to make changes. FERC’s position may have been in part attributable to Atlantic’s failure to formally notify FERC of the RPBB discovery until July 14, 2017 – a month after the RPBB was discovered but days before the FEIS was published.

The Service’s Biological Opinion concedes that “comprehensive [RPBB] surveys were not conducted through the action area in VA . . .” BiOp, 19. In part, FWS lacked adequate survey data because Atlantic declined to collect it in a timely fashion, and the Service failed to question Atlantic’s position. In response to Service inquiries, Atlantic reported its survey options were limited by the terms of its special use permit with the Forest Service which allowed it access to a 3,000 foot buffer on either side of the proposed pipeline corridor, which was inconsistent with FWS’ request that surveys be conducted in a 5km buffer. Atlantic reported that it was under limitations because “[s]urveying outside of his area requires an amendment to our SUP and has taken some time in the past. . . .” See Email from Spencer Trickhell to Paul Phifer August 22, 2017. Nothing disclosed in agency records suggests that either Atlantic or FWS inquired whether the Forest Service would allow broader surveys for the RPBB.

On February 28, 2018, FWS issued final Survey Protocols for RPBB.³ The protocol is clear that it is possible, indeed expected, that surveys look not only for suitable habitat, but also

³ <https://www.fws.gov/midwest/endangered/insects/rpbb/pdf/SurveyProtocolsRPBB28Feb2018.pdf>

for individual bees to evaluate the presence and size of a population. The survey protocols for “project review” recommend “[f]or each sampling event, survey for a minimum one (1) person-hour per three acres of the highest quality habitat in your survey area or continue to sample until at least 150 bumble bees are sighted, whichever comes first.” *Id.* at 15. The protocol further recommends four evenly spaced survey events over the course of the survey season (early June to mid-August). *Id.* at 8-9.

Without survey data, FWS based its analysis, jeopardy determination, and take limits on a desktop habitat analysis only. Moreover, as discussed in greater detail below, the FWS, lacking any real survey data for the RPBB, *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 RPBB; it certainly cannot do so without a single competent survey from which to evaluate the affected population.

d. Madison Cave Isopod

Atlantic failed to complete competent surveys for Madison Cave isopod prior to the issuance of the biological opinion. However, recent statements by counsel for Atlantic suggest that this data is now available. Counsel for Atlantic represented to the Fourth Circuit at oral argument that Atlantic conducted “thousands of surveys for the bats, Madison cave isopods, the bee” In response to a question from the Court (“Are you going to do sample borings to see if you killed crustaceans that are subterranean?”) counsel for Atlantic responded that “[i]ndeed the FERC order requires that” and that “[y]ou have to do it as part of construction” and “[b]efore you start the construction.” Counsel further explained that the “particular geotechnical borings into karst terrain are required for ESA purposes before construction begins.”⁴ That data is not in the record and has not been reflected in the biological opinion for the project. The Service must update its analysis to reflect that survey information.

That survey data should help resolve other flaws in the agency’s October 16, 2017 Biological Opinion. For instance, 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. BiOp, 22. 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? Surveys would help determine the prevalence of isopods in that area. If the Service cannot determine the presence of isopods through surveying or reliance on competent models, it must assume in its jeopardy analysis that 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 (*id.* at 52), will be taken by the project.

⁴ These quotes were taken from the recording of oral argument available on the website for the Fourth Circuit Court of Appeals, *available at* : <http://coop.ca4.uscourts.gov/OAarchive/mp3/18-1082-20180510.mp3>

III. The Service Must Revisit its No-jeopardy Determination for Rusty Patched Bumble Bee

Without competent survey data, the Service issued a deeply flawed incidental take statement for RPBB and, based on records recently made available, an erroneous jeopardy determination that contradicts the agency's own conclusions about the species.

There is no question that construction of the ACP will impact RPBB potential habitat in the vicinity of the species occurrence documented in June 2017. The Forest Service biologist who surveyed the area after the RPBB was discovered on the forest noted that "[w]e 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." See Email Carol Croy to Sarah Nystom (June 9, 2017).

Similarly, Atlantic's Supplemental Information Letter regarding the RPBB disclosed:

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 located in construction spread 4 which 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.

See Dominion Energy to Kimberly Bose, "Supplemental Information – Rusty Patched Bumble Bee" (June 13, 2017).

The Service's Biological Opinion acknowledges that the project will have negative effects on RPBB 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 ROW." BiOp, 43.

Ground disturbance will take place during the active foraging season and "RPBB workers are expected to be crushed by machinery" which is expected to reduce resources available to the colony "resulting in reduced survival of individual workers and reduced reproductive capacity of the queen." *Id.* at 32. Machinery is expected to crush any colonies in the project footprint found in the high potential zone. *Id.* Harassment from noise and vibration "may reduce survival and reproduction." *Id.* Soil compaction and removal of floral resources are also expected to result in "reduced reproduction." *Id.*

Without actual population data, however, the Service dismissed “loss of 1 colony as a result of crushing” and “reduction in the reproductive capacity of queens” and loss of individual workers as insignificant to the health of this population “due to the metapopulation dynamics of RPBB.” *Id.* at 44–45. Specifically, the Service assumed that the confirmed observation of a single bee was indicative of a colony, which the service assumed consist of “100 to 1,000 workers.” *Id.* at 21. The Service further assumed that single colony was part of a population of multiple colonies dispersed across the landscape at a density of 14 nests per 100 ha, based on survey data for the buff-tailed bumblebee, which is not endangered, with an assumed “potential presence of an additional 27 colony nests within 0.8 km of the observed RPBB.” *Id.* at 20, 44. Based on those wildly optimistic and unsupported assumptions incorporating numbers only appropriate for a robust, healthy population of RPBB, and data extrapolated from other non-endangered bees, 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 sizeable population. In other words, based on finding only one RPBB, FWS assumed no other RPBBs were present along the 600+ mile pipeline route, except within 0.8 km of where the single RPBB was found, and in that area FWS assumed presence of up to 27,000 other RPBBs.

The Service’s assumption that a single bee equates to a robust population of up to 27,000 bees within a 0.8 km radius of the location where that bee was observed, but nowhere else in the project area, is unsupported by any survey data, analysis, or research. It contradicts the Service’s own findings in its Species Assessment and Listing Rule for RPBB that most known populations for RPBB are likely quite small and not healthy. The Service concluded in its species status assessment for RPBB 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).” Species Assessment, 74.⁵ In short, the Service’s own assessment of the best available science refutes the assertion in this Biological Opinion that the presence of a “population” as confirmed by the discovery of RPBB in the project area necessarily indicates a robust population of 27,000 bees.

If FWS’s assumptions are correct, this RPBB population would be globally significant and likely the highest concentration of RPBB found anywhere throughout its range. Rangewide, the number of documented populations has declined 88% and the spatial extent of those populations has declined 87% from historical records. *Id.* at 98. Moreover, “[o]f the 103 known current populations, 96% have been documented by 5 or fewer individuals bees.” Listing Rule, 82 Fed. Reg. 32,205 (Jan. 11, 2017). According to the Service’s own listing rule “[t]he risk of extinction is currently high because the number of remaining populations is small, most of those populations are extremely small in size (all but 2 have 10 or fewer individuals), and the species’ range is severely reduced.” *Id.* “There is virtually no redundancy of populations within each

⁵ <https://www.fws.gov/midwest/endangered/insects/rpbb/pdf/SSARreportRPBBwAdd.pdf>

occupied ecoregion, further increasing the risk of loss of representation of existing genetic lineages and, ultimately, extinction.” *Id.*

As documented by FWS, declining populations create a feedback loop resulting in ever smaller population size because they can trigger a “diploid male vortex” in which greater concentrations of diploid males decrease population growth which, in turn, contributes to higher concentrations of diploid males, continuing and accelerating the cycle of population decline. Species Assessment, 51. Reduced population sizes and genetic diversity, in turn, diminish the capacity of the population to respond to habitat disruption and other stressors. *Id.* “[E]ven slight changes in resource availability could have significant cumulative effects on colony development and productivity.” *Id.* at 50.

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 and listing rule for RPBB. 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 RPBB.

The Service based its jeopardy analysis on its faulty assumption that a robust population of RPBB would survive in the project area notwithstanding construction impacts: “As we have concluded that populations of RPBB are unlikely to experience reductions in their fitness, there will be no harmful effects (i.e., there will be no reduction in RND[reproduction, numbers and distribution]) on the species as a whole.” BiOp, 45.

That faulty assumption was essential to the Service’s no-jeopardy finding for RPBB because there is no question that loss of this population of RPBB would jeopardize the survival and recovery of the species. The Service defines jeopardy as activity “that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02.

The Service’s Species Assessment for RPBB recognized that RPBB is at risk of extinction “even without further exposure to stressors.” Species Assessment, 5. “As fewer and fewer populations persist, the ability to withstand normal environmental stochasticity is diminished, and thus the decline to extinction is accelerated.” *Id.* at 4. The Service concluded that to increase RPBB viability “it is necessary to . . . prevent further declines by protecting the remaining populations and sufficient habitat to support them (this is paramount).” *Id.* at 74. In its recently finalized survey protocol for RPBB populations, the Service recognized that “[t]he rusty patched bumble bee is so imperiled that every remaining population is important for the continued existence of the species.” Survey Protocol (2018), 1 (emphasis added). The loss of

this population of RPBB to ACP construction will reduce the reproduction, numbers, and distribution of RPBB and appreciably reduce the likelihood of recovery or survival of RPBB.

Moreover, neither FERC nor Atlantic has demonstrated that impacts to this confirmed RPBB habitat cannot be avoided. FWS asked for avoidance measures, in particular choosing another access road at Laurel Run to avoid construction work along the forest road where RPBB was found. Atlantic responded that the Laurel Run access road “doesn’t address [their] needs.” See Email from Spencer Trichell to Paul Phifer (August 3, 2017). FWS can, indeed must, determine where RPBBs are present along the proposed pipeline path and require a rerouting of this project as necessary to avoid jeopardy to the survival and recovery of the critically endangered RPBB.

IV. The Service Must Revisit its No-jeopardy Determination for Clubshell

The Clubshell Recovery Plan requires “viable populations” of Clubshell – *i.e.*, 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. Clubshell Recovery Plan (1994), 29. Of the ten drainages, the Recovery Plan identified eight specific drainages and left two to be determined at a future date. *Id.* at 9. All ten “must be permanently protected from all foreseeable and controllable threats, both natural and anthropogenic.” *Id.* at 30.

The Service’s jeopardy analysis for Clubshell concluded that the Hackers Creek population “is not likely to be part of the 2 unspecified additional drainages” so loss of the Hackers Creek population would not prevent meeting recovery criteria leading to a jeopardy determination. BiOp, 43. The Service provided no explanation of how it reached that conclusion but it appears to be based, in part, on the relatively small number of Clubshell found at the site in past years. A 2009 survey documented 29 Clubshell and a 2014 survey found only 19. BiOp, 18.

Recent data however confirm that the population is doing much better than originally believed by the Service. Surveys conducted on May 3, 2018 by Atlantic’s consultants documented 56 Clubshell in the same area. That not only reveals a more substantial population but reproductive success. There are only seven known Clubshell populations that exhibit any reproductive success. BiOp, 43. In light of this new information the Service must revisit its jeopardy-based finding that the Hackers Creek population “is not likely to be part of the 2 unspecified additional drainages.”

The Service appears not to have addressed whether any other populations are more likely candidates for the two undetermined populations called for in the Recovery Plan. The Service must address how the Hackers Creek population compares with other options and how harm to this population would be consistent with a no jeopardy determination.

V. The Service Must Reinitiate Formal Consultation to Consider the Yellow Lance

As we have conveyed, FWS must reinitiate formal consultation to consider impacts to the newly listed Yellow Lance. FWS regulations direct that “[r]einitiation of formal consultation is required and shall be requested . . . by the Service . . . [i]f a new species is listed . . . that may be affected by the identified action.” 50 C.F.R. § 402.16. On April 3, 2018, FWS issued a final rule listing the Yellow Lance as threatened under the Endangered Species Act. 83 Fed. Reg. 14,189 (April 3, 2018). The Service’s Biological Opinion did not analyze impacts to or provide incidental take coverage for Yellow Lance.

FERC’s FEIS confirms that the ACP will cross Yellow Lance habitat. “In Virginia, the yellow lance is known to occur in the Cowpasture River, Nottoway River, Meherrin River, [] Sturgeon Creek,” and the James River. FEIS, 4-307. In North Carolina, Yellow Lance has been documented in Swift Creek and Little River, and may occur in the Tar River. *Id.* The Atlantic Coast Pipeline is proposed to cross each of these waterbodies and multiple of their tributaries. *See* FEIS, Appendix K.

These crossings are likely to affect Yellow Lance. Atlantic proposes to use dry construction methods for some of the crossings. In some places, that may require in-stream blasting. *See, e.g., id.*, K-53. Other waterbodies will be crossed by horizontal directional drilling. “Mussels occurring in waterbodies crossed by HDD may be affected if there is an inadvertent release of drilling fluid in or near the waterbody.” FEIS, 4-309. These activities may kill, harm, harass, or otherwise result in take of Yellow Lance at the crossing site or downstream.

Crossing waterbodies is not the only pipeline activity that poses a risk to Yellow Lance. The rule listing Yellow Lance as threatened recognizes timbering as a primary threat to the species. 83 Fed. Reg. 14,193. While silvicultural best management practices are required for pipeline construction, they “are not 100 percent effective.” FEIS, 4-75. Improper implementation “can have drastic effects” and impacts to riparian areas “can cause sedimentation and habitat degradation for miles downstream.” 83 Fed. Reg. 14,194.

On July 21, 2017, FERC conceded that the ACP will affect Yellow Lance by requesting “conference with the FWS to confirm our provisional finding of not likely to jeopardize the yellow lance mussel.” Letter from David Swearingen to Paul Phifer (July 21, 2017). The Service responded that “formal conference is not necessary” because still incomplete habitat “surveys did not find the species.” Letter from Cindy Shultz to Kimberly Rose (September 7, 2017). The Service’s response is not a formal finding, and is indicative, at most, of the agency’s belief based on information then available that the project is “not likely to jeopardize the continued existence of any proposed species.” 50 C.F.R. § 402.10(a). That response does not relieve the Service or FERC of the obligation to reopen consultation for the Yellow Lance now that it is listed.

First, the Service's response to FERC's conference request was based on survey data then available, which the Service acknowledged was incomplete. To the contrary, existing population data confirms that there are currently populations of Yellow Lance downstream of construction activities proposed by the ACP. Attached to this letter is a spreadsheet of documented occurrences known to the N.C. Wildlife Resources Commission and a map plotting those known occurrences against the proposed path of the ACP. Yellow Lance have been confirmed throughout the project area in downstream portions of Swift Creek as recently as 2016. Moreover, these populations in the Tar River basin are essential, stable population reserves for the Yellow Lance. According to the Service's listing rule, "[a]t the population level, the overall condition of one of the eight populations (the Tar population) is estimated to have moderate resiliency, while the remaining six extant populations (Patuxent, Rappahannock, York, James, Chowan, and Neuse populations) are characterized by low resiliency." 83 Fed. Reg. 14,193.

Significantly, the baseline status of the Tar River population has changed since the listing rule was published. The Service recently issued an incidental take statement for construction on Interstate 540 which authorizes the project to take all Yellow Lance across 47 miles of potentially occupied habitat, including some of the same waterbodies crossed by the Atlantic Coast Pipeline. Fish and Wildlife Service, Biological Opinion for Complete 540 (April 10, 2018), 29.⁶ For purposes of a biological opinion, "[t]he environmental baseline includes . . . the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation. . . ." 50 C.F.R. § 402.02.

Second, even if FWS ultimately concludes that the project is not likely to jeopardize Yellow Lance, it must reinitiate consultation to develop an incidental take statement specifying the impact, reasonable and prudent measures required to minimize impacts, terms and conditions, monitoring requirements, and reinitiation triggers. 50 C.F.R. 402.14(i).

Sincerely,



Austin DJ Gerken

Gregory Buppert

Southern Environmental Law Center

On Behalf of the Defenders of Wildlife, the Sierra Club and the Virginia Wilderness Committee

⁶ <https://www.ncdot.gov/projects/complete540/download/biological-opinion-complete-540.pdf>

cc:

Kimberly D. Bose, Secretary, FERC

FERC Docket Submittal

Fish and Wildlife Service, West Virginia Field Office

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

Kathleen Atkinson, Regional Forester, Eastern Region, U.S. Forest Service

Avi Kupfer, U.S. Department of Justice

Document Content(s)

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EXHIBIT 6

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

In the Matter of

**ATLANTIC COAST PIPELINE, LLC
DOMINION TRANSMISSION, INC.**

**Docket Nos. CP15-554-000
CP15-554-001
CP15-554-002
CP15-554-003
CP15-555-000
CP15-555-001
CP15-554-002**

FILED JUNE 11, 2018

**REQUEST FOR REHEARING
AND
MOTION TO STAY
MAY 11, 2018 NOTICE TO PROCEED AUTHORIZING
COMMENCEMENT OF FULL CONSTRUCTION FOR THE 2018
CONSTRUCTION SPREADS IN WEST VIRGINIA
BY
DEFENDERS OF WILDLIFE, SIERRA CLUB, AND
VIRGINIA WILDERNESS COMMITTEE**

As authorized by section 19(a) of the Natural Gas Act (“NGA”), 15 U.S.C. §717r(a) and Rule 713 of the Federal Regulatory Energy Commission’s (“Commission”) Rules of Practice and Procedure, 18 C.F.R. § 385.713, DEFENDERS OF WILDLIFE, SIERRA CLUB, and VIRGINIA WILDERNESS COMMITTEE (collectively, “Petitioners”) hereby request rehearing of the Commission’s May 11, 2018 letter authorizing Atlantic Coast Pipeline, LLC, (“Atlantic”) and Dominion Transmission, Inc., (“Dominion”) “to commence full construction” of the “2018 construction

spreads in West Virginia” for the Atlantic Coast Pipeline. David Swearingen, FERC, Letter to Matthew Bley, Dominion Transmission, Inc. (May 11, 2018), eLibrary No. 20180511-3048 (hereafter, the “Notice to Proceed”).

The Commission granted Sierra Club’s and Virginia Wilderness Committee’s respective motions to intervene in this proceeding. Atlantic Coast Pipeline, LLC, 161 FERC ¶ 61,042, p. 19 (Oct. 13, 2017) (the “Certificate Order”). Thus, Sierra Club and Virginia Wilderness Committee are “parties” to this proceeding, 18 C.F.R. § 385.214(c), and have standing to file this request for rehearing. *See* 15 U.S.C. § 717r(a); 18 C.F.R. § 385.713(b). Defenders of Wildlife joins this request for rehearing because it is a petitioner in *Defenders of Wildlife v. U.S. Dep’t of the Interior*, 722 Fed. Appx. 321 (4th Cir. 2018), which vacated the Incidental Take Statement for the Atlantic Coast Pipeline, and it has an important interest in enforcing the Court’s order.

Petitioners request that the Commission grant rehearing, immediately revoke the West Virginia Notice to Proceed, and stay all pipeline construction authorized by the Notice. 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. Therefore, Atlantic and Dominion

are not in compliance with two mandatory conditions of the project's Certificate Order: Environmental Condition 54 and Environmental Condition 10. Certificate Order, Appendix A, ¶¶ 10, 54. Both of these conditions require a valid incidental take statement before pipeline construction proceeds. *See id.*

STATEMENT OF RELEVANT FACTS

On October 13, 2017, the Commission issued an “Order Issuing Certificates” authorizing construction and operation of the Atlantic Coast Pipeline. *See* Certificate Order, 161 FERC ¶ 61,042. The Certificate Order contained numerous conditions including Environmental Conditions 10 and 54, which state:

10. Atlantic and DETI must receive written authorization from the Director of OEP **before commencing construction of any project facilities**. To obtain such authorization, Atlantic and DETI must file with the Secretary documentation that it has received all applicable authorizations required under federal law (or evidence of waiver thereof). The Director of OEP will not issue a notice to proceed with construction of the Atlantic or DETI project facilities independently.

...

54. Atlantic and DETI **shall not begin construction of the proposed facilities until:**

- a. all outstanding biological surveys are completed;
- b. the FERC staff complete any necessary section 7 consultation with the FWS; and

- c. Atlantic and DETI have received written notification from the Director of OEP that construction and/or use of mitigation (including implementation of conservation measures) may begin.

Certificate Order, Appendix A, ¶¶ 10, 54 (emphasis in original). On October 16, 2017, the U.S. Fish and Wildlife Service issued a Biological Opinion of the effects of the Atlantic Coast Pipeline on threatened and endangered species with an accompanying Incidental Take Statement. U.S. Fish & Wildlife Serv., Biological Opinion for the Atlantic Coast Pipeline (Oct. 16, 2017), eLibrary No. 20171103-3008. On January 19, 2018, Petitioners challenged the adequacy of the Biological Opinion and Incidental Take Statement in the U.S. Fourth Circuit Court of Appeals. Pet. for Review, *Defenders of Wildlife et al. v. Fish & Wildlife Serv. et al.*, Case No. 18-1083 (4th Cir. Jan. 18, 2018). On April 18, 2018, Atlantic and Dominion requested authorization through a notice to proceed to begin construction in the 2018 construction spreads in West Virginia. Matthew Bley, Dominion Energy Transmission, Letter to Kimberly Bose, FERC (April 18, 2018), eLibrary No. 20180419-5081. On May 11, 2018, the Commission issued the Notice to Proceed with construction in West Virginia. *See* Notice to Proceed. On May 15, 2018, the Fourth Circuit vacated the Fish and Wildlife Service's Incidental Take Statement for the Atlantic Coast Pipeline. *See Defenders of*

Wildlife v. U.S. Dep't of the Interior, 722 Fed. Appx. 321 (4th Cir. 2018).

Aerial photographs taken June 8, 2018, show land grading, excavation, and other construction underway on Spread 2-1 in Upshur County, West Virginia.

STATEMENT OF ISSUES

1. The Commission's Notice to Proceed is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" because Endangered Species Act consultation is not complete. Environmental Condition 54 of the Certificate Order requires that consultation be complete before the Commission authorizes pipeline construction. Environmental Condition 10 of the Certificate Order requires that Atlantic and Dominion provide a valid incidental take statement before the Commission authorizes pipeline construction. 5 U.S.C. § 706; 15 U.S.C. § 717r(b); *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *Defenders of Wildlife v. U.S. Dep't of the Interior*, 722 Fed. Appx. 321 (4th Cir. 2018); Certificate Order, Appendix A, ¶¶ 10, 54.
2. The Commission's Notice to Proceed is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" because the Commission, Atlantic, and Dominion will violate Section 7(d) of the Endangered Species Act if pipeline construction continues before consultation is complete. 5 U.S.C. § 706; 15 U.S.C. § 717r(b); 16 U.S.C. § 1536(d); *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *Defenders of Wildlife v. U.S. Dep't of the Interior*, 722 Fed. Appx. 321 (4th Cir. 2018); *Conner v. Burford*, 848 F.2d 1441, 1455 n.34 (9th Cir. 1988).
3. The Commission's Notice to Proceed is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" because the Commission, Atlantic, and Dominion risk violation of the Endangered Species Act's prohibition on the "take" of protected species without a valid incidental take statement. 5 U.S.C. § 706; 15 U.S.C. § 717r(b); 16 U.S.C. § 1538(a); *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983);

Defenders of Wildlife v. U.S. Dep't of the Interior, 722 Fed. Appx. 321 (4th Cir. 2018); *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997); 50 C.F.R. § 17.31.

ARGUMENT

A. Endangered Species Act consultation is not complete, and Atlantic and Dominion are not in compliance with Environmental Conditions 54 and 10 of the Certificate Order.

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. *See Defenders of Wildlife*, 722 Fed. Appx. at 321. Petitioners notified the Commission on May 16, 2018, and again on May 21, 2018, that the project lacked an incidental take statement, a key approval necessary to proceed with construction. Without that approval, the Commission 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 the Certificate Order and two other federal agency approvals.

Foremost, the Commission's October 13, 2017 Certificate Order authorizing this project requires a valid biological opinion *and* incidental take statement for work to proceed. *See* Certificate Order, Appendix A, ¶¶ 10, 54. Condition No. 54 of the Certificate Order prohibits Atlantic and

Dominion from beginning any construction until “the FERC staff complete any necessary section 7 consultation with the FWS.” Certificate Order, Appendix A, ¶ 54. Elsewhere in its Order, the Commission 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.” Certificate Order, ¶ 243.

On October 16, 2017, Atlantic accepted the terms of the Certificate Order. *See* Matthew Bley, Dominion Energy Transmission, Letter to Kimberly Bose, FERC (October 16, 2017), eLibrary No. 20171016-5254. That acceptance is conditioned on Atlantic’s “compliance with the environmental conditions listed in Appendix A to this order,” which includes Condition No. 54. Certificate Order, p. 129.

As it stands, the Commission’s consultation obligations under Section 7 of the Endangered Species Act are incomplete. As part of consultation, the Fish and Wildlife Service 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). The Service has confirmed that take is reasonably certain to occur, but the Incidental Take Statement attached to the project’s Biological Opinion is

now invalid. Thus, the Commission does not have the “statement concerning incidental take” necessary to complete Section 7 consultation.¹

To fulfill Section 7 consultation requirements and move forward with this project, the Commission must obtain a valid incidental take statement through consultation with the Fish and Wildlife Service. To be clear, this is not a situation where the limits of a valid incidental take statement have been exceeded, requiring the Commission to reinitiate previously completed Section 7 consultation. Here, the underlying Incidental Take Statement has been vacated, and consultation is incomplete. The Commission’s Certificate Order prohibited commencement of construction before obtaining its first, now invalid, Incidental Take Statement; the Certificate Order likewise does not allow construction to continue in the absence of an incidental take statement.

Other conditions in the Certificate Order also bar construction absent a valid incidental take statement. Condition No. 10 of the Certificate Order requires Atlantic and Dominion to “file with the Secretary documentation that it has received all applicable authorizations required under federal law” before commencing construction of any project facilities. Certificate Order,

¹ The Fish and Wildlife Service 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.

Appendix A, ¶10. An incidental take statement is an “applicable authorization required under federal law” for this project. Atlantic and Dominion can no longer make the requisite showing because they lack a valid incidental take statement. The face of the Certificate Order does not allow for the possibility that construction would continue in the absence of such an authorization required under federal law.

B. The Commission, Atlantic, and Dominion will violate Section 7(d) of the Endangered Species Act if pipeline construction continues before consultation is complete.

Allowing Atlantic and Dominion to proceed with pipeline construction in West Virginia will run 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). That prohibition “ensur[es] that the status quo will be maintained during the consultation process.” *Conner v. Burford*, 848 F.2d 1441, 1455 n.34 (9th Cir. 1988). Allowing the Notice to Proceed to stand would facilitate the opposite. The Commission should not allow Atlantic and Dominion 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 the Fish and Wildlife Services determines necessary to protect those species.

The extent of what the Fish and Wildlife Service must do to issue a valid and enforceable incidental take statement for the project, besides complete consultation, is unclear, particularly as the parties await the Fourth Circuit's opinion. It is entirely possible that to develop enforceable limits on take, the Service 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. At oral argument before the Fourth Circuit, counsel for the Fish and Wildlife Service indicated the Service could employ a habitat surrogate limit on take which would allow take of *all* Indiana bats within its habitat, over 4,000 acres in this instance.² That stands in stark contrast to the smaller number of "taken" bats assessed in the agency's jeopardy analysis. *See* Biological Opinion, 46-67.

Adopting that approach may require the Fish and Wildlife Service 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 the Service is unable to develop enforceable take limits for inclusion in an incidental take

² Audio Recording of Oral Argument: 22:06-22:53 available at <http://coop.ca4.uscourts.gov/OAarchive/mp3/18-1082-20180510.mp3>.

statement, it may require the pipeline to simply avoid certain species altogether.

The habitat for several endangered or threatened species covers significant portions of the current pipeline route in West Virginia. For example, of the 11,776 acres of land that will be disturbed by pipeline construction (Biological Opinion, 7), at least 4,448 of those acres are Indiana bat habitat (*id.* at 24). In fact, the Biological Opinion determined take of Indiana bat would occur where the project intersects the Indiana Bat Appalachian Recovery Unit, which includes *all* of West Virginia.³ If the Fish and Wildlife Service were to require route modifications as part of its new incidental take or jeopardy analyses, those modifications could be significant.

The Commission also should not assume that it knows what remedy the court will order, nor the Fish and Wildlife Service's response to it. For instance, the Commission cannot know if the Service 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. The Commission puts itself at considerable risk by assuming it, Atlantic, or

³ U.S. Fish and Wildlife Service, Indiana Bat Range/Recovery Unit Map, available at <https://www.fws.gov/midwest/endangered/images/mammals/inba/MapIBatRangeRUs9April2015.pdf> (last visited June 10, 2018).

Dominion can predict what the court will order and how that will play out on the ground.

Allowing pipeline construction to proceed outside areas Atlantic and Dominion identify as used by endangered species could dangerously lock the Commission and the developers into a pipeline route that the Fish and Wildlife Service'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. The Commission should not assume that it is going to be allowed to take species or impact habitat until the Service shows it can issue a valid biological opinion and incidental take statement for this project. As it stands today, this project cannot be completed as planned.

C. The Commission, Atlantic, and Dominion risk violation of the Endangered Species Act's prohibition on the "take" of protected species without a valid incidental take statement.

Allowing construction to proceed also risks exposing the Commission, Atlantic, and Dominion 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 the Commission 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 and Dominion seem to envision. 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 the Fish and Wildlife Service and is accomplished through consultation, the process that remains uncompleted here. 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 Fish and Wildlife Service approval as a prerequisite to the Commission's approval is a logical, commonsense approach. Undoubtedly that is why it is included in the Certificate Order. The Commission 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. The Commission'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 the Service, it cannot be completed as planned. The Commission must enforce the terms of its Certificate Order and prohibit pipeline construction until the Service approves of the pipeline route by completing Section 7 consultation and issuing a valid statement concerning incidental take.

COMMUNICATIONS

Communications and correspondence regarding this proceeding should be served upon the following individuals:

Gregory Buppert
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gbuppert@selcva.org

Patrick Hunter
Southern Environmental Law Center
48 Patton Avenue, Suite 304
Asheville, NC 28801-3321
828.258.2023
phunter@selcnc.org

CONCLUSION AND REQUESTED RELIEF

For the foregoing reasons, Petitioners respectfully request that the Commission:

1. Grant Petitioners' request for rehearing;
2. Revoke or suspend the Notice to Proceed authorizing pipeline construction in West Virginia;
3. Grant Petitioners' motion for a stay and immediately stay Atlantic and Dominion from taking any further steps under the Notice to Proceed to construct the Atlantic Coast Pipeline in West Virginia; and
4. Grant any and all other relief to which Petitioners are entitled.

Respectfully submitted,

s/ Gregory Buppert

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*On behalf of Defenders of Wildlife, Sierra
Club, and Virginia Wilderness Committee*

June 11, 2018

CERTIFICATE OF SERVICE

I hereby certify that I have on June 11, 2018, caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

s/ Gregory Buppert
Gregory Buppert
Southern Environmental Law Center

On behalf of Defenders of Wildlife, Sierra Club, and Virginia Wilderness Committee

Document Content(s)

Defenders of Wildlife et al. Request for Rehearing.PDF.....1-17

EXHIBIT 7

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

OFFICE OF ENERGY PROJECTS

In Reply Refer To:

OEP/DG2E/Gas Branch 4
Atlantic Coast Pipeline, LLC
Atlantic Coast Pipeline
Dominion Energy Transmission, Inc.
Supply Header Project
Docket Nos. CP15-554-000,
CP15-554-001, and CP15-555-000

June 25, 2018

Mr. Matthew R. Bley
Director Gas Transmission Certificates
Dominion Energy Transmission, Inc.
707 East Main Street
Richmond, VA 23219

Re: Notice to Proceed with Construction and Approval of Variances

Dear Mr. Bley:

I grant Atlantic Coast Pipeline, LLC's (Atlantic) and Dominion Energy Transmission, Inc.'s (DETI) requests to commence the following work in West Virginia:

- Supply Header Project (SHP) – construction of an additional 336 feet of right-of-way at approximate station number 1306+64 adjacent to previously authorized construction spreads and as described in your May 15, 2018 request;
- Atlantic Coast Pipeline (ACP) – construction of the 14 of right-of-way locations as described in your June 13, 2018 and June 22, 2018 supplement to your April 13, 2018 request totaling approximately 0.5 mile, clarifying the location of construction areas by stationing/feature adjacent to previously authorized construction spreads;
- SHP – construction of the Mockingbird Hill Compressor Station in Wetzel County as described in your June 15, 2018 request which was previously approved for site-clearing on March 15, 2018; and
- ACP – development and use of CY Spr 02-A in Randolph County as described in your June 14, 2018 request which does not require cutting of trees.

Additionally, I grant Atlantic and DETI's June 14, 2018 variance request to utilize previously graded Contractor Yard (CY) 1-1 (Meadowbrook Yard) in Harrison County, West Virginia and Pipe Yard (PY) 3A in Pocahontas County, West Virginia that does not require cutting of trees.

In considering this limited notice to proceed and variance approval, we have reviewed Atlantic's and DETI's Implementation Plan and supplements, as referenced above. Based on our review, Atlantic and DETI have provided the necessary information to meet the environmental conditions of the Commission's October 13, 2017 Order Issuing Certificates (Order) as it relates to the requested work at these locations. Atlantic and DETI have received all federal authorizations applicable for the work activities requested.

I remind you that Atlantic and DETI must comply with all applicable terms and conditions of the Order, as well as the conservation measures identified in other agency authorizations required by federal law, and any required state or local permits. If you have any questions regarding this authorization, please contact me at 202-502-6287.

Sincerely,

Kevin Bowman, Project Manager
Division of Gas – Environment
and Engineering

cc: Docket Nos. CP15-554-000, CP15-554-001, and CP15-555-000

Document Content(s)

CP 15-554 CP 15-555 Notice to Proceed 6_25_2018_.PDF.....1-2

EXHIBIT 8

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

OFFICE OF ENERGY PROJECTS

In Reply Refer To:

OEP/DG2E/Gas Branch 4
Atlantic Coast Pipeline, LLC
Atlantic Coast Pipeline Project
Dominion Energy Transmission, Inc.
Supply Header Project
Docket Nos. CP15-554-000,
CP15-554-001, and CP15-555-000

June 1, 2018

Cindy Schulz, Field Supervisor
U.S. Fish and Wildlife Service; Virginia Ecological Services
Virginia Field Office
6669 Short Lane
Gloucester, VA 23061

Re: Incidental Take Statement Vacatur and FWS Project #s 05E2VA00-2016-F-1219; 05E2WV00-2014-F-0832; 05E2PA00-2016-TA-0960; and 04EN2000-2017-I-0738

Dear Ms. Schulz:

On May 15, 2018, the U.S. Court of Appeals for the Fourth Circuit issued an order vacating the U.S. Fish and Wildlife Service's (FWS) Incidental Take Statement included within the FWS' October 17, 2017 biological opinion for the Atlantic Coast Pipeline and Supply Header Projects. Accordingly, on May 21, the FWS requested supplemental information from the FERC in anticipation of revising the Incidental Take Statement. We hereby provide the requested information below and in the attachments.

Request #1: A detailed description of any modifications to the proposed action made since the issuance of the Federal Energy Regulatory Commission's July 2017 Atlantic Coast Pipeline and Supply Header Project Final Environmental Impact Statement.

FERC Response: Modifications to the proposed action since the final environmental impact statement fall into two categories. The first are changes requested by the applicants in their respective implementation plans and were incorporated into revised alignment sheets depicting these changes. These are primarily minor alignment shifts, additions, or deletions in temporary additional workspaces. We are providing the revised alignment sheets along with a separate table that describes these changes along with a unique corresponding "change ID." The second category of changes are variances approved by the FERC during construction. These have primarily consisted of

performance-based measures identified in the field, but also for use of additional contractor storage yards and parking areas. We are electronically providing a tracking table detailing these changes along with the corresponding FERC approvals for these variances.

Request #2: A summary of any changes or modifications to the various construction and restoration plans listed in table 2.3.1-1 of the Federal Energy Regulatory Commission's July 2017 Atlantic Coast Pipeline and Supply Header Project Final Environmental Impact Statement.

FERC Response: Atlantic Coast Pipeline LLC has made several minor modifications to some of the restoration plans listed in table 2.3.1-1 of the final environmental impact statement to address agency or resource management concerns. A detailed tabular list of these changes is included as attachment "Item 2."

Request# 3: Listed species survey results/reports completed since October 16, 2017.

FERC Response: Various species surveys and habitat assessments have been completed since October 16, 2017. A comprehensive table is provided below as attachment "Item 3." Due to the voluminous nature of survey reports, these will be provided directly to FWS staff.

Request #4: A detailed description of any portion of the referenced action (as described in the Federal Energy Regulatory Commission's July 2017 Atlantic Coast Pipeline and Supply Header Project Final Environmental Impact Statement) completed or partially completed. For partially completed actions, provide a description of what portion of the action has been completed and is yet to be completed. Include a map delineating each area described.

FERC Response: Various activity associated with the Atlantic Coast Pipeline and Supply Header Project aboveground facilities has begun. To date, FERC has authorized mainline pipeline construction activity associated with the Supply Header Project, and on Spreads 1-1, 2-1, 2A, and 3A of the Atlantic Coast Pipeline. Additionally, tree-felling activities by hand commenced on all 2018 construction spreads. A detailed depiction of these locations is provided in the enclosed attachment "Item 4" for both the Supply Header Project and the Atlantic Coast Pipeline. In addition to the pipeline construction segments, activity has begun at aboveground facilities as follows:

Compressor Station 1 (Marts) & Kincheloe M&R

Tree felling is complete.

Erosion & Sediment Controls are installed.

Felled trees are being removed from site or chipped.

Existing structures have been removed.

Site grading is ongoing.

Compressor Station 2 (Buckingham)

No activity to date.

Compressor Station 3 (Northampton)

Tree felling is complete.

Erosion and Sediment Controls are installed.

Site grading is ongoing.

Smithfield M&R

Tree felling is complete.

Erosion and Sediment Controls are installed.

Site grading is complete.

Foundations are being installed.

Pipe welding and installation is ongoing.

Burch Ridge Compressor Station

No activity to date.

Mockingbird Hill Compressor Station

Trees felled/cleared. Site grading commenced.

Crayne Compressor Station

Full construction commenced.

JB Tonkin Compressor Station

Trees felled/cleared. Site grading commenced.

Request #5: A detailed description of completed or partially completed Terms and Conditions included in the October 16, 2017 Opinion. For partially completed Terms and Conditions, provide a description of what portion of the Terms and Condition has been completed and is yet to be completed. Include a map delineating each area described, as appropriate.

FERC Response: Atlantic Coast Pipeline LLC has fulfilled and partially fulfilled various Terms and Conditions as they relate to Roanoke Logperch, Clubshell, Madison Cave Isopod and Indiana Bat. A detailed description is provided below in attachment "Item 5."

Due to the voluminous nature of certain materials associated with requests #1, #2, and #4, we are providing maps and tables directly to FWS staff in electronic copy only. If you have any questions, please contact Kevin Bowman at 202-502-6287.

Sincerely,

Dave Swearingen
Chief, Gas Branch 4
Division of Gas – Environment
and Engineering

Attachments (4)

cc: Docket Nos. CP15-554-000, CP15-554-001, and CP15-555-000

U.S. Fish and Wildlife Service

Response to Information Request Dated May 21, 2018

Item 2

**Changes or Modifications to Atlantic Coast Pipeline and Supply Header Project
Construction and Restoration Plans since the July 2017 Final Environmental Impact
Statement**

Updates to Construction, Restoration, and Mitigation Plans Listed in Table 2.3.1-1 of the Final Environmental Impact Statement for the Atlantic Coast Pipeline and Supply Header Project	
Plan Name	Post-FEIS Modifications
<i>Upland Erosion Control, Revegetation and Maintenance Plan</i>	None
<i>Wetland and Waterbody Construction and Mitigation Procedures</i>	None
<i>Atlantic's and DETI's Proposed Modifications to the FERC Plan and Procedures</i>	None
<i>Restoration and Rehabilitation Plan</i>	Minor revisions to incorporate project changes and address agency comments, including the following: additions and updates to seed mix prescriptions and best management practices; the addition of restoration commitments and seed mix prescriptions relative to site-specific areas, such as National Forest Lands, Seneca State Forest, the Appalachian National Scenic Trail, Piney Mountain, and Stanley Slough; the addition of applicable commitments from the <i>Non-Native Invasive Plant Species Management Plan</i> ; and minor text updates and edits. The current version of the plan was filed with FERC on March 1, 2018 (FERC Accession Number 20180305-5034).
<i>Construction, Operation, and Maintenance Plan</i>	Revisions to incorporate project changes and address comments from USFS staff, including the following: additional discussion of the purpose and need for the COM Plan; minor revisions throughout the plan to incorporate the results of environmental, biological, or cultural resources field surveys; additional description of construction and restoration methods and use of access roads on USSFS lands; updates to agency contact information; additional discussion of construction and restoration best management practices in steep slope areas, including a description of Atlantic's Best-in-Class program for construction activities in mountainous terrain; additional discussion of erosion and sediment controls; additional discussion of post-construction monitoring; and minor text edits throughout. The current version of the COM Plan was filed with FERC on October 27, 2017 (FERC Accession Number 20171027-5240). Section 5 of the COM Plan (Fire Prevention and Suppression) was filed on January 26, 2018 (FERC Accession Number 20180126-5073).
<i>Horizontal Directional Drill Drilling Fluid Monitoring, Operations and Contingency Plan</i>	None
<i>Contingency Plan for the Proposed Crossing of the Appalachian National Scenic Trail and Blue Ridge Parkway</i>	None
<i>Site-Specific HDD Crossing Plans</i>	None, with the exception of an updated site-specific plan for the Cape Fear River HDD. An update to this plan, incorporating minor changes in the HDD design, was filed with FERC on May 14, 2018 (FERC Accession Number 20180514-6108).

Updates to Construction, Restoration, and Mitigation Plans Listed in Table 2.3.1-1 of the Final Environmental Impact Statement for the Atlantic Coast Pipeline and Supply Header Project	
Plan Name	Post-FEIS Modifications
<i>Karst Terrain Assessment, Construction, Monitoring, and Mitigation Plan</i>	Minor revisions based on the results of field surveys and agency consultations, including the following: updates and additions to definitions of key terms; the addition of background information on acid-forming bedrock; updates regarding field survey methods; additional information regarding the electrical resistivity survey to be completed in karst areas during the construction phase of the project; updates and additions to the description of monitoring methodologies for karst features during construction; and updates and additions to the description of mitigation measures for avoiding impacts to the karst environment. The current version of the plan was filed with FERC on April 19, 2018 (FERC Accession Number 20180419-5261).
<i>Residential Construction Plans</i>	Updated site-specific drawings to incorporate project changes (e.g., route variations and adjustments to construction workspace). Updates for ACP were filed on February 23, 2018; April 19, 2018 (for 2018 construction spreads in West Virginia), and May 14, 2018 (for 2018 construction spreads in North Carolina) (FERC Accession Numbers 20180223-5159, 20180419-5079, and 20180514-6108, respectively). Updates for SHP for 2018 construction spreads were filed on March 9, 2018 (FERC Accession Number 20180309-5141).
<i>Site-Specific Crossing Plan for the Greenbrier Rail Trail</i>	None
<i>Site-Specific Crossing Plan for the Allegheny Trail</i>	None
<i>Site-Specific Crossing Plan for the North Bend Rail Trail</i>	None
<i>Spill Prevention, Control, and Countermeasures Plan</i>	None
<i>Timber Removal Plan</i>	An update to this plan containing proposed changes in time of year restrictions for tree felling was filed with FERC on March 16, 2018 (FERC Accession Number 20180316-5008); however, the update to the plan was not approved by FERC. The version of the plan included with the FEIS remains in effect.
<i>Stormwater Pollution Prevention Plan</i>	None for Virginia. Updates to the erosion and sediment control drawings incorporating project changes and addressing agency comments for West Virginia and North Carolina were provided to the applicable state agencies (i.e., WVDEQ and NCDEQ). These revisions are currently under review and have not been filed with FERC.

Updates to Construction, Restoration, and Mitigation Plans Listed in Table 2.3.1-1 of the Final Environmental Impact Statement for the Atlantic Coast Pipeline and Supply Header Project	
Plan Name	Post-FEIS Modifications
<i>Contaminated Media Plan</i>	Minor revisions to incorporate route changes and address comments from the VDEQ, including the following: the addition of a comprehensive list of sources consulted to identify contaminated media sites; updates to the list of known contaminated sites in the vicinity of the project area; additional information regarding the purpose and scope of training for Environmental Inspectors in the implementation of the plan; updates to agency phone numbers; the inclusion of information on the Borden Smith Douglass Site, including the Site Operations Plan; and other minor text edits. The current version of the plan was filed with FERC on August 25, 2018 (FERC Accession Number 20170825-5201).
<i>Traffic and Transportation Management Plan</i>	No updates to this plan, but a supplemental <i>Haul Plan</i> for ACP, depicting the haul routes to be used during construction, was filed with FERC on December 1, 2017 (FERC Accession Number 20171201-5302).
<i>Non-Native Invasive Plant Species Management Plan</i>	Minor revisions to incorporate project changes and address agency comments, including the following: additional discussion of the use of herbicides, including restrictions on herbicide use in environmentally sensitive areas; minor revisions throughout to incorporate the results of field surveys; the addition of a table identifying locations of vehicle wash stations; and minor text edits.
<i>Blasting Plan</i>	None
<i>Slope Stability Policy and Procedure</i>	None
<i>Winter Construction Plan</i>	None
<i>Plans for Unanticipated Discovery of Historic Properties or Human Remains During Construction (ACP – West Virginia, Virginia, and North Carolina; and SHP – West Virginia and Pennsylvania)</i>	Added or updated contact information for Atlantic and DETI staff, including Environmental Inspectors. The current versions of the plans were filed with FERC on January 9, 2018 (FERC Accession Number 20181010-5019).
<i>Unanticipated Discoveries Plans for Cultural Resources and Human Remains Policy (MNF and GWNF)</i>	None
<i>Migratory Bird Plan</i>	<p>A September 2017 update was filed with FERC on October 17, 2017 (FERC Accession Number 20171018-5002). The update included recommendations from the WVDNR, VDGIF, and NCWRC and added the crossings of important bird areas.</p> <p>An additional update to this plan containing proposed changes in time of year restrictions for tree felling was filed on March 16, 2018 (FERC Accession Number 20180316-5008). However, the update to the plan was not approved by FERC. The September 2017 Migratory Bird plan remains in effect.</p>

Updates to Construction, Restoration, and Mitigation Plans Listed in Table 2.3.1-1 of the Final Environmental Impact Statement for the Atlantic Coast Pipeline and Supply Header Project	
Plan Name	Post-FEIS Modifications
<i>Fire Prevention and Suppression Plan</i>	Updates to the section on firefighting tools and minor text edits. The current version was filed with FERC on January 26, 2018 (FERC Accession Number 20180126-5073).
<i>Open Burning Plan</i>	None
<i>Fugitive Dust Control and Mitigation Plan</i>	None
<i>Protected Snake Conservation Plan</i>	None, but an additional, site-specific plan for West Virginia addressing comments from the West Virginia Division of Natural Resources was filed with FERC on August 11, 2017 (FERC Accession Number 20170811-5089).
<i>Virginia Fish Relocation Plan</i>	Minor revision to address agency comments, including the addition of a discussion of reporting requirements and response procedures in the event that aquatic invasive species are identified during relocation surveys. The current version was filed on September 22, 2017 (FERC Accession Number 20170922-5153).
<i>North Carolina Revised Fish and Other Aquatic Taxa Collection and Relocation Protocol for Instream Construction Activities</i>	Minor revision to address agency comments, including the addition of a discussion of reporting requirements and response procedures in the event that aquatic invasive species are identified during relocation surveys. The current version was filed on September 22, 2017 (FERC Accession Number 20170922-5153).

U.S. Fish and Wildlife Service

Response to Information Request Dated May 21, 2018

Item 3

Listed Species Surveys Results and Reports Completed since October 16, 2017

Threatened and Endangered Species Reports and Survey Results Completed For Atlantic Coast Pipeline and Supply Header Project Since October 16, 2017	
Survey Report	Summary
<i>Virginia Segment Protected Bat Species Habitat Assessment Report Fall 2017</i>	The habitat report summarized additional survey effort regarding hibernacula surveys, including Phase 1 and Phase 2 survey results. This report included any habitat survey efforts conducted between April 30, 2017 and September 30, 2017. A Phase 1 survey was conducted at one site and a subsequent Phase 2 survey was conducted in Fall 2017.
<i>West Virginia Segment Protected Bat Species Habitat Assessment Report Fall 2017</i>	The habitat report summarized additional survey effort regarding potential habitat surveys, which included potential roost tree mapping and hibernacula surveys. This report included any habitat survey efforts conducted between April 30, 2017 and September 30, 2017. Potential roost tree surveys identified 11 potential roost trees within newly surveyed areas. Hibernacula survey efforts included Phase 1 surveys at a total of 26 potential sites and Phase 2 surveys at 19 suitable sites. Phase 2 survey efforts in 2017 did not find any occupied sites for protected species.
<i>Habitat Assessments Conducted For Roanoke Logperch (Percina Rex) Along the Proposed Atlantic Coast Pipeline in Virginia, Revised</i>	This habitat assessment summarizes Roanoke logperch habitat assessments a survey results performed between 2015 & 2017. Cumulatively, 83 proposed stream crossings (both pipeline and access roads) are contained within the Nottoway Subbasin (Figure 2). Of these, only two crossings of the Nottoway River were identified as having potential to support populations of Roanoke logperch according to the Lahey and Angermeier (2007) model. In addition to the Nottoway River crossings, eight other streams were identified as suitable habitat for the Roanoke logperch based on the VDGIF Wildlife Action Plan model.
<i>Revised 2017 Freshwater Mussel (Unionidae) Site Assessments and Surveys for the Proposed Atlantic Coast Pipeline in Virginia</i>	This report summarizes freshwater mussel survey efforts in Virginia through October 2017. Twenty-seven stream crossings were assessed or surveyed in Virginia in 2017 as of 11 October 2017, and nine of these crossings yielded live and/or deadshell material and warrant relocations prior to construction.
<i>West Virginia Segment Protected Bat Species Habitat Assessment Report Winter 2017</i>	The habitat report summarized additional survey effort regarding potential habitat surveys, which included potential roost tree mapping conducted between September 30, 2017 and December 31, 2017. Potential roost tree surveys did not identify any new potential roost trees (newly surveyed areas include a total of 13.1 acres).
<i>SHP West Virginia Segment Protected Bat Species Habitat Assessment Report Winter 2017</i>	The habitat report summarized additional survey effort regarding potential habitat surveys, which included potential roost tree mapping and hibernacula surveys. This report included any habitat survey efforts conducted between April 30, 2017 and September 30, 2017. Potential roost tree surveys identified 8 potential roost trees within newly surveyed areas. Hibernacula survey efforts included Phase 1 surveys at one site. No suitable sites were identified and no Phase 2 surveys were needed on SHP.

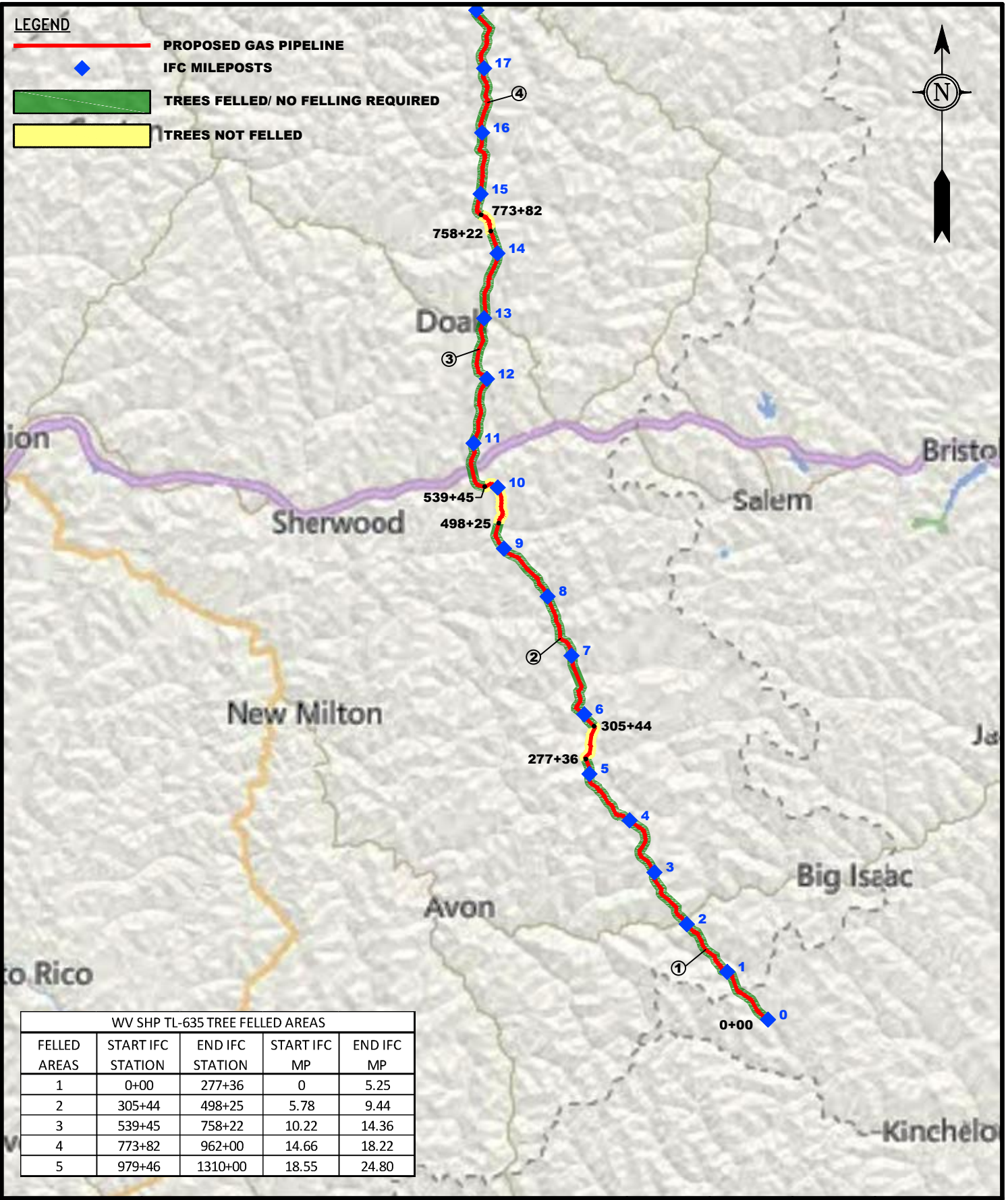
Threatened and Endangered Species Reports and Survey Results Completed For Atlantic Coast Pipeline and Supply Header Project Since October 16, 2017	
Survey Report	Summary
<i>SHP Allegheny Woodrat and Timber Rattlesnake Survey Report</i>	This survey report summarizes field surveys conducted between May 2016 and October 2017 in Lewis Wetzel Wildlife Management Area. No Allegheny woodrats or evidence of use by Allegheny woodrats were found within the vicinity of the study corridor or access roads during the 2016 and 2017 field surveys. Five timber rattlesnakes, along with evidence of use by timber rattlesnakes, were observed within or near proposed access roads.
<i>SHP West Virginia Botanical Survey Report</i>	This report summarizes cumulative results of botanical survey efforts within SHP through January 25, 2018
<i>West Virginia Segment Protected Bat Species Habitat Assessment Report Spring 2018</i>	The habitat report summarized additional survey effort regarding potential habitat surveys, which included potential roost tree mapping and Phase 1 surveys conducted between January 1, 2018 and April 1, 2018. Potential roost tree surveys identified 4 potential roost trees within newly surveyed areas. Hibernacula survey efforts included Phase 1 surveys at two potential sites; both were found unsuitable and no Phase 2 surveys are required.
<i>Revised Rare, Threatened, and Endangered Aquatic Species Studies for the Atlantic Coast Pipeline in North Carolina</i>	This report describes the habitat assessment and survey results that occurred between 2015 and 2018 for freshwater mussels, Carolina madtom, Neuse River waterdog, Chowanoke crayfish, and North Carolina spiny crayfish.
<i>2018 Neuse River Waterdog (Necturus lewisi) surveys for the Atlantic Coast Pipeline in North Carolina</i>	This report summarizes January 2018 trapping efforts at Millstone Creek and Jacket Swamp in North Carolina. No Neuse River waterdogs were yielded during trapping.
<i>2017 West Virginia Botanical Survey Report</i>	This report provides cumulative survey results for plants in West Virginia through January 12, 2018.



U.S. Fish and Wildlife Service

Response to Information Request Dated May 21, 2018

Item 4

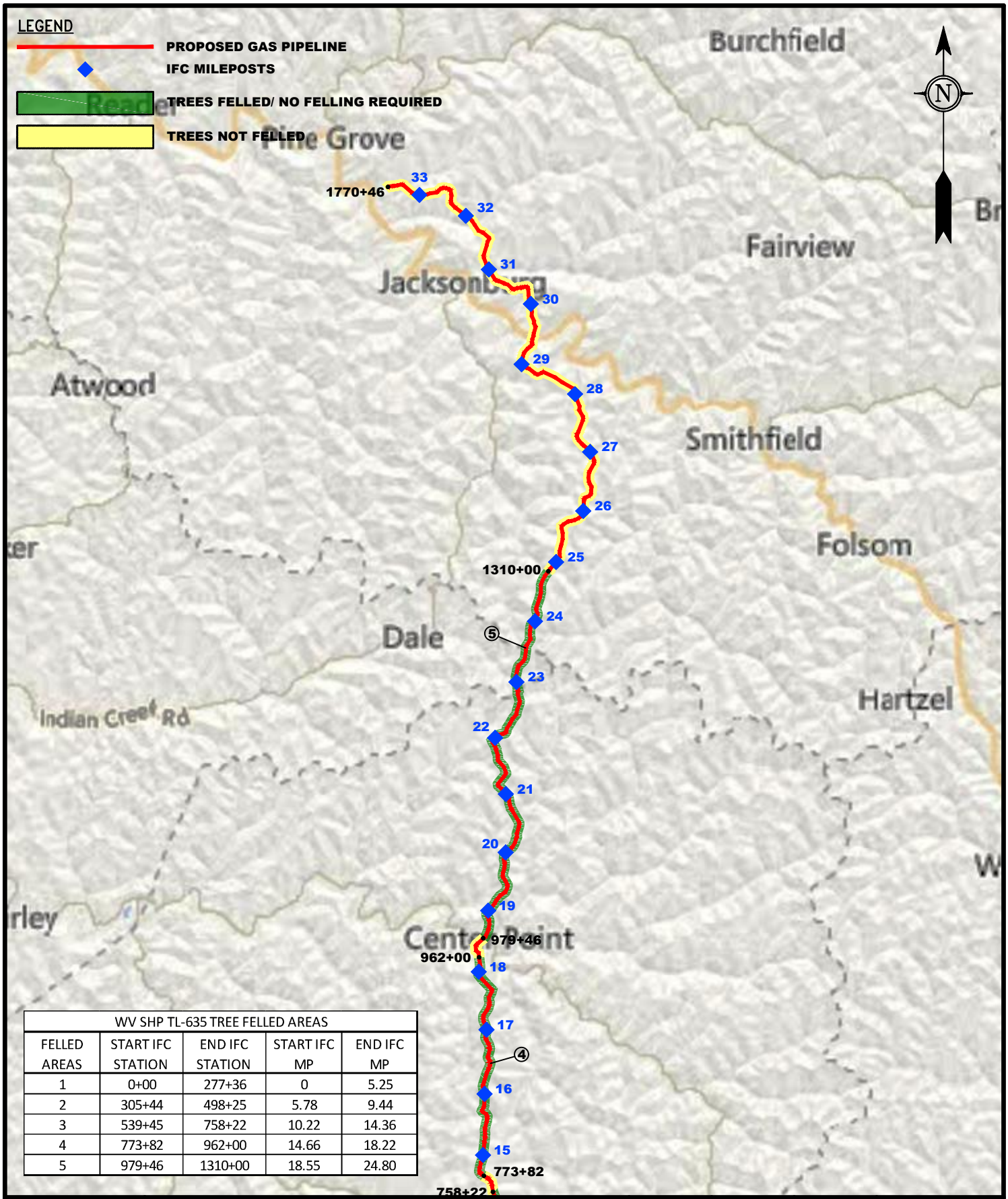
Project Mapping of Tree-Felled and Non Tree-Felled Areas



 gai consultants <small>SOUTHPOINTE OFFICE 6000 TOWN CENTER BLVD. SUITE 300 EAST CLARKSBURG, PA 15317 724-673-3545</small>	SUPPLY HEADER PROJECT WEST VIRGINIA TL-635 TREE FELLING ACTIVITY MAP	DWN. <u>FortnCJ</u> CHKD. <u>MarkeST</u> APPD. <u>TysonNE</u> DATE <u>5/29/18</u>	SCALE: 1"=10000'	
	DOMINION ENERGY TRANSMISSION, INC. 445 W. MAIN STREET CLARKSBURG, WEST VIRGINIA 26301	PROJECT NO./DASH NO. <u>141330.01</u> DRAWING NO. <u>1 OF 2</u>		TASK NO. <u>05</u>
	© 2018 GAI Consultants, Inc.			

LEGEND

- PROPOSED GAS PIPELINE
- ◆ IFC MILEPOSTS
- TREES FELLED/ NO FELLING REQUIRED
- TREES NOT FELLED



WV SHP TL-635 TREE FELLED AREAS

FELLED AREAS	START IFC STATION	END IFC STATION	START IFC MP	END IFC MP
1	0+00	277+36	0	5.25
2	305+44	498+25	5.78	9.44
3	539+45	758+22	10.22	14.36
4	773+82	962+00	14.66	18.22
5	979+46	1310+00	18.55	24.80



gai consultants
SOUTHPOINTE OFFICE
6000 TOWN CENTER BLVD.
SUITE 300 EAST
CLARKSBURG, PA 15317
724-673-3545

SUPPLY HEADER PROJECT

WEST VIRGINIA TL-635
TREE FELLING ACTIVITY MAP

DOMINION ENERGY TRANSMISSION, INC.

445 W. MAIN STREET
CLARKSBURG, WEST VIRGINIA 26301

DWN.
FortnCJ

CHKD.
MarkeST

APPD.
TysonNE

DATE
5/29/18

SCALE: 1"=10000'

TASK NO. 05

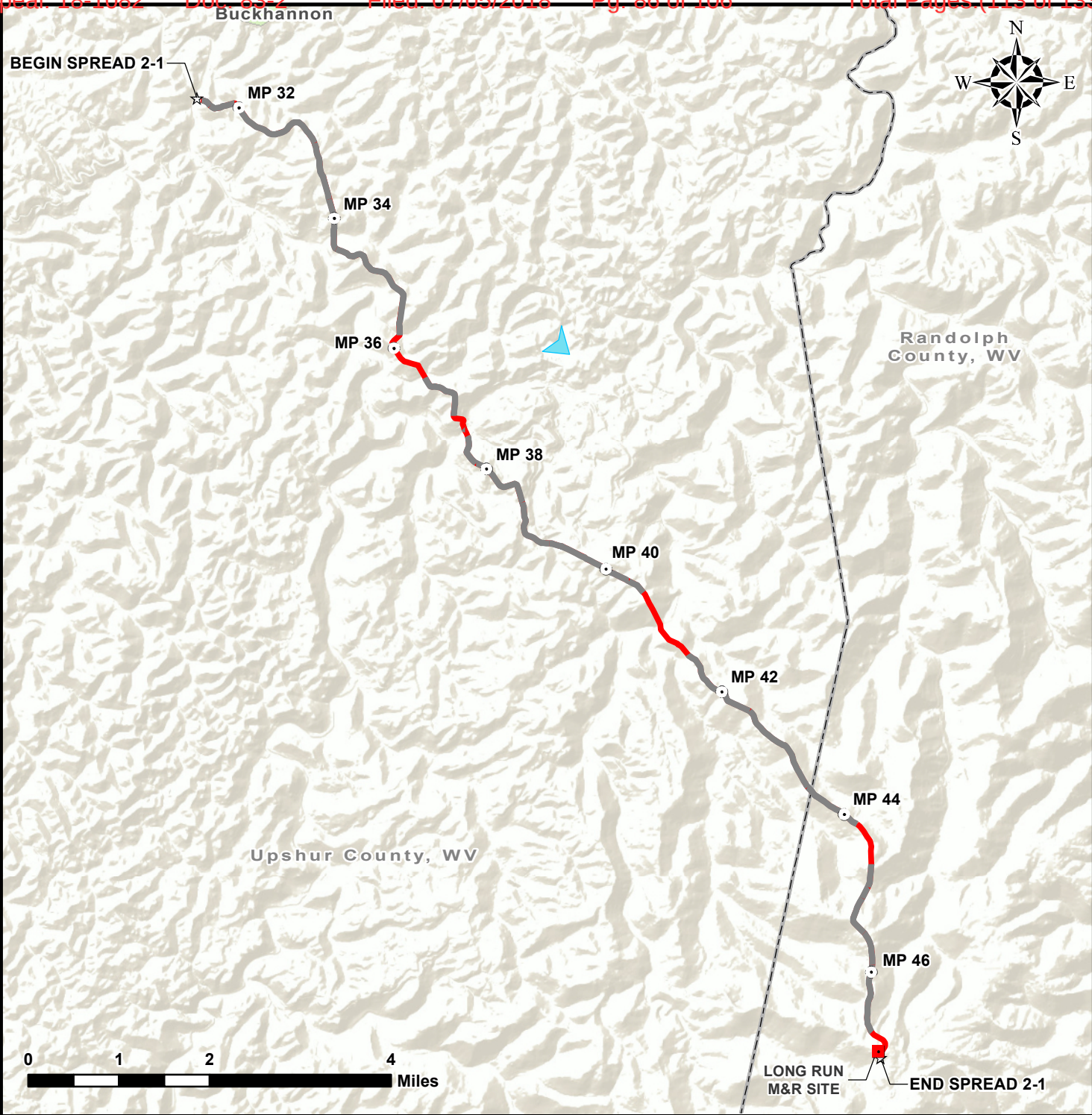
PROJECT NO./DASH NO. 141330.01

DRAWING NO. 2 OF 2

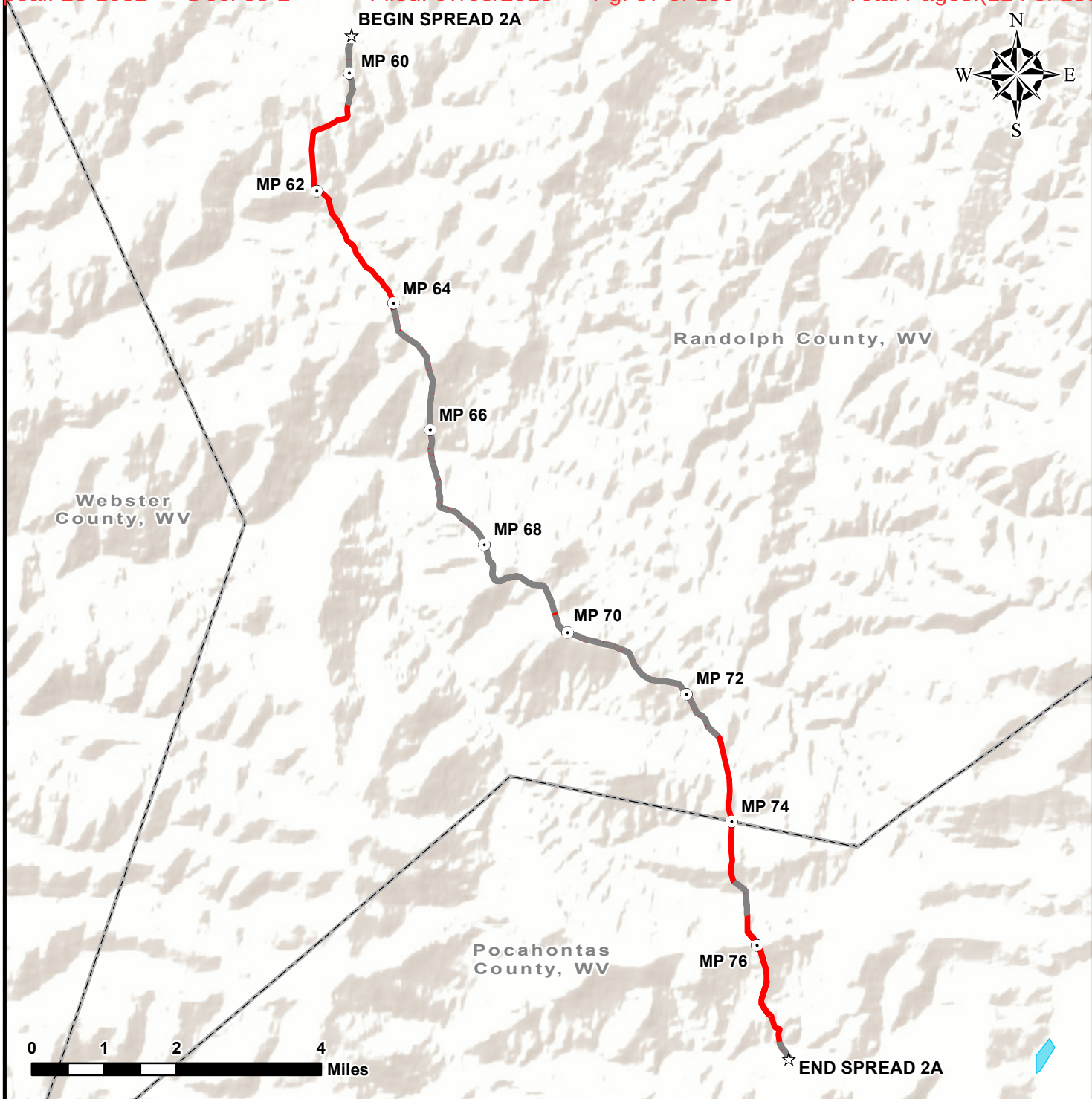


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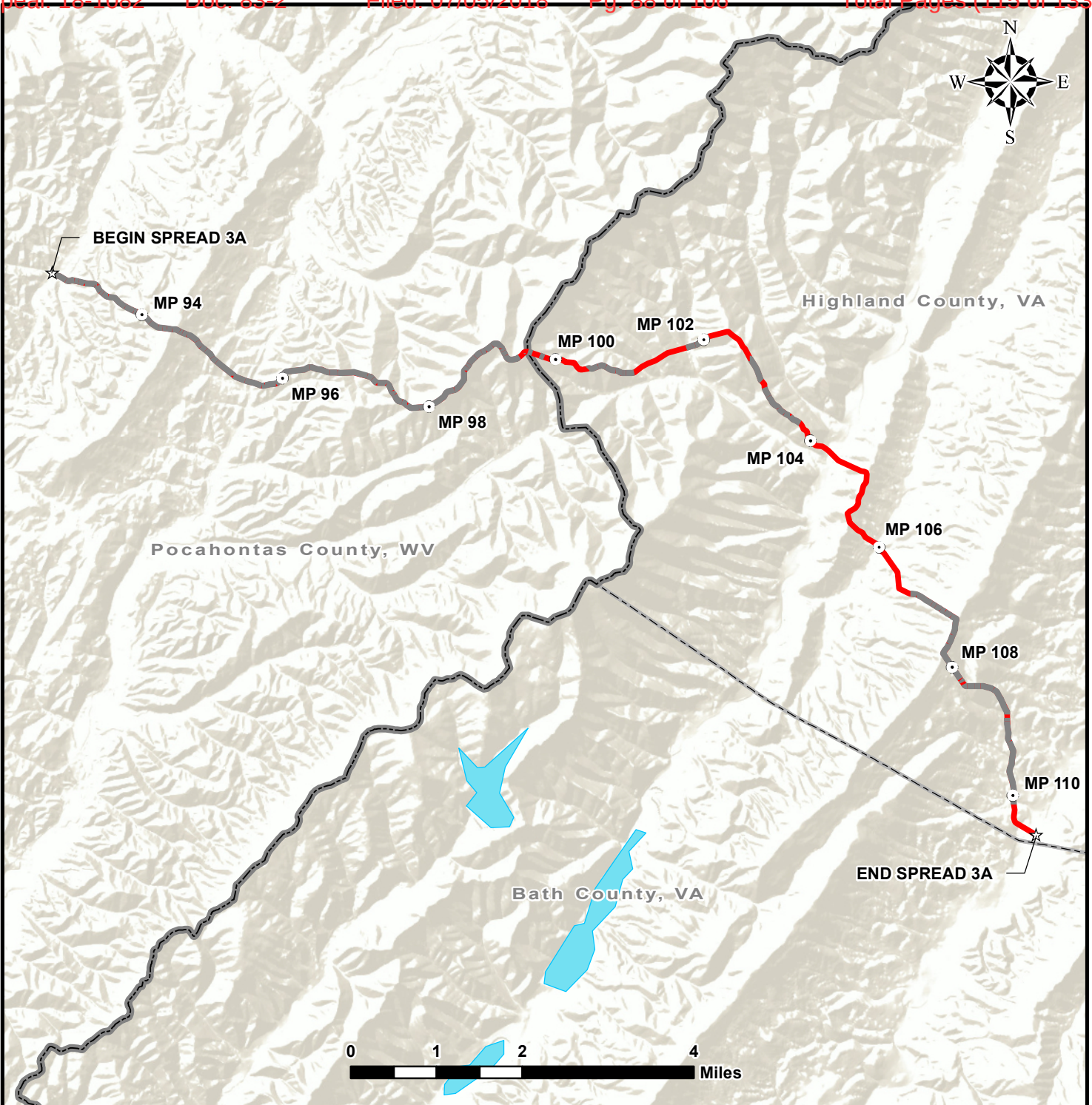




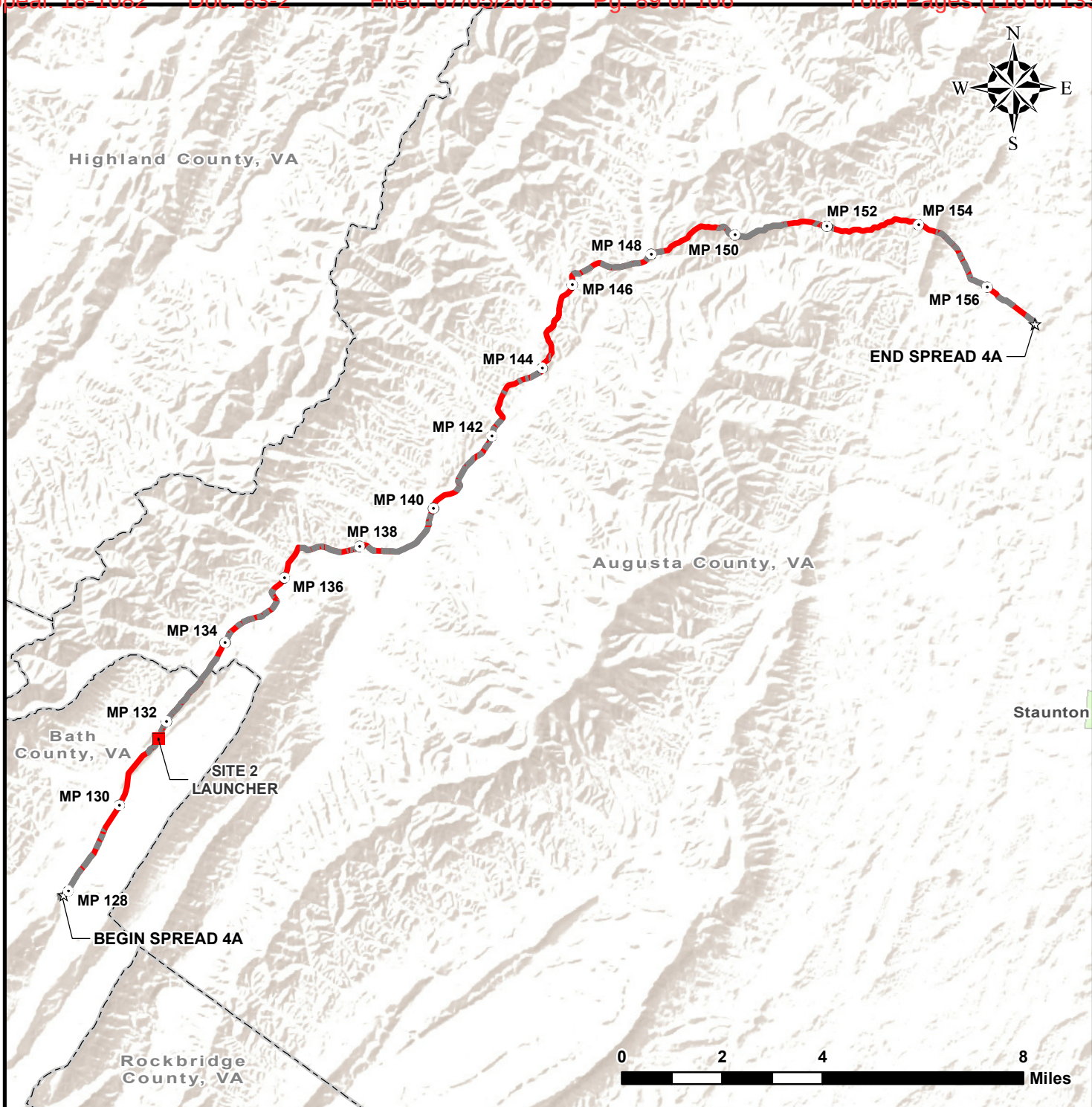
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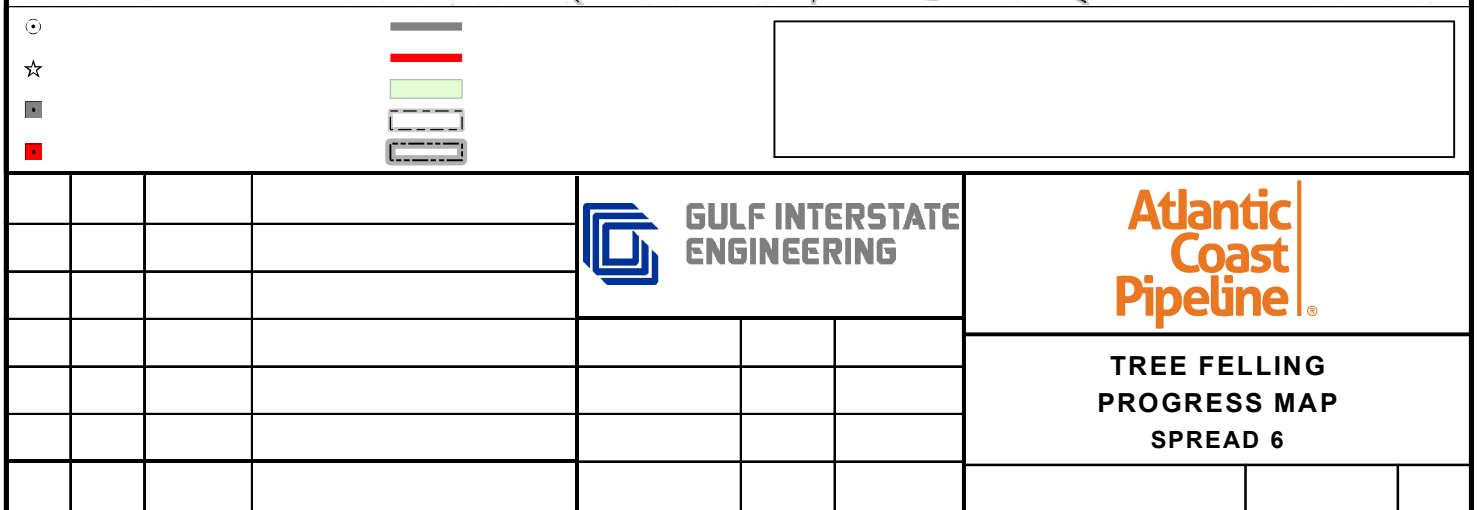
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							TREE FELLING PROGRESS MAP SPREAD 2A		

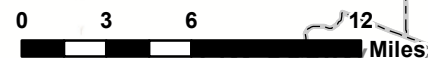


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<p>TREE FELLING PROGRESS MAP SPREAD 3A</p>																											



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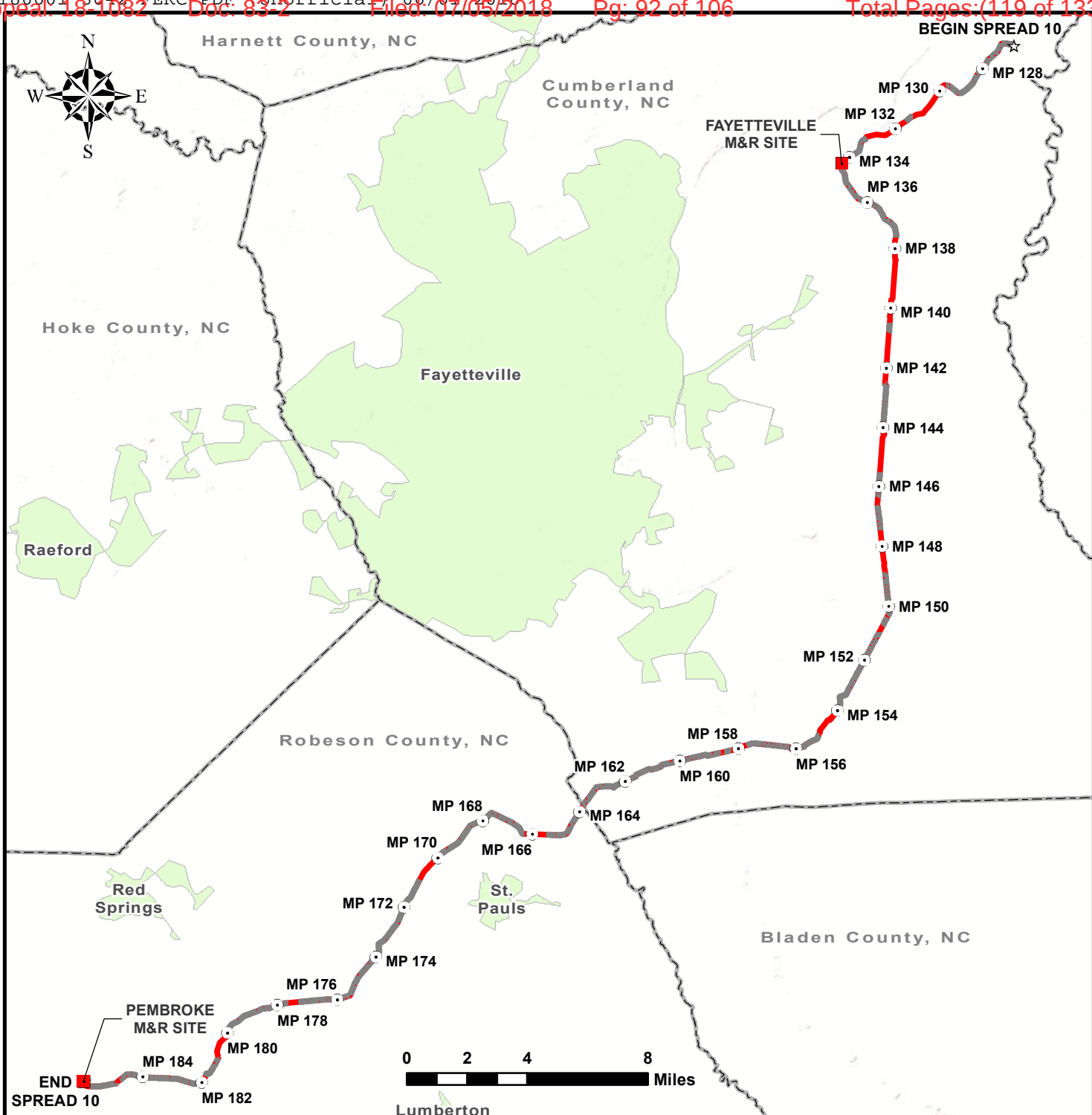




**GULF INTERSTATE
ENGINEERING**



**Atlantic
Coast
Pipeline**®

**TREE FELLING
PROGRESS MAP
SPREAD 8**



						TREE FELLING PROGRESS MAP SPREAD 10	



				 GULF INTERSTATE ENGINEERING			
					TREE FELLING PROGRESS MAP SPREAD 11		

U.S. Fish and Wildlife Service

Response to Information Request Dated May 21, 2018

Item 5

**Terms and Conditions from the October 16, 2017 Biological Opinion Complete or Partially
Completed by the Atlantic Coast Pipeline and Supply Header Project**

As of May 15, 2018, Atlantic Coast Pipeline LLC. (Atlantic) has completed or partially completed the following Terms and Conditions from the October 16, 2017 Biological Opinion (BO):

Roanoke Logperch

Condition 1: Prior to initiation of on-site work, notify all prospective employees, operators, and contractors about the presence and biology of the RLP, special provisions necessary to protect the RLP, activities that may affect the RLP, and ways to avoid and minimize these effects. This information can be obtained by reading RLP-related information in this Opinion or a fact sheet containing this information can be created and provided by FERC or the applicant.

Atlantic has fulfilled Condition 1 of the Roanoke Logperch Terms and Conditions. Atlantic requires all Project personnel (e.g. all prospective employees, operators, and contractors) to attend environmental training prior to starting work on the Project. Atlantic presents information about the Roanoke logperch (*Percina rex*) range, and biology. In addition, Atlantic educates all personnel on activities that may affect the species and mitigation measures to minimize or avoid impacts. This includes time of year restrictions. At each training session, attendance is recorded and personnel receive a hard hat sticker signifying the successful completion of the training. Hard hat stickers must be worn at all times while on the Project. Individuals who have not received the training are prohibited from working on the Project until the training is complete.

Clubshell

Condition 1: One week prior to any construction activities, search the area 130 m downstream and 455m upstream of Life's Run Bridge and collect all federally listed freshwater mussels. The search and collection will be conducted by a qualified surveyor(s) with a valid WVDNR 56 State Collecting Permit for these activities. The permitted surveyor(s) will take all federally listed mussels found to a Service-approved holding facility. These federally listed mussels will be held and propagated at the approved facility for reintroduction into the Monongahela River basin after project construction is completed. Contact the WV Field Office (WVFO) at elizabeth_stout@fws.gov regarding Service-approved facilities and reintroduction details.

Atlantic has partially fulfilled Clubshell (*Pleurobema clava*) Condition 1 Terms and Conditions. The BO stipulated that federally listed freshwater mussels must be collected within 130 meters downstream and 455 meters upstream of the of Life's Run Bridge over Hacker's Creek (Figure 1). In addition, the BO stipulated that any federally listed mussel collected should be transferred to an approved propagation facility; in this case the White Sulfur Springs National Fish Hatchery, in White Sulphur Springs, West Virginia.

Approximately 6.4 miles of ACP construction right-of-way and 11.9 miles of access roads from MP 14.7 to MP 21.1 are proposed upstream of Life's Run Bridge within the drainage area of Hacker's Creek 12-digit hydrologic unit code (HUC-12) watershed. The BO noted the potential that construction activities could adversely affect the Life's Run Bridge population of

clubshell mussels from the potential effects of sedimentation. As a result, relocation efforts should occur prior to any construction activities between the specified mileposts.

All required agency notification requirements were adhered to. On April 30, 2018, Atlantic conducted a conference call with the U.S. Fish and Wildlife Service (USFWS) and West Virginia Department of Natural Resources (WVDNR), to discuss relocation efforts. Atlantic prepared the Hacker's Creek Relocation Study Plan (Plan) and submitted it to the USFWS and WVDNR on May 2, 2018. In accordance with the Plan, Atlantic would conduct up to three independent salvage efforts with a minimum of 7-days between events at the Life's Run Bridge salvage location. All individual mussels would be transported to the White Sulphur Springs National Fish Hatchery by the USFWS.

The first relocation effort was conducted by Atlantic on May 3, 2018. Relocations were conducted by qualified surveyors holding WVDNR State Collection Permits for Clubshell relocation activities. Personnel from the USFWS and WVDNR also were on site to receive the mussels. Individuals were measured, aged, gender verified, and marked with tags provided by WVDNR. In total, 56 clubshell mussels were identified and collected during the salvage efforts. The clubshell mussels were transported to the White Sulphur Springs National Fish Hatchery. Atlantic had planned additional salvage efforts; however, precipitation in the area resulted in unfavorable stream conditions during the subsequently planned salvage events. As of May 15, 2018, Atlantic has completed only the first relocation effort. Further relocation efforts are now delayed due to the U.S Court of Appeals for the Fourth Circuit decision to vacate the Opinion's Incidental Take Statement.



Salvage Zone

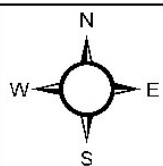


Figure 1. Clubshell mussel salvage extent on Hackers Creek in Lewis County, West Virginia.

Project No. 588

0 40 80
Meters
Base Map: WV Sheriff Association Imagery



ENVIRONMENTAL SOLUTIONS
& INNOVATIONS, INC.

Condition 2: Prior to initiation of on-site work, notify all prospective employees, operators, and contractors about the presence and biology of the clubshell, special provisions necessary to protect the clubshell, activities that may affect the clubshell, and ways to avoid and minimize these effects. This information can be obtained by reading clubshell-related information in this Opinion or a fact sheet containing this information can be created and provided by FERC or the applicant.

Atlantic has fulfilled Condition 2 of the Clubshell Terms and Conditions. Atlantic requires all Project personnel (e.g. all prospective employees, operators, and contractors) to attend training prior to starting work on the Project. Atlantic presents information about the clubshell range, and biology. In addition, Atlantic educates all personnel on activities that may affect the species and mitigation measures to minimize or avoid impacts. At each training session, attendance is recorded and personnel receive a hard hat sticker signifying the successful completion of the training. Hard hat stickers must be worn at all times while on the Project. Individuals who have not received the training are prohibited from working on the Project until training is complete.

Madison Cave Isopod

Condition 1: Prior to initiation of on-site work, notify all prospective employees, operators, and contractors about the presence and biology of the MCI, special provisions necessary to protect the MCI, activities that may affect the MCI, and ways to avoid and minimize these effects. This information can be obtained by reading MCI-related information in this Opinion or a fact sheet containing this information can be created and provided by FERC or the applicant.

Atlantic has fulfilled Condition 2 of the Madison Cave isopod Terms and Conditions. Atlantic requires all Project personnel (e.g. all prospective employees, operators, and contractors) to attend training prior to starting work on the Project. Atlantic presents information about the Madison Cave isopod range, and biology. In addition, Atlantic educates all personnel on activities that may affect the species and mitigation measures to minimize or avoid impacts. At each training session, attendance is recorded and personnel receive a hard hat sticker signifying the successful completion of the training. Hard hat stickers must be worn at all times while on the Project. Individuals who have not received training are prohibited from working on the Project.

Indiana Bat

Condition 1: 1. Prior to initiation of on-site work, notify all prospective employees, operators, and contractors about the presence and biology of the Ibat, special provisions necessary to protect the Ibat, activities that may affect the Ibat, and ways to avoid and minimize these effects. This information can be obtained by reading Ibat-related information in this Opinion or a fact sheet containing this information can be created and provided by FERC or the applicant.

Atlantic has fulfilled Condition 1 of the Indiana Bat Terms and Conditions. Atlantic requires all Project personnel (e.g. all prospective employees, operators, and contractors) to attend training prior to starting work on the Project. Atlantic presents information about the Indiana bat range, and biology. In addition, Atlantic educates all personnel on activities that may affect the species and mitigation measures to minimize or avoid impacts. At each training session, attendance is recorded and personnel receive a hard hat sticker signifying the successful completion of the training. Hard hat stickers must be worn at all time while on the Project. Individuals who have not received the training are prohibited from working on the Project until training is complete.

Document Content(s)

CP15-554 FWS Data Response with Attachments.PDF.....1-29

EXHIBIT 9



United States
Department of
Agriculture

Forest
Service

Eastern Region
Regional Office
626 East Wisconsin Avenue
Suite 800
Milwaukee, WI 53202

Southern Region
Regional Office
1720 Peachtree Road NW
Atlanta, GA 30309

File Code: 2700
Date: January 19, 2016

Ms. Leslie Hartz
Atlantic Coast Pipeline, LLC
707 East Main Street
Richmond, VA 23219

Dear Ms. Hartz:

Thank you for submitting your proposal dated November 12, 2015, for the special use of National Forest System (NFS) lands in West Virginia and Virginia for the Atlantic Coast Pipeline (ACP) Project. In accordance with the pre-application screening process described at 36 C.F.R. §251.54(e), the Forest Service has reviewed the proposal and related documents filed with the Federal Energy Regulatory Commission (FERC) under docket nos. PF15-6-000 and PF15-554-000.

We have determined that the proposed route does not meet minimum requirements of initial screening criteria found at 36 CFR 251.54(e)(1)(i) and (ii). The Land and Resource Management Plans for the Monongahela and George Washington National Forests contain standards and guidelines to protect highly sensitive resources, including Cheat Mountain salamanders, West Virginia northern flying squirrels, Cow Knob salamanders, and red spruce ecosystem restoration areas. The enclosed letter outlines specific inconsistencies with Forest Plan direction and other applicable directives that would result with the proposed route. As discussed in the Forest Service's December 11, 2015, filing with the Federal Energy Regulatory Commission and the enclosed, ACP's proposed route variations do not resolve inconsistencies with Forest Plan direction and the Cow Knob Conservation Agreement.

Therefore, alternatives must be developed to facilitate further processing of the application. Alternatives must avoid the Cheat Mountain and Cow Knob salamanders and their habitats, the West Virginia Northern Flying squirrel and its habitat, and spruce ecosystem restoration areas. These resources, and any other resources that are of such irreplaceable character that minimization and compensation measures may not be adequate or appropriate, should be avoided. The status of the species in terms of risk for loss of viability on the National Forests, consistency with protections in the Forest Plans and other directives, and the uniqueness of ecosystems such as the spruce ecosystem restoration areas must be considered in the development of alternatives.

Please provide the following information and data necessary for the Forest Service to continue with the pre-application screening process for new routes:

1. Develop and evaluate system and/or route alternatives that avoid Cheat Mountain and Back Allegheny Mountain on the Monongahela National Forest (MNF) and Shenandoah Mountain on the George Washington National Forest (GWNF). In addition, the new alternative(s) must conform with the *Conservation Agreement for the Cow Knob Salamander* (USFWS, USFS, January 25, 1994), with particular attention paid to management measure no. 2, *Protection from Take*, stating that the Cow Knob salamander must be actively protected against take; and measure no. 14, *Utility and Transportation Corridors*, stating that corridors of any size will fragment habitat and isolate populations.



Ms. Leslie Hartz

2

The pipeline must be routed around areas where Cow Knob salamander habitat is found. Please note that the Conservation Agreement was initiated to protect the species in lieu of federal listing. The Cow Knob salamander was petitioned for listing in 2012 by the Center for Biological Diversity, and review is currently underway by the U.S. Fish and Wildlife Service.

As similarly described in item 154 of FERC's Information Request of December 4, 2015, please ensure there is a comparative analysis of the new alternative(s) that utilizes current and defensible criteria and data to evaluate resource impacts, such that project effects can be compared across route alternatives, which was also stated in the Forest Service's response to FERC's regulation at 18 C.F.R. §385.2013 for authorizing agencies, filed on November 23, 2015. Criteria to analyze must include resources that are managed under each National Forest's Land and Resource Management Plan and all items that are currently being inventoried for the proposed route. Environmental information about the new alternative(s) must contain sufficient and consistent comparative environmental data such that the agency and the public can reasonably evaluate the potential environmental effects of all alternatives that would affect resources on NFS lands.

2. Because the proposed and alternative ACP routes across the George Washington National Forest hinge on successfully accomplishing horizontal directional drilling (HDD) to cross under the Appalachian National Scenic Trail and Blue Ridge Parkway, the Forest Service will need to review and evaluate the proposed contingency plan as part of the technical feasibility component of the special use pre-application screening process. In addition to the information required in FERC's information request issued December 4, 2015, the Forest Service will detail information requests in upcoming comments on final resource reports. Any special use authorization that may be issued could be conditioned to require the successful completion of HDDs prior to constructing any other spreads across the National Forests as a safeguard to assure viability of an approved route and/or contingency alternative(s).

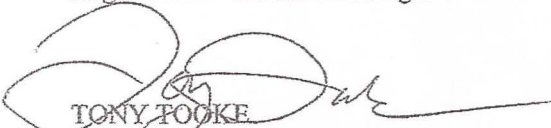
The Forest Service remains committed to cooperating with FERC and working with ACP on continued development of the project in such a way that addresses public needs, both for the growing demand for natural gas in Virginia and North Carolina, and for the sensitive resources that the Forest Service is entrusted to protect.

For questions or additional information regarding, please contact Jennifer Adams, Special Project Coordinator, at (540) 265-5114 or jenniferadams@fs.fed.us.

Sincerely,



KATHLEEN ATKINSON
Regional Forester Eastern Region



TONY TOOKE
Regional Forester Southern Region

Enclosures (2)

cc: Clyde Thompson

ENCLOSURE

**Assessment of Inconsistencies with Forest Plan Direction and Other Directives
Atlantic Coast Pipeline – Proposed Route
George Washington and Monongahela National Forests
19 January 2016**

A full assessment of the project's consistency with Forest Plan direction and other directives is ongoing. However, based on the portion of the assessment completed to date, the following inconsistencies that cannot be remedied have been identified for the proposed route.

Special Use application screening criterion i: *The proposed use is consistent with the laws, regulations, orders, and policies establishing or governing National Forest System lands, with other applicable Federal law, and with applicable State and local health and sanitation laws.*

The proposed route is not consistent with the following U.S. Department of Agriculture (USDA) regulations and Forest Service directives as they relate to the Cow Knob salamander and the West Virginia northern flying squirrel, both of which are Forest Service sensitive species:

1. *FSM2670.12 and USDA Directive, Departmental Regulation 9500-4:*
 3. *Avoid actions "which may cause a species to become threatened or endangered"*
2. *FSM2670.22 – Sensitive Species Objectives*
 1. *Develop and implement management practices to ensure that species do not become threatened or endangered because of Forest Service actions.*
3. *FSM2670.32 - Sensitive Species Policy*
 4. *Analyze, if impacts cannot be avoided, the significance of potential adverse effects on the population or its habitat within the area of concern and on the species as a whole. (The line officer, with project approval authority, makes the decision to allow or disallow impact, but the decision must not result in loss of species viability or create significant trends toward federal listing.)*

Cow Knob Salamander: The 1994 Conservation Agreement (CA) for the Cow Knob salamander (CKS) between the U.S. Fish and Wildlife Service and the Forest Service identified management measures to be carried out by the Forest Service to stabilize or enhance populations and avoid actions which may cause CKS to become threatened or endangered under the Endangered Species Act.

CA Management Measure 2, *Protection from Take*, states, "The Cow Knob salamander must be actively protected against taking and killing by humans, except for specified scientific purposes." Based on available information, the construction, operation, and maintenance of the proposed ACP route is highly likely to result in the taking of CKS.

CA Management Measure 14, *Utility and Transportation Corridors*, states, "Because corridors of any size will fragment Cow Knob salamander habitat and isolate populations on either side, new utility corridors must be sited around the SMC-SIA. When opportunities exist, utility corridors should be closed and allowed to revegetate naturally." Though the Cow Knob HDD route variation reduces the size of the ACP corridor where CKS have been found, the proposed ACP route is not sited around these areas.

Authorizing ACP's proposed route would be a Forest Service action that violates the CA, which may cause the species to become threatened or endangered. Such act is prohibited by USDA regulations and Forest Service directives and therefore would not meet the subject screening criterion (Note: In 2012, the CKS was petitioned for listing by the Center for Biological Diversity and review is currently underway by the U.S. Fish and Wildlife Service).

West Virginia northern flying squirrel: The de-listing of the WVNFS was largely predicated on the protection of large patches of suitable habitat on the Monongahela National Forest per the 5-Year review for the WVNFS (USFWS 2006); the Final Rule for Removal of the NFS from the list of Endangered Species (USFWS 2008; "*guidelines by the Monongahela National Forest (MNF) effectively abated the main threat to the squirrel ... throughout the majority of its range, by eliminating adverse impacts on all suitable habitat on the MNF...*"); and the Post-delisting Monitoring Plan for the species (USFWS 2007; "*The Monongahela National Forest contains the greatest amount of modeled WVNFS habitat and therefore bears primary responsibility for the protection, restoration, and management of the red spruce and red spruce-northern hardwood ecosystem in the central Appalachians. The Forest's 2006 Land and Resource Management Plan provides substantial long-term direction and guidance toward implementing this responsibility*").

Thus, implementation of the MNF LRMP, and its protective standards and guidelines relative to the WVNFS and its habitat, is critical to the continued recovery of the species. The proposed pipeline could not be constructed without amending the plan to weaken these standards and guidelines.

Special Use application Screening Criterion ii: *The proposed use is consistent or can be made consistent with standards and guidelines in the applicable forest land and resource management plan prepared under the National Forest Management Act and 36 CFR part 219.*

The proposed route is not consistent and cannot be made consistent with the following standards and guidelines in the Monongahela National Forest Land and Resource Management Plan (Sept. 2006, Updated 2011):

1. Standard TE59 for Cheat Mountain salamander: *Ground and vegetation-disturbing activities shall be avoided within occupied habitat and a 300-foot buffer zone around occupied habitat, unless analysis can show that the activities would not have an adverse effect on populations or habitat.*

As noted in our December 11, 2015, filing, the proposed route, as adjusted, would impact occupied Cheat Mountain salamander habitat.

2. Standard TE64 for West Virginia northern flying squirrel: *Suitable habitat shall be considered occupied. Vegetation management activities in suitable habitat shall only be conducted after consultation with USFWS, and: (a) Under an Endangered Species Act section 10 research permit to determine the effects of an activity on WVNFS or to determine activities that would contribute to the recovery of the species, or (b) To improve or maintain WVNFS or other TEP species habitat after research has demonstrated the beneficial effects of the proposed management, or (c) When project-level assessment results in a no effect or may affect, not likely to adversely affect determination, or (d) To address public safety concerns.*

As noted in our December 11, 2015, filing, the proposed project would not meet any of the exceptions to the prohibition on activities in suitable habitat for the West Virginia northern flying squirrel.

Forest Service letter to ACP_19Jan2016.PDF.....1-4