

No. 18-2090

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

DEFENDERS OF WILDLIFE, SIERRA CLUB, and THE VIRGINIA
WILDERNESS COMMITTEE,
Petitioners,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, *et al.*,
Respondents,

and

ATLANTIC COAST PIPELINE, LLC
Respondent-Intervenor.

**PETITIONERS' MOTION TO STAY FISH AND WILDLIFE SERVICE
APPROVALS**

Pursuant to Federal Rule of Appellate Procedure 18(a) and Local Rule 27(e),
Petitioners seek a stay of the Fish and Wildlife Service's ("FWS's") Biological
Opinion ("BiOp") and Incidental Take Statement ("ITS"), which allow the Atlantic
Coast Pipeline ("ACP") to harm and kill species protected by the Endangered
Species Act ("ESA"). This Court has jurisdiction under the Natural Gas Act. 15
U.S.C. § 717r(d)(1).

ACP construction adversely affects four species relevant here. Indiana bats are adversely affected by logging and construction in their habitat. FWS2-000048; FWS1-017717–017718.¹ Those activities are occurring in occupied Indiana bat habitat and in suitable but currently unoccupied habitat within the Indiana bat Appalachian Recovery Unit.² *Compare* FERC eLibrary No. 20181123-5035 (reporting tree felling in West Virginia through Nov. 16, 2018), attached as Ex. 1 *with* FWS2-001265 (showing Indiana bat habitat). A time of year restriction that had prohibited those activities in occupied habitat since April 1 was lifted on November 15, allowing tree felling to resume. FWS2-000049.

Clubshell are adversely affected by sedimentation-inducing activities in their watershed. FWS2-000044. Clubshell are located in pipeline construction spread 1. *Compare* FWS1-017923 (spread 1-1 covers mileposts 0.0–17.2) *with* FWS2-000044 (clubshell impacted by construction between mileposts 14.7-21.2). Various sedimentation-inducing activities are ongoing in spread 1-1, including “grading” and “ditching.” *See* Ex. 1.

¹ FWS incorporated into this administrative record the record from Case No. 18-1083. We note records from that case with “FWS1” and records provided separately with Case No. 18-2090 with “FWS2.” FWS also incorporated FERC Docket Nos. CP15-554, CP15-555, and CP15-556. *See* Certified List of Administrative Record, Entry 1 (ECF No. 28).

² There are four Indiana bat Recovery Units designated “to protect both core and peripheral populations.” FWS1-020764.

Rusty-patched bumble bee (“RPBB”) will be injured or killed as a result of tree felling and construction in Bath County, Virginia. FWS2-000028, -000045–46. Madison cave isopod (“MCI”) will be injured or killed as a result of pipeline and access road construction in Augusta County, Virginia. FWS2-000046–47. Tree felling was scheduled to recommence in Bath and Augusta Counties the week of November 19th. *See* Ex. 1.

Petitioners are harmed by impacts to protected species that occur as a result of FWS’s rushed, erroneous re-authorizations. An immediate stay is necessary to prevent ongoing, imminent, and irreparable harm to Petitioners’ members.

On November 9, 2018, Petitioners asked FWS to stay the effect of its BiOp pending this challenge. *See* Letter from Patrick Hunter to Paul Phifer, attached as Ex. 2. FWS declined. *See* Letter from Paul Phifer to Patrick Hunter (Nov. 16, 2018), attached as Ex. 3.

Respondents and Intervenor Atlantic Coast Pipeline, LLC (“Atlantic”) oppose this motion.

I. BACKGROUND

This is the second time FWS’s approvals for the ACP have come for review before this Court. *See* Case No. 18-1083. Twice FWS rushed its authorizations, introducing errors into its analysis, in order to accommodate Atlantic’s timeline.

FWS informed Atlantic that it needed to survey for protected species as early as January 2015. FWS1-001728. FWS reiterated its request for survey and other data in March 2017 comments to FERC. FWS1-012471. By then, “extensive conversations [were] taking place between ACP and the Secretary[of the Department of the Interior]’s office.” Email from Glenn Smith, FWS, to Christine Willis, FWS (Apr. 7, 2017), attachment 3 to Ex. 4.³ A Special Assistant to Secretary Ryan Zinke rebuked FWS staff for not providing “opportunity to review [the March 2017 comments] prior to submission” because “the Administration and Secretary Zinke are interested in projects of this nature.” Email from Virginia Johnson, Dept. of Interior, to Jim Kurth, FWS (Apr. 6, 2017), attachment 1 to Ex. 4. From then on, “there [was] a new expectation that any significant correspondence, formal or informal, relating to directions, decisions, comments, recommendations, policy, response to ACP/FERC policy or procedure questions, etc., needs to be cleared through DOI prior to releasing to ACP or FERC.” Attachment 3 to Ex. 4. Most significantly, FWS received “internal direction...that we can’t require surveys and will not make further requests for

³ FERC reinitiated ESA Section 7 consultation with FWS on August 23, 2018. FWS2-000146. Petitioners submitted comments with attachments to FWS while consultation was reopened. Petitioners’ letter was included in the administrative record, FWS2-001445, but the attachments were not. The attachments were submitted to the FERC docket, which FWS has incorporated into the administrative record. *See* FERC eLibrary No. 20180911-5098. The attachments to Petitioners’ letter are provided here as Exhibit 4.

surveys *that interfere with applicant's project schedule*...and we will not state that we have insufficient information to initiate consultation and will not delay initiation of consultation based on lack of baseline/species survey data.” Email from Glenn Smith, FWS, to Jerry Ziewitz, et al., FWS (Apr. 14, 2017) (emphasis added), attached as Ex. 5.⁴

Lacking information it had previously requested, FWS issued a BiOp and ITS on October 16, 2017 (“2017 BiOp” and “2017 ITS”). FWS1-017685. Petitioners challenged that ITS. *See* Case No. 18-1083 (ECF No. 1). FWS argued the limits set in the ITS were reasonable, in part, “because either [FWS] lacked current survey information about many of the species or ACP had not completed the necessary surveys.” *Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260, 272 (4th Cir. 2018) (“*Sierra Club*”). This Court rejected that argument and vacated the ITS. Order, Case No. 18-1082(L) (May 15, 2018) (ECF No. 82). A full opinion issued on August 6, 2018. FERC issued a stop work order halting all pipeline construction four days later. *See* FERC eLibrary No. 20180810-4011.

FWS was again under pressure to correct its analysis quickly: “[n]ow that the court's opinion has been released timelines have ramped up.” Email from Elizabeth Stout, FWS, to Casey Swecker, consultant (Aug. 15, 2018), FWS2-000839. FWS field staff compiled their proposed revisions by September 5, 2018,

⁴ Exhibit 5 was produced to Petitioners in response to a Freedom of Information Act Request.

FWS2-000140; a new BiOp and ITS issued September 11, 2018, FWS2-000005 (“2018 BiOp” and “2018 ITS”); and FERC lifted its stop work order on September 17, 2018, allowing construction to proceed. *See* FERC eLibrary No. 20180917-3025. This second round of rushed decision-making introduced new errors.

As in *Sierra Club*, Petitioners have standing to bring this challenge. Petitioners’ members have averred an interest in observing species that are the subject of FWS’s approvals. *See* Exs. 6-14. Those members are harmed by impacts to species flowing from FWS’s erroneous authorizations. *See id.* A stay will prevent irreparable injury to Petitioners’ members’ interests pending completion of the Court’s review.

II. ARGUMENT

Whether to issue a stay pending review turns on “consideration of four factors: ‘(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.’” *Nken v. Holder*, 556 U.S. 418, 434 (2009) (citation omitted). Petitioners meet all four factors.

A. Petitioners Are Likely to Succeed on the Merits

FWS's BiOp and ITS are final agency actions reviewable under the Administrative Procedure Act. *Sierra Club*, 899 F.3d at 270. The Court “shall hold unlawful and set aside agency action, findings and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A).

1. FWS Failed to Specify the Impact of Take on Indiana Bat, Producing Arbitrary Limits in the ITS

The ESA prohibits “take” of listed species.⁵ To “take” a species “means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). “Harm and harassment include the disruption of normal behavioral patterns and indirect injury caused by habitat modification.” *Sierra Club*, 899 F.3d at 269 (citations omitted).

There is a “narrow exception to the prohibition against take: when such taking is incidental to...the carrying out of an otherwise lawful activity.” *Id.* (citations and quotations omitted). “To take a species under this exception, agencies...must receive a valid [ITS] from FWS.” *Id.* Because the amount of take set by the ITS creates a “‘trigger’ that, when reached, results in an unacceptable level of incidental take,” *id.*, it is critical that FWS accurately “[s]pecific[y] the

⁵ The ESA prohibits “take” of endangered species by statute. 16 U.S.C. § 1538(a)(1)(B). FWS regulations extended that prohibition to threatened species. 50 C.F.R. § 17.31.

impact, i.e., the amount or extent, of such incidental taking on the species.” 50 C.F.R. § 402.14(i)(1)(i).

FWS’s 2017 BiOp determined that the “pipeline will adversely affect Indiana Bats by temporarily or permanently removing 4,448 acres of suitable habitat in the [Indiana bat] Recovery Unit.” *Sierra Club*, 899 F.3d at 278. Loss of that habitat was “the impact, i.e., the amount or extent, of such incidental taking on the species.” 50 C.F.R. § 402.14(i)(1)(i).

Of those 4,448 acres, 3,275.382 acres are categorized as suitable unoccupied summer habitat. *Sierra Club*, 899 F.3d at 278. Suitable unoccupied summer habitat is habitat in an Indiana bat recovery unit that appeared unoccupied at the time of summer surveying. *See* FWS1-017707. In 2017, FWS concluded that “*the majority of effects* to [Indiana bats] from tree clearing will occur in suitable unoccupied summer habitat.” FWS1-017784 (emphasis added). Clearing that habitat would cause “pregnant females [to] expend additional energy to seek alternate travel corridors,” “which could decrease pup survival,” and make bats “more vulnerable to predation, resulting in injury or death.” *Id.*

This Court vacated the 2017 ITS because “FWS knew that the pipeline will directly affect 3,275.382 acres of suitable unoccupied summer habitat...[y]et, without any explanation, the agency set the take limit for [this habitat] at half of the[] acreage[]. In other words, FWS set the take limit at half the affected bat

habitat that it knows the pipeline is going to affect.” *Sierra Club*, 899 F.3d. at 279.

The 2018 BiOp and ITS exacerbate this error. Instead of accounting for the missing half of suitable unoccupied summer habitat, FWS omitted the habitat altogether, deciding that clearing suitable unoccupied summer habitat is not likely to affect Indiana bats *at all*. See FWS2-000035 (“[E]ffects to [Indiana bats] from habitat clearing in the suitable unoccupied summer habitat category are ‘not likely to adversely affect’ and are not addressed further in this Opinion.”). What FWS previously determined would cause “the majority of effects” to Indiana bats, FWS1-017784, it now determines will have *no* adverse effect. This is the definition of capricious decision-making.

FWS provides two inadequate explanations for its about-face. First, FWS explains that “other field offices and regions of the Service” have reached a similar conclusion. FWS2-000035. But *this office* has already determined that for *this project*, clearing suitable unoccupied summer habitat will cause “*the majority of effects*” to Indiana bats. FWS1-017784 (emphasis added). “While the agency is entitled to change its view...it is obligated to explain its reasons for doing so.” *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 56 (1983). FWS offered no explanation based on the facts of *this project*; rather, it simply ignored the “majority of effects” on the species, because another FWS region apparently took a different approach after analyzing a distinct,

unidentified project.

Second, FWS asserts that clearing unoccupied suitable summer habitat “is presumed not to result in indirect effects to [Indiana bats] because survey results indicate they are not currently occupying the area.” FWS2-000035. But the 2017 BiOp explained how clearing this habitat will indirectly affect bats: “pregnant females [may] expend additional energy to seek alternate travel corridors,” “which could decrease pup survival;” fragmented habitat will make bats “more vulnerable to predation, resulting in injury or death.” FWS1-017784. FWS has offered no explanation as to why those conclusions no longer apply. By ignoring impacts to suitable unoccupied summer habitat, FWS failed to “[s]pecific[y] the impact, i.e., the amount or extent, of such incidental taking on the species.” 50 C.F.R. § 402.14(i)(1)(i).

2. FWS Failed to Establish a Causal Link Between Take of MCI and its Habitat Surrogate Take Limit

In some circumstances FWS may utilize a habitat surrogate as an ITS trigger. *See Sierra Club*, 899 F.3d at 271. Relevant here, a valid habitat surrogate must describe “the causal link between the surrogate and take of the listed species.” *Id.* (citing 50 C.F.R. § 402.14(i)(1)(i)). A “causal link is an articulated, rational connection between the activity and the taking of species,” established “by examining the habitat requirements and behavior of the listed species and determining the effect of the expected habitat modification.” *Sierra Club*, 899

F.3d at 271 (internal quotes and citation omitted). FWS has provided an arbitrary causal link between the surrogate and take of MCI in its 2018 approval, just as it did in 2017.

In its 2017 BiOp, “FWS stated that the pipeline will affect 1,974 surface acres of MCI potential habitat, all of which it assumes contains isopods.” *Id.* at 278. “But without providing a reasoned explanation, FWS arbitrarily limited the habitat surrogate to the 896.7 acres near Cochran’s Cave.” *Id.* As a result, “its causal link between the isopod and the geographic bounds of the take limit is arbitrary.” *Id.*

Notwithstanding this Court’s prior ruling, FWS relies on the *same approach* in its 2018 BiOp and ITS. FWS again finds that the pipeline will affect 1,974 surface acres of MCI potential habitat it assumes contains isopods, FWS2-000033, and again develops a habitat surrogate using only the area where construction “cross[es] Cochran’s Cave” – this time 11.2 linear surface acres rather than 896.7 acres. FWS2-000072–73. FWS still provides no reasoned explanation for ignoring the remainder of the 1,974-acre area.

At best, FWS suggests two reasons it does “not anticipate impacts to MCI in the remainder of the 1,974 surface acres.” FWS2-000033. First, FWS points to “the AMMs [avoidance and minimization measures].” *Id.* But FWS knows “AMMs... will not be completely effective” at preventing impacts that “are likely

to crush or trap MCIs.” FWS2-000062–63. AMMs will be used at Cochran’s Cave, too, but FWS concedes they will not avoid impacts there. FWS2-000062. In short, even with AMMs “there will be impacts to individual MCIs.” *Id.*

Second, FWS suggests MCIs will not be impacted because the groundwater inhabited by MCI “is approximately 20 ft. below ground...surface,” which is deeper than the area “6-8 ft below ground surface” that will be directly impacted by construction activities. FWS-000063. To the contrary, the data cited by FWS confirms that groundwater levels vary; it is frequently closer to the surface than 20 feet.⁶

More to the point, construction impacts, like “shifts in surface and subsurface formations and hydrology from trenching, digging, or blasting...are likely to crush or trap MCIs,” whether that digging or blasting is within the groundwater table or not. FWS2-000062–63. And “digging into karst areas causes direct movement of sediments into MCI habitat and may smother MCI.” FWS2-000129. “[M]aterials released into surface or subsurface karst features may reach MCI up to 0.5 mile away.” FWS2-000033. These impacts are not limited to Cochran’s Cave.

Further, MCI are “likely present deeper in the aquifer” at Cochran’s Cave, as they are “beneath pretty much the entire ACP route through the Shenandoah

⁶ USGS, Current Conditions for USGS 382523078535501 38P 1 SOW 070, *available at* https://waterdata.usgs.gov/va/nwis/uv/?site_no=382523078535501&PARAMeter_cd=72019,72020.

Valley.” FWS1-016679. FWS focused on Cochran’s Cave in part because of a “phreatic upwelling stream at the site,” or upward flow of groundwater, which provides a “window for surface sediments to enter the phreatic system.” FWS2-000033, -000047. But it is not the only window. Atlantic “identified 20 open throat sinkhole features where the presence of [MCI] *is assumed*, of which 9 are located within 25 feet of the trenchline and *could be directly impacted by construction activities*.” FWS1-018290 (emphasis added). The majority of those features are located *outside* the Cochran’s Cave area. *See* FWS1-018287–018290.

The analysis shows MCI will be impacted outside of Cochran’s Cave. FWS provided an arbitrary habitat surrogate by again ignoring the remainder of the 1,974 acres of MCI habitat it assumes contained isopods.

3. FWS Arbitrarily Determined the ACP Will Not Jeopardize RPBB

Federal agencies are prohibited from engaging in actions “likely to jeopardize the continued existence” of a protected species. 16 U.S.C. § 1536(a)(2). An action jeopardizes the continued existence of a species if it “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.

To make this determination, FWS must “[e]valuate the current status of the listed species,” and “[e]valuate the effects of the action and cumulative effects on

the listed species.” 50 C.F.R. § 402.14(g)(2-4). The “status of the species” considers “all past human and natural activities or events that have led to the current status.” FWS, Endangered Species Consultation Handbook (“ESA Handbook”), FWS1-000379. FWS must also consider the “environmental baseline”—certain past, current, and anticipated impacts “in the action area.” 50 C.F.R. § 402.02.

Ultimately, FWS must determine “whether *the aggregate effects* of the factors analyzed under ‘environmental baseline,’ ‘effects of the action,’ and ‘cumulative effects’ in the action area - *when viewed against the status of the species*...are likely to jeopardize the continued existence of the species.” ESA Handbook, FWS1-000393 (emphasis changed); *see Am. Rivers v. Fed. Energy Regulatory Comm’n*, 895 F.3d 32, 45 (D.C. Cir. 2018) (invalidating jeopardy determination made inconsistent with ESA Handbook related to baseline conditions). “[W]here baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm.” *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 930 (9th Cir. 2008).

RPBB is on the brink of extinction. Its populations have plummeted 88% since the 1990s,⁷ and it is now “likely to be present in only 0.1% of its historical

⁷ Listing RPBB as Endangered, 82 Fed. Reg. 3,186, 3,188 (Jan. 11, 2017).

range.”⁸ Ninety-six percent of known populations are documented by five or fewer bees. 82 Fed. Reg. at 3,205. No RPBBs have been observed at 73 percent of the known population locations since 2015. *Id.* at 3,188. “[T]he species is vulnerable to extinction even without further external stressors acting upon the populations.” *Id.* at 3,189. It “is so imperiled that *every remaining population* is important for the continued existence of the species.” FWS1-021650 (emphasis added).

Neither FWS nor Atlantic purposely surveyed for RPBBs. FWS’s 2017 analysis was based on the accidental discovery of one RPBB in June 2017, during surveys for other species, FWS1-017703 – after FWS was warned not to “interfere[] with applicant’s project schedule.” Ex. 5.

In the summer of 2018, the Virginia Department of Conservation and Recreation (“DCR”) conducted surveys and documented “an additional 22 RPBB findings” near the pipeline, some “closer to the construction ROW than the 2017 RPBB location and...near 3 project access roads.” FWS2-000026. According to one expert working with FWS to conserve RPBBs in other contexts, this additional survey data confirms a population “of global significance in our efforts to prevent extinction of the rusty-patched bumble bee.” Attachment 3 to Ex. 2; *see also*

⁸ FWS, Rusty Patched Bumblebee, *available at* <https://www.fws.gov/midwest/endangered/insects/rpbb/>.

Attachment 2 to Ex. 2 (“[T]he importance of the Virginia area population to the long-term existence of this species cannot be overstated; it is essential.”).

The ACP will crush RPBBs – up to one nest and eight overwintering queens. FWS2-000060. Because one nest represents thirty potential foundress queens, *id.*, the ACP will cause the loss of up to thirty-eight nests the following year. Thirty-eight individual RPBBs – much less nests – have not been documented in one location in decades. Nevertheless, FWS determined the project would not jeopardize the species. That finding is arbitrary for at least three reasons.

a. FWS Relied on Unreasonable Assumptions to Dismiss Impacts

FWS evaluated impacts to RPBBs through use of a high potential zone (“HPZ”) model. FWS2-000027. RPBBs are assumed to be impacted where the HPZ intersects pipeline construction activity. Because the “[s]tatus of colonies and the population in the HPZ are unknown” FWS relied on assumptions to complete its jeopardy analysis. FWS2-000030. Two are particularly irrational.

First, FWS’s 2017 and 2018 analyses are based on nest density information for a different species: the “common and abundant” buff-tailed bumble bee. FWS2-000030. Using that information, FWS assumed a robust population of RPBBs in the project area. The 2018 BiOp assumes there are twenty-two nests in the HPZ, FWS2-000060; the 2017 BiOp assumed there were twenty-seven nests within 0.8 km of the location where the single RPBB had been found, FWS1-

017728.⁹ Based on that hypothetical, robust population, the 2018 BiOp asserts that loss of some RPBB nests and queens to pipeline construction is acceptable.

This is the problem: substituting information for a common and abundant species in FWS's analysis converts the RPBB from a critically endangered species to a common one. Under FWS's reasoning, detection of *one* RPBB indicates a thriving population expected of an abundant species. *Every* known occurrence of RPBB would indicate a healthy – not endangered – population. And FWS would always conclude that a local population is robust enough to withstand impacts including crushed nests and dead queens. As multiple bee experts have explained to FWS, nothing indicates this RPBB population mirrors that of a “common and abundant” species. *See* Attachments 2-4 to Ex. 2. RPBB is not abundant; it is critically endangered and rapidly declining.

Second, in both BiOps FWS assumed RPBB impacts would not occur outside the HPZ. FWS2-000029, FWS1-017704. When DCR detected additional RPBBs in 2018 outside the original HPZ, FWS expanded the HPZ by nearly 50% to account for the new sightings, but again assumed that RPBBs would not be impacted outside the revised HPZ. FWS2-000028. This reasoning is circular. FWS cannot rationally expand the HPZ because RPBBs are found outside it, but then recommit to its original, proven-to-be faulty assumption that RPBBs will not

⁹ The BiOps use “nest” and “colony” interchangeably. We use “nest” for simplicity.

be impacted outside the HPZ, without explaining why the expanded area does not suffer from the same problems; that “runs counter to the evidence before the agency.” *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43.

b. FWS Failed to Evaluate the Action Against the Status of the Species

FWS must evaluate “the aggregate effects” of the action “viewed against the status of the species” to determine jeopardy. FWS1-000393. Here, it failed to account for the status of the species.

RPBB is in dire straits. Without affirmative protections, it may go extinct in the next thirty years. FWS, RPBB Species Status Assessment, FWS1-21505. Nothing indicates FWS took this into account in its jeopardy analysis. At most, FWS disclosed that RPBB is “declining,” just as it did for four other species. FWS2-000016–18. But RPBB is in a class of its own: it “is vulnerable to extinction even without further external stressors.” 82 Fed. Reg. at 3,189.

FWS’s error is partially attributable to the fact that it considered “impacts to species” only if it first determined there would be “impacts to populations.” *See, e.g.*, FWS2-000062–63 (considering “aggregated consequences...on the species as a whole” only after determining MCI “populations” would be impacted). Relying on data for the “common and abundant” buff-tailed bumble bee, FWS arbitrarily found populations of RPBBs would not be impacted, and thus never evaluated impacts on the “species as a whole.” That violates the ESA. *See Oceana, Inc. v.*

Pritzker, 125 F. Supp. 3d 232, 245–46 (D.D.C. 2015) (“NMFS cannot examine the effects of an action in isolation when [assessing jeopardy]...A species teetering on the brink of extinction may be unable to withstand even the slightest degree of additional harm.”).

c. FWS Failed to Consider RPBB Recovery

Jeopardy requires consideration of the effects of an action on the “survival *and recovery* of a listed species.” 50 C.F.R. § 402.02 (emphasis added). Recovery means “improvement in the status of a listed species to the point at which listing is no longer appropriate.” ESA Handbook, FWS1-000396. Considering recovery is critical when species exist in a highly precarious state, because there is a “substantial possibility that considering recovery impacts could change the jeopardy analysis.” *Nat’l Wildlife Fed’n*, 524 F.3d at 933.

That is a real possibility here. Because “every remaining population is important for the continued existence of the species,” FWS1-021650, the analysis may confirm that assuring survival and recovery requires avoiding impacts to every remaining RPBB population. In violation of the ESA, the 2018 BiOp does not discuss RPBB recovery at all.

4. FWS Arbitrarily Determined the ACP Will Not Jeopardize Clubshell

The clubshell mussel was listed as endangered in 1993. FWS1-020630. “[T]he species is declining.” FWS2-000017. There are thirteen populations, only

seven of which are reproducing. FWS2-000059. The ACP may extirpate the Hackers Creek clubshell population. *See* Attachment 26 to Ex. 4. “Loss of Hackers is very bad for the species...because it meets all the criteria that are considered in the jeopardy definition.” *Id.* The “project will diminish the species numbers (all take does), reproduction...and distribution.” *Id.* Nevertheless, FWS determined the ACP would not jeopardize the continued existence of clubshell. FWS2-000066. FWS’s conclusion rests on two arbitrary findings.

First, FWS anticipates no “reductions in the overall [reproduction, numbers, and distribution] of the species.” FWS2-000066. But the project may extirpate an entire population, one of only three in West Virginia and thirteen worldwide. That is a reduction in “numbers” and “distribution.”

Second, while FWS considered how ACP would affect clubshell recovery (in contrast to the RPBB), it arbitrarily determined that the project would not “prevent meeting the Recovery Criteria.” FWS2-000059. The Clubshell Recovery Criteria require establishing “viable populations...in 10 separate drainages.” *Id.* Eight drainages are specifically named, and two are “wildcard” drainages. *Id.* “A viable population consists of sufficient numbers of reproducing individuals to maintain a stable or increasing population.” FWS1-020667. Hackers Creek is not a named drainage, and FWS determined it was not “likely to be part of the 2 unspecified additional drainages because the population is not reproductive.”

FWS2-000059. That finding does not demonstrate a rational connection between the facts found and FWS's conclusion.

“Data from the...Hackers Creek population [] has been collected every 5 years.” FWS2-000024. “The 2009 and 2014 monitoring events documented a continued decline and no recruitment (29 individuals in 2009; 19 individuals in 2014).” *Id.* But in 2018, FWS recovered 68 live clubshell from the monitoring location and now estimates as many as 94 are present. FWS2-000023, -000069. These best available data indicate an increasing, *i.e.*, reproducing, population.

FWS asserts that the 2009/2014 surveys and the 2018 salvage effort are not comparable. FWS2-000025. FWS never explains any differences in methodology, but its assertion does not erase the evidence indicating this is a reproducing population.

FWS also stresses that its 2018 efforts did not uncover gravid individuals or juveniles. But “[r]eproducing clubshell populations are often hard to detect when densities are very low or surveys are single-day, catch-per-unit efforts.” FWS1-020707. In short, it was unlikely that FWS would find gravid individuals or juveniles. Failure to do so does not prove this population is not reproducing.

Assuming *arguendo* that the Hackers Creek population is not reproducing, FWS still must consider if it should be protected to meet recovery criteria. There are seven currently reproducing clubshell populations, not enough to meet the

recovery criteria of ten populations. If FWS considers impacts to only those seven populations when assessing jeopardy, the recovery criteria will never be met.

FWS's out-of-hand rejection of Hackers Creek as one of the two wildcard drainages in the Recovery Plan was arbitrary.

B. Petitioners Will Be Irreparably Injured Absent a Stay of the Permit

“In light of the stated purposes of the ESA...establishing irreparable injury should not be an onerous task for plaintiffs.” *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1091 (9th Cir. 2015) (reviewing denial of permanent injunction). Construction of the ACP will cause imminent, significant, and permanent harm to endangered and threatened species and Petitioners' members' interest in viewing, photographing, and protecting those species. *See* Exs. 6-14.

For example, several of Petitioners' members live on properties where RPBBs have been located. Ex. 7 ¶ 15; Ex. 9 ¶ 17. They, and other members of Petitioners, enjoy photographing and searching for RPBBs on their property and plan to continue doing so in the future. Ex. 10 ¶¶ 11, 16; Ex. 7 ¶¶ 22-24. Another member played a key role in having the RPBB listed under the ESA, and has plans to continue photographing and advocating for the species wherever it is found, including in Virginia. Ex. 6 ¶¶ 11-14, 20. These members' interests are harmed by FWS's erroneous authorization to take RPBBs.

Other members routinely travel to areas impacted by the pipeline to view and monitor endangered bats, including Indiana bat. Ex. 9 ¶¶ 9, 14. These members will similarly be harmed by impacts to bats, which are only permitted to occur with FWS's sign-off.

Environmental harm, “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).

Harm to ecosystems and biological diversity also constitutes irreparable harm. *Sierra Club v. Clinton*, 689 F. Supp. 2d 1123, 1145 (D. Minn. 2010) (finding irreparable harm where pipeline could harm aquatic ecosystems through degradation of aquatic habitat); *P.R. Conservation Found. v. Larson*, 797 F. Supp. 1066, 1072 (D.P.R. 1992) (“No money damages would be sufficient to compensate society for the permanent loss of one of our most precious natural resources, biological diversity.”).

C. Balancing of the Parties' Interests Favors Listed Species

“Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978). As a result, “when evaluating a request for injunctive relief to remedy an ESA []

violation, the equities and public interest factors *always* tip in favor of the protected species.” *Cottonwood*, 789 F.3d at 1091 (emphasis added).

Nevertheless, FWS will not incur any substantial injury if its BiOp and ITS are stayed. Atlantic may argue that delaying construction will result in economic harm, but temporary harm to Atlantic’s economic interests is far outweighed by irreparable harm to listed species.

D. A Stay Pending Review is in the Public Interest

For the same reasons, a stay pending review is in the public interest. *Cottonwood*, 789 F.3d at 1090 (“*Hill* also held that Congress established an unparalleled public interest in the ‘incalculable’ value of preserving endangered species”). Protection of endangered species is in the public interest because endangered species “are of ‘esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.’” *Gibbs v. Babbitt*, 214 F.3d 483, 487 (4th Cir. 2000) (*quoting* 16 U.S.C. § 1531(a)(3) (1994)).

The public interest is not harmed by a delay in construction. Even if Atlantic can make a showing of economic harm, that economic harm does not equate to harm to the public interest.

III. CONCLUSION

Petitioners request that the Court stay implementation of the 2018 BiOp and ITS pending completion of the Court’s review.

Dated: November 30, 2018

Respectfully submitted,

/s/ J. Patrick Hunter

J. Patrick Hunter (N.C. Bar No. 44485)
Amelia Y. Burnette (N.C. Bar No. 33845)
Austin D. Gerken, Jr. (N.C. Bar No. 32689)
Southern Environmental Law Center
48 Patton Avenue, Suite 304
Asheville, NC 28801
Telephone: 828-258-2023
Facsimile: 828-258-2024
Email: phunter@selcnc.org;
aburnette@selcnc.org; djgerken@selcnc.org;

Gregory Buppert (V.A. Bar No. 86676)
Southern Environmental Law Center
201 West Main Street, Suite 14
Charlottesville, VA 22902
Telephone: 434-977-4090
Facsimile: 434-977-1483
Email: gbuppert@selcva.org;

*Counsel for Defenders of Wildlife, Sierra Club,
and 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: November 30, 2018

/s/ J. Patrick Hunter

J. Patrick Hunter

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2018, I electronically filed the foregoing Motion for Stay 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
Kevin McArdle
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