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Bath & Highland Counties – Virginia

Pipeline permit vacated by court

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RICHMOND — In yet another blow to the proposed Atlantic Coast Pipeline, the U.S. Fourth Circuit vacated another key permit.

In writing the opinion, issued Friday, July 26, Chief Judge Roger Gregory explained the U.S. Fish and Wildlife Service issued a “Biological Opinion” in 2017 for the project, designed to transport natural gas from West Virginia to Virginia and North Carolina.

“That Opinion, required by the Endangered Species Act, concluded that the proposed pipeline will not jeopardize the continued existence of several endangered and threatened species that are likely to be impacted by pipeline construction,” Judge Gregory wrote. “As relevant here, the Biological Opinion concluded that the pipeline will not jeopardize four species: the rusty patched bumble bee, clubshell, Indiana bat, or Madison Cave isopod. However, because FWS anticipated the incidental taking, i.e., harassing or killing, of those species, the agency issued an Incidental Take Statement with its Biological Opinion, setting limits on the number of each species that the pipeline could legally take.”

Petitioners challenged those take limits, which were imposed by the 2017 Incidental Take Statement.

“After reviewing that agency action, we determined that FWS’s take limits were arbitrary and capricious. Accordingly, we vacated the Incidental Take Statement,” the judge noted.

“Shortly after our decision, FWS issued a new Biological Opinion and Incidental Take Statement. Petitioners now challenge the findings of both of those agency actions. Specifically, Petitioners assert that FWS improperly determined that pipeline construction will not jeopardize the rusty patched bumble bee or the clubshell, and they challenge the validity of the take limits imposed for the Indiana bat and the Madison Cave isopod. Because we find that FWS arbitrarily reached its no-jeopardy conclusions and failed to correct the deficiencies in the take limits that we identified in the previous appeal, we grant the petition and vacate the 2018 Biological Opinion and Incidental Take Statement,” he wrote.

The judge explained the procedures for consulting with the USFWS for projects where endangered species could be affected, and how entities must obtain Incidental Take Statements from the agency if some species will be affected, or “taken.”

Judge Gregory said, “On Oct. 16, 2017, FWS issued a biological opinion, concluding that the ACP is not likely to jeopardize the existence of any of the affected listed species. FWS also issued an incidental take statement because it determined that pipeline construction was likely to result in the take of members of six of those species.”

But, he noted, the incidental take statement did not set numeric take amounts for five of the species to be taken. Instead, it relied on habitat surrogates, setting take limits such as “small percent of,” “majority,” and “all,” Gregory said.

Petitioners challenged that determination in January 2018 and sought a review.

In May 2018, the court vacated that incidental take statement, then later in August, explained how that decision was made. The court said the Fish and Wildlife Service had failed to create proper habitat surrogates, failed to explain why numeric take limits were not practical, and failed to create enforceable take limits for the club shell mussel, rusty patched bumble bee, Madison cave isopod, Indiana bat, and northern long-eared bat.

Then, Aug. 23, 2018, the Federal Energy Regulatory Commission again formally consulted the USFWS to correct the statement, including new information for some of the species.

Less than three weeks later, Judge Gregory pointed out, the USFWS issued a new biological opinion and incidental take statement, on Sept. 11, 2018. That opinion concluded the ACP would not jeopardize the survival and recovery of the bumble bee, Indiana bat, or Madison Cave isopod, and set take limits for each of those species.

“Petitioners now challenge the biological opinion’s conclusion that the ACP will not jeopardize the rusty patched bumble bee or the clubshell,” the judge wrote. “Petitioners also challenge the take limits imposed for the Indiana bat and Madison Cave isopod. We stated the 2018 biological opinion and incidental take statement pending our review of this petition.”

The court explained that in preparing the opinion and statement, the USFWS was required to use the best scientific and commercial data available, to ensure the agency does not act based on “speculation and surmise.” Gregory’s opinion also noted that “federal law expressly authorizes FWS to request new survey data from a consulting agency if the existing data is not ‘adequate’ to determine the effect of the project.”

Citing case law, the court also said a “best-available-data” standard means the agency is not free to disregard other available information that is in some way better than the evidence it relies on. “Rather, FWS must seek out and consider all existing scientific data relevant to the decision it is tasked with making.”

Judge Gregory continued, “After reviewing the agency’s 2018 biological opinion and incidental take statement, we agree with petitioners that FWS has again acted arbitrarily.”

The court’s opinion then detailed each of the species in question.

Rusty patched bumble bee

Judge Gregory said the court had previously found the take limits imposed by the USFWS on the bumble bee violated the Endangered Species Act.

“The RPBB is a colonial bee species with an annual cycle,” the judge explained. “That cycle begins in early spring, when nests or colonies are started by solitary queen bees. Those nests, although occasionally observed above ground, typically are located underground, in abandoned rodent nests or other similar cavities. Throughout the summer, the foundress queen bees produce worker bees.

“Worker bees are responsible for foraging for food for the colony. The health of the colony depends on the number of workers foraging and the abundance of foraging habitat. RPBB colony sizes are larger than those of other bumble bees, and a healthy colony is composed of up to 1,000 worker bees in a season.

“In late summer and early fall, the queen bee produces male drones and new queens. At the end of the cycle, male drones and the new queens mate, while the foundress queen and workers die. The new queens then overwinter, or hibernate. Overwintering occurs underground, primarily in soft-soil and leaf-litter chambers that the queens form in forested areas. After overwintering, these queens emerge in the spring, and the cycle begins again,” he said.

“Historically, the RPBB was ‘abundant and widespread, with hundreds of populations across an expansive range.’ Since the late 1990s, however, RPBB populations have plummeted by nearly 90 percent. When the species was listed as endangered in January 2017, 95 percent of the 103 known populations had been documented by five or fewer bees. As FWS has recognized, the RPBB ‘is so imperiled that every remaining population is important for the continued existence of the species.’ Without affirmative protection, all but one RPBB ecoregion are predicted to be extinct within five years, and that one remaining ecoregion would cease to exist within 30 years,” the judge wrote.

The USFWS had developed guidelines for projects that might affect the bees’ continued existence, using a model to predict “high potential zones,” areas where the bees might be.

The judge explained, “If a project area overlaps with a habitat suitable to RPBBs in a high potential zone, the consulting agency has two options to determine actual bee presence: it may survey the area of overlap to verify the presence of RPBBs or it may choose to forgo a survey, in which case RPBB presence is assumed and consultation with FWS is required.”

In its 2017 opinion, the agency concluded that a 653-hectare high potential zone for the bees existed in Bath County. It was calculated when one worker bee was sighted foraging in the George Washington National Forest along a pipeline access road. The USFWS had said the one bee indicated a colony existed, but there was no way to determine where it was. The agency assumed it was part of a colony composed of 100 to 1,000 worker bees that produced 6-8 new foundress queens each cycle.

Then, in July and August 2018, the agency received information from the Virginia Department of Conservation and Recreation that 22 of the bees — nine in Bath and 13 in Highland County — had been observed during 2018 bee surveys. Those sightings were closer to the pipeline right of way than the lone 201 sighting, and were near three project access roads, not just one.

Based on that information, the USFWS expanded the Bath County zone from 653 hectares to 969 hectares.

The judge continued, “Evaluating the effects of pipeline construction in the newly drawn high potential zone, the 2018 Biological Opinion determined that construction will likely cause the crushing of eight overwintering queens, the crushing of worker bees, and will impact one RPBB colony capable of producing 30 overwintering queens.

“These estimates were based on FWS’ assumption that 22 RPBB nests are located in the high potential zone and that each nest produces 30 overwintering queens, resulting in a total of 660 overwintering queens each cycle in the high potential zone — a number of queens that far exceeds the 6-8 queen-per-colony estimate of the 2017 Biological Opinion and that exceeds the total number of RPBBs that have been documented in current populations worldwide.”

urthermore, Gregory said, “Explaining that a healthy bee population typically contains tens to hundreds of colonies and that the loss of a single colony or overwintering queen ‘could reduce the health of a metapopulation due to lost opportunities to interbreed, FWS nonetheless concluded that the destruction of one of the 22 colonies in the high potential zone, with the potential to produce 30 foundress queens, and the loss of eight overwintering queens were ‘not likely to negatively impact the fitness or survival of the population.’

“Accordingly, FWS found that the ACP would not jeopardize the RPBB.”

Petitioners advance several arguments “that we find persuasive,” the judge said.

“We first find that the 2018 Biological Opinion’s nest density calculation — a calculation that FWS used to determine the total number of RPBBs likely to be impacted by pipeline construction — is arbitrary because it is not based on the best available information and in fact ignores evidence that the agency itself has developed,” the court said.

“Although FWS has developed guidance for surveying the RPBB, it has conducted no surveys to estimate RPBB nest density. In fact, the agency made a point of avoiding surveys in order to ‘fast-track’ pipeline authorization.”

The court found the agency’s estimates on bee populations didn’t hold up, either. And in fact, were based on a “guess” by one expert. “And an expert’s ‘wild guess’ inspires not additional confidence in the reasonableness of the FWS’ estimate,” the judge wrote.

“The agency has also ignored significant evidence that undermines the reasonableness of its estimates — evidence that the agency itself has gathered — and has instead chosen to rely on one bee expert’s ‘wild guess.’ We agree with Petitioners that these arbitrary calculations demonstrate the overall arbitrariness of FWS’s no-jeopardy finding with respect to the RPBB.”

Inconsistencies in evidence

The petitioners argued the 2018 opinion’s conclusion that the ACP wouldn’t jeopardize the bee is arbitrary because it’s at odds with the USFWS’ own evidence of the importance of the bees likely to be killed by pipeline construction.

“We agree,” Judge Gregory wrote. “According to the 2018 Biological Opinion, ACP construction will impact RPBBs in two ways. First, it will indirectly reduce reproductive success because it will remove foraging resources that support queens and will crush worker bees. Second, it will directly impact colony reproduction by crushing eight overwintering queens and by impacting one colony, thereby preventing another 30 foundress queens from being produced. See J.A. 1282 (describing impacts of ACP construction as crushing individual RPBBs, queens, or colonies; displacing worker bees, which could affect their ability to provide sufficient food resources to colony; and affecting the quality, quantity, and timing of floral resources, thereby reducing survivability and reproductive success of queens.”

The judge continued, “In fact, FWS has recognized that the RPBB is ‘so imperiled that every remaining population is important’ for the species’ continued survival.”

And, he said, “While the death of a handful of bees may not be as significant to a healthy bee population with tens to hundreds of thousands of bees, record evidence indicates that the RPBB population at issue is far from healthy. The 2018 Biological Opinion fails to explain why it is that the loss of 38 potential queens does not endanger the survival of the Bath County RPBB population when the loss of ‘a colony or overwintering queen could reduce the health of a metapopulation.’

“Absent a reasoned discussion of the agency’s apparently contradictory positions about the species, we can only conclude that FWS acted arbitrarily in determining that the likely impacts of the ACP on the RPBB will not jeopardize the species’ continued existence and recovery,” Gregory said.

He noted petitioners also argued the 2018 opinion failed to account for the overall status of the bees. “In light of the precarious status of the species, we again agree with petitioners,” the court said.

Gregory said the USFWS failed to document the serious nature of the bees’ decline. “To the contrary, many of the assumptions that FWS makes about the RPBB suggest that the agency considered the Bath County population as a healthy population.”

Petitioners’ final argument related to the opinion’s no-jeopardy finding for the RPBB is that FWS considered only the pipeline’s effects on RPBB survival and ignored the effects on the bees’ recovery.

“A jeopardy evaluation must determine whether a proposed action ‘reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species.’”

Again citing law, the judge said, “While a separate and distinct section analyzing the pipeline’s impact on RPBB recovery was not necessary, FWS was required to address the impacts of pipeline construction on the species’ recovery.” tions of the other species at stake, and for each, it found the USFWS failed to rely on the best data available, and noted numerous flaws in the agency’s reasoning. And, it said the agency failed to rely on its own information and plans, or did an “about-face” on its own discussions of these species.

“We cannot ignore that it took FWS a mere 19 days to issue the 2018 Biological Opinion and Incidental Take Statement after FERC resumed formal consultation with the agency following our first decision in this matter,” the judge wrote.

“In fast-tracking its decisions, the agency appears to have lost sight of its mandate under the ESA: ‘to protect and conserve endangered and threatened species and their habitats.’ This mandate has ‘priority

over the primary missions of federal agencies.’ We hope that, upon remand, FWS will consider any further action it takes with this mandate in mind.

“Because FWS’ decisions are arbitrary and capricious, we vacate the 2018 Biological Opinion and Incidental Take Statement.”

The petitioners were Defenders of the Wildlife, the Sierra Club, and the Virginia Wilderness Committee.