

The Recorder

Inclusive, independent, indispensable.

Outdated pipeline surveys need updates from Dominion

April 09, 2020

BY JOHN BRUCE • STAFF WRITER

MONTEREY — If Dominion Energy wants to proceed with construction of the proposed Atlantic Coast Pipeline, then it must update expired surveys applying to endangered bats and mussels, an environmental lawyer suggests.

On March 20, Atlantic Coast Pipeline LLC requested a variance to conduct slip remediation activities in the Hackers Creek watershed in West Virginia.

In an April 2 letter to Liz Stout of the U.S. Fish and Wildlife Service, Southern Environmental Law Center staff attorney Patrick Hunter challenged the pipeline company's assertion it was replying on current surveys from 2015.

"That is not correct," Hunter said. "To the contrary, surveys performed under the 2015 Indiana bat survey guidance are generally valid for two years; consequently, the 2015 surveys expired approximately three years ago under the relevant guidance. Even if Atlantic argues that its surveys should be considered valid for five years because surveys completed using the current, 2020 survey guidance can be valid for five years, the 2015 surveys also will soon be more than five years out of date and therefore expired even by that metric. Similarly, surveys for protected mussels are also generally valid for two years and many that underpin the analysis supporting the Atlantic Coast Pipeline have apparently expired. The Fish and Wildlife Service must require all species surveys to be brought up to date to ensure Section 7 consultation is based on best available science under the agency's own guidance," Hunter said.

Similarly, the company's Indiana bat surveys are no longer valid, Hunter argued. "Even if surveys under the 2015 guidance could be used for longer than two years in some circumstances, they do not remain valid for as much as five years – as Atlantic recently indicated to FWS – when not completed with the same level of analysis FWS has determined is necessary for surveys to last five years. Atlantic's surveys completed under the 2015, 2016, and 2017 guidance have expired," he said.

“We previously made FWS aware that Atlantic’s surveys had expired, and we hope that this language was not added in another attempt by a federal agency to accommodate the developers of the Atlantic Coast Pipeline.

“Regardless, FWS’s obligation is not to discuss the pros and cons of requiring project developers to use current data to ensure endangered and threatened species are appropriately protected. FWS’s job is to protect and conserve endangered and threatened species and their habitats.

“FWS’s obligation to protect endangered and threatened species does not turn on whether a protective act would be subjectively considered a pro or a con. Congress has already decided it is a pro. And to give endangered and threatened species any protections at all, FWS must know where they are – that requires current surveys,” he said.

“FWS should not retroactively apply this new language to surveys completed under the less rigorous 2015-2017 survey guidance. At most the new language should only apply to surveys that meet the criteria FWS determined were necessary to extend validity to five years (instituted in 2018). But even that approach is dubious. FWS cannot meet its obligations under the Endangered Species Act by assuming species are absent, and therefore will not be harmed, without requiring project applicants to look for them in the first place. It similarly would be arbitrary for FWS to assume species are absent by relying on surveys the agency’s guidance documents recognize as out of date,” he said.

“More to the point, we are aware of no cons in requiring Atlantic to update its bat surveys. Atlantic may argue that surveying will further delay the project, but the project’s delays to date have been self-inflicted. Instead of designing a project that minimized impacts on endangered species and protected lands, Atlantic insisted on its preferred route and exerted pressure on agencies to quickly issue permits on its preferred timeline. That strategy was just as flawed as the resulting permits, and now the project is years behind schedule, billions of dollars over budget, and less than 6 percent complete. Atlantic chose to barrel through endangered species habitat regardless of the ecological cost. As a consequence of that choice, it must go through the process of complying with Endangered Species Act requirements, including updating surveys once they have expired,” Hunter argued.

“On the other hand, there are numerous pros associated with making sure surveys are current ... The conclusion here is unmistakable — surveys are critical to conserving this species. FWS cannot meet its Endangered Species Act obligations by allowing Atlantic to rely on outdated surveys ... Updated surveys are also necessary to accurately assess impacts to northern long-eared bats. As FWS is aware, the U.S. District Court for the District of Columbia recently remanded FWS’s rule listing the northern long-eared bat as a threatened species. Northern long-eared bat is likely in a more precarious position than FWS determined in its rule listing the species as threatened, which it relied on in its first two biological opinions for the Atlantic Coast Pipeline. Having current survey information will be critical to accurately assessing the impact of this project on this species.

“The problem of outdated surveys is not unique to bats. Both the Virginia and North Carolina wildlife agencies have cautioned Atlantic that mussel surveys are valid for only two years. As explained by the North Carolina Wildlife Resources Commission, a mussel survey is valid for up to two years; therefore, if the project is not completed within two years, an additional mussel survey is needed if federal-listed species are found during the initial survey.

“FWS originally requested, and Atlantic originally compiled, species survey data because it was necessary to accurately assess the impact of the Atlantic Coast Pipeline on protected species. That information is no less necessary now. If Atlantic plans to move forward with this project, it must submit up-to-date survey information,” Hunter concluded.