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*Via Electronic Mail and FERC Docket Nos. CP15-554-000 & CP15-554-001*Liz Stout
U.S. Fish and Wildlife Service
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April 2, 2020

Re: Outdated Surveys for the Atlantic Coast Pipeline

Dear Ms. Stout:

On March 20, 2020, Atlantic Coast Pipeline, LLC (“Atlantic”), requested a variance to conduct slip remediation activities in the Hackers Creek watershed in West Virginia. *See* Letter from Patrick Prince, Dominion Energy, to Kimberly Bose, FERC (March 20, 2020) (Accession No. 20200320-5030). As part of its request, Atlantic noted that “[b]at surveys were conducted in this area during the 2015 survey season, and are considered ‘current’ because they were conducted within the minimum timeframe for a survey that shows absence.” *See id.*, Attachment 2. That is not correct. 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the current, 2020 survey guidance can be valid for five years, the 2015 surveys also will soon be more than five years out of date and therefore expired even by that metric.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 (“FWS”) 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.

I. Bat Surveys Have Expired

Bat surveys near Hackers Creek and other areas of West Virginia were completed in 2015 using FWS’s “2015 Range-wide Indiana Bat Summer Survey Guidelines (April 2015).”¹ The general expectation under those guidelines is that negative surveys are valid for two years: “negative presence/probable absence survey results obtained using this guidance are valid for a

¹ Available at

https://www.fws.gov/midwest/endangered/permits/hcp/r3wind/pdf/DraftHCPandEIS/MSHCPDraftAppG_CoverSheetAnd2015INBASurveys.pdf.

minimum of two years” which can be further “reduced if significant habitat changes have occurred in the area.” 2015 Guidance, 2. Surveys completed under that guidance expired long ago. The same is true for surveys completed under the 2016 and 2017 survey guidance which were also valid for only two years and therefore expired in 2019. Atlantic can no longer rely on those outdated surveys.

In 2018, FWS changed its Indiana bat survey guidelines so that, for the first time, surveys going forward were valid for a minimum of five years. *See* FWS, 2018 Range-wide Indiana bat Summer Survey Guidelines (April 2017).² However that longer validity was accompanied by an increase in survey rigor. For instance, in the Appalachian Recovery Unit where the Atlantic Coast Pipeline is proposed, the 2015 survey guidance calls for surveying “a minimum of 6 net nights per km (0.6 miles) of suitable summer habitat” for linear projects. 2015 Guidance, 5. But the 2018 Guidance calls for surveying “a minimum of 10 net nights per km (0.6 miles) of suitable summer habitat” for linear projects in the same area. 2018 Guidance, 6 (emphasis added). Surveys under the 2018 guidelines are valid longer, in part, because they adhere to more rigorous standards. FWS cannot reasonably allow Atlantic to take advantage of the longer timeframe provided under the 2018 guidance when Atlantic did not complete surveys meeting the requirements of that guidance.

Thus, 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.

The 2020 Indiana bat summer survey guidelines allow surveys to remain valid for a minimum of five years and generally retain the heightened survey requirements instituted under the 2018 guidelines. *See* FWS 2020 Range-wide Indiana bat Summer Survey Guidelines, 4, 6.³ The 2020 guidelines include new language, however, stating that “[i]f survey results are older than 5 years, [applicants should] coordinate with [FWS] to discuss the pros and cons of conducting any additional surveys.” *Id.* at 4. 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. *See* Letter from Patrick Hunter, SELC, to Paul Phifer, FWS (Oct. 1, 2019) (Accession No. 20191018-5045). 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 . . .

² Available at <https://www.fws.gov/midwest/endangered/mammals/inba/surveys/pdf/2018RangewideIBatSurveyGuidelines.pdf>.

³ Available at <https://www.fws.gov/midwest/endangered/mammals/inba/surveys/pdf/FINAL%20Range-wide%20IBat%20Survey%20Guidelines%203.23.20.pdf>.

This mandate has priority over the primary missions of federal agencies.” *Defs. of Wildlife v. U.S. Dep't of the Interior*, 931 F.3d 339, 366 (4th Cir. 2019) (quotations and citation omitted). Restated, 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.

Regardless, 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.

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% 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.

On the other hand, there are numerous “pros” associated with making sure surveys are current. Since 2007, Indiana bat numbers in West Virginia have plummeted, decreasing by 96%. FWS, 2019 Indiana Bat Population Status Update.⁴ FWS’s 2019 estimate is that only 620 Indiana bats remain in West Virginia – a reduction of over 42% even since the first biological opinion for the Atlantic Coast Pipeline was produced. *Id.* Since 2011, the Indiana bat Appalachian Recovery Unit (which includes Virginia and West Virginia) has seen population numbers decline by over 93%. *Id.* If FWS is going to give bats in the Appalachian Recovery Unit any chance of survival, it must require project applicants to look for them through surveys and avoid their habitats or apply appropriate protections.

FWS’s recent Indiana bat Five-Year Review reaches this same conclusion. It calls for “[a]dditional summer survey efforts . . . to locate remaining maternity colonies in areas along the

⁴ Available at https://www.fws.gov/midwest/endangered/mammals/inba/pdf/2019_IBat_Pop_Estimate_6_27_2019a.pdf.

periphery of the range and interior areas heavily impacted by [white-nose syndrome]” such as the Appalachian Recovery Unit. FWS, Indiana bat Five-Year Review, 13 (September 2019). “Because of ongoing [white-nose syndrome]-related declines, field surveys aimed at locating ‘new’ maternity colonies and monitoring the status of known maternity colonies and hibernacula will remain *vital to the species’ long-term conservation and recovery.*” *Id.* (emphasis added). And again: “Additional efforts to monitor known maternity colonies and to discover additional ones on the summer landscape is needed particularly in regions hardest-hit by WNS” including West Virginia and the Appalachian Recovery Unit. *Id.* at 34. 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.

Surveys are all the more important because the Atlantic Coast Pipeline is one of the types of projects that threaten Indiana bats. “The most significant range-wide threats to the Indiana bat have traditionally been habitat loss/degradation, [and] forest fragmentation . . .” *Id.* at 15. “[O]ne of the greatest emerging causes of conversion of forest/habitat loss within the range of the Indiana bat is energy production *and transmission* (e.g., oil, gas, coal, wind).” *Id.* at 16 (emphasis added). The Atlantic Coast Pipeline falls squarely within that category. In fact, in West Virginia and Virginia, the pipeline “is the first project that proposes to remove such a large amount of trees.” Email from Sumalee Hoskin, FWS, to Robyn Niver, FWS (Oct. 31, 2017). In other words, forest/habitat degradation and loss is a leading threat to the Indiana bat, construction of pipelines is a growing cause of that loss, and the Atlantic Coast Pipeline entails the largest such loss of habitat FWS has seen in Virginia and West Virginia. This harm will be levied against a dwindling population that, in West Virginia, has suffered a 96% decline since 2007. All the while, the Appalachian Recovery Unit is subject to other increased threats, such as habitat loss/degradation from the Mountain Valley Pipeline. The risks the Atlantic Coast Pipeline poses to bats – singularly and in combination with other ongoing projects in the Appalachian Recovery Unit – are real. To appropriately consider them, FWS needs accurate survey information. Even if FWS were allowed to balance pros and cons of obtaining reliable and current species data for purposes of the Endangered Species Act, the “pros” of requiring updated surveys would far outweigh any “cons.”

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. *Ctr. for Biological Diversity v. Everson*, No. 15-CV-477, 2020 WL 437289 (D.D.C. Jan. 28, 2020). The court remanded the listing decision, in part, because FWS focused too narrowly on threats to the species from white-nose syndrome, failing to appropriately assess the cumulative impact to the species from additional threats such as “[c]urrent and future forest conversion [which] may have negative additive impacts where the species has been impacted by WNS” such as in West Virginia. *Id.* at *8. 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.

II. Mussel Surveys Have Expired

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.” Letter from Gabriela Garrison, NCWRC, to Sara Thronson, Natural Resource Group, 2 (Nov. 21, 2014). The Virginia Department of Game and Inland Fisheries has similarly explained that mussel surveys, even negative surveys, are only valid for two years: “We note that negative surveys are only valid for two years.” Letter from Raymond Fernald, VDGIF, to Richard Gangle, Dominion Energy, 5 (Feb. 7, 2017). Atlantic’s consultants have also stated as much: “Mussel survey results are valid for two years from the date of survey.” Environmental Solutions & Innovations, Study Plan: Aquatic Species Surveys for the Proposed Atlantic Coast Pipeline North Carolina, 15 (Feb. 23, 2016). As far as we are aware, many mussel surveys are now out of date and cannot be relied on to complete Section 7 consultation.

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.

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



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