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September 13, 2021

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

**Re: Comments on Draft Supplemental Environmental Impact Statement for
Atlantic Coast Pipeline Restoration Project and Supply Header Restoration
Project, Dockets CP15-554-009 & CP15-555-007**

Dear Secretary Bose:

On behalf of Alliance for the Shenandoah Valley, Appalachian Voices, Chesapeake Bay Foundation, Inc., Chesapeake Climate Action Network, Cowpasture River Preservation Association, Friends of Buckingham, Friends of Nelson, Highlanders for Responsible Development, Piedmont Environmental Council, Shenandoah Valley Battlefields Foundation, Sierra Club, Sound Rivers, Inc., Virginia Wilderness Committee, Wild Virginia, Inc., and Winyah Rivers Foundation, and in response to the Federal Energy Regulatory Commission's ("FERC's") July 23, 2021 notice,¹ we hereby submit these comments on the draft supplemental environmental impact statement ("EIS") for the Atlantic Coast Pipeline Restoration Project and Supply Header Restoration Project.²

While we appreciate FERC's careful review of the restoration plans submitted by Atlantic Coast Pipeline, LLC ("Atlantic") and Eastern Gas Transmission and Storage, Inc. ("Eastern GTS"), we highlight several shortcomings in FERC's draft supplemental EIS and urge FERC to make the revisions described in these comments prior to FERC's release of a final supplemental EIS and the Commission's issuance of an order resolving this certificate amendment proceeding.

¹ Notice of Availability of the Draft Supplemental Environmental Impact Statement for the Proposed Atlantic Coast Pipeline Restoration Project and Supply Header Restoration Project, Dkt. Nos. CP15-554-009 et al. (July 23, 2021) (eLibrary No. 20210723-3018).

² Draft Suppl. Envtl. Impact Statement for the Atlantic Coast Pipeline Restoration Project and Supply Header Restoration Project, Dkt. Nos. CP15-554-009 et al. (July 2021) (eLibrary No. 20210723-3006) ("Draft Suppl. EIS").

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1. The Commission's order resolving the certificate amendment proceeding should require Atlantic to release easements upon request from private landowners or open-space easement holders.

As we have urged FERC in prior letters,³ now that the Atlantic Coast Pipeline (“ACP”) will not be built, the Commission should require Atlantic to give private landowners and open-space easement holders the opportunity to regain full ownership of their property through Atlantic’s release of its permanent easements. In the draft supplemental EIS, FERC declines to resolve the disposition of permanent easements, saying that “easements between landowners and Atlantic or EGTS are legal instruments and as such, any requests for Atlantic to relinquish easements or rights-of-way are not within the scope of this supplemental EIS.”⁴ If so, then the Commission has an obligation to address this issue in its anticipated order resolving this certificate amendment proceeding.

Atlantic obtained permanent easements from private landowners affecting the use of 2,603 parcels along the ACP’s route,⁵ many secured through eminent domain proceedings or through agreements backed by the express threat of Atlantic’s exercise of eminent domain. Some landowners incurred tens of thousands of dollars in costs for assessments and attorneys’ fees—costs that the landowners cannot recoup—before ultimately being compelled to sign easement agreements.

These permanent easements represent a severe, continuing, and now wholly unwarranted burden on properties throughout the ACP’s 604-mile path. As FERC recognizes in the draft supplemental EIS, “there appears to be no obvious cause for Atlantic to retain an easement for disconnected segments of pipe that are not flowing gas.”⁶ As long as these 50-foot-wide easements remain in effect, landowners are prohibited from engaging in “the construction of permanent structures, including houses, house additions, trailers, tool sheds, garages, poles, patios, pools, mobile homes, septic tanks, or other objects not easily removable, or the planting of trees.”⁷ Such restrictions can significantly impair the owners’ enjoyment of their property and diminish its value, and owners who wish to sell their property may find that potential purchasers are deterred by these same restrictions. The easements also burden landowners’ peace of mind, due to the threat that Atlantic could someday transfer the easement to the developer of another project that could carve through their property.

³ See Letter from Gregory Buppert, SELC, et al. to Kimberly D. Bose, FERC, at 2–3, Dkt. Nos. CP15-554 et al. (Feb. 9, 2021) (eLibrary No. 20210209-5147); Letter from Gregory Buppert, SELC, et al. to Kimberly D. Bose, FERC, at 4–5, Dkt. Nos. CP15-554-009 et al. (Apr. 16, 2021) (eLibrary No. 20210416-5277) (“April 2021 Scoping Comments”).

⁴ Draft Suppl. EIS at 4-66.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

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Atlantic has informed FERC that it plans to retain its permanent easements for at least as long as it performs restoration work and subsequent monitoring along the ACP right-of-way.⁸ That process alone is expected to take at least 4½ to 5 years⁹—an unreasonable additional burden for landowners who have already faced several years of restrictions on the use of their property. And even when restoration and monitoring are complete, Atlantic has indicated only that it will “communicate with landowners on a case-by-case basis to determine the permanent disposition of the easement.”¹⁰ Atlantic has never committed not to transfer the easements to a third party for use in another pipeline or infrastructure project, saying only that it “ha[s] no plans to do so at this time.”¹¹

If FERC will not resolve this issue in its supplemental EIS, the Commission must address it in its order resolving this certificate amendment proceeding—and should do so in a manner consistent with its recently avowed commitment to improving fairness and transparency for landowners affected by energy projects under its jurisdiction. The Commission’s order should require Atlantic to contact the owner of each property where a permanent easement exists and inform the owner that (a) Atlantic will release the right-of-way easement within 90 days of a written request from an affected landowner or open-space easement holder; (b) Atlantic will provide the affected landowner or open-space easement holder with the proposed written release of the right-of-way easement; (c) Atlantic will pay the reasonable attorneys’ fees of the affected landowner or open-space easement holder incurred in reviewing and negotiating changes to the proposed written release of the right-of-way easement; and (d) Atlantic will file the final, executed written release of the right-of-way easement in the land records of the appropriate jurisdiction.

2. FERC should preserve its proposed condition that Atlantic honor landowner preferences regarding removal of felled trees and should include a similar condition for other restoration requirements.

Construction of the now-abandoned ACP involved the felling of trees on approximately 2,588 acres of forested land, of which about 1,581 acres (108.4 miles) of downed trees were left in place and remain on the ground today.¹² While Atlantic proposed to leave only 25.2 miles of felled trees in place and remove 83.2 miles, FERC determined in the draft supplemental EIS that in most circumstances it would offer a significant environmental advantage to leave all felled

⁸ *Id.*

⁹ *See id.* at 2-27 (estimating that restoration will take “between 1 1/2 to 2 years”), 2-28 (reporting that post-restoration monitoring will last for “a minimum of three years”).

¹⁰ *Id.* at 4-66.

¹¹ Sarah Rankin, *Regulators Get Plan for Undoing the Atlantic Coast Pipeline*, Associated Press, Jan. 5, 2021, <https://bit.ly/3c9R3ki>.

¹² Draft Suppl. EIS at 3-3.

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trees in place.¹³ But FERC also explained that it “understand[s] and agree[s] that landowners ought to have a say in how their land is affected with respect to the felled trees”¹⁴ Consequently, the draft supplemental EIS recommends requiring Atlantic to leave all felled trees in place, except on parcels where the landowners prefer removal of the felled trees.¹⁵

We support FERC’s approach, which gives affected landowners a voice in how their property will be restored without sacrificing environmental protection.¹⁶ The proposed Condition 7 should be preserved in the final supplemental EIS and included in the Commission order that resolves this certificate amendment proceeding.

We also appreciate that Atlantic “plans to continue with its outreach to landowners” regarding their specific restoration requests, and that Atlantic has indicated that it “will coordinate with landowners to ensure the work is completed to the reasonable satisfaction of the landowner.”¹⁷ FERC should memorialize Atlantic’s commitment by making completion of restoration work to the reasonable satisfaction of the landowner a condition of the Commission’s certificate amendment order. In addition, FERC should require Atlantic to reimburse landowners for the reasonable costs incurred in obtaining professional advice as to appropriate restoration measures for their property.¹⁸

3. FERC should not permit Atlantic to engage in new tree-felling within established setbacks around wetlands and waterbodies.

Atlantic has proposed to engage in new tree-felling in segments associated with setbacks around wetlands and waterbodies, in order to move equipment between work areas where tree-

¹³ *Id.* at 3-5 to 3-6.

¹⁴ *Id.* at 3-4.

¹⁵ *Id.* at 3-5 to 3-6, 5-3 (proposed Condition 7).

¹⁶ Where Atlantic believes that there are “safety, landowner, or environmental concerns that have yet to be identified” that would militate towards leaving felled trees in place despite a landowner’s preference for removal, Atlantic would be required to justify its decision and obtain FERC’s prior approval to leave the trees in place. *Id.*

¹⁷ *Id.* at 2-27.

¹⁸ See Reh’g En Banc Br. of FERC at 48, *Allegheny Def. Project v. FERC*, No. 17-1098 (D.C. Cir. June 30, 2020), 2020 WL 635749, at *48 (recognizing that if certificate is vacated and pipeline does not go forward, pipeline company that proceeded with condemnation and construction prior to appellate review “would be liable to the landowner for the time it occupied the land and for any damages resulting to the land and to fixtures and improvements, or for the cost of restoration.”) (quoting *E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 826 (4th Cir. 2004)).

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felling has already occurred.¹⁹ According to the draft supplemental EIS, FERC would allow Atlantic to conduct “a minimal amount of new tree felling in order to accomplish more robust project restoration in areas of difficult access.”²⁰

But these riparian buffers, acknowledged in the Clean Water Act Section 401 certifications issued by both Virginia²¹ and North Carolina,²² protect waters from the impacts of nearby land use. The draft supplemental EIS offers no compelling reason why waters currently protected from tree-felling should no longer receive that protection during restoration work. We note that in its comments on the draft supplemental EIS, the Commonwealth of Virginia recently raised concerns about the potential effects of additional tree-felling on specific aquatic natural communities, including the Matthew Creek Stream Conservation Unit.²³ FERC should require Atlantic to continue to comply with setbacks around wetlands and waterbodies and to develop an alternative to tree-felling in these areas that continues to protect the identified waters.

4. FERC should address the recent failures of Atlantic’s erosion and sediment controls and require Atlantic to upgrade such controls to protect aquatic resources.

Since the issuance of the draft supplemental EIS, Atlantic has sought five variances from FERC to retrieve gravel, sediment, and woody debris that washed from ACP workspaces and access roads onto adjoining property and into waterbodies.²⁴ These failures of Atlantic’s erosion

¹⁹ Letter from Sharon L. Burr, Atlantic, to Kimberly D. Bose, FERC, Attach. (“Atlantic Coast Pipeline Disposition and Restoration Plan”), at 11, Dkt. No. CP15-554 (Jan. 4, 2021) (eLibrary No. 20210104-5278) (“ACP Plan”).

²⁰ Draft Suppl. EIS at 2-4.

²¹ Va. Dep’t of Env’tl. Quality, Section 401 Water Quality Certification No. 17-002 (Dec. 20, 2017), <https://bit.ly/2YAe7Rn>.

²² N.C. Dep’t of Env’tl. Quality, Section 401 Water Quality Certification #WQC004162 (Jan. 26, 2018), <https://bit.ly/3j6gW6h>.

²³ See Letter from Bettina Rayfield, Va. Dep’t of Env’tl. Quality, to Kimberly D. Bose, FERC, Attach. A, at 2, Dkt. Nos. CP15-554-009 et al. (Sept. 8, 2021) (eLibrary No. 20210908-5082) (“Virginia Draft Suppl. EIS Comments”).

²⁴ See Letter from Sharon L. Burr, Atlantic, to Kimberly D. Bose, FERC, Attach. 1, Dkt. Nos. CP15-554-000 et al. (Aug. 18, 2021) (eLibrary No. 20210818-5052); Letter from Sharon L. Burr, Atlantic, to Kimberly D. Bose, FERC, Attach. 1, Dkt. Nos. CP15-554-000 et al. (Aug. 18, 2021) (eLibrary No. 20210818-5055); Letter from Sharon L. Burr, Atlantic, to Kimberly D. Bose, FERC, Attach. 1, Dkt. Nos. CP15-554-000 et al. (Aug. 18, 2021) (eLibrary No. 20210818-5061); Letter from Sharon L. Burr, Atlantic, to Kimberly D. Bose, FERC, Attach. 1, Dkt. Nos. CP15-554-000 et al. (Aug. 18, 2021) (eLibrary No. 20210818-5063); Letter from Sharon L. Burr, Atlantic, to Kimberly D. Bose, FERC, Attach. 1, Dkt. Nos. CP15-554-000 et al. (Sept. 8, 2021) (eLibrary No. 20210908-5035).

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and sediment controls are not discussed in the draft supplemental EIS. FERC should update the supplemental EIS to address these incidents and should require Atlantic to upgrade its temporary and permanent erosion and sediment controls—particularly at stream crossings and on steep slopes—to prevent any future failures and to protect aquatic resources during and after restoration of ACP project areas.

We also note that the Commonwealth of Virginia, in its comments on the draft supplemental EIS, has urged FERC to ensure that Atlantic takes strict measures to minimize impacts to wetlands and water quality.²⁵ In particular, in areas with karst resources, DEQ stresses that Atlantic must continue to flag karst features during its restoration work and to take measures to minimize impacts to karst, groundwater, and surface water resources.²⁶

5. The Forest Service and FERC should require Atlantic to treat non-native invasive species on national forest lands to halt their spread.

The United States Forest Service’s 2020 surveys of ACP restoration workspaces in the George Washington and Jefferson National Forest revealed that “the following non-native invasive species were found—autumn olive, mullein, Queen Anne’s lace, and thistle.”²⁷ Yet the Forest Service has recommended no treatment of such invasive species, claiming that treatment “would have potential to cause more harm to the recovery of native vegetation” and that non-natives would likely be outcompeted by native vegetation.²⁸ This recommendation makes little sense; the Forest Service’s own finding that several invasive species have sprouted up within the ACP right-of-way since the cessation of construction belies the suggestion that native vegetation will likely “outcompete” non-native invasive species.

The Forest Service and FERC should require Atlantic to treat areas on national forest lands that are infested with non-native species. Atlantic’s Invasive Plant Species Management Plan identifies hand application of herbicides as an effective means of reducing the size of invasive plant species problems,²⁹ and the Forest Service routinely treats non-native invasive species through hand application of herbicides to avoid impacts to adjacent native species. The current infestation—described by the Forest Service as “limited in occurrence”³⁰—should be

²⁵ Virginia Draft Suppl. EIS Comments Attach. A, at 16–17.

²⁶ *Id.* Attach. A, at 6–7.

²⁷ Draft Suppl. EIS at 4-19; *see also* Letter from Sharon L. Burr, Atlantic, to Kimberly D. Bose, FERC, App. I, at 10, Dkt. No. CP15-554 (Jan. 4, 2021) (eLibrary No. 20210104-5278) (“Forest Service Site Assessment”).

²⁸ Draft Suppl. EIS at 4-19.

²⁹ Letter from Matthew R. Bley, DETI, to Kimberly D. Bose, FERC, at 1–2 & Encl. (Invasive Plant Species Management Plan) at 6–7, 9–10, 11–12 & Attach. A, Dkt. Nos. CP15-554 et al. (July 12, 2018) (eLibrary No. 20180712-5138).

³⁰ Forest Service Site Assessment at 22.

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easy to target. If these invasives are not treated now, it will become increasingly difficult to halt their spread.

6. FERC should require Atlantic and Eastern GTS to adopt more effective methods for treatment of non-native invasive species on off-forest lands.

According to the draft supplemental EIS, if non-native invasive plant species become established in the right-of-way, Atlantic and Eastern GTS will implement measures to control them.³¹ FERC concludes that Atlantic's and Eastern GTS's implementation of their Invasive Plant Species Management Plan will minimize the impact of invasive species.³²

The efforts by Atlantic and Eastern GTS to control invasive plants to date have not succeeded. As the draft supplemental EIS reports, "[i]nspection reports and FERC construction compliance monitors have documented that ACP spreads in West Virginia, Virginia, and North Carolina contain a considerable amount of non-native invasive species . . . where trees were felled."³³ "Non-native species . . . are present in ACP restoration workspaces in particular," and "[d]ense vegetation, mostly invasive and non-native species like mountain olive, occurs between felled trees."³⁴ Accordingly, FERC should require Atlantic and Eastern GTS to adopt more effective methods for treatment of invasives—or should explain in its supplemental EIS why it is reasonable to conclude that Atlantic's and Eastern GTS's efforts will "minimize the impact of invasive species" when to date they have not done so.

7. FERC should hold Atlantic to its commitment to reseed the high-potential zone and dispersal zone for rusty-patched bumble bee with pollinator-friendly plant species.

The rusty-patched bumble bee ("RPBB") is an endangered species "so imperiled that every remaining population is important for the continued existence of the species."³⁵ Since 2017, federal, state, and private surveyors have documented multiple occurrences of RPBB in the ACP's proposed path along the Virginia-West Virginia border.³⁶ The draft supplemental EIS confirms that "[d]ue to the potential for this species to be encountered during restoration activities, the potential for direct mortality of one or more individuals, and the temporary loss of

³¹ Draft Suppl. EIS at 4-20.

³² *Id.*

³³ *Id.* at 4-18.

³⁴ *Id.* at 4-19.

³⁵ U.S. Fish & Wildlife Serv. ("FWS"), Survey Protocols for the Rusty Patched Bumble Bee at 1 (Apr. 12, 2019), <https://bit.ly/2Ajffji>.

³⁶ See *Rusty Patched Bumble Bee Map*, FWS, <https://bit.ly/2TJsil2> (last visited Sept. 6, 2021) (providing shapefiles documenting specimen detections); Draft Suppl. EIS at 4-40 (reporting that surveys completed by Atlantic in 2019 confirmed that RPBB were present along ACP's route).

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foraging habitat, the ACP Restoration Project *may affect and is likely to adversely affect* the RPBB.”³⁷

Reseeding the ACP right-of-way with pollinator-friendly plant species is a simple restoration measure that could have a meaningful impact on the survival of the endangered RPBB. Throughout the ACP’s planning and construction, Atlantic committed to reseed all construction right-of-way and workspace areas within the high-potential zone and dispersal zone for RPBB with pollinator-friendly plant species, including species believed to be preferred by RPBB.³⁸ The U.S. Fish and Wildlife Service (“FWS”) made the use of pollinator-friendly plant species an express condition of the Biological Opinion and Incidental Take Statement for the ACP.³⁹ Now, however, Atlantic has abandoned this commitment.⁴⁰

According the draft supplemental EIS, Atlantic’s position appears to be that pollinator-friendly plant species would be unlikely to survive in undisturbed areas or in disturbed areas that Atlantic will allow to revert over time back to scrub-shrub or forested habitat.⁴¹ FERC should ensure that Atlantic honors its prior commitment—or at least require Atlantic to use pollinator-friendly seed mixes in disturbed areas and to consider other mechanisms to improve pollinator habitat in undisturbed areas.

³⁷ Draft Suppl. EIS at 4-42 (emphasis in original).

³⁸ ACP Plan App. H (citing, *inter alia*, Letter from Richard B. Gangle, Dominion Energy, to Troy Andersen, FWS, at 1 (Sept. 15, 2017)); Letter from Angela M. Woolard, Dominion Transmission, Inc., to Kimberly D. Bose, FERC, App. D (Updated Draft Biological Assessment), at 18, 44, 232, Dkt. Nos. CP15-554 et al. (Jan. 27, 2017) (eLibrary Nos. 20170127-5202 and 20170127-5203).

³⁹ FWS, Biological Opinion and Incidental Take Statement for ACP and Supply Header Projects at 56, Dkt. Nos. CP15-554 et al. (Oct. 16, 2017) (eLibrary No. 20171103-3008); FWS, Revised Biological Opinion and Incidental Take Statement for ACP and Supply Header Projects at 82, Dkt. Nos. CP15-554 et al. (Sept. 11, 2018) (eLibrary No. 20180917-3001).

⁴⁰ See ACP Plan App. H (listing as “Not Proposed” Atlantic’s prior commitment to “[r]e-seed all construction [right-of-way] areas (temporary and permanent) within the [high-potential zone] and the dispersal zone with pollinator friendly native seed mixes consistent with recommendations for plant restoration by [George Washington National Forest]” and to “[i]nclude species preferred by RPBB”).

⁴¹ Draft Suppl. EIS at 4-25.

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8. FERC should require Atlantic to implement the time-of-year restriction for rusty-patched bumble bee within the dispersal zone—not just the high-potential zone.

In response to FWS's recommendation that Atlantic certain restrict restoration activities between March 15 and October 15 to minimize harm to RPBB,⁴² Atlantic responded that it would "implement the recommended time of year restriction (TOYR) for rusty patched bumble bee (RPBB), which restricts tree felling, mowing and shrub removal *within the High Priority Zone (HPZ)* from March 15 to October 15 to mitigate any potential adverse effects to RPBB."⁴³ The draft supplemental EIS similarly indicates that the time-of-year-restriction for RPBB applies only "[w]ithin the RPBB High Potential Zone (HPZ)"⁴⁴—and not within the area surrounding the high-potential zone, known as the dispersal zone.⁴⁵

As we commented in our April 16, 2021 letter,⁴⁶ FWS designated the high-potential zone for RPBB in September 2018, now a full three years ago.⁴⁷ It is possible that RPBB have moved outside the high-potential zone and into the dispersal zone since that time. Given the imperiled status of the species, the time-of-year restriction should apply within *both* the high-potential zone and the dispersal zone for RPBB.

⁴² Email from Cindy Schulz, FWS, to Julia Yuan, FERC, et al., Attach., at 1, Dkt. Nos. CP15-554 et al. (Feb. 22, 2021) (eLibrary No. 20210311-5061) ("Recommend March 15 – Oct. 15 [time-of-year restriction] for RPBB").

⁴³ Letter from Sharon L. Burr, Atlantic, to Kimberly D. Bose, FERC, Question No. 48.03, Dkt. No. CP15-554 (Apr. 7, 2021) (eLibrary No. 20210407-5244) (emphasis added).

⁴⁴ Draft Suppl. EIS at 4-27 tbl. 4.7.2-1.

⁴⁵ We note that the draft supplemental EIS does not accurately describe the areas of the high-potential zone and dispersal zone for RPBB. On page 4-40, FERC refers to "83.0 acres of the ACP Restoration Project workspace within the HPZ." Draft Suppl. EIS at 4-40. But on page 4-24, FERC states that the "RPBB high potential zone (HPZ) and dispersal zones . . . make up 83 acres of the total 4,012.1 acres of the ACP restoration workspace." *Id.* at 4-24. Unless the area of the dispersal zone is zero—which it is not—then both statements cannot be accurate. FERC should correct this error in its final supplemental EIS and include accurate figures for the areas of the high-potential zone and dispersal zone for RPBB.

⁴⁶ April 2021 Scoping Comments at 8. FERC's draft supplemental EIS contains no response to this comment.

⁴⁷ See FWS, Revised Biological Opinion and Incidental Take Statement for ACP and Supply Header Projects at 23–29, Dkt. Nos. CP15-554 et al. (Sept. 11, 2018) (eLibrary No. 20180917-3001).

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9. FERC should clarify that no tree-felling will be permitted during the time-of-year-restrictions for migratory birds.

The draft supplemental EIS concludes that impacts on migratory birds from restoration work would not be significant due to Atlantic and Eastern GTS's compliance with seasonal restrictions on tree-felling set forth in table 4.7.2-1.⁴⁸ Table 4.7.2-1 indicates that “[n]o tree felling, mowing, [or] shrub removal” may occur in Virginia from March 15 to August 31 or in Pennsylvania, West Virginia, or North Carolina from April 1 through August 31.⁴⁹

In the same section of the draft supplemental EIS, however, FERC also reports that “[c]utting of standing timber and limbing of overhanging trees along access roads *would* take place within the [time-of-year-restriction].”⁵⁰ This statement suggests that at least some tree-felling—“cutting of standing timber”—would be allowed to take place. FERC should either remove this statement from the supplemental EIS or clarify (1) how “cutting of standing timber” is distinct from “tree felling,” and (2) how FERC has determined that permitting “cutting of standing timber” within the time-of-year-restrictions would not have the potential to significantly impact migratory birds.

10. FERC should require Atlantic to quantify and offset freshwater-mussel impacts from tree-felling and other disturbances.

Freshwater mussels represent a highly imperiled class of organisms that are sensitive to water-quality disturbances such as sedimentation and erosion.⁵¹ Sedimentation and erosion can cause mortality, inhibit reproduction, or cause sublethal effects,⁵² as described in the biological assessment prepared for another pipeline project in the region.⁵³ Further, impacts to filter-feeding mussels deplete ecosystem services, with consequent negative impacts for downstream

⁴⁸ Draft Suppl. EIS at 4-26.

⁴⁹ *Id.* at 4-27 tbl. 4.7.2-1.

⁵⁰ *Id.* at 4-26.

⁵¹ Siu Gin Cheung et al., *Size Effects of Suspended Particles on Gill Damage in Green-Lipped Mussel Perna Viridis*, 51 Marine Pollution Bull. 801 (2005), <https://doi.org/10.1016/j.marpolbul.2005.02.019>.

⁵² Sean B. Buczek et al., *Effects of Turbidity, Sediment, and Polyacrylamide on Native Freshwater Mussels*, 54 JAWRA J. of Am. Water Resources Ass'n 631 (2018), <https://doi.org/10.1111/1752-1688.12639>.

⁵³ Biological Assessment for Mountain Valley Pipeline, LLC: Mountain Valley Pipeline Project § 4.1.3.1, Dkt. No. 16-10-000 (July 7, 2017) (eLibrary No. 20170707-4008), <https://bit.ly/3naUGvP>.

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waterbodies. Specifically, mussels have the capacity to sequester suspended solids or nutrients and enhance denitrification. Mussels also serve as habitat and food source for other organisms.⁵⁴

Atlantic's tree-felling and resulting erosion and sedimentation occurred in systems that are potential habitat to endangered mussels including James River spiny mussel, Atlantic pigtoe, dwarf wedgemussel, and yellow lance.⁵⁵ These waters are also habitat to numerous other common freshwater mussels such as *Eastern elliptio* that are considered generally ubiquitous across freshwater ecosystems. In addition, Atlantic's refusal to reroute the ACP to avoid a population of clubshell mussels in Hackers Creek, West Virginia, led to extensive damage to one of the last remaining populations of this endangered species. The draft supplemental EIS notes that Atlantic "completed multiple salvage efforts to remove and relocate the federally listed clubshell mussel from the workspace and surrounding areas," but omits any discussion of their outcome.⁵⁶ In fact, the relocation efforts backfired; almost every clubshell that was moved died while in captivity.⁵⁷ This history calls into question FERC's statement in the draft supplemental EIS that "[i]mpacts on mussels associated with prior construction were avoided and/or minimized and mitigated to the greatest extent practicable."⁵⁸

The draft supplemental EIS reports that "Atlantic does not plan to conduct any additional mussel surveys or relocations as part of the disposition and restoration activities for ACP."⁵⁹ This would be a mistake. Given the harm that ACP construction has likely inflicted on endangered mussels—and on the Hackers Creek clubshell population in particular—FERC should ensure that Atlantic, in conjunction with FWS, quantifies and mitigates impacts to freshwater mussels through propagation and augmentation of mussel populations in impacted areas, just as other restoration plans have required.⁶⁰ Restored mussel assemblage would help mitigate impacts to

⁵⁴ Caryn C. Vaughn, *Ecosystem Services Provided by Freshwater Mussels*, 810 *Hydrobiologia* 15 (2018), <https://doi.org/10.1007/s10750-017-3139-x>.

⁵⁵ FWS recently designated critical habitat for the yellow lance, including watersheds in North Carolina and Virginia. See *Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Yellow Lance*, 86 Fed. Reg. 18,189 (Apr. 8, 2021).

⁵⁶ Draft Suppl. EIS at 4-14 to 4-15.

⁵⁷ FWS, *Clubshell (Pleurobema Clava) 5-Year Review* at 10 (2019), <https://bit.ly/3yWkUoa>.

⁵⁸ Draft Suppl. EIS at 4-15.

⁵⁹ *Id.*

⁶⁰ See, e.g., FWS et al., *Restoration Plan & Env'tl. Assessment for DuPont Waynesboro-South River/South Fork Shenandoah River/Shenandoah River Site* § 5.3.2 (Mar. 2017), <https://bit.ly/3h7wZaQ>.

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vital aquatic ecosystem functions such as nutrient retention that have been caused by the ACP's construction.

11. FERC's initial determination that restoration work is not likely to adversely affect the endangered clubshell mussel in Hackers Creek runs counter to the available evidence.

As described above, ACP construction has already inflicted serious damage on the endangered clubshell population in Hackers Creek, where clubshell are still assumed present.⁶¹ Atlantic proposes to perform restoration work along 3.4 miles of Hackers Creek, intersecting 19 of its direct tributaries.⁶² The draft supplemental EIS acknowledges that "upland restoration activities may result in water quality impacts from increased [total suspended solids], sedimentation, and potential contaminants from accidental spills in the tributaries, as well as downstream in Hackers Creek."⁶³ These facts support the conclusion that Atlantic's restoration activities are likely to adversely affect clubshell in Hackers Creek; therefore, the draft supplemental EIS's "initial determination" that restoration work "*may affect but is not likely to adversely affect*" clubshell cannot be squared with the available evidence.⁶⁴ FERC must complete formal Section 7 consultation under the Endangered Species Act with respect to clubshell. Considering the harm that this population has already endured, a cautious approach is warranted here.

12. FERC should ensure that Atlantic fulfills all prior commitments regarding treatment of historic and cultural resources affected by ACP construction.

The draft supplemental EIS confirms that Atlantic has committed to reassemble the rock walls along the ACP route in Augusta County, Virginia, and to prepare a popular report of local history to be submitted to FERC and consulting parties within 60 days of completion of the walls' reconstruction.⁶⁵ In addition to these actions, it is critical that Atlantic uphold the specific commitments it made in its July 3, 2018 response⁶⁶ to FERC's information request, in which Atlantic detailed how it would carry out its treatment plan for historic rock walls in Augusta

⁶¹ Draft Suppl. EIS at 4-49.

⁶² *Id.*

⁶³ *Id.* at 4-50; *see also id.* ("Restoration activities and use of access roads may cause short-term incremental increases in [total suspended solids] in tributaries to Hackers Creek.").

⁶⁴ *Id.* (emphasis in original).

⁶⁵ *Id.* at 4-71; *id.* App. G tbl. G-1, at 3.

⁶⁶ Letter from Matthew R. Bley, DETI, to Kimberly D. Bose, FERC, Attach. (Response to Environmental Information Request Dated June 28, 2018), Dkt. Nos. CP15-554 et al. (July 3, 2018) (eLibrary No. 20180703-5160) ("Response to June 2018 Information Request").

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County, Virginia.⁶⁷ Among those commitments, Atlantic pledged to notify and provide access to the Augusta County Historical Society (“ACHS”) during the reconstruction of rock walls that Atlantic had dismantled and to consult with the ACHS on Atlantic’s public education measures.⁶⁸ It is also essential that Atlantic coordinate with the ACHS for all sites in Augusta County that are listed in, or eligible for listing in, the National Register of Historic Places, including significant Native American sites and a cemetery for enslaved people at Folly Farm.⁶⁹ FERC should ensure that Atlantic fulfills all of its prior commitments regarding treatment of historic and cultural resources.

13. FERC must assess the significance of the restoration projects’ impacts on climate change.

The draft supplemental EIS acknowledges that the restoration projects “would increase the atmospheric concentration of [greenhouse gases] . . . and would contribute to climate change.”⁷⁰ Yet FERC claims that it is unable either to “assess the Restoration Projects’ contribution to climate change” or to “determine significance regarding the Restoration Projects’ impacts on climate change.”⁷¹ This “analysis” is inadequate under the National Environmental Policy Act (“NEPA”).

In making this comment, we are not suggesting that restoration of ACP and Supply Header Project workspaces *will* have a significant impact on climate change. Nor would a determination by FERC that the restoration projects will significantly affect climate change necessarily mean that the projects should not proceed. But as for its review of any project with environmental impacts, FERC cannot simply decline to assess the significance of those impacts.

⁶⁷ See Letter from Angela M. Woolard, DETI, to Kimberly D. Bose, FERC, App. B (Treatment Plan for Historic Resource Potentially Eligible for the National Register of Historic Places: Rock Walls and Rock Features (007-5765)), Dkt. Nos. CP15-554 et al. (May 1, 2018) (eLibrary No. 20180502-5019).

⁶⁸ Response to June 2018 Information Request.

⁶⁹ See Programmatic Agreement for ACP and Supply Header Project § III.C, Dkt. Nos. CP15-554 et al. (eLibrary No. 20171128-3056) (requiring Atlantic to provide consulting parties with management summary of treatment implemented and draft and final reports documenting implementation of each treatment plan); *id.* § IV (requiring Atlantic to develop public education program in consultation with consulting parties and to implement program); Letter from David Swearingen, FERC, to Timothy K. Fitzgerald, Augusta County, Dkt. Nos. CP15-554 et al. (Nov. 28, 2017) (eLibrary No. 20171128-3055) (designating Augusta County as consulting party).

⁷⁰ Draft Suppl. EIS at 4-83.

⁷¹ *Id.*

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Indeed, the Commission itself now recognizes that it is both required to assess, and fully capable of assessing, the significance of a project's impacts on climate change.⁷²

It makes no difference that FERC has not identified “an established threshold for determining significance when compared to established [greenhouse gas] reduction targets at the state or federal level.”⁷³ Failing to assess significance because no “established threshold” exists would circumvent NEPA's requirement that agencies discuss “direct effects *and their significance*,”⁷⁴ and ignores the factors provided for agencies to consider in assessing whether a project's impacts are significant.⁷⁵ In fact, in this draft supplemental EIS, FERC repeatedly makes determinations as to significance despite the absence of an established numerical limit.⁷⁶

The D.C. Circuit's recent decision in *Vecinos para el Bienestar de la Comunidad Costera v. FERC*⁷⁷ further compels FERC to revisit its decision not to assess the significance of climate change impacts in its NEPA analysis. The court in *Vecinos* remanded FERC's certificate orders authorizing the construction and operation of three liquefied natural gas terminals and a gas pipeline based in part on an analysis of climate change impacts in FERC's EISs for those projects that was strikingly similar to FERC's analysis here. In the *Vecinos* EISs, just as in the draft supplemental EIS for the restoration projects at issue here, FERC quantified the greenhouse gas emissions associated with the construction and operation of the projects, described existing and potential climate change impacts in the project areas, and explained that construction and operation of the projects would increase the atmospheric concentration of greenhouse gases and contribute incrementally to future climate change impacts.⁷⁸ Yet in both cases, that is where FERC's analysis ended.

⁷² See *N. Nat. Gas Co.*, 174 FERC ¶ 61,189, at ¶¶ 29–36 (2021); see *id.* at ¶ 32 (“We find that there is nothing about [greenhouse gas] emissions or their resulting contribution to climate change that prevents us from making that same type of significance determination.”)

⁷³ Draft Suppl. EIS at 4-83.

⁷⁴ 40 C.F.R. § 1502.16 (2019) (emphasis added). The Council on Environmental Quality revised its regulations for NEPA implementation in July 2020, but as FERC correctly notes, the 2020 NEPA regulations authorize FERC to prepare its supplemental EIS using the preexisting NEPA regulations because the NEPA review of these projects began prior to the September 14, 2020 effective date of the 2020 regulations. See Draft Suppl. EIS at 1-6 n.19; 40 C.F.R. § 1506.13 (2020) (providing that new regulations “apply to any NEPA process begun after September 14, 2020”).

⁷⁵ 40 C.F.R. § 1508.27 (2019).

⁷⁶ See, e.g., Draft Suppl. EIS at 4-6 (soils), 4-8 (groundwater), 4-9 (surface waters), 4-10 (wetlands), 4-22 (vegetation), 4-24 (fire danger), 4-25 (wildlife), 4-26 (migratory birds), 4-60 (state-protected species), 4-75 (noise).

⁷⁷ 6 F.4th 1321 (D.C. Cir. 2021).

⁷⁸ *Id.* at 1328; Draft Suppl. EIS at 4-79 to 4-81.

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In the *Vecinos* EISs, FERC “concluded that it was ‘unable to determine the significance of the Project’s contribution to climate change’⁷⁹; here, FERC stated that it was “unable to assess the Restoration Projects’ contribution to climate change.”⁸⁰ In *Vecinos*, FERC “explained that that ‘there is no universally accepted methodology to attribute discrete, quantifiable, physical effects on the environment to [the] Project’s incremental contribution to [greenhouse gas emissions],’ and that therefore ‘it is not currently possible to determine localized or regional impacts from [greenhouse gas] emissions from the Project.’”⁸¹ Here, FERC explained that it “has not identified a methodology to attribute discrete, quantifiable, physical effects on the environment to a project’s incremental contribution to [greenhouse gas emissions],”⁸² and that FERC “could not determine specific localized or regional physical impacts from [greenhouse gas] emissions from the Restoration Projects.”⁸³

Faced with this nearly identical analysis in *Vecinos*, the D.C. Circuit found that FERC had failed to comply with the NEPA regulation, 40 C.F.R. § 1502.21(c), that provides that “[i]f . . . information relevant to reasonably foreseeable significant adverse impacts cannot be obtained . . . because the means to obtain it are not known, the agency shall include within the environmental impact statement . . . [t]he agency’s *evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community*.”⁸⁴ Specifically, the court found, FERC was required to use the social cost of carbon protocol or some other generally accepted methodology to evaluate the impact of each project’s contribution to climate change.⁸⁵ FERC’s failure to do so rendered its analysis of the projects’ greenhouse gas emissions deficient in that case. So too here; in preparing the supplemental EIS, FERC must actually evaluate the significance of the restoration projects’ impacts on climate change.

CONCLUSION

The environmental harm caused by partial construction of the ACP and Supply Header Project has proven entirely unnecessary now that the projects have been cancelled. This makes it even more critical for FERC to ensure that Atlantic and Eastern GTS fully restore the land and resources they disturbed and respect the landowners who have borne the greatest burden of these now-abandoned projects. We urge FERC to revise its draft supplemental EIS as described in

⁷⁹ *Vecinos*, 6 F.4th at 1328.

⁸⁰ Draft Suppl. EIS at 4-83.

⁸¹ *Vecinos*, 6 F.4th at 1328.

⁸² Draft Suppl. EIS at 4-81.

⁸³ *Id.* at 4-82.

⁸⁴ *Vecinos*, 6 F.4th at 1329 (emphasis added); *see* 40 C.F.R. § 1502.21(c) (2020). The court noted that the relevant regulation had been codified at 40 C.F.R. § 1502.22(b) at the time FERC completed its EISs. *Vecinos*, 6 F.4th at 1328.

⁸⁵ *Vecinos*, 6 F.4th at 1329.

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these comments and to incorporate our comments into the Commission's order resolving this certificate amendment proceeding.

Sincerely,

/s/ Gregory Buppert

Gregory Buppert

Mark Sabath

SOUTHERN ENVIRONMENTAL LAW CENTER

*On behalf of Alliance for the Shenandoah Valley,
Cowpasture River Preservation Association,
Friends of Buckingham, Friends of Nelson,
Highlanders for Responsible Development,
Piedmont Environmental Council, Shenandoah
Valley Battlefields Foundation, Virginia
Wilderness Committee, Sound Rivers, Inc., and
Winyah Rivers Foundation*

/s/ Benjamin A. Luckett

Benjamin A. Luckett

APPALACHIAN MOUNTAIN ADVOCATES

*On behalf of Appalachian Voices, Chesapeake
Climate Action Network, Sierra Club, and Wild
Virginia, Inc.*

/s/ Jon A. Mueller

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U.S. Fish and Wildlife Service

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated: September 13, 2021

/s/ Gregory Buppert

Gregory Buppert

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