

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

In the Matter of

**ATLANTIC COAST PIPELINE, LLC
DOMINION TRANSMISSION, INC.**

**Docket Nos. CP15-554-000
CP15-554-001
CP15-554-002
CP15-554-003
CP15-555-000
CP15-555-001
CP15-554-002**

FILED JUNE 11, 2018

**REQUEST FOR REHEARING
AND
MOTION TO STAY
MAY 11, 2018 NOTICE TO PROCEED AUTHORIZING
COMMENCEMENT OF FULL CONSTRUCTION FOR THE 2018
CONSTRUCTION SPREADS IN WEST VIRGINIA
BY
DEFENDERS OF WILDLIFE, SIERRA CLUB, AND
VIRGINIA WILDERNESS COMMITTEE**

As authorized by section 19(a) of the Natural Gas Act (“NGA”), 15 U.S.C. §717r(a) and Rule 713 of the Federal Regulatory Energy Commission’s (“Commission”) Rules of Practice and Procedure, 18 C.F.R. § 385.713, DEFENDERS OF WILDLIFE, SIERRA CLUB, and VIRGINIA WILDERNESS COMMITTEE (collectively, “Petitioners”) hereby request rehearing of the Commission’s May 11, 2018 letter authorizing Atlantic Coast Pipeline, LLC, (“Atlantic”) and Dominion Transmission, Inc., (“Dominion”) “to commence full construction” of the “2018 construction

spreads in West Virginia” for the Atlantic Coast Pipeline. David Swearingen, FERC, Letter to Matthew Bley, Dominion Transmission, Inc. (May 11, 2018), eLibrary No. 20180511-3048 (hereafter, the “Notice to Proceed”).

The Commission granted Sierra Club’s and Virginia Wilderness Committee’s respective motions to intervene in this proceeding. Atlantic Coast Pipeline, LLC, 161 FERC ¶ 61,042, p. 19 (Oct. 13, 2017) (the “Certificate Order”). Thus, Sierra Club and Virginia Wilderness Committee are “parties” to this proceeding, 18 C.F.R. § 385.214(c), and have standing to file this request for rehearing. *See* 15 U.S.C. § 717r(a); 18 C.F.R. § 385.713(b). Defenders of Wildlife joins this request for rehearing because it is a petitioner in *Defenders of Wildlife v. U.S. Dep’t of the Interior*, 722 Fed. Appx. 321 (4th Cir. 2018), which vacated the Incidental Take Statement for the Atlantic Coast Pipeline, and it has an important interest in enforcing the Court’s order.

Petitioners request that the Commission grant rehearing, immediately revoke the West Virginia Notice to Proceed, and stay all pipeline construction authorized by the Notice. On May 15, 2018 the Fourth Circuit Court of Appeals vacated the Fish and Wildlife Service’s Incidental Take Statement for the Atlantic Coast Pipeline. Therefore, Atlantic and Dominion

are not in compliance with two mandatory conditions of the project's Certificate Order: Environmental Condition 54 and Environmental Condition 10. Certificate Order, Appendix A, ¶¶ 10, 54. Both of these conditions require a valid incidental take statement before pipeline construction proceeds. *See id.*

STATEMENT OF RELEVANT FACTS

On October 13, 2017, the Commission issued an “Order Issuing Certificates” authorizing construction and operation of the Atlantic Coast Pipeline. *See* Certificate Order, 161 FERC ¶ 61,042. The Certificate Order contained numerous conditions including Environmental Conditions 10 and 54, which state:

10. Atlantic and DETI must receive written authorization from the Director of OEP **before commencing construction of any project facilities**. To obtain such authorization, Atlantic and DETI must file with the Secretary documentation that it has received all applicable authorizations required under federal law (or evidence of waiver thereof). The Director of OEP will not issue a notice to proceed with construction of the Atlantic or DETI project facilities independently.

...

54. Atlantic and DETI **shall not begin construction of the proposed facilities until:**

- a. all outstanding biological surveys are completed;
- b. the FERC staff complete any necessary section 7 consultation with the FWS; and

- c. Atlantic and DETI have received written notification from the Director of OEP that construction and/or use of mitigation (including implementation of conservation measures) may begin.

Certificate Order, Appendix A, ¶¶ 10, 54 (emphasis in original). On October 16, 2017, the U.S. Fish and Wildlife Service issued a Biological Opinion of the effects of the Atlantic Coast Pipeline on threatened and endangered species with an accompanying Incidental Take Statement. U.S. Fish & Wildlife Serv., Biological Opinion for the Atlantic Coast Pipeline (Oct. 16, 2017), eLibrary No. 20171103-3008. On January 19, 2018, Petitioners challenged the adequacy of the Biological Opinion and Incidental Take Statement in the U.S. Fourth Circuit Court of Appeals. Pet. for Review, *Defenders of Wildlife et al. v. Fish & Wildlife Serv. et al.*, Case No. 18-1083 (4th Cir. Jan. 18, 2018). On April 18, 2018, Atlantic and Dominion requested authorization through a notice to proceed to begin construction in the 2018 construction spreads in West Virginia. Matthew Bley, Dominion Energy Transmission, Letter to Kimberly Bose, FERC (April 18, 2018), eLibrary No. 20180419-5081. On May 11, 2018, the Commission issued the Notice to Proceed with construction in West Virginia. *See* Notice to Proceed. On May 15, 2018, the Fourth Circuit vacated the Fish and Wildlife Service's Incidental Take Statement for the Atlantic Coast Pipeline. *See Defenders of*

Wildlife v. U.S. Dep't of the Interior, 722 Fed. Appx. 321 (4th Cir. 2018). Aerial photographs taken June 8, 2018, show land grading, excavation, and other construction underway on Spread 2-1 in Upshur County, West Virginia.

STATEMENT OF ISSUES

1. The Commission's Notice to Proceed is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" because Endangered Species Act consultation is not complete. Environmental Condition 54 of the Certificate Order requires that consultation be complete before the Commission authorizes pipeline construction. Environmental Condition 10 of the Certificate Order requires that Atlantic and Dominion provide a valid incidental take statement before the Commission authorizes pipeline construction. 5 U.S.C. § 706; 15 U.S.C. § 717r(b); *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *Defenders of Wildlife v. U.S. Dep't of the Interior*, 722 Fed. Appx. 321 (4th Cir. 2018); Certificate Order, Appendix A, ¶¶ 10, 54.
2. The Commission's Notice to Proceed is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" because the Commission, Atlantic, and Dominion will violate Section 7(d) of the Endangered Species Act if pipeline construction continues before consultation is complete. 5 U.S.C. § 706; 15 U.S.C. § 717r(b); 16 U.S.C. § 1536(d); *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *Defenders of Wildlife v. U.S. Dep't of the Interior*, 722 Fed. Appx. 321 (4th Cir. 2018); *Conner v. Burford*, 848 F.2d 1441, 1455 n.34 (9th Cir. 1988).
3. The Commission's Notice to Proceed is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" because the Commission, Atlantic, and Dominion risk violation of the Endangered Species Act's prohibition on the "take" of protected species without a valid incidental take statement. 5 U.S.C. § 706; 15 U.S.C. § 717r(b); 16 U.S.C. § 1538(a); *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983);

Defenders of Wildlife v. U.S. Dep't of the Interior, 722 Fed. Appx. 321 (4th Cir. 2018); *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997); 50 C.F.R. § 17.31.

ARGUMENT

A. Endangered Species Act consultation is not complete, and Atlantic and Dominion are not in compliance with Environmental Conditions 54 and 10 of the Certificate Order.

On May 15, 2018, the Fourth Circuit Court of Appeals vacated the Fish and Wildlife Service's Incidental Take Statement for the Atlantic Coast Pipeline. *See Defenders of Wildlife*, 722 Fed. Appx. at 321. Petitioners notified the Commission on May 16, 2018, and again on May 21, 2018, that the project lacked an incidental take statement, a key approval necessary to proceed with construction. Without that approval, the Commission must not allow pipeline construction to continue. This is because, as we previously noted, having a valid incidental take statement, which both limits take and provides a shield from liability under the Endangered Species Act, is a required condition of the Certificate Order and two other federal agency approvals.

Foremost, the Commission's October 13, 2017 Certificate Order authorizing this project requires a valid biological opinion *and* incidental take statement for work to proceed. *See* Certificate Order, Appendix A, ¶¶ 10, 54. Condition No. 54 of the Certificate Order prohibits Atlantic and

Dominion from beginning any construction until “the FERC staff complete any necessary section 7 consultation with the FWS.” Certificate Order, Appendix A, ¶ 54. Elsewhere in its Order, the Commission explains what this requirement means: “Environmental Condition 54 in the appendix to this order stipulates that construction cannot begin until after staff completes the process of complying with the Endangered Species Act.” Certificate Order, ¶ 243.

On October 16, 2017, Atlantic accepted the terms of the Certificate Order. *See* Matthew Bley, Dominion Energy Transmission, Letter to Kimberly Bose, FERC (October 16, 2017), eLibrary No. 20171016-5254. That acceptance is conditioned on Atlantic’s “compliance with the environmental conditions listed in Appendix A to this order,” which includes Condition No. 54. Certificate Order, p. 129.

As it stands, the Commission’s consultation obligations under Section 7 of the Endangered Species Act are incomplete. As part of consultation, the Fish and Wildlife Service must provide “a statement concerning incidental take, if such take is reasonably certain to occur,” which is included with the biological opinion. 50 C.F.R. § 402.14(g)(7); *see also* § 402.14(i). The Service has confirmed that take is reasonably certain to occur, but the Incidental Take Statement attached to the project’s Biological Opinion is

now invalid. Thus, the Commission does not have the “statement concerning incidental take” necessary to complete Section 7 consultation.¹

To fulfill Section 7 consultation requirements and move forward with this project, the Commission must obtain a valid incidental take statement through consultation with the Fish and Wildlife Service. To be clear, this is not a situation where the limits of a valid incidental take statement have been exceeded, requiring the Commission to reinitiate previously completed Section 7 consultation. Here, the underlying Incidental Take Statement has been vacated, and consultation is incomplete. The Commission’s Certificate Order prohibited commencement of construction before obtaining its first, now invalid, Incidental Take Statement; the Certificate Order likewise does not allow construction to continue in the absence of an incidental take statement.

Other conditions in the Certificate Order also bar construction absent a valid incidental take statement. Condition No. 10 of the Certificate Order requires Atlantic and Dominion to “file with the Secretary documentation that it has received all applicable authorizations required under federal law” before commencing construction of any project facilities. Certificate Order,

¹ The Fish and Wildlife Service need not allow incidental take in every instance it is requested but still must include a statement concerning take – setting an enforceable limit on it, or disallowing it.

Appendix A, ¶10. An incidental take statement is an “applicable authorization required under federal law” for this project. Atlantic and Dominion can no longer make the requisite showing because they lack a valid incidental take statement. The face of the Certificate Order does not allow for the possibility that construction would continue in the absence of such an authorization required under federal law.

B. The Commission, Atlantic, and Dominion will violate Section 7(d) of the Endangered Species Act if pipeline construction continues before consultation is complete.

Allowing Atlantic and Dominion to proceed with pipeline construction in West Virginia will run afoul of the Endangered Species Act’s prohibition on “any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures” after initiation of consultation. 16 U.S.C. § 1536(d). That prohibition “ensur[es] that the status quo will be maintained during the consultation process.” *Conner v. Burford*, 848 F.2d 1441, 1455 n.34 (9th Cir. 1988). Allowing the Notice to Proceed to stand would facilitate the opposite. The Commission should not allow Atlantic and Dominion to encroach upon the edge of habitat for endangered and threatened species in an effort to secure its preferred pipeline route, foreclosing alternative routes

or other measures the Fish and Wildlife Services determines necessary to protect those species.

The extent of what the Fish and Wildlife Service must do to issue a valid and enforceable incidental take statement for the project, besides complete consultation, is unclear, particularly as the parties await the Fourth Circuit's opinion. It is entirely possible that to develop enforceable limits on take, the Service may have to allow take of a larger number of individuals than was anticipated as the "small percent" in its original Biological Opinion and Incidental Take Statement. At oral argument before the Fourth Circuit, counsel for the Fish and Wildlife Service indicated the Service could employ a habitat surrogate limit on take which would allow take of *all* Indiana bats within its habitat, over 4,000 acres in this instance.² That stands in stark contrast to the smaller number of "taken" bats assessed in the agency's jeopardy analysis. *See* Biological Opinion, 46-67.

Adopting that approach may require the Fish and Wildlife Service to revisit its jeopardy analysis for some or all of these species. Its revisited jeopardy analysis could require route modifications as a reasonable and prudent alternative to affecting the species. Additionally, if the Service is unable to develop enforceable take limits for inclusion in an incidental take

² Audio Recording of Oral Argument: 22:06-22:53 available at <http://coop.ca4.uscourts.gov/OAarchive/mp3/18-1082-20180510.mp3>.

statement, it may require the pipeline to simply avoid certain species altogether.

The habitat for several endangered or threatened species covers significant portions of the current pipeline route in West Virginia. For example, of the 11,776 acres of land that will be disturbed by pipeline construction (Biological Opinion, 7), at least 4,448 of those acres are Indiana bat habitat (*id.* at 24). In fact, the Biological Opinion determined take of Indiana bat would occur where the project intersects the Indiana Bat Appalachian Recovery Unit, which includes *all* of West Virginia.³ If the Fish and Wildlife Service were to require route modifications as part of its new incidental take or jeopardy analyses, those modifications could be significant.

The Commission also should not assume that it knows what remedy the court will order, nor the Fish and Wildlife Service's response to it. For instance, the Commission cannot know if the Service will have to consider additional habitat areas not assessed in the original Biological Opinion and Incidental Take Statement in order to comply with the court's opinion. The Commission puts itself at considerable risk by assuming it, Atlantic, or

³ U.S. Fish and Wildlife Service, Indiana Bat Range/Recovery Unit Map, available at <https://www.fws.gov/midwest/endangered/images/mammals/inba/MapIBatRangeRUs9April2015.pdf> (last visited June 10, 2018).

Dominion can predict what the court will order and how that will play out on the ground.

Allowing pipeline construction to proceed outside areas Atlantic and Dominion identify as used by endangered species could dangerously lock the Commission and the developers into a pipeline route that the Fish and Wildlife Service's analysis may require it to change. That is part of the reason the ESA prohibits "any irreversible or irretrievable commitment of resources" during consultation—to ensure the action agency does not wed itself to a proposal that it ultimately cannot complete. The Commission should not assume that it is going to be allowed to take species or impact habitat until the Service shows it can issue a valid biological opinion and incidental take statement for this project. As it stands today, this project cannot be completed as planned.

C. The Commission, Atlantic, and Dominion risk violation of the Endangered Species Act's prohibition on the "take" of protected species without a valid incidental take statement.

Allowing construction to proceed also risks exposing the Commission, Atlantic, and Dominion to criminal and civil penalties under the ESA. *See* 16 U.S.C. § 1540. Take of even a single protected individual is prohibited under the Act. 16 U.S.C. § 1538(a); 50 C.F.R. § 17.31. When a federal agency such as the Commission authorizes an action that results in

take of species, that federal agency can be held liable for any unauthorized take. *See Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997). Take is broadly defined to include killing, injuring, harming, and harassing species, or modifying their habitat in a way that harms wildlife by disrupting behavior patterns. *Id.* at § 1532(19); 50 C.F.R. § 17.3. We are aware of no map that guarantees take will not, or likely will not, occur, as Atlantic and Dominion seem to envision. And such a map would have zero legal effect, in any event. The ESA does not contemplate a process by which a developer can say where and when its project goes forward—that obligation rests with the Fish and Wildlife Service and is accomplished through consultation, the process that remains uncompleted here. Without a valid incidental take statement, pipeline construction cannot cause take of a single animal, anywhere along the pipeline route, without risking serious penalties.

Requiring Fish and Wildlife Service approval as a prerequisite to the Commission's approval is a logical, commonsense approach. Undoubtedly that is why it is included in the Certificate Order. The Commission would never allow construction of a natural gas pipeline to begin in North Carolina with instructions to the pipeline developer to attempt to determine a viable route to West Virginia while construction is underway. The Commission's approval, and the analysis supporting that approval, must be for a specific,

pre-planned and viable pipeline route. The route chosen by Atlantic is currently in question; without approval from the Service, it cannot be completed as planned. The Commission must enforce the terms of its Certificate Order and prohibit pipeline construction until the Service approves of the pipeline route by completing Section 7 consultation and issuing a valid statement concerning incidental take.

COMMUNICATIONS

Communications and correspondence regarding this proceeding should be served upon the following individuals:

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CONCLUSION AND REQUESTED RELIEF

For the foregoing reasons, Petitioners respectfully request that the Commission:

1. Grant Petitioners' request for rehearing;
2. Revoke or suspend the Notice to Proceed authorizing pipeline construction in West Virginia;
3. Grant Petitioners' motion for a stay and immediately stay Atlantic and Dominion from taking any further steps under the Notice to Proceed to construct the Atlantic Coast Pipeline in West Virginia; and
4. Grant any and all other relief to which Petitioners are entitled.

Respectfully submitted,

s/ Gregory Buppert

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

June 11, 2018

CERTIFICATE OF SERVICE

I hereby certify that I have on June 11, 2018, caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

s/ Gregory Buppert _____
Gregory Buppert
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On behalf of Defenders of Wildlife, Sierra Club, and Virginia Wilderness Committee