

March 17, 2018

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

RE: Request for modification to time-of-year restrictions for tree felling for Atlantic Coast Pipeline and Supply Header Projects, Docket Nos. CP15-554-000, CP15-554-001, and CP15-555-000.

Dear Secretary Bose:

The Southern Environmental Law Center and Appalachian Mountain Advocates submit this letter on behalf of their clients with pending rehearing requests before the Commission in dockets CP15-554 and CP15-555¹ responding to the request of Atlantic Coast Pipeline, LLC and Dominion Energy Transmission, Inc. (together “Atlantic”) to modify time-of-year restrictions on tree felling for the Atlantic Coast Pipeline.

Two days ago, Atlantic submitted a letter (hereinafter, the “Letter”) to the docket requesting a modification to the time-of-year restrictions on tree-felling—the same day, March 15, that the time-of-year restriction intended to protect migratory birds comes into effect in Virginia. That commitment is expressly incorporated in the Commission’s Order Issuing Certificates for the Atlantic Coast Pipeline: “Atlantic and DETI developed a Migratory Bird Plan to minimize impacts on bird species, and have agreed to conduct tree clearing outside of state-specific migratory bird nesting seasons.”²

Atlantic requests approval to continue tree-felling until May 15, 2018—two additional months. In all three states, such an extension would result in the felling of trees well into the periods when tree felling has been restricted in order to protect migratory birds and threatened or endangered bats.³ This request must be denied in order to

¹ See Shenandoah Valley Network et al., Request for Rehearing, CP15-554 (Nov. 13, 2017) (FERC eLibrary No. 20171113-5367).

² *Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042 at P 242 (Oct. 13, 2017) (hereinafter the “Certificate Order”) (emphasis added). Environmental Condition 19 of the Certificate Order also incorporates the Migratory Bird Plan.

³ In North Carolina and West Virginia, the migratory bird time-of-year restriction comes into effect on April 1, and in Indiana Bat territory time-of-year restrictions begin on April 1 as well.

maintain the protections for migratory birds, Indiana Bats, and Northern Long-Eared Bats upon which the Commission’s NEPA effects analysis relies.

What is more, before granting the request, the Commission would need to prepare a Supplemental Environmental Impact Statement to assess the effects of a modification to the time-of-year restrictions, and issue that Supplemental EIS in draft form for public notice and comment.⁴ As we pointed out in our March 12, 2018 letter, multiple agency approvals that rely upon the Commission’s Final Environmental Impact Statement incorporate these time-of-year restrictions. An agency must prepare a supplemental draft EIS when the agency “makes substantial changes in the proposed action that are relevant to environmental concerns” or there are “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.”⁵

The Commission’s NEPA analysis of the effects of the project on migratory birds, and on bats, depends on the incorporation of the time-of-year restrictions contained in multiple sections of the Final EIS, and in the incorporated Migratory Bird Plan and Timber Removal Plan. A modification of these restrictions that would allow, in the case of migratory birds in Virginia, two months of tree-felling during the period of restricted tree-felling established to mitigate impacts to migratory birds, and six weeks in other states, and approximately six weeks of tree-felling in all states during the restricted period established to mitigate impacts to endangered bats, is a “substantial change . . . relevant to environmental concerns” and a “significant new circumstance.”

Further, the Letter inaccurately suggests that the modification will provide “an equal or greater level of environmental protection” than the original restrictions because Atlantic will survey the “construction right-of-way and FERC approved construction workspaces” before harvesting timber.⁶ To the contrary, the modification will provide a lower level of environmental protection for at least two reasons.

Northern Long-Eared Bat time-of-year restrictions begin on June 1 within 150 feet of occupied maternity roost trees.

⁴ Southern Environmental Law Center and Appalachian Mountain Advocates submitted comments on the DEIS that addressed impacts to bird and other wildlife that the time-of-year restrictions are intended to protect. After-the-fact relaxation of those restrictions thus frustrates their clients’ meaningful public participation in the NEPA process.

⁵ 40 C.F.R. § 1502.9(c)(1).

⁶ Letter from Matthew R. Bley, Director Gas Transmission Certificates, Dominion Energy Transmission, Inc., to Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, requesting modification to time-of-year restrictions on tree-felling, 3 (Mar. 15, 2018) (hereinafter the “Letter”).

First, the referenced surveys for “migratory bird nests” are likely only to identify raptor nests and rookeries, and to overlook migrant neotropical songbird nests. These migrant neotropical songbirds more densely populate the landscape than do raptors and wading birds. Even if Atlantic could establish a protective buffer around every migrant songbird nest existing in the right-of-way and workspaces, a scenario that is an impossibility in a forested landscape, effectively all harvest would be precluded. This is exactly the purpose of the existing time-of-year restriction.

Second, the migratory bird restrictions are not intended only to prevent direct impacts to individual birds from clearing activities. The Final EIS states that the restrictions are necessary “to minimize breeding and nesting impacts” because

*even if nests are located outside the active clearing area, noise from construction activities may disturb and displace nesting adults, potentially leading to mortality of eggs and nestlings due to nest abandonment and interrupted or decreased feeding at the nest.*⁷

The time-of-year restrictions minimize all of these impacts, and are incorporated in the Commission’s NEPA analysis. Site surveillance, however, will not avoid these impacts if tree-clearing is extended into the migratory bird nesting season.

Critically, before the dates can be modified, the Commission must reinitiate consultation with the United States Fish and Wildlife Service (“FWS”). Although Atlantic claims that no re-initiation of consultation with FWS is needed because the request “do[es] not change the time-of-year restriction considered in the [Biological Opinion][,]”⁸ this claim is false. The Biological Opinion makes very clear that it “is based on information provided in the July 2017 Final Environmental Impact Statement[.]”⁹ On multiple occasions, the Final EIS for the project makes clear that Atlantic will *not* conduct site preparation or tree clearing activities between March 31 and November 16 of a calendar year, for the express purpose of protecting Indiana Bats and Northern Long-Eared Bats.¹⁰

⁷ Final EIS, 4-181 (emphasis added).

⁸ Letter, 3.

⁹ United States Fish and Wildlife Service Biological Opinion, 2.

¹⁰ See Final EIS at 4-265 (“To avoid direct impacts on Indiana bats, Atlantic and DETI would conduct site preparation and tree clearing activities between November 16 and March 31”); Final EIS at 4-274 (“To avoid direct impacts on northern long-eared bats, Atlantic and DETI would conduct site preparation and clearing activities between November 16 and March 31”).

The findings in the Biological Opinion are expressly tied to the findings in the Final EIS, which includes the time-of-year restrictions and incorporates other documents (*e.g.*, the Timber Removal Plan) setting out those restrictions. The Final EIS is the NEPA document supporting the findings made in the Biological Opinion.

The Letter states that trees will not be cleared when Indiana Bats “are present.”¹¹ To begin with, it is not clear how the presence of Indiana Bats will be determined—but the Biological Opinion incorporates time-of-year restrictions for “known use summer habitat” and “known use spring staging/fall habitat,” regardless of whether bats are physically present.¹² What is more, the Biological Opinion includes time-of-year restrictions for “unknown use spring staging/fall habitat,” and FWS states that it “assum[es] [Indiana Bat] presence” in such habitat,¹³ *i.e.*, the time-of-year restriction applies even presuming FWS and Atlantic do not know if bats are present in that area.

In reaching a finding of “no jeopardy” for the Indiana Bat, FWS relies on the fact that “[a]ny removal of trees within the known use spring staging/fall swarming habitat will occur during the winter when bats are hibernating[.]”¹⁴ FWS also considered the “effects of the proposed action,” which are limited by the restrictions, in reaching the “no jeopardy” finding.¹⁵ The no jeopardy finding therefore depends on the time-of-year restrictions, and changing the restrictions changes the effects of the project, meaning that FWS must reconsider those effects.

Extending timber harvest until mid-May renders meaningless and ineffective the restrictions that are not only “considered in the [Biological Opinion]” but are in fact made an express part of the Biological Opinion’s authorization.

Finally, the Commission’s determination under the Natural Gas Act that the project is required by the public convenience and necessity depends on its conclusion that the construction of the pipeline is an “environmentally acceptable action[.]”¹⁶ That conclusion is in turn based on the environmental conditions, including the time-of-year restrictions on tree felling, imposed in the Final EIS and incorporated into the Certificate

¹¹ Letter, 4.

¹² Biological Opinion, 33-34.

¹³ *Id.*

¹⁴ *Id.* at 47.

¹⁵ *Id.* at 49.

¹⁶ Certificate Order at P 325.

Order.¹⁷ Atlantic's requested relaxing of those conditions thus undermines FERC's Natural Gas Act determination.

The Southern Environmental Law Center and Appalachian Mountain Advocates respectfully request that the Commission deny the request to modify time-of-year restrictions on tree felling or, in the alternative, before issuing a decision, develop and issue for public notice and comment a draft Supplemental EIS as required under federal regulations and re-initiate consultation with FWS.

Sincerely,

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¹⁷ *Id.* (“Based on our consideration of this information and the discussion above, we agree with the conclusions presented in the final EIS and find that the projects, if constructed and operated as described in the final EIS, are environmentally acceptable actions.”) (emphasis added); *Id.* at P 242 (relying on the Migratory Bird Plan and time-of-year restrictions).