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Via First Class U.S. Mail and Electronic Mail

Pam Toschik
U.S. Fish and Wildlife Service
Ecological Services – Northeast Region
Hadley, MA 01035
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Re: Section 7 Consultation on the Atlantic Coast Pipeline

Dear Ms. Toschik:

Yesterday, the Federal Energy Regulatory Commission (FERC) requested reinitiation of Section 7 formal consultation for the Atlantic Coast Pipeline (ACP). *See* Letter from David Swearingen, FERC, to Spencer Simon, FWS (Feb. 10, 2010) (Docket Nos. CP15-554-000, CP15-554-001, and CP15-555-000, FERC Accession No. 20200210-3002). The request points to, among other things, an October 22, 2019, meeting between FERC, Dominion Energy, Duke Energy, and the Fish and Wildlife Service (FWS) related to the ACP. Minutes from that meeting were posted in December 2019 to FERC’s online docket for this project. *See* Atlantic Coast Pipeline Project Meeting Minutes (October 22, 2019) (FERC Accession No. 20191210-5190) (October 22 Meeting Minutes). Yesterday’s request for reinitiation of consultation, and discussion at the October 22, 2019, meeting as documented in the meeting minutes, suggest FWS is once again preparing to commit legal errors in an effort to approve this pipeline along Atlantic Coast Pipeline, LLC’s (Atlantic’s) preferred route. Again, we point them out, on behalf of Defenders of Wildlife, Sierra Club, and the Virginia Wilderness Committee.

A. FWS Cannot Complete Consultation on the Atlantic Coast Pipeline Without a Final Route

FWS cannot complete consultation on the ACP until it knows the final route of the pipeline. Because the final route of the pipeline is currently unknown, FWS should not engage in formal Section 7 consultation at this time.

To comply with the court’s opinion in *Cowpasture River Preservation Ass’n v. Forest Service*, 911 F.3d 150 (4th Cir. 2018), the Forest Service and Atlantic must evaluate “whether the ACP project’s needs can be reasonably met on non-national forest lands,” i.e., whether there are off-forest alternatives. *Id.* at 169. For its part, the Forest Service has already signaled its intention to disregard this portion of the court’s opinion, representing to the United States Supreme Court that the “remand proceedings, [following *Cowpasture*] are in service of a *single*

question: whether the Forest Service may again grant Atlantic a special use permit to construct a pipeline *along the route through national forests* approved by [FERC].” United States Forest Service Petition for Writ of Certiorari, Reply Br. 8 (Sept. 2019) (emphasis added). We strongly caution the agencies against this ill-conceived, pre-decisional commitment to Atlantic’s preferred route. The Forest Service would not comply with *Cowpasture*’s instruction to consider off-forest alternative routes if it only considers how to reauthorize the current route *through national forests*. Consideration of alternatives is the “heart” of NEPA because it provides “a clear basis for *choice* among options.” 40 C.F.R. § 1502.14 (emphasis added). Converting it into a check-the-box exercise to approve a pre-chosen alternative undermines the core tenets of the statute and violates the law. *See, e.g., Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 714 (10th Cir. 2010) (“[I]t is clear that an agency may violate NEPA, and consequently the APA, when it predetermines the result of its environmental analysis.”).

To the contrary, compliance with the *Cowpasture* decision in this regard requires supplementing the analysis of alternatives in Final Environmental Impact Statement (FEIS) prepared by FERC, in coordination with the Forest Service and other federal agencies. “A supplemental EIS [is] *mandatory* if the agency ‘makes substantial changes in the proposed action that are relevant to environmental concerns’ or if ‘significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts’ arise.” *Webster v. U.S. Dep’t of Agric.*, 685 F.3d 411, 418 (4th Cir. 2012) (citing 40 C.F.R. § 1502.9(c)) (emphasis added). Consideration of new alternatives that avoid national forests constitutes “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts” and certainly choosing a new off-forest alternative would be a “substantive change[] in the proposed action.” *Id.*

The Council on Environmental Quality’s (CEQ’s) guidance addresses this squarely. When there is “an alternative which is not a variation of the proposal or of any alternative discussed in the [] impact statement, and is a reasonable alternative that warrants serious agency response . . . the agency *must issue a supplement* to the [] EIS that discusses this new alternative.” Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,035 (Mar. 23, 1981). To be sure, this typically happens between the draft and final stages of environmental impact statement preparation, but the fact that the requirement has been triggered in response to litigation does not somehow make it inapplicable. The basic point is that the Forest Service cannot cure the *Cowpasture*-identified defects in the FEIS’s alternatives analysis without changing that analysis, just as it would be required to do if this problem arose between draft and final environmental impact statement stages. Again, CEQ’s guidance speaks directly to what has happened here: “If the lead agency leaves out a significant issue or ignores the advice and expertise of the cooperating agency, *the EIS may be found later to be inadequate.*” 46 Fed. Reg. at 18,030 (emphasis added). The Forest Service repeatedly asked FERC to examine off-forest alternatives, FERC refused, but the Forest Service relied on FERC’s FEIS anyway. The Forest Service’s reliance on the FEIS was

then challenged, and consideration of off-forest alternatives was found inadequate. Fixing that problem necessitates supplementing FERC's FEIS.

FWS should be wary of any assertion that the Forest Service can justify a refusal to look at (or choose) off-forest alternatives by pointing to the fact that FERC has already adopted an alternative in its Certificate. The Forest Service is not party to FERC's Certificate, which is a separate agency decision, or bound by its conclusions. As the Fourth Circuit has made clear, the Forest Service has a stand-alone obligation to comply with NEPA and cannot rely on an analysis from FERC that is deficient to meet the Forest Service's obligations, in its role as a cooperating agency. The idea that the Forest Service is limited by findings in FERC's Certificate states the problem backwards. By nature of the Natural Gas Act, FERC must approve any final route for this pipeline including any route through national forests, but the Forest Service does not have to sign off on whatever route FERC prefers. FERC cannot force a route on the Forest Service, particularly not one that violates Forest Service policy. Limiting Forest Service analysis to only the route currently approved by FERC years ago would repeat previous errors identified in the *Cowpasture* decision and, as a consequence, would likely be grounds for reversal.

Not only must *off-forest* routes be considered, but if those routes are available, the Forest Service is required to reject *on-forest* routes. As explained in *Cowpasture*, "the Forest Service's regulations state: [a]n authorized officer shall *reject* any proposal ... if, upon further consideration, the officer determines that: ... the proposed use would not be in the public interest" and "a proposed use should be authorized as in the public interest *only* if ... the proposed use cannot reasonably be accommodated off of National Forest System lands." *Id.* at 168. (quotations and citations omitted; emphasis added).

The ACP can reasonably be accommodated off of National Forest System lands. FERC's FEIS for the project, relied upon by the Forest Service and FWS, identifies at least two off-forest routes. *See* FEIS, 3-19. Both were arbitrarily rejected under the assumption that "as the length of a pipeline route is increased, the amount of environmental impacts on various resources are concurrently increased." *Id.* But FWS, the Forest Service, FERC, and Atlantic know that assumption cannot always be true because it masks qualitative differences in the routes chosen (as in, remote steep forested areas versus existing pipeline or utility corridors). The Forest Service, through EIS development with FERC, has already required one reroute that substantially increased the length of the pipeline path but was environmentally beneficial because it avoided impacts to rare species and habitats. *See* Letter from Kathleen Atkinson and Tony Tooke, USFS, to Leslie Hartz, Dominion Energy (Jan. 19, 2016). The Forest Service will not be able to reject off-forest routes simply because they may be incrementally longer than Atlantic's preferred route, and we are aware of no information indicating the off-forest routes identified (but not evaluated) in the FEIS, or some other off-forest route, cannot reasonably accommodate the pipeline.

It is important to underscore that the obligation to consider off-forest routes and choose them if they are available is unaffected by the portions of the *Cowpasture* decision currently pending before the Supreme Court. That appeal is related only to whether the Forest Service has authority under the Mineral Leasing Act to approve a gas pipeline crossing of the Appalachian Trail on federal lands. Regardless of how the Supreme Court decides that case, the obligation to consider off-forest routes, and choose them when they are available, will remain.

Yet, because the Forest Service and Atlantic have appealed to the Supreme Court, the Forest Service will not be able to reissue approvals for the project until the Court announces its decision. That is unlikely before the summer of 2020. Even after the Court announces its decision, the Forest Service will have to go through the supplemental EIS process, a formal comment process, and allow administrative objections before it can reissue a final decision. The Forest Service's consideration of off-forest alternatives to carry out its standalone obligations under the National Forest Management Act and NEPA may also trigger additional NEPA requirements and supplementation, including comment opportunities, separately for FERC. All in all, a final decision from the Forest Service is unlikely before the fall of 2020 at the very earliest. Until the Forest Service reaches a final decision, and that decision is accepted by FERC, FWS will not know what the final pipeline route will be. With the route undecided, FWS cannot complete a biological opinion, which must cover the entire final route. *See Conner v. Burford*, 848 F.2d 1441, 1453 (9th Cir. 1988) (“[T]he ESA requires the biological opinion to analyze the effect of the *entire* agency action”) (citation omitted).

This is the point: FWS cannot complete consultation on this project if it does not know the route of the pipeline, and a route will not be decided until the Forest Service assesses, and potentially chooses, off-forest alternatives. That will require at least the Forest Service, and potentially FERC, to go back through the process of issuing approvals including offering comment and administrative objection opportunities. That is unlikely before fall 2020 at the earliest and potentially not until significantly later. Meeting consultation requirements before the path of the project is known is not possible making reinitiation of formal consultation premature at this point.

B. FWS Must Fully Assess Impacts to Candy Darter and Its Critical Habitat

We are glad that the October 22 Meeting Minutes convey that FWS is going to engage in Section 7 formal consultation for the candy darter. There are two obstacles that prevent that from concluding anytime soon however. First, as far as we are aware, the agency is yet to conclude its critical habitat designation for this species. The Forest Service recently abandoned its proposed Big Rock Project on the Monongahela National Forest, in part, because FWS had not yet “issue[d] a final designation of critical habitat for the candy darter that includes portions of the project area.” *See* Letter from Shawn Cochran, Forest Service, to Interested Parties (Dec. 18, 2019). The ACP project area also includes potential candy darter critical habitat, and we

assume consultation on the pipeline, like that for the Big Rock Project, will be delayed until the agency completes its critical habitat designation.

But more to the point, analysis of impacts to candy darter illustrates why FWS cannot complete consultation until it knows the final route (if any) of this pipeline. The route through the Monongahela National Forest relates directly to the degree of impact on the candy darter. FERC's preferred route threads through the national forest passing south of an area called Thorny Flats, West Virginia. Construction through this area has "disadvantages and challenges," "[f]irst and foremost [being] the difficulty of the terrain" indicating likely sedimentation impacts from construction. *See Atlantic Coast Pipeline, Resource Report 10* (Sept. 2015), 10-88 (FERC Accession No. 20150918-5212). The area also hosts prime candy darter habitat in Clover Creek and the Greenbrier River. If the pipeline is rerouted out of this area those impacts will be avoided but, depending on the reroute, new impacts to candy darter may need to be considered if the pipeline is moved to other areas of the species' habitat such as the Gauley River watershed or elsewhere in the Greenbrier River watershed. That would intensify impacts to candy darter in those areas from construction of the Mountain Valley Pipeline in the former instance, and other Forest Service projects such as the Greenbrier South East Project, in the latter. FWS is well aware of this possibility, even on the current route "the candy darter would be affected by both ACP and MVP." FEIS, 4-610. Evaluating how those projects will affect the species requires knowing the final route of ACP.

C. FWS May Not Authorize Further Impacts to the Clubshell

In practically its first involvement with this project, FWS warned Dominion Energy about the threat the ACP posed to the population of endangered clubshell in Hackers Creek, West Virginia. FWS's concerns were sobering: "The current population of clubshell mussels present in Hackers Creek will likely be adversely affected and could potentially be extirpated by the [project] . . . Stressors include an increase in sediment load in the stream due to runoff which would cause excessive sedimentation that may reduce suitable habitat for mussels and can smother them, causing death." Letter from John Schmidt, FWS, to William Scarpinato, Dominion Energy (Dec. 9, 2014). The solution to this problem was obvious: "The Service highly recommends avoiding or drastically minimizing the number of crossings to Hackers Creek *by seeking an alternative route* for the pipeline alignment." *Id.* (emphasis added).

But Atlantic refused, and FWS ultimately signed off on a project route that included 6.4 miles of construction right of way and nearly 12 miles of road construction in the Hackers Creek watershed. *See FWS, Biological Opinion for the Atlantic Coast Pipeline* (Sept. 11, 2018), 21 (2018 BiOp). That decision has proved ruinous for the clubshell.

In a last-ditch effort to save the Hackers Creek population and avoid a jeopardy determination for the ACP, FWS authorized the salvage and translocation of the Hackers Creek population. This was truly an attempt to "rescue this population before it's too late," i.e., before

the ACP comes trenching through. Email from John Schmidt, FWS, to Anne Hecht, FWS (April 5, 2018). “[I]n the absence of ACP, Hackers Creek might remain suitable to support the species.” Email from Barbara Douglas, FWS, to John Schmidt, FWS (May 17, 2018). Indeed, the expert malacologist that attempted to salvage the population confirmed that “the [Hackers Creek] population appears to be stable . . . This bodes well for the future outlook of the species in Hackers Creek since we now know that water quality is not the limiting factor influencing the survival of the species.” Environmental Solutions and Innovations, Salvage Report (August 21, 2018).

Unfortunately, this hasty effort to move a population of endangered species out of the way of an unnecessary pipeline backfired. Nearly every clubshell moved to accommodate the ACP has “*died while in captivity*.” FWS, Clubshell Five-Year Review (2019), 10 (emphasis added). Instead of avoiding impacts to the population by rerouting out of the Hackers Creek watershed, as FWS requested in 2014, the ACP has now inflicted extensive damage on one of the last remaining populations of this endangered species – making preservation of any remaining clubshell in Hackers Creek critical.

Astonishingly, minutes from the October 22 meeting indicate that FWS is considering reauthorizing the project to cross through the Hackers Creek watershed. *See* October 22 Meeting Minutes. FWS is apparently contemplating two justifications for this rubber stamp.

First, FWS suggests that “based on two years of turbidity data in the watershed,” which FWS apparently considers “baseline” data, “ACP is expected to have minimal effect on the overall water quality in Hacker Creek.” *Id.* This turbidity data is not baseline data. For well over a year, significant portions of the Hackers Creek watershed have been cleared to accommodate pipeline construction. *See, e.g.*, Email from Maggie Voth, Environmental Resources Management, to Elizabeth Stout, FWS (Aug. 22, 2018). Even without trenching, this has led to at least one landslide event that risks impacts to water quality. *See, e.g.*, Letter from Spencer Trichell, Dominion Energy, to Elizabeth Stout, FWS (March 15, 2019). And ongoing monitoring confirms that turbidity in Hackers Creek has at times been more than a *thousand* Nephelometric Turbidity Units higher downstream of tributaries crossed by ACP when compared to monitoring locations in Hackers Creek upstream of the relevant tributary. *See* Hackers Creek Turbidity Monitoring Results (February 2019); *see also* Atlantic Coast Pipeline Construction Progress Chart for week ending Dec. 9, 2018 (indicating clearing has occurred along relevant tributary). This is not baseline data but reflects the clearing that has already occurred in the watershed.

Moreover, FWS has repeatedly determined that ACP is *not* expected to have a “minimal effect on the overall water quality in Hackers Creek.” Since 2014, FWS has understood that the project will cause an “increase in sediment load in the stream due to runoff which would cause *excessive* sedimentation.” Letter from John Schmidt, FWS, to William Scarpinato, Dominion Energy (Dec. 9, 2014) (emphasis added). Even then, FWS explained that the “population of

clubshell mussels present in Hackers Creek will likely be adversely affected and could potentially be extirpated” by ACP – not because of physical crushing but because of sedimentation of the stream. *Id.* Restated, for *five years* FWS has consistently taken the position that this project will have a substantial adverse effect on water quality in Hackers Creek. Its 2018 Biological Opinion further confirms that “sedimentation from the proposed action will affect the entire length of Hackers Creek.” 2018 BiOp, 40. Erosion control devices are expected to only be partially effective given the significant “magnitude of anticipated disturbance” in the watershed. *Id.* at 41. The turbidity data collected to date, even before trenching has substantially begun in the watershed, supports these conclusions. The 2019 Five-Year Review for clubshell also confirms that “pipeline construction,” specifically “in West Virginia . . . [the] numerous stream crossings for gas pipelines,” leads to sedimentation of habitat which threatens the species. Five-Year Review, 21. And FWS’s experience with the Mountain Valley Pipeline confirms that it is virtually impossible to construct a pipeline in this type of terrain without causing adverse water quality impacts.¹ We are aware of no basis for the agency to turn on a dime and decide now that the project will only minimally affect water quality despite five years of agency findings and practical experience to the contrary.

Second, FWS indicates it can reauthorize project impacts to clubshell in Hackers Creek given the “planned conservation measures applied by the ACP (*including relocation*).” October 22 Meeting Minutes (emphasis added). This assertion beggars belief. Atlantic and FWS have already attempted to relocate the Hackers Creek population once, killing nearly every clubshell they moved in the process. This is not a viable conservation strategy, to say nothing of its dubious legality under the Endangered Species Act; FWS cannot remove populations of endangered species from the landscape to facilitate construction of infrastructure projects.

At this point, FWS’s responsibilities are clear. Efforts to approve the project with a no-jeopardy biological opinion have resulted in the near full extirpation of the Hackers Creek clubshell population, one of the last remaining populations of clubshell in the world. FWS and FERC “may not take action that will tip a species from a state of precarious survival into a state of likely extinction,” yet they are on the precipice of that act. *Def. of Wildlife v. U.S. Dep’t of the Interior*, 931 F.3d 339, 353 (4th Cir. 2019) (citations and quotations omitted). “[W]here baseline conditions already jeopardize a species,” as they do here, “an agency may not take action that deepens the jeopardy by causing additional harm.” *Id.* (citations and quotations omitted). FWS may not authorize *any* additional harm to any clubshell remaining in Hackers Creek. The agency’s obligation is to protect this species including this population, not hasten its end. The ACP has and will continue to jeopardize the clubshell and that reality must be reflected in any further biological opinions FWS seeks to issue for the project.

¹ See, e.g., Laurence Hammack, Judge approves \$2.15 million settlement of lawsuit against Mountain Valley Pipeline, THE ROANOKE TIMES (Dec. 12, 2019) available at https://www.roanoke.com/business/judge-approves-million-settlement-of-lawsuit-against-mountain-valley-pipeline/article_21f6a275-c34d-5f67-b547-8b4267ed6c09.html.

Of course, a finding from FWS that the ACP will jeopardize the clubshell does not stop the project. FWS can provide “reasonable and prudent alternatives” to FERC and Atlantic that would allow the project to move forward while avoiding jeopardy. *See* 16 U.S.C. § 1536(b)(3)(A). Any reasonable and prudent alternative provided for the ACP must involve avoiding impacts to remaining clubshell in Hackers Creek, which, practically, requires a reroute out of the watershed. If Atlantic is unhappy with that outcome, it can seek an exemption from the Endangered Species Committee. *See id.* § 1536(e). To be clear, FWS may not authorize further impacts to this population, which it has already put on the brink of extinction. “Congress foresaw that [consultation under the Endangered Species Act] would, on occasion, require agencies to alter ongoing projects in order to fulfill the goals of the Act.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 186 (1978). This is one of those occasions.

Sincerely,



Patrick Hunter

cc: FERC Docket Nos. CP15-554-000, CP15-554-001, and CP15-555-000
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