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Constitution DEIS comments

Tim Sullivan <tim_r_sullivan@fws.gov> Wed, Apr 2, 2014 at 3:01 PM
To: Robyn Niver <robyn_niver@fws.gov>
Cc: Sandra Doran <sandra_doran@fws.gov>, John Wiley <john_wiley@fws.gov>

I made a few edits. How about this?

Tim

Endangered Species Act

The FERC requested that the FWS consider the DEIS as your biological assessment (BA) for the purposes of conducting ESA Section 7(a)(2) consultation procedures. The DEIS addresses the potential for impacts to the following federally-listed endangered species: Indiana bat (*Myotis sodalis*) and dwarf wedgemussel (*Alasmidonta heterodon*); and the following federally-listed threatened species: bog turtle (*Clemmys [= Glyptemys] muhlenbergii*) and northern monkshood (*Aconitum noveboracense*).

Indiana bat

Page 4-97. Mist-net and acoustic surveys were conducted in the Pennsylvania portion of the project in 2012 and 2013 and Indiana bats were not captured or detected. The project is located outside the current range of the species in New York. FERC has determined the project may affect, but is not likely to adversely affect the Indiana bat given the survey results and project location. We concur with this determination.

Dwarf wedgemussel

Habitat surveys were conducted at 35 waterbodies in 2013 and the DEIS states that no habitat or individual dwarf wedgemussels were found in the project area (Page 4-97). The DEIS also states that “Prior to construction, Constitution should develop impact avoidance or effective impact minimization or mitigation measures (e.g., utilization of trenchless crossing methods or mussel relocation) in consultation with the FWS, the PFBC, the PGC, the PADCNR, and the NYSDEC for any dwarf wedgemussels encountered during construction.” FERC has determined the project may affect, but is not likely to adversely affect the dwarf wedgemussel because no individuals or suitable habitat were found during surveys in 2013 and because of recommendations to develop avoidance, minimization, or mitigation measures. The FWS cannot concur with this determination. To date, we have not received copies of the dwarf wedgemussel survey report. However, if FERC believes habitat is not found in the project area based upon field surveys, then they could change their determination to no effect on this species.

Bog turtle

Page 4-97. Historically bog turtles were found in Otsego County but are now believed to be extirpated. The

FERC has determined the project will result in no effects to the bog turtle as no suitable habitat for the species will be impacted. We have no further comments on this species.

Northern monkshood

Page 4-97. Surveys for northern monkshood were conducted in 2012 and 2013. All but four parcels with potential suitable habitat were surveyed and no plants were found. The DEIS includes several measures in the event populations are found in the future. The FERC has determined the project may affect, but is not likely to adversely affect the northern monkshood because no plants were found during the surveys and because of recommendations to develop avoidance, minimization, and mitigation measures. The FWS cannot concur with this determination because some areas have not yet been surveyed. If any individuals of the species are anticipated to adversely impacted (i.e., avoidance is not fully possible), formal consultation is required.[RN1]

Summary

At this time, the FWS cannot concur with FERC's determination that the project may affect, but is not likely to adversely affect the dwarf wedgemussel and the northern monkshood. We look forward to receiving final survey results, plans for avoidance of impacts, and a more robust assessment of the potential for impacts to these species.

The FWS concurs with the FERC's determination that the project may affect, but is not likely to adversely affect the Indiana bat and we have no further comments regarding the bog turtle. Should project plans change, or if additional information on listed or proposed species or critical habitat becomes available, these determinations may be reconsidered. The most recent compilation of federally-listed and proposed endangered and threatened species in New York is available for your information. Until the proposed project is complete, we recommend that you check our website every 90 days from the date of this letter to ensure that listed species presence/absence information for the proposed project is current.*

Bats

We appreciate your efforts to address the above-listed species. The DEIS also discusses three special-status bat species: the eastern small-footed bat (*Myotis leibii*), listed as a threatened species in Pennsylvania and a species of concern in New York; the northern myotis [northern long-eared bat] (*Myotis septentrionalis*) (NLEB), a species the FWS has proposed listing as endangered; and the silver-haired bat (*Lasionycteris noctivagans*), listed as a Pennsylvania species of concern.

Page 4-101. We recommend editing the bullet "northern myotis, which is listed as proposed endangered by the FWS…" to say something like, "the northern myotis, a species the FWS has proposed listing as endangered." We recommend this because this species is not "listed" as anything at this time.

Page 4-101. The DEIS states, "In December 2013, FWS stated that the eastern small-footed bat did not warrant listing, but the northern myotis bat was proposed as an endangered species." Please revise the document as the final determination for the eastern small-footed bat and the NLEB proposed rule was published on October 2, 2013.

Page 4-102. We understand the NLEB were captured/detected during surveys of the Pennsylvania portion of the project. We also understand that Constitution has proposed conducting the majority of tree clearing between

September 1 through April 1. The EIS states that "Prior to construction, Constitution should develop avoidance, minimization, or mitigation measures… for construction between April 1 and October 31 to minimize impacts on the small-footed bat, Northern myotis, silver haired bat, and little brown bat." Constitution met with the FWS's New York Field Office on April 2, 2014, to discuss additional NLEB survey options and conservation measures. However, additional coordination is necessary.

As mentioned above, the NLEB is currently proposed for listing under the ESA. While the ESA prohibits unauthorized "take"[1] of fish and wildlife species *listed* as endangered or threatened, *proposed* species are not afforded this protection. However, 30 days after publication of a final listing rule, take prohibitions become effective. The FWS anticipates a final listing decision for the NLEB by October 2014. The FWS is encouraging all federal and non-federal landowners and project developers to implement conservation measures for NLEBs. If the species becomes listed, project proponents will need to avoid adverse effects unless and until they have incidental take authorization (i.e., biological opinion is issued). Therefore, for projects that are currently in the planning stage, such as this project[RN2] , we are recommending coordination with our office now so as to avoid potential project delays in the event the species becomes listed. Therefore, we recommend updating the DEIS to fully address the potential for adverse effects to NLEB. We do not agree with FERC's assessment that "construction and operation of the project would not result in adverse impacts on sensitive bat species" since avoidance, minimization, and mitigation measures have not yet been determined. Also, the DEIS fails to address the potential for killing or injuring NLEB that may be roosting in trees during tree clearing activities.

From: Niver, Robyn [mailto:robyn_niver@fws.gov]
Sent: Wednesday, April 02, 2014 7:04 AM
To: Tim R Sullivan
Cc: Sandra Doran; John Wiley
Subject: Constitution DEIS comments

[Quoted text hidden]

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[1] Section 3 of the ESA defines "Take" as, "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. The term "Harm" is further defined by the FWS to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing behavioral patterns such as breeding, feeding, or sheltering. "Harass" is further defined by the FWS as actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding, or sheltering.

[RN1]True that we don't have results?

[RN2]Edit this to match with however we are referring to the project in this letter