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Joe Martens
Commissioner

MEMORANDUM

TO: Mr. Greg Hufnagel
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FROM: Stephen Tomasik
Project Manager
Major Projects Management Section
Division of Environmental Permits
NYS Department of Environmental Conservation
625 Broadway - 4th Floor
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RE: Yellow Lampmussel Presence-Absence Surveys in Schoharie Creek
Constitution Pipeline
Town of Schoharie, Schoharie County, New York

DATE: November 13, 2013

This memo is in response to your letter dated October 23, 2013 regarding efforts conducted by Constitution Pipeline Company to survey and assess the habitat of the Yellow Lampmussel (*Lampsilis cariosa*) at the proposed pipeline crossing of the Schoharie Creek in Schoharie County, New York. In your letter, you reported that sediment laden water prevented a visual survey for this species; therefore you are not able to determine the presence or absence of this species at this location. DEC staff have reviewed this letter, and have reported that there are healthy and diverse mussel beds known from both upstream and downstream of the pipeline crossing point, therefore it likely that there are mussels in the proposed crossing area as well.

Your letter indicates that the yellow lampmussel is not a state-listed rare, endangered, threatened or special concern species, but is of conservation concern and considered to be vulnerable in New York. This does not mean, however, that this species does not have legal protection in the state. All mussels are protected under the Environmental Conservation Law

(ECL) and their taking requires a permit from the Department. Article 11 of the ECL, § 11-0103, states that "Shellfish" means oysters, scallops, and all kinds of clams and mussels. "Taking" and "take" include pursuing, shooting, hunting, killing, capturing, trapping, snaring and netting fish, wildlife, game, shellfish, crustacea and protected insects, and all lesser acts such as ***disturbing***, harrying or worrying, or placing, setting, drawing or using any net or other device commonly used to take any such animal. ***No person shall, at any time of the year, pursue, take, wound or kill in any manner, number or quantity***, any fish protected by law, game, protected wildlife, ***shellfish***, harbor seals, crustacea protected by law, or protected insects, ***except as permitted by the Fish and Wildlife Law***. In this situation, DEC would consider the potential for impacts to this species and include conditions in the Article 15 stream disturbance permit to avoid, minimize or mitigate these potential impacts.

Given the limitations of the survey conducted for this species, Constitution proposes to rely on an avoidance plan that includes the following elements:

- Crossing the Schoharie Creek using a “Direct Pipe” method that would not disturb the streambank or streambed, thereby avoiding all impacts to this species;

- If it is determined that the Direct Pipe method is not feasible at this location, implementation of a “dry cut trench method” to isolate and dewater the proposed workspace.

Regarding the proposed Direct Pipe method, DEC generally agrees that this proposed method is preferable to the cut trench method, and if determined to be feasible and implemented without incident, would avoid impacts to Unionid mussel species, including yellow lampmussel in the creek. However, if a "fracking out" incident occurs, and there is a release of drilling mud into the waterway, a great deal of physical harm both lethal and chronic to finfish and mussels would be expected. If this crossing method is chosen, DEC will require a contingency plan as part of the Article 15 permit to minimize and mitigate impacts that may result from a frack-out incident.

Use of the “dry cut trench method” would require a permit under Article 15 of the ECL, for excavation or placement of fill in a navigable waterway. If it is determined that the Direct Pipe crossing method is infeasible, Constitution will need to submit a modification to the Joint Application for Permit to include the feasibility review of the Direct Pipe method showing why it is not feasible, details regarding the proposed crossing activity, assessment of the presence/absence of mussels at this location, and proposed removal and relocation methods.

If you have additional questions, please send them to me and I will direct them to the appropriate DEC staff.

cc: K. Bowman, FERC
K. Bruce, USACE
T. Sullivan, USFWS
DEC Review Team