



Endangered Species Issues Slow Pipeline Completion

The federal Fourth Circuit Court of Appeals has struck down an evaluation by the U.S. Fish and Wildlife Service of the potential impacts on two endangered fish species presented by stream crossings for the Mountain Valley Pipeline. In its [February 3, 2022](#) opinion, the Court concluded that the Service failed to sufficiently establish the “environmental baseline” conditions for each species, and failed to adequately evaluate how the stream crossings, along with other anticipated activities impacting the streams, will affect the species on a cumulative basis. The Court also faulted the Service for not assuming future negative effects of climate change in its analysis.

In September 2020, the Service published a “Biological Opinion” addressing how the proposed pipeline would likely affect five species listed for protection under the federal Endangered Species Act (ESA) (one plant; two fish; and two bats). The Service concluded that the pipeline would likely affect each species, but would not jeopardize those species, which is the key determination under the ESA for whether other federal agencies may issue permits for a project. The Service also issued an “Incidental Take Statement” that authorized certain levels of “take” of each species associated with construction of the stream crossings, which would otherwise be prohibited by the ESA. For purposes of the ESA, “take” of a species means actions “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”

A group of organizations opposed to the pipeline, including the Sierra Club, challenged both the Biological Opinion and the Incidental Take Statement with regard to the two fish species (Roanoke Logperch and Candy Darter) and one bat species (Indiana Bat). The Court only squarely addressed the Service’s evaluation of the two fish species, but included a detailed footnote that strongly recommended a second look by the Service at its evaluation of the Indiana Bat.

The opinion explaining the Court’s ruling primarily focuses on how the Service ascertained the environmental baseline for the two fish species and assessed the cumulative impacts of the proposed pipeline along with other anticipated activities. The Court faulted the Service for not gathering site specific data for each stream crossing proposed in areas of the species’ habitat. The opinion states that the Service did not sufficiently identify the existing “stressors” that were negatively impacting the species in the pipeline path. Although the Service observed that a primary driver decreasing the Candy Darter population is “hybridization” – i.e. interbreeding by the Candy Darter with another similar species of darter – the Court concluded that the Service did not adequately consider other factors negatively affecting the Candy Darter, such as increased stream sedimentation.

FEBRUARY 11, 2022

CONTACT

ROBERT M. STONESTREET

rstonestreet@babstcalland.com
681.265.1364

Charleston, WV

Suite 1000
300 Summers Street
Charleston, WV 25301
681.205.8888

BABSTCALLAND.COM

The Court rejected the Service’s argument that statistical modeling used to prepare both the environmental baseline determination and cumulative effects evaluation sufficiently accounted for conditions within the pipeline path. The Court did so because (1) the Biological Opinion does not indicate a reliance on statistical modeling to establish the environmental baseline or cumulative effects determinations; and (2) the models were not designed to assess environmental conditions on a small-enough scale to evaluate the specific areas to be impacted by the project.

With respect to climate change, the Court acknowledged that the statistical modeling used by the Service takes into account “environmental stochasticity,” which is defined as “unpredictable fluctuations in environmental conditions.” The Court still found that the Service did not adequately consider climate change because the models assumed a constant amount of environmental stochasticity in the future. According to the Court, “the model failed to account for the one thing we know about climate change: that it will get worse over time.” The opinion identifies anticipated increased water temperatures, frequency and intensity of flooding, and increased sedimentation as negative impacts of climate change that were not considered in the statistical models. The court does not cite to any of the materials in the administrative record to support this observation. Other than referencing a description of climate change by the Service as presenting an “increasing threat,” the Court does not offer any guidance on why the Service should assume conditions for the species will necessarily get “worse” over time due to climate change, or how the Service should go about factoring these considerations into its evaluations.

In light of the Service’s shortcomings described in the opinion, the Court concluded that the Service could not have reasonably concluded that the proposed project is unlikely to jeopardize the two fish species. The Court recognized that the ESA does not prohibit approval of projects “solely because baseline conditions or cumulative effects already imperil a species.” However, the ESA does prohibit approval of a project that will likely accelerate the decline of a species. “Put differently, if a species is already speeding toward the extinction cliff, an agency may not press on the gas.”

The Court rejected several additional arguments advanced by the challengers as grounds to set aside the Biological Opinion and Incidental Take Statement. These included claims that the Service (1) arbitrarily limited the scope of the “action area” (i.e. the impact area); (2) erroneously excluded the Blackwater River from its evaluation of the Roanoke Logperch; and (3) the Incidental Take Statement established “unlawfully vague” take limits.

This opinion highlights the importance of Endangered Species Act considerations for energy projects. The Candy Darter was listed as endangered on November 20, 2018, which was over a year after the Federal Energy Regulatory Commission (FERC) authorized the pipeline project. As noted in the “[2021 Babst Calland Report](#),” the Service has drastically accelerated the pace of proposing and adopting species for protection under the ESA. As more species are designated for protection under the ESA, there is an increased likelihood that areas slated for development will trigger a rigorous review by the Service before any federal permit may be issued for a proposed project.

The opinion makes clear that the Service must methodically analyze the specific areas expected to be affected by a proposed project to determine whether the project may jeopardize a listed species. This effectively means that project proponents, through their counsel and consultants, must ensure that the Service adequately evaluates potential impacts on listed species, and more importantly, documents that evaluation correctly. A failure by the Service to do so, or a finding that the project will jeopardize a listed species, can stop a project in its tracks. Even one that is “an already mostly finished Pipeline” as the court observed in this case. As of December 2021, 94 percent of the pipeline had been constructed with approximately 20 linear miles remaining.

If you have any questions about the court’s opinion or the Endangered Species Act in general, please contact Robert M. Stonestreet at rstonestreet@babstcalland.com or 681-265-1364.

PITTSBURGH, PA | CHARLESTON, WV | SEWELL, NJ | STATE COLLEGE, PA | WASHINGTON, DC

Babst Calland was founded in 1986 and has represented environmental, energy and corporate clients since its inception. Our attorneys concentrate on the current and emerging needs of clients in a variety of industry sectors, with focused legal practices in construction, corporate and commercial, creditors' rights and insolvency, emerging technologies, employment and labor, energy and natural resources, environmental, land use, litigation, public sector, real estate and transportation safety. For more information about Babst Calland and our practices, locations or attorneys, visit babstcalland.com.

This communication was sent by Babst Calland, headquartered at Two Gateway Center, Pittsburgh, PA 15222.

This communication is privately distributed by Babst, Calland, Clements and Zomnir, P.C., for the general information of its clients, friends and readers and may be considered a commercial electronic mail message under applicable regulations. It is not designed to be, nor should it be considered or used as, the sole source of analyzing and resolving legal problems. If you have, or think you may have, a legal problem or issue relating to any of the matters discussed, consult legal counsel.

This communication may be considered advertising in some jurisdictions. To update your subscription preferences and contact information, please [click here](#). If you no longer wish to receive this communication, please [reply here](#). To unsubscribe from all future Babst Calland marketing communications, please [reply here](#).

©2022 Babst, Calland, Clements and Zomnir, P.C. All Rights Reserved.