DEPARTMENT OF THE ARMY
US ARMY CORPS OF ENGINEERS
NORFOLK DISTRICT
FORT NORFOLK
803 FRONT STREET
NORFOLK VA 23510-1096

JANUARY 12, 2018

Southern Virginia Regulatory Section
NAO-2012-00080 / 13-V0408 (James River)

Julie E. Crocker
Acting Assistant Regional Administrator
Protected Resources Division
National Marine Fisheries Service / Northeast Regional Office
55 Great Republic Drive
Gloucester, Massachusetts 01930-2276

Dear Ms. Crocker:

As a result of newly listed critical habitat for Atlantic Sturgeon in the James River, we are requesting re-initiation of consultation (last completed in 2016) and requesting the National Marine Fisheries Service's (NMFS) concurrence with a "not likely to adversely affect" determination pursuant to 50 CFR 402.13 for activities we authorized. Department of Army Permit Number NAO-2012-00080/VMRC# 13-V0408 authorizes jurisdictional impacts and crossings associated with Dominion Energy's proposed Surry-Skiffes Creek-Whealton Aerial Transmission Line Project, including placement of tower and fender system piles within areas of the James River. Re-initiation of consultation is required where discretionary federal involvement or control over the action has been retained or is authorized by law and: (a) the amount or extent of taking specified in the incidental take statement is exceeded; (b) new information reveals effects of the action that may not have been previously considered; (c) the identified action is subsequently modified in a manner that causes an effect to listed species; or (d) a new species is listed or critical habitat designated that may be affected by the identified action. Based on the information and analysis we have put together, we have determined that re-initiation of consultation is required at this time to address the recent critical habitat listing within the action area.

Consultation History

In 2014, NMFS previously concurred in the U.S. Army Corps of Engineers' (USACE) determination that the Project is "not likely to adversely affect" the Atlantic Sturgeon, thereby completing informal Endangered Species Act Section 7 consultation pursuant to 50 CFR 402.13. In June of 2015, the USACE reinitiated informal consultation with NMFS to address changes in the proposed action and possible effects on the listed Atlantic Sturgeon. In a letter dated January 28, 2016 (attached), NMFS again concurred with our determination that the proposed action, as altered, is "not likely to adversely affect" listed species, including the Atlantic Sturgeon (NMFS Concurrence Letter, 2016).

The USACE issued the subject permit to Dominion Energy on July 3, 2017. NMFS made its designation of critical habitat for the Atlantic Sturgeon effective as of September 18, 2017. The final designation defines critical habitat as "physical features essential to the conservation of the species," including areas with conditions (e.g., appropriate substrate and salinity gradient) appropriate to support spawning and early life stage (ELS) Atlantic Sturgeon and water of appropriate conditions to support unimpeded movement, staging, resting, or holding of adults or subadults. (NMFS Designation of Critical Habitat, 82 FR 39160).

The project has not changed since the previous 2016 consultation, and all analyses considered in that consultation are incorporated into this document by reference (see attached).

Effects to Critical Habitat

The action area for the subject permit is located in a stretch of the James River that falls within the geographical scope of Atlantic sturgeon critical habitat. While previous consultation was specific to the effects on a species, we do believe it provided useful insight on the nature of this habitat, its larger matrix, and conservation values. We have noted from the robust analysis (1) the absence of any evidence of spawning habitat or ELS in the stretch of the James River where the action area is located, and (2) that "[a]ny reductions in foraging, resting, or migration as a result of habitat loss related to the action will be so small they cannot be detected." (NMFS Concurrence Letter, 2016). Such findings hold true that habitat removal from the larger matrix and any effects on the conservation values associated with critical habitat will be so small they cannot be detected, and therefore, insignificant, as a result of the project. Our supporting analysis is included below.

CONSIDERATION OF PHYSICAL OR BIOLOGICAL FEATURES (PBF's)

The critical habitat rules identify four essential physical and biological features necessary for the conservation of the species. The term "physical or biological features" is defined as the features that support the life-history needs of the species, including, but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species or other features.

> **PBF1:** Hard bottom substrate (*e.g.,* rock, cobble, gravel, limestone, boulder, etc.) in low salinity waters (*i.e.,* 0.0 to 0.5 parts per thousand (ppt) range) for settlement of fertilized eggs, refuge, growth, and development of early life stages;
>
> > **<u>Effects Determination:</u>** The action area, located at river mile 30 of the James River, is characterized by soft sediment. Evidence indicates that conditions in this portion of the James River where the action area is located do not support Atlantic Sturgeon spawning or ELS. In its analysis supporting the 2016 concurrence, NMFS explained that Atlantic Sturgeon "from the Chesapeake Bay DPS spawn in upstream reaches of the James River." (NMFS Concurrence Letter, 2016). According to the letter, appropriate spawning conditions generally occur at or above mile marker 75. The letter further explained that river conditions in the action area for the USACE permit are not appropriate for spawning or for early life stage sturgeon: "No early life stages (ELS) are expected to be present in the action area due to its location in the

lower James River (river mile 30) with saline conditions. ELS cannot withstand exposure to salinity." This PBF (i.e. hard bottom habitat with salinity less than 0.5 ppt) is not present in the action area. Because this feature is not present, the project will have no effect on this PBF.

PBF 2: Transitional salinity zones inclusive of waters with a gradual downstream salinity gradient of 0.5 up to as high as 30 ppt and soft substrate (*e.g.,* sand, mud) between the river mouth and spawning sites for juvenile foraging and physiological development;

Effects Determination: The James River is influenced by both fresh and saline waters which creates transitional salinity gradients between upstream and downstream areas. Fluctuations in these transitional areas are influenced by weather conditions. Construction, and specifically the completed project, will have no influence on existing salinity gradients within the river.

The action area, located between the river mouth and upstream spawning sites, comprises soft sediment habitat, with salinity gradients (no effect on salinity from construction or completed project) that support pre-spawning staging and fall spawning runs, and may support juvenile development. The project once completed project, will not prohibit these activities, as discussed in the 2016 consultation (only small areas of habitat will be unavailable to Atlantic sturgeon and thus effects on the species are too small to be detected and thus, insignificant). Additionally, also detailed in the 2016 consultation, the use of bubble curtains and ramp up methods for sound attenuation, and time of year restrictions for piling installation in deep water habitat areas during construction should be suitable avoidance and minimization measures that will mitigate any effects to these pre-spawning activities, juvenile development, and usage of the area by Atlantic sturgeon.

Loss of PBF 2, while small, (i.e. 2712 sq ft) will result from piling installation associated with tower foundations and fender protection systems. Increased sedimentation and turbidity is also likely during construction within the action area, which may temporarily alter PBF 2. Since the impacts of turbidity will be temporary, limited in scope, and concentrated in the areas immediately surrounding each tower during construction, no permanent loss of PBF 2 will occur.

The permanent placement of towers and fenders in the substrate will directly remove or shade a small amount of river bottom reducing photosynthesis in these areas which could impact benthic communities and will permanently alter PBF 2. The reduction of photosynthesis could result in a loss of prey species for other marine life, and the small permanent loss of habitat due to the towers will reduce the amount of PBF 2 available in the action area. However, in the 2016 consultation, NMFS noted the applicant had estimated the project would impact approximately 2,712 square feet of river bottom, which "equates to 0.002% of the 132,930,000 square foot cross section of the James River that includes the shore length extent and cross river extent of the transmission line, inclusive of the action area." NMFS then explained that, "When broken down further, approximately 0.003% of the 72,250,000 square feet of deep water habitat will be permanently altered." The letter concluded, "If Atlantic Sturgeon

are in the action area, the action will not measurably reduce their ability to opportunistically forage, rest, and migrate in nearby suitable habitat near river mile 30, which has been identified as an aggregation area for sturgeon. Any reductions in foraging, resting, or migration as a result of habitat loss related to the action will be so small they cannot be detected." The cross-sectional area evaluated in the 2016 consultation has been designated as PBF 2, and thus, since a very small portion of that area will be permanently altered, any effects to PBF 2 throughout the action area will be so small they cannot be detected, and therefore insignificant.

PBF 3: Water of appropriate depth and absent physical barriers to passage (*e.g.,* locks, dams, thermal plumes, turbidity, sound, reservoirs, gear, etc.) between the river mouth and spawning sites necessary to support:

(i) Unimpeded movement of adults to and from spawning sites;
(ii) Seasonal and physiologically dependent movement of juvenile Atlantic sturgeon to appropriate salinity zones within the river estuary; and
(iii) Staging, resting, or holding of subadults or spawning condition adults.
Water depths in main river channels must also be deep enough (*e.g.,* at least 1.2 m) to ensure continuous flow in the main channel at all times when any sturgeon life stage would be in the river.

Effects Determination: The James River contains appropriate water depths and is free of physical barriers from Boshers Dam downstream to the mouth of the Chesapeake Bay. Construction, including the finished project, will not affect the habitat in a way that impedes the movements of spawning adults or juveniles; this is because it will not alter the depth of the action area in a way that makes the area inaccessible or result in the placement of physical barriers to passage. As stated above, the action will have no effect on salinity. Additionally, all construction will be temporary and will not permanently impact PBF 3. There, any effects to PBF are extremely unlikely to occur, and are therefore discountable.

PBF 4: Water quality conditions, especially in the bottom meter of the water column, between the river mouth and spawning sites with the temperature and oxygen values that support:

(i) Spawning;
(ii) Annual and interannual adult, subadult, larval, and juvenile survival; and
(iii) Larval, juvenile, and subadult growth, development, and recruitment (*e.g.,* 13 °C to 26 °C for spawning habitat and no more than 30 °C for juvenile rearing habitat, and 6 milligrams per liter (mg/L) dissolved oxygen (DO) or greater for juvenile rearing habitat).

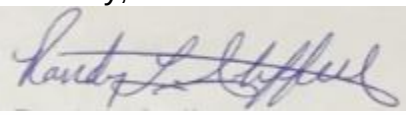
Effects Determination: A temporary reduction in dissolved oxygen will result during construction, but no permanent shifts will occur. No impacts to temperature are anticipated. Effects critical habitat because of changes to water quality are extremely unlikely to occur and therefore, discountable.

Conclusions

We certify that we have used the best information available and conclude that the action is “not likely to adversely affect” the species’ critical habitat. The permitted activities will have no impact on spawning and ELS habitat, and any effects to habitat used for foraging, resting, and migrating will be “insignificant.” We seek your concurrence at your earliest convenience.

Should you have any questions or require further information on this submittal, please do not hesitate to contact me at (757) 201-7579 or via email at randy.l.steffey@usace.army.mil . Thank you for your assistance.

Sincerely,



Randy L. Steffey
Project Manager, Southern Virginia
Regulatory Section

Attachment