UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION
No: 4:18-CV-00097-D

SOUND RIVERS, INC., et al.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
U.S. FISH AND WILDLIFE SERVICE, et al.,	)
	)
	)
Defendants.	)
	)

MEMORANDUM IN SUPPORT OF FEDERAL DEFENDANTS' MOTION FOR A VOLUNTARY REMAND OR, IN THE ALTERNATIVE, FOR A STAY OF PROCEEDINGS

Federal Defendants hereby submit this memorandum of points and authorities in support of their motion for a voluntary remand, or in the alternative, for a stay of proceedings pending a reinitiation of Endangered Species Act ("ESA") consultation with the United States Fish and Wildlife Service ("FWS") and any necessary reconsideration by the Federal Highway Administration ("FHWA") of its Record of Decision ("ROD") selecting a particular alternative for the Complete 540 Triangle Expressway Southeast Extension toll highway ("Complete 540 Project"). Federal Defendants' request for remand is based on the following factual background:

1. On May 23, 2018, Plaintiffs commenced this action against FWS challenging its biological opinion dated April 10, 2018, concerning the Complete 540 Project. ECF No. 1. Plaintiffs filed an Amended Complaint on June 25, 2018, adding the FHWA, NCDOT, and the National Marine Fisheries Service ("NMFS") as defendants. ECF No. 9. Plaintiffs' Amended Complaint added claims challenging the lawfulness of the FHWA's ROD finalizing the selection of DSA 2 as the preferred alternative for the Complete 540 Project and NMFS's conclusion that

the Complete 540 Project is not likely to adversely affect Atlantic sturgeon or its critical habitat. *See id.* Plaintiffs filed a Second Amended Complaint on October 24, 2018. ECF No. 33. Plaintiffs currently assert twenty-three claims for relief arising under several federal laws, including the NEPA, 42 U.S.C. § 4321 *et seq.*, the ESA, 16 U.S.C. § 1531 *et seq.*, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 701-706.

2. Some of Plaintiffs' ESA-related claims question the sufficiency of the FWS's biological opinion dated April 10, 2018 and the legality of FHWA's reliance on that opinion. *See* ECF No. 33 ¶¶ 267-320, 390-401.

3. After FWS issued its biological opinion, and after Plaintiffs brought this lawsuit, FWS proposed to list the Atlantic pigtoe freshwater mussel as a threatened species pursuant to the ESA. *See* 83 Fed. Reg. 51,570 (Oct. 11, 2018). In addition, FWS proposed to designate critical habitat for the species pursuant to the ESA. *Id.*

4. Also after FWS issued its biological opinion and after this lawsuit commenced, the United States Court of Appeals for the Fourth Circuit issued its decision in *Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260 (4th Cir. 2018). Among other holdings, *Sierra Club* construed the sufficiency of an incidental take statement ("ITS") issued by FWS in conjunction with a biological opinion rendered pursuant to the ESA concerning an unrelated federal action.

5. FHWA has determined that it would be appropriate to reinitiate consultation with FWS to ensure that the ITS that is part of the biological opinion in this case conforms with the applicable standards articulated by the Fourth Circuit in *Sierra Club*. In addition, FHWA will use the reinitiation of consultation to conduct a conference with FWS concerning any anticipated effects of the Complete 540 Project on the Atlantic pigtoe in light of the proposed listing of that

species as threatened, and the proposed designation of critical habitat, as provided in the ESA regulations. *See* 50 C.F.R. § 402.10.

6. As of this date, as explained in the declaration of Edward T. Parker (filed herewith as Exhibit 1), FHWA anticipates that it will take until August 2019 to complete consultation with FWS. Parker Decl. ¶ 7. During this time, FHWA anticipates that NCDOT will develop a biological assessment for the Atlantic pigtoe--as well as provide supplemental information regarding the dwarf wedgemussel and the yellow lance mussel--for FHWA to submit to FWS as part of a re-initiation package in May 2019. *Id.* ¶ ¶ 5-6. FHWA anticipates that FWS, in turn, will review the re-initiation package and assuming the prior timetables are accurate, issue a revised biological opinion by August, 2019. *Id.* ¶ 7. FHWA anticipates that this revised biological opinion may incorporate a "conference opinion" concerning the Atlantic pigtoe, as provided in the ESA regulations, 50 C.F.R. § 402.10. *Id.* ¶¶ 6-7. Additional time would be required for FHWA to complete any reconsideration of its ROD, if necessary, depending on the outcome of consultation with FWS. *Id.* ¶ 8.

7. This motion for remand, or in the alternative for a stay, is consistent with the inherent authority of FHWA as a federal agency to request a remand to reconsider prior decisions. *See The Last Best Beef, LLC v. Dudas*, 506 F.3d 333, 340 (4th Cir. 2007) (citing *Macktal v. Chao*, 286 F.3d 822, 825-26 (5th Cir. 2002)). "When a court reviews an agency action, the agency is entitled to seek remand 'without confessing error, to reconsider its previous position.'" *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.,* 556 F.3d 177, 215 (4th Cir. 2009) (quoting *SKF USA Inc. v. United States,* 254 F.3d 1022, 1028 (Fed. Cir. 2001)). Voluntary remand is also important for judicial economy because it allows courts to preserve judicial resources. *Friends of Park v. Nat'l Park Serv.*, No. 2:13-cv-03453-DCN, 2014 WL 6969680, at

*2 (D. S.C. Order filed Dec. 9, 2014) (citing *Ethyl Corp v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993)).

8. The Court also has inherent power to remand or stay this case based on the doctrine of primary jurisdiction. The doctrine of primary jurisdiction was first recognized by the Supreme Court in the case of *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907). As the Supreme Court later explained, it is intended to "promot[e] proper relationships between the courts and administrative agencies charged with particular regulatory duties." *U.S. v. Western Pac. Ry. Co.*, 352 U.S. 59, 63 (1956). "The doctrine has been deemed to apply in circumstances in which federal litigation raises a difficult, technical question that falls within the expertise of a particular agency." *Piney Run Pres. Ass'n v. Cty. Comm'rs of Carroll County*, 268 F.3d 255, 262 n. 7 (4th Cir.2001). Moreover, the decision to refer an issue to an administrative agency is "a discretionary matter." *Environmental Tech. Council v. Sierra Club*, 98 F.3d 774, 789 n. 24 (4th Cir.1996). The Court should exercise its discretion to remand this matter to allow FHWA to engage in ESA consultation with FWS in order to ensure that the agency actions challenged in this case conform with the requirements of the ESA and the Fourth Circuit's recent decision in *Sierra Club*.

9. Voluntary remand will conserve judicial resources and save the parties from additional burdens of potentially unnecessary litigation. *See Maryland v. Universal Elections, Inc.*, 729 F.3d 370, 379 (4th Cir. 2013) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the cause on its docket with economy of time and effort for itself, for counsel, and for litigants."), citation omitted. Here, for example, it is possible that some or all of Plaintiffs' challenges to the FWS's existing biological opinion may be rendered moot or otherwise resolved by a revised biological opinion resulting from the

reinitiation of consultation. In addition, it is possible that, depending on the outcome of the reinitiated consultation, FHWA will reconsider its decision to select the preferred alternative for the Complete 540 Project as memorialized in the ROD dated June 6, 2018.

10. Although this motion for remand, or in the alternative for a stay, is focused on FHWA's review of its prior decision in the context of new information relative to FWS's biological opinion dated April 10, 2018 and the legality of FHWA's reliance on that opinion, the litigation should also be held in abeyance as to Plaintiffs' claims concerning the sufficiency of FHWA's ESA consultation with NMFS, including NMFS's concurrence with FHWA's determination that the Complete 540 Project is not likely to adversely affect Atlantic sturgeon or its critical habitat. Federal Defendants do not believe there are any legal deficiencies with respect to the FHWA's ESA consultation with NMFS. Nevertheless, it is possible that remand may result in developments that would warrant further consultation with NMFS and, in turn, address some of Plaintiffs' existing claims involving NMFS.

11. To the extent that some or all of Plaintiffs' claims are resolved by voluntary action of the Federal Defendants on remand, judicial intervention may become unnecessary. *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992) (*quoting Mills v. Green*, 159 U.S. 651, 653 (1895)) (A Federal court lacks jurisdiction "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it."). In any case, the contours of the challenge presented by the Plaintiffs' lawsuit will certainly shift as the operative underlying documents will be altered.

Accordingly, for all the foregoing reasons, Federal Defendants respectfully move this Court for an order: 1) remanding this action to afford the FHWA the opportunity to reinitiate ESA consultation with FWS and, depending on the outcome of such consultation, to reconsider

its decision to select the preferred alternative for the Complete 540 Project; or 2) staying further proceedings in this action pending the completion of the ESA consultation process referenced above.

Respectfully submitted,

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Dated: April 8, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send electronic notification of such filing to the following:

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