IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION

NO. 4:18-CV-97-D

SOUND RIVERS, INC., CENTER FOR BIOLOGICAL DIVERSITY, and CLEAN AIR CAROLINA, Plaintiffs, v. U.S. FISH AND WILDLIFE SERVICE and GREG SHEEHAN, in his official capacity as ACTING DIRECTOR, U.S. FISH AND WILDLIFE SERVICE; NORTH CAROLINA DEPARTMENT OF TRANSPORTATION and JAMES H. TROGDON III, in his official capacity as SECRETARY, NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; FEDERAL HIGHWAY ADMINISTRATION and EDWARD T. PARKER, in his official capacity as ASSISTANT DIVISION ADMINISTRATOR, FEDERAL HIGHWAY ADMINISTRATION, NORTH CAROLINA DIVISION; NATIONAL MARINE FISHERIES SERVICE and CHRISTOPHER OLIVER, in his official capacity as ASSISTANT ADMINISTRATOR FOR FISHERIES, NATIONAL MARINE FISHERIES SERVICE, Defendants.	**PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR CLARIFICATION** [Fed. R. Civ. P. 7]

NOW COME Plaintiffs Sound Rivers, Center for Biological Diversity, and Clean Air Carolina (the "Conservation Groups") to submit this memorandum in support of their motion for clarification of the Court's April 11, 2019 Order.

I. Background

On April 8, 2019 Defendants the Federal Highway Administration, the United States Fish and Wildlife Service, and the National Marine Fisheries Service (herein after the "Federal Defendants") filed a Motion for "Voluntary Remand" of the above captioned case. ECF No. 47. Federal Defendants noted that the Conservation Groups opposed this motion.[1] This Court granted Defendants' motion on April 11, 2019 before the Conservation Groups submitted a response. The Conservation Groups now seek clarification of the Order. The Conservation Groups specifically ask the Court to clarify (1) what affect the Order has on the federal approvals that have been challenged by the Conservation Groups in this matter, including the Record of Decision issued pursuant to the National Environmental Policy Act ("NEPA"), and (2) the Order's impact on efficient resolution of this matter given State Defendant NCDOT's stated intent to press forward to construction of the toll highway during the stay of the litigation.

II. Defendants' Opaque Motion

Defendants were opaque about whether the voluntary remand they requested included vacatur of the relevant environmental approvals, and thus ignored a key element courts consider alongside voluntary remand. *See, e.g.*, *Friends of Park v. Nat'l Park Serv.*, No. 2:13-CV-03453-DCN, 2014 WL 6969680, at *2-3 (D.S.C. Dec. 9, 2014). While Defendants did not explicitly state that they would vacate their approvals upon remand, the cases they relied on in their motion

[1]Because the Federal Defendants failed to confer with the Conservation Groups prior to filing their motion, the Conservation Groups asked that they clarify their position, which Federal Defendants did in a revised filing. The Conservation Groups stated that they did not oppose voluntary remand so long as it was coupled with vacatur of the remanded decisions.

all include vacatur of the federal permit or approval involved in the remand. ECF No. 48 at ¶ 7. For example, in *Friends of Park v. Nat'l Park Serv*., the federal defendants agreed that during remand they would "reopen the administrative record and initiate a new NEPA and NHPA evaluation . . . ." No. 2:13-CV-03453-DCN, 2014 WL 6969680, at *1. The federal defendants in that case further committed that "[n]o outcome w[ould] be preordained by this reconsideration." *Id.* In addition "the federal defendants agree[d] that the [federal agency] w[ould] 'provide notice and opportunity for public, local, and community involvement' during the review process on remand." *Id.* at 4; *see also The last Best Beef, LLC v. Dudas*, 506 F.3d 333, 340 (4th Cir. 2007) (holding that U.S. Patent and Trademark Office acted within its inherent authority to correct is unlawful action by cancelling the issuance of two registration determined to be in error); *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177,215 (4th Cir. 2009) (Court remanded section 404 fill permit to Corps, and permits were reissued a month later).[2]

Despite relying on these cases, it is unclear whether Federal Defendants intended to make the same commitment in the instant matter. Indeed, Federal Defendants fail entirely to define the contours of their requested "voluntary remand pending completion of [Endangered Species Act] consultation." ECF No. 50 at 1. Federal Defendants characterize this reinitiation of consultation as "necessary" pursuant to the strictures of the Endangered Species Act ("ESA"), *id.*, in light of recent Fourth Circuit precedent as well as the newly-proposed to be listed Atlantic pigtoe mussel. ECF No. 48, ¶ 5. Reinitiation of consultation is no minor undertaking, requiring NCDOT to

[2] Defendants also cite cases that speak to the issue of "primary jurisdiction." But reliance on these cases are entirely misplaced. As Defendants' legal citations acknowledge, the primary jurisdiction doctrine applies under circumstances involving "a difficult, **technical** question that falls within the expertise of a particular agency." ECF No. 50 ¶ 8 (quoting *Piney Run Pres. Ass'n v. Cty. Comm'rs of Carrol Cty.*, 268 F. 3d 255, 262 n. 7 (4th Cir. 2001)) (emphasis added). The Federal Defendants make no claim that they are reinitiating consultation because of a technical issue requiring agency expertise, rather, the impetus is new legal precedent and the predictable development of a newly-listed species. ECF No. 48, ¶ 5-6. Plaintiffs' NEPA claims likewise do not present a technical matter of agency expertise—instead, the NEPA claims, brought pursuant to the APA, only raise the legal issue of whether Defendants' review was "arbitrary and capricious." *See* 5 U.S.C. § 706.

create an entirely new biological assessment and FWS to create a newly-revised biological opinion. ECF No. 48-1 ¶ 5-6. The Federal Defendants estimate the entire process will take four months. ECF No. 50 at 1.

As a result of this new consultation process, Federal Defendants anticipate that "[d]epending on the outcome of such ESA consultation, it is possible that FHWA will reconsider its decision to select the 'Detailed Study Alternative 2' ('DSA 2') as the preferred alternative." ECF No. 48 at 2; *see also* ECF No. 48-1 ¶ 8. Thus, while Federal Defendants asserted explicitly in their motion that they will revisit their final approvals of two mussel species pursuant to the ESA, that they will analyze a species that they have thus far failed to consider at all, and, moreover, that they may need to reconsider their choice of selected alternative, Federal Defendants do not make clear what remand entails for the FHWA's final approval under NEPA—which relies on the ESA decisions being reconsidered under remand.

III. State Defendants' Continued Reliance on Remanded Decisions

The status of the federal approvals during remand was placed into further question when State Defendants stated publicly last week that they would continue to rely on the remanded decisions as if they are in full effect. In response to press enquiries about the status of the project subsequent to the Federal Defendant's motion, an NCDOT spokesperson stated that the agency was continuing to proceed along the same schedule, and that, despite the federal request to reinitiate consultation, NCDOT is "moving forward based on current approvals."[3] The same news story states that NCDOT "has awarded two [construction] contracts, worth $563 million, for the first two legs of the project, from just east of Holly Springs Road to I-40 near the

[3] Richard Stradling, *There's another obstacle for NC 540 to clear, and once again it involves tiny mussels*, News and Observer (Apr. 11, 2019) *available at* https://www.newsobserver.com/news/politics-government/article229023454.html#storylink=cpy (Exhibit 1).

Johnston County line, and says it hopes to begin construction late this year and finish in 2023." Thus despite the supposed "remand" of the environmental approval documents to Federal Defendants, State Defendants appear to be proceeding ahead with construction based on the analysis and decisions that Federal Defendants are reconsidering.

IV. Voluntary Remand with Vacatur is Necessary

Federal Defendants failed to cite any standard of review in their motion. It is well established, however, that remand in Administrative Procedure Act cases is usually accompanied ***with*** vacatur. *See, e.g.*, *AquaAlliance v. U.S. Bureau of Reclamation*, 312 F.Supp.3d 878 (E.D. Cal. 2018); *Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin. Nat'l Marine Fisheries Serv.*, 109 F. Supp. 3d 1238, 1239 (N.D. Cal. 2015); s*ee also* Wright & Miller § 8382 Remand Without Vacation, 33 Fed. Prac. & Proc. Judicial Review § 8382 (2d ed.) (collecting cases and noting that "[p]erhaps because of lingering doubts over its legality, courts deploy remand without vacation relatively rarely.") Vacatur is an equitable remedy and may be ordered with or without a final determination on the merits. *See Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1139 (10th Cir. 2010).

When considering whether vacatur is appropriate when an agency seeks voluntary remand, courts apply their equitable powers to construct a remedy that balances the seriousness of the agency's errors with "the disruptive consequences of an interim change that may itself be changed." *See, e.g.*, *id*. at 1231. In determining whether vacatur is appropriate, courts consider two factors: (1) "the seriousness of an agency's errors;" and (2) "the disruptive consequences that would result from vacatur." *Allied-Signal, Inc. v. U.S. Nuclear Ref. Commn.*, 988 F.2d 146, 150-51 (D.C. Cir. 1993).

A) The Agencies' Serious Errors

The errors the Federal Defendants have admitted here are severe. As noted in their motion, Defendants' Incidental Take Statements ("ITS") for the populations of endangered mussels are likely inconsistent with a recent ruling by the United States Court of Appeals for the Fourth Circuit. *See* ECF No. 48 ¶¶ 4-5 (citing *Sierra Club*, 899 F.3d 620). This is no small error. As Conservation Groups noted in their complaint, the many flaws in the Biological Opinion and Incidental Take Statement are likely to place the dwarf wedgemussel and yellow lance in jeopardy. ECF No. 33 ¶¶ 182-237, 390-401. The risk is particularly acute for the dwarf wedgemussel as the challenged ITS would allow "take" of all mussels from the Swift Creek watershed, despite the determination by FWS that the Swift Creek population is essential to the recovery of the species.[4] *Id.* ¶ 173. Moreover, as no attempt has been taken to date (despite entreaties from the Conservation Groups) to analyze the Atlantic pigtoe under either the ESA or NEPA, that analysis will need to begin from scratch.

Federal Defendants have not provided any evidence that the agency will be able to substantiate its decision on remand—to the contrary, Federal Defendants state that "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." ECF No. 48 at ¶9. The seriousness of the agencies' errors and the likelihood that the agencies' seriously defective decision will not be substantiated on remand weighs in favor of clarifying this Court's Order to provide for remand with vacatur.

In a similar recent case, the federal government sought remand without vacatur in a case involving NEPA claims and ESA claims as it seeks here. *Bundorf v. Jewell*, 142 F. Supp. 3d

[4] Moreover, without a valid Biological Opinion, NCDOT will be directly liable for "take" of any listed species that its actions may cause. *See, e.g., Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1108 (9th Cir. 2012).

1133 (D. Nev. 2015). In denying this request, the court noted that such a remand would afford Defendants "two-bites at the apple" and allow them to "offer post-decision explanations to fill the analytical gaps" in direct contradiction of the APA standard that requires Defendants to show they have "examine[d] the relevant data and articulate[d] a satisfactory explanation for [their] action including a 'rational connection between the facts found and the choice made' on the administrative record before the court." *Id*. (citing *Humane Soc'y of U.S. v. Locke,* 626 F.3d 1040, 1048 (9th Cir.2010) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)). The court noted that if a finding was "'not sustainable on the administrative record made, then the [agency's] decision must be vacated and the matter remanded to [the agency] for further consideration.'" *Id.* (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 63 S.Ct. 454, 87 L.Ed. 626 (1943)). Consequently the court found that "vacatur of the ROD, the FEIS and the BiOp" was necessary. *Id*.

The *Bundorf* court's explanation is further buoyed by the fact that NEPA is a "democratic decisionmaking tool," and, as the Supreme Court has noted, "the very purpose of public issuance of an environmental impact statement is to 'provid[e] a springboard for public comment.'" *N.C. Wildlife Fed'n*, 677 F.3d at 603 (quoting *U.S. Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004) (alteration in original)). The Fourth Circuit has made clear that "NEPA procedures emphasize clarity and transparency of process over particular substantive outcomes." *N. Carolina Wildlife Fed'n v. N. Carolina Dep't of Transp.*, 677 F.3d 596, 603 (4th Cir. 2012).

Here, where the EIS includes no information about the Atlantic pigtoe, and, moreover, relies on a Biological Opinion and Incidental Take Statement that the agencies state they will revisit, the public (and the Conservation Groups) have been deprived of its legal right to review and comment on this information prior to a final decision. Similarly, the Conservation Groups

will be deprived of any opportunity to comment on whether the new information requires Defendants to reconsider their selection of alternative. "When relevant information 'is not available during the [impact statement] process and is not available to the public for comment[,] ...the [impact statement] process cannot serve its larger informational role, and the public is deprived of [its] opportunity to play a role in the decision-making process." *N. Carolina Wildlife Fed'n,* 677 F.3d at 604–05 (citing *Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1084 (9th Cir. 2011); *Robertson*, 490 U.S. at 349, 109 S.Ct. 1835).

Furthermore, granting the motion for remand without vacatur, and preserving Defendants' defective approvals, directly contravenes the ESA's "preference for protecting endangered species." *See Center for Native Ecosystems v. Salazar*, 795 F. Supp. 2d 1236, 1243 (D.Co. 2011) ("In enacting the ESA, Congress definitively skewed the balancing process in favor of species protection and [the court] cannot ignore this clear command."). Consistent with the ESA, vacatur will provide the dwarf wedgemussel, yellow lance, and Atlantic pigtoe the legal protection they are entitled to pending the Federal Defendants' reinitiation of consultation. *See id.*

B) The Lack of Any Disruptive Consequences

By contrast, with the grave nature of their errors and the extent of the actions to be reconsidered upon remand, Defendants have not articulated any disruptive consequences that would result from vacatur. Lack of information weighs in favor of vacatur. *North Coast Rivers Alliance v. U.S. Dep't of Interior*, 2016 WL 8673038, at *9 (E.D. Cal. 2016). In determining the "disruptive consequences" of vacatur, courts disregard assertions that vacatur would cause economic disruption or "imprecise or speculative" harms. *Public Employees for Environmental Responsibility v. United States Fish & Wildlife Serv.*, 2016 WL 3030228, at *1–2 (D.D.C. 2016).

Here Federal Defendants have made no showing that there would be any harm if the ROD were not left in place. In fact, they have indicated that because of their new analysis of Endangered Species they may be required to revisit their selected alternative. ECF No. 48 at 5. Until such a decision is finalized it would be fiscally and environmentally imprudent for Defendants to take any steps towards advancing the alternative selected currently.[5]

V. The Uncertain Nature of the Remand Harms the Conservation Groups

The currently vague parameters of the voluntary remand pose significant harm to the Conservation Groups and may require a request for preliminary injunctive relief if Defendants continue to proceed with construction plans while summary judgment briefing is halted. The Groups promptly filed this case in May 2018, challenging the sufficiency of the ESA approvals the agencies now intend to revise. ECF No. 1. The Conservation Groups then amended the complaint in June 2018 to include claims under NEPA as soon as those claims became ripe. ECF No. 9. The Conservation Groups then again promptly amended their complaint in October 2018 once their ESA claims against the Transportation Agencies became ripe. ECF No. 33.

The Conservation Groups have consistently pressed forward with this case as swiftly as possible, even cutting time out of their own deadlines to make up for time lost during the Federal Shutdown. ECF No. 40. The Conservation Groups have taken these steps in the interests of judicial economy so that summary judgment briefing might be complete before Defendants attempt to begin construction of the project,[6] which they have previously told the Court will commence in "late summer / fall 2019." ECF No. 30. A four-month delay of the legal proceedings without any corresponding delay to Defendants' construction plans renders this

[5] Moreover, as discussed below in Section VI, any steps taken to advance a particular alternative would violate NEPA.

[6] In their joint case management report to the Court, Conservation Groups noted their concern about the lengthy period—more than 7 months—taken by Defendants to prepare the Administrative Record for this case, and further noted that there may be need to file a motion for preliminary injunctive relief. ECF No. 30 at 5, 7.

orderly briefing schedule impossible. While Federal Defendants attest in their motion that a voluntary remand will preserve judicial economy, it will in fact do the reverse: the current schedule appears bound to force the Conservation Groups to file a motion for preliminary injunction to prevent construction prior to the completion of summary judgment briefing.

Given the severity of Federal Defendants' admitted errors, the extent of analysis and reconsideration to be performed on remand, and the failure of Federal Defendants to articulate any harm if the remanded approvals are vacated, the Conservation Groups request that the Court employ its equitable powers and clarify its April 11, 2019 Order to make clear that in remanding the matter to the agencies, the underlying decisions are vacated.

VI. The Court Should Enjoin Activity to Preserve Viability of Alternatives Required by NEPA

In the alternative, the Conservation Groups ask that the Court clarify that no actions can be taken in reliance on the remanded decisions. *See All. for the Wild Rockies v. Krueger*, 950 F. Supp. 2d 1196, 1207 (D. Mont. 2013), aff'd sub nom. *All. for the Wild Rockies v. Christensen*, 663 F. App'x 515 (9th Cir. 2016) (remanding for reinitation of consultation coupled with an order enjoining defendants from implementing the challenged project pending the consultation process). In the Parties' September 12, 2018 Joint Report, State Defendants indicated that they might proceed with construction in "late summer/fall 2019." ECF No 30 ¶ 6.j. The stay of proceedings issued by this Court will expire in mid-August 2019, and thus may fall concurrent with this construction period. In the meantime, as noted above, State Defendants state that they are pushing ahead with other activities "based on current approvals." Exhibit 1. Upon information and belief these steps include issuing multi-million dollar construction contracts, work force mobilization, design work, bond sales, right of way acquisition and more.

An order from this Court clarifying that action may not be taken in reliance on the federal approvals remanded to the agency would help preserve the Conservation Groups' interests which have been placed in jeopardy through no fault of their own, and, indeed, despite the diligent efforts of counsel to swiftly pursue a remedy in this case.

Such an order would also preserve the protection and guarantees afforded by NEPA. As a procedural statute, the fundamental purpose of NEPA is to influence the agency's decisionmaking process "by focusing the [federal] agency's attention on the environmental consequences of a proposed project," so as to "ensure[ ] that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). The Fourth Circuit has made clear that until the NEPA process is concluded, agencies may not take steps to "[l]imit the choice of reasonable alternatives," or "commit resources prejudicing selection of alternatives before making a final decision." *Nat'l Audubon Soc'y v. Dep't of the Navy*, 422 F.3d 174 (4th Cir. 2005) (citing 40 C.F.R. §§ 1501.2, 1502.22.). For example, that court enjoined work on a highway because further "investment … prior to and during the Secretary's consideration of the environmental report," would lead to the nominal final decision being "a meaningless formality." *Nat'l Audubon*, 422 F.3d at 201 (quoting *Arlington Coalition on Transp. v. Volpe*, 458 F.2d 1323, 1333 (4th Cir. 1972)).

Here, where Federal Defendants expressly stated in their motion that their additional analysis may require them to revisit their choice of alternatives, ECF No. 48 at 2, it is essential that no actions should be taken in reliance on the remanded approvals. Allowing the agencies to take actions toward the currently-selected alternative would render it inevitable, regardless of any new findings resulting from the remanded decisions, in contravention of NEPA.

At the very least, the Conservation Groups ask that the Court order State Defendants to provide regular status reports to the Court about activities related to permitting, bond issuance, right of way acquisition, design work, labor mobilization, construction activities, and any other irretrievable expenditures of resources made in reliance on the approvals remanded to Federal Defendants.

This the 16th day of April, 2019.

s/ Kimberley Hunter
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CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2019, I electronically filed the foregoing Plaintiffs' Memorandum in Support of Motion for Clarification with the Clerk of the Court using the CM/ECF system, which will automatically send notification of such filing to counsel for Defendants.

This the 16th day of April 2019.

/s/ Kimberley Hunter
Southern Environmental Law Center