

May 15, 2018

Kimberly D. Bose, Secretary  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Washington, DC 20426

**Re: U.S. Fourth Circuit Court of Appeals Vacates Incidental Take Statement for Atlantic Coast Pipeline Dockets CP15-554 et seq. & CP15-555 et seq.**

Dear Secretary Bose:

Today, the U.S. Fourth Circuit Court of Appeals vacated the Incidental Take Statement for the Atlantic Coast Pipeline issued as part of the Biological Opinion prepared by the Fish and Wildlife Service. A copy of the court's order is attached.

An incidental take statement is a required component of formal consultation under the Endangered Species Act. 50 C.F.R. § 402.14(g)(7). Because the court vacated the Incidental Take Statement, consultation is not complete and construction cannot commence as specified by Environmental Condition 54 in the Commission's Certificate Order for the Atlantic Coast Pipeline. 161 FERC ¶ 61,042 (Oct. 13, 2017). Therefore, the Commission must halt all on-the-ground construction activities and revoke or suspend all notices to proceed for the Atlantic Coast Pipeline until consultation has been reinitiated and completed and the defects of the Incidental Take Statement are remedied.

The vacatur of the Incidental Take Statement also halts implementation of the U.S. Forest Service's Record of Decision and Special Use Permit for the Atlantic Coast Pipeline which are contingent upon compliance with a valid biological opinion and incidental take statement. U.S. Forest Service, Record of Decision, Atlantic Coast Pipeline at 13 (Nov. 2017). Permits issued by the U.S. Army Corps of Engineers likewise must also be supported by a valid biological opinion and incidental take statement. 16 U.S.C. § 1536(a). Therefore, the Forest Service and Corps of Engineers must halt all on-the-ground pipeline activities under these permits until consultation has been reinitiated and completed and the defects of the Incidental Take Statement are remedied.

Sincerely,

s/ Gregory Buppert

Gregory Buppert

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cc: Ken Arney, Acting Regional Forester, Southern Region, U.S. Forest Service  
Kathleen Atkinson, Regional Forester, Eastern Region, U.S. Forest Service  
Teresa Spanga, Chief, U.S. Army Corps of Engineers, Huntington District  
William T. Walker, Chief, U.S. Army Corps of Engineers, Norfolk District  
Henry Wicker, Deputy Chief, U.S. Army Corps of Engineers, Wilmington District

**UNPUBLISHED**

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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**No. 18-1082**

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SIERRA CLUB; VIRGINIA WILDERNESS COMMITTEE,

Petitioners,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; NATIONAL PARK SERVICE, an agency of the U.S. Department of the Interior; RYAN ZINKE, in his official capacity Secretary of the Department of the Interior; MICHAEL T. REYNOLDS, in his official capacity as Deputy Director, Operations, Exercising the Authority of Director; STAN AUSTIN, in his official capacity as Southeast Regional Director, Responsible Official,

Respondents,

ATLANTIC COAST PIPELINE, LLC,

Intervenor.

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**No. 18-1083**

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DEFENDERS OF WILDLIFE; SIERRA CLUB; VIRGINIA WILDERNESS COMMITTEE,

Petitioners,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; FISH AND WILDLIFE SERVICE, an agency of the U.S. Department of the Interior; RYAN ZINKE, in his official capacity Secretary of the Department of the Interior; GREG SHEEHAN, in

his official capacity as Principal Deputy Director; CINDY SCHULZ, in her official capacity as Field Supervisor, Virginia Ecological Services, Responsible Official,

Respondents,

ATLANTIC COAST PIPELINE, LLC,

Intervenor.

On Petition for Review from the United States Department of the Interior. (5-140-1945)

Argued: May 10, 2018

Decided: May 15, 2018

Before GREGORY, Chief Judge, WYNN and THACKER, Circuit Judges.

**ARGUED:** Austin Donald Gerken, Jr., SOUTHERN ENVIRONMENTAL LAW CENTER, Asheville, North Carolina, for Petitioners. Avi Kupfer, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondents. Brooks Meredith Smith, TROUTMAN SANDERS LLP, Richmond, Virginia, for Intervenor. **ON BRIEF:** Amelia Burnette, J. Patrick Hunter, Asheville, North Carolina, Gregory Buppert, SOUTHERN ENVIRONMENTAL LAW CENTER, Charlottesville, Virginia, for Petitioners. Eric Grant, Deputy Assistant Attorney General, Andrew Mergen, J. David Gunter II, Environment and Natural Resources Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Andrew Tittler, S. Amanda Bossie, Office of the Solicitor, DEPARTMENT OF THE INTERIOR, Washington, D.C., for Respondents. Andrea W. Wortzel, TROUTMAN SANDERS LLP, Richmond, Virginia, for Intervenor.

ORDER

## PER CURIAM:

Petitioners seek review of the U.S. Fish and Wildlife Service's Incidental Take Statement, which authorized the Atlantic Coast Pipeline project to take certain threatened or endangered species. As to five of the affected species, Petitioners argue that the agency failed to set clear limits on take as required by the Endangered Species Act.

Exercising jurisdiction pursuant to 15 U.S.C. § 717r(d)(1), we conclude, for reasons to be more fully explained in a forthcoming opinion, that the limits set by the agency are so indeterminate that they undermine the Incidental Take Statement's enforcement and monitoring function under the Endangered Species Act. Accordingly, we VACATE the Fish and Wildlife Service's Incidental Take Statement. *See* 5 U.S.C. § 706(2). We reserve judgment on the parties' remaining disputes until our forthcoming opinion.

IT IS SO ORDERED.