

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Mountain Valley Pipeline, LLC
Equitrans, L.P.

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Docket Nos. CP16-10-000
CP16-13-000

SIERRA CLUB’S REQUEST TO RE-INITIATE CONSULTATION

On Tuesday, May 15th, 2018, 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. That order held that the “limits on take” set by that statement were, as to Indiana bats, Northern long-eared bats, and three other species, “so indeterminate that they undermine the Incidental Take Statement’s enforcement and monitoring function under the Endangered Species Act.”

The Incidental Take Statement for the Mountain Valley Pipeline sets limits on take of Indiana and Northern long-eared bats that are indistinguishable from the limits held to be inadequate in the Atlantic Coast Pipeline proceeding. Both limit take to a “small percent of individuals present within” various enumerated and quantified habitat types. MVP BiOp, Accession No. 20171122-0006, at 41-42; ACP BiOp, Accession No. 20171103-3008, at 53-54. Until these indefinite limits are clarified, it will be impossible to determine whether Mountain Valley Pipeline will in fact jeopardize these bat species or, conversely, whether harm to individual bats caused by the pipeline has exceeded the level of “take” contemplated by the Biological Opinion.

In light of this deficiency in the Incidental Take Statement, Sierra Club requests re-initiation of formal consultation. Re-initiation is warranted because, *inter alia*, it is impossible to determine whether the amount or extent of taking that has been caused or that is anticipated to be caused by project activities exceeds the level specified in the ITS. 50 C.F.R. §402.16(a).

FERC must halt all project activity pending completion of re-initiated consultation. The ITS is an integral part of the Biological Opinion; absent a valid ITS and BiOp, FERC cannot

ensure than *any* project activity complies with the Endangered Species Act. FERC appropriately recognized this fact in the conditions imposed by the certificate order: condition 28(b) prohibits *all* construction activity prior to completion of Endangered Species Act consultation with the Fish and Wildlife Service. 161 FERC ¶ 61,043 (Oct. 13, 2017). Other federal approvals, such as those of the Bureau of Land Management, Forest Service, and Army Corps of Engineers, are similarly dependent on valid consultation. These agencies similarly must require Mountain Valley Pipeline to halt activity unless and until an adequate Biological Opinion and Incidental Take Statement are prepared.

Sincerely,



Nathan Matthews

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-1082

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.

No. 18-1083

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.

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