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February 13, 2013

Via US and Electronic Mail

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Dear Mr. Vital:

Please accept these comments on the Environmental Assessment (“EA”) for the City of Creedmoor’s proposed wastewater system project, prepared by The Wooten Company for the US Department of Agriculture – Rural Development (“NEPA Environmental Assessment for Wastewater Collection and Treatment System Improvements, City of Creedmoor, Granville County, North Carolina, December 2012,” hereafter “the EA”). The Southern Environmental Law Center (“SELC”) submits these comments on behalf of the Pamlico-Tar River Foundation (“PTRF”) and the Environmental Defense Fund (“EDF”). PTRF is a private, non-profit organization that has been dedicated to protecting, preserving, and promoting the Tar-Pamlico River and its watershed since 1981. EDF is a private, non-profit organization with long-term experience with issues affecting water quality in the Tar-Pamlico River basin. SELC is a private, non-profit legal organization that seeks to protect and preserve the Southeastern environment.

Based on a review of the EA, and of public correspondence between the U.S. Department of Agriculture – Rural Development (“USDA RD”) and state and federal agencies, the proposed project may have significant environmental effects on the ecologically important and sensitive Tar River. For this reason, USDA RD must prepare an Environmental Impact Statement (“EIS”) for the proposed wastewater system project to meet the agency’s legal obligations under the National Environment Policy Act (“NEPA”).

I. NEPA requires federal agencies to prepare an EIS for actions “significantly affecting the quality of the human environment.”

NEPA seeks to “promote efforts which [sic] will prevent or eliminate damage to the environment and biosphere.” 42 U.S.C. § 4321. To achieve this goal, NEPA requires federal agencies to carefully analyze proposals for “major Federal actions significantly affecting the quality of the human environment” by preparing an EIS. 42 U.S.C. § 4332(2)(C).¹

An EA is a document that assists an agency in determining whether an EIS is necessary. 40 C.F.R. § 1508.9(a)(1); 40 C.F.R. § 1501.4(b). If the EA reveals that an action may significantly affect the quality of the human environment, the responsible agency must prepare an EIS. 40 C.F.R. §§ 1501.1 *et seq.*; Methow Valley, 490 U.S. at 348; Webster v. United States Dep’t of Agriculture, 685 F.3d 411, 417 (4th Cir. 2012); Hunt v. North Carolina Dep’t of Transp., 299 F. Supp. 2d 529, 535 (E.D.N.C. 2004).

When determining whether an action may *significantly* affect the environment, and therefore requires an EIS, agencies must consider the “context of the action and the intensity, or severity, of the impact.” Ohio Valley Env’tl. Coalition v. Aracoma Coal Co., 556 F.3d 177, 191 (4th Cir. 2009), *citing* 40 C.F.R. § 1508.27. “Context” means that an agency must consider an action’s potential effects as they relate to the “affected geographical region and its interests.” Hodges v. Abraham, 300 F.3d 432, 438 (4th Cir. 2002).² “Intensity” means that an agency must consider the severity of potential effects based on ten factors. Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 374 n. 20 (1989); North Carolina v. Fed. Aviation Admin., 957 F.2d 1125, 1132 (4th Cir. 1992) (stating that “intensity [is] a function of ten factors.”).³ An agency

¹ The Council on Environmental Quality (CEQ) regulations implementing NEPA define “major Federal action” to include projects “entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies” 40 C.F.R. § 1508.18(a). *See also* Rucker v. Willis, 484 F.2d 158, 163 (4th Cir. 1973) (examples of “major Federal actions” include “projects financed in whole or in part by federal funds [and] projects designed and planned in part by a federal agency”).

The regulations broadly define “human environment” to include “the natural and physical environment and the relationship of people with that environment.” 40 C.F.R. § 1508.14.

²“Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.” 40 C.F.R. § 1508.27(a).

³ The factors to be considered are:

- (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
- (2) The degree to which the proposed action affects public health or safety.
- (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, parks lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
- (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
- (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
- (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about future consideration.

must prepare an EIS “[i]f *any* ‘significant’ environmental impacts might result from the proposed agency action” Sierra Club v. Peterson, 717 F.2d 1409, 1415 (D.C. Cir. 1983) (emphasis in original).⁴

The proposed project triggers six of the ten factors for determining that an action will have significant environmental effects. Therefore, an EIS is required for Creedmoor’s project.

II. *USDA RD must prepare an EIS because the City of Creedmoor wastewater system project may “significantly affect” the environment.*

The EA for the proposed Creedmoor wastewater system project and comments submitted by federal and state agencies demonstrate that the project may have significant environmental effects based on a consideration of the project’s “context” and the “intensity” of its impacts. At the same time, measures to mitigate these effects that are mentioned in the EA are not sufficient to reduce the need for in-depth environmental review that only an EIS can provide.

- a) The proposed Creedmoor wastewater system project must be evaluated in the “context” of the Tar River and of affected interests.

Context means that the severity of a project’s impacts must be considered in relation to the affected locality and to affected interests, recognizing that “[s]ignificance varies with the setting of the proposed action.” 40 C.F.R. § 1508.27(a); see also Abraham, 300 F.3d at 438. Courts have essentially treated this as a common sense directive to ensure that agencies consider a project’s impacts in light of existing conditions where the environmental effects will occur. See Nat’l Parks & Conservation Ass’n v. Babbitt, 241 F.3d 722, 731 (9th Cir. 2001), abrogated as stated in, 130 S. Ct. 2743 (2010). For example, in Babbitt, before analyzing the effect of allowing more cruise ships in Glacier Bay, the court stated that “the context is Glacier Bay National Park, its natural setting, its variegated non-human inhabitants, and its pure but fragile air quality.” Babbitt, 241 F.3d at 731. Here, the proposed project will involve discharges from a wastewater treatment system into the Tar River. Therefore, consideration of the project’s environmental effects must include consideration of environmental impacts to the Tar River, specifically the unique characteristics of the area that would be affected. As discussed further below, the Tar River is a nationally significant home for several endangered, threatened, or rare species, and several state and federal resource agencies have an interest in protecting the river’s

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- (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment ...
 - (8) The degree to which the action may adversely affect [sites] listed in or eligible for listing in the National Register of Historic Places ...
 - (9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
 - (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment. 40 C.F.R. § 1508.27(b).

⁴ USDA follows NEPA’s requirements, including for rural development infrastructure projects it funds. 7 C.F.R. § 1b.2; 7 C.F.R. § 1794.3; Sierra Club v. United States Dep’t of Agric., 777 F. Supp. 2d 44, 60 (D.D.C. 2011).

ecological health. The proposed project's effects, then, must be considered in the "context" of an ecologically important and sensitive water body.

- b) The proposed Creedmoor wastewater system project triggers six of the "intensity" factors for determining that a project's effects will be environmentally "significant."

An agency must prepare an EIS if a proposed project is "environmentally 'significant' according to *any* of [the] criteria" for determining the intensity, or severity, of the project's environmental impacts. Coal. to Pres. McIntire Park v. Mendez, 862 F. Supp. 2d 499, 519 (W.D. Va. 2012) (emphasis in original), quoting Pub. Citizen v. Dep't of Transp., 316 F.3d 1002, 1023 (9th Cir. 2003), rev'd on other grounds, 541 U.S. 752 (2004). Creedmoor's wastewater system project triggers six of these factors in the context of the ecologically important Tar River.

First, the project will affect an "ecologically critical area" (Factor 3). As noted in the EA, and by several of the state and federal agencies that have commented on the project, the Tar River is of "national significance" because it provides a habitat for endangered, threatened, and rare species.⁵ The Upper Tar River Basin, which encompasses the project area, is "recognized as one of the most important watersheds for the conservation of aquatic species on the Atlantic Slope due to the number of rare and endemic species known from the basin."⁶ The North Carolina Wildlife Resources Commission ("NCWRC") has identified the watershed as "essential for the continued survival of endangered or threatened aquatic wildlife species" and the North Carolina Natural Heritage Program has designated the Upper Tar River Aquatic Habitat as a "significant natural heritage area."⁷ This designation is based on the presence of high-quality or rare natural communities, rare species, or special animal habitats.⁸

In particular, the Tar River is a "mussel refugium of national significance," which supports "one of two remaining 'best' populations" of the federally endangered dwarf wedgemussel (*Alasmidonta heterodon*) in North Carolina.⁹ As stated in the EA, the Tar "supports one of the highest diversity river mussel assemblages in NC and is recognized in [U.S. Fish and Wildlife Service] and [NC]WRC conservation plans as vital habitat for the survival of [the] Dwarf Wedgemussel"¹⁰

The Tar is also home to the federally-endangered harperella plant (*Ptilimnium nodosum*), and three species that may be proposed for federal listing in the near future: the Atlantic pigtoe (*Fusconaia masoni*), the yellow lance (*Elliptio lanceolata*), and the green floater (*Lasmigona subviridis*). In addition, two species listed under the North Carolina Endangered Species Act, N.C. Gen Stat. §§ 113-331 *et seq.*, the Carolina madtom (*Noturus furiosus*) and the Neuse River waterdog (*Necturus lewisi*), as well as the federally endangered Tar River spiny mussel (*Elliptio*

⁵ Memo from Sarah McRae (NC Natural Heritage Program) to Melba McGee (NC DENR), March 11, 2010, at 1.

⁶ The Catena Group, "Freshwater Mussel Survey Report," October 2012, at 24.

⁷ *Id.*

⁸ McRae memo at 1.

⁹ Letter from Pete Benjamin (U.S. Fish and Wildlife Service) to Bruce Pleasant (USDA – Rural Development), January 24, 2013, at 1.

¹⁰ EA at 47.

steinstansana), are found in the Tar River basin and are “endemic to only the Neuse and Tar-Pamlico drainages.”¹¹

Second, the project’s potential effects are “highly controversial” (Factor 4). Courts have explained that “highly controversial” applies to “cases where a substantial dispute exists as to the size, nature or effect of the major federal action” Rucker v. Willis, 484 F.2d 158, 162 (4th Cir. 1973). Controversy is not measured in community opposition alone. *Id.* But it can be measured in the concern expressed by officials reviewing a proposal for a major federal action. In one case, for example, a court found “legitimate controversy” where “[s]tate, local and federal officials, interested individuals, and the General Accounting Office ... *expressed concern*” over a project’s cumulative impacts. North Carolina v. Fed. Aviation Admin., 957 F.2d at 1133 (emphasis added). In another, a court found no legitimate controversy where “there has been no opposition whatsoever from any state or federal environmental resource agency” Coal. to Pres. McIntire Park, 862 F. Supp. 2d at 520.

Here, several state and federal agencies have expressed concern about the project’s potential environmental effects, as well as opposition to proceeding with the project in the absence of further information about these effects. The North Carolina Division of Water Quality (“NCDWQ”) has stated that Creedmoor “must resolve any outstanding issues regarding impacts with [sic] listed species with [the U.S. Fish and Wildlife Service] prior to DWQ being able to issue a discharge permit.”¹² In addition to the issues raised by NCDWQ, NCWRC and the Natural Heritage Program, the U.S. Fish and Wildlife Service (“USFWS”) is currently unable to concur with USDA RD’s conclusion that the project is “not likely to adversely affect” the dwarf wedgemussel or harperella, and has asked for more information “*should the [current discharge location] continue to be pursued.*”¹³

Third, many of the project’s potential effects are “highly uncertain or involve unique or unknown risks” (Factor 5). In particular, the EA does not adequately explain how the wastewater discharge into the Tar River will be controlled to protect sensitive aquatic species. For example, the City of Creedmoor’s response to concerns regarding ammonia and copper in the effluent is that “[a]mmonia and copper limits will be enforced through the use of an NPDES permit for the proposed WWTP’s discharge” and that permit limits “will be reduced to a level to protect the aquatic life in the area affected by the discharge from the treatment plant.”¹⁴ It is impossible to assess how protective of the endangered mussels these conjectural limits will be. The EA was drafted without using site-specific effluent limits for the proposed location of the discharge into the river. And the EA suggests that the discharge will conform to water quality criteria that were not designed to protect highly vulnerable, sedentary species, such as the dwarf wedgemussel.¹⁵ The EA also does not adequately address concerns raised by the resource agencies about endocrine-disrupting chemicals (“EDCs”) in the effluent and the effect of episodic events, such as WWTP upsets.¹⁶

¹¹ Benjamin letter at 2.

¹² Memorandum from Hannah Headrick (North Carolina Division of Water Quality) to Lyn Hardison (North Carolina Department of Environment and Natural Resources), February 5, 2013, at 3.

¹³ Benjamin letter at 1, 7 (emphasis added).

¹⁴ EA at 142.

¹⁵ Benjamin letter at 5.

¹⁶ See, e.g., EA at 146.

In addition, the EA states that “Creedmoor’s consultants were unable to locate any information on the impacts of wastewater effluent to River Harperella.”¹⁷ It is for these reasons, and others, that the FWS has asked for “further discussions to look at additional alternatives as well as address needed restrictions, modifications, contingency plans, and conservation measures” before it can determine whether the project will adversely affect endangered aquatic species.¹⁸

Fourth, the project creates a harmful precedent in two respects (Factor 6). First, it is dependent upon an unprecedented, unlawful reading of the Tar-Pamlico Nutrient Sensitive Waters Implementation Strategy Phase III Agreement (“Phase III Agreement”). As stated in the EA, the North Carolina Division of Water Quality (“DWQ”) allocated retired nutrient credits to Creedmoor following its admission to the Tar-Pamlico Basin Association. The award of nutrient credits is governed by the Phase III Agreement. Under Phase III, new discharges to the Tar-Pamlico can only be authorized by imposing nutrient limits that are approved by consent of all parties to the Agreement.¹⁹ The Pamlico-Tar River Foundation and Environmental Defense Fund are parties to the Phase III Agreement.²⁰ Neither PTRF nor EDF, however, consented to DWQ’s decision to allocate retired nutrient credits to Creedmoor. Therefore, the decision violates the Phase III Agreement, is unlawful, and cannot be the basis for the analysis of environmental impacts in the EA. Reliance on these nutrient credits would set an unlawful precedent with respect to allocation of nutrient credits in the Tar-Pamlico basin.

In addition, the proposed project would set a precedent for new discharges in the Upper Tar River. As discussed in this comment letter, the Upper Tar River includes some of the best remaining habitat for several endangered, threatened, or rare aquatic species. The proposed discharge would be the proverbial camel’s nose under the tent, setting the stage for additional discharges in the future.

Fifth, the project “may adversely affect an endangered or threatened species” (Factor 9). Because the Tar River is critical to the survival of several species, threats to its ecological health are threats to the sensitive species that call it home. In 1989, the Tar-Pamlico River Basin was designated a Nutrient Sensitive Water (“NSW”) by the State of North Carolina to address serious problems, such as fish kills and algal blooms.²¹ Since that time, fecal coliform bacteria and turbidity have continued to be “noted stressors” on the river’s health.²² Wastewater treatment plant effluent, siltation, and related water quality impairments are believed to have a negative impact on mussel populations.²³ The sedentary nature of mussels also means that they are susceptible even to localized pollution events.²⁴ Indeed, mussel populations are “extremely

¹⁷ EA at 54.

¹⁸ Benjamin letter at 7.

¹⁹ “Tar-Pamlico Nutrient Sensitive Waters Implementation Strategy: Phase III,” at 9 (April 14, 2005).

²⁰ *Id.* at 1.

²¹ North Carolina Division of Water Quality, “Tar-Pamlico River Basinwide Water Quality Management Plan: 2010 Summary,” 2010, at 4.

²² *Id.* at 6.

²³ Mussel survey at 5, 23; Benjamin letter at 4.

²⁴ Benjamin letter at 5.

vulnerable to extirpation from a single catastrophic event or activity,”²⁵ such as, conceivably, a WWTP upset. And without “any information on the impacts of wastewater effluent to River Harperella” it is possible that these endangered plants will also be adversely affected.²⁶

Sixth, the proposed project threatens a violation of state law, namely North Carolina’s antidegradation rule (Factor 10). The rule states that a project “shall not be permitted unless existing uses are protected.” 15A N.C. Admin. Code 02B.0201(b). Protecting existing uses requires protecting the biological integrity of a river, or protecting “the ability of an aquatic ecosystem to support and maintain a balanced and indigenous community of organisms having species composition, diversity, population densities and functional organization similar to that of reference conditions.” 15A N.C. Admin. Code 02B.0202(11). As noted by state and federal wildlife agencies, the proposed project would threaten the biological integrity of the Tar River by adversely affecting endangered, threatened, rare, and endemic species. Therefore, the project “threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.” 40 C.F.R. § 1508.27(b).

- c) The mitigation strategies mentioned in the EA do not obviate the need to prepare an EIS.

As a result of the proposed project’s review under the factors above, USDA must prepare an EIS unless mitigation measures reduce the project’s potential environmental effects to insignificant levels. The mitigation proposed in the EA fails to do so, therefore USDA must prepare an EIS.

An agency may not need to prepare an EIS for a major federal action if mitigation will bring potential environmental effects below the level of “significance.” Aracoma Coal, 556 F.3d at 191-92. However, mitigation measures need to be articulated in a manner that is not “purely perfunctory or conclusory.” *Id.* at 206. An EIS is not required only “[i]f a mitigation condition eliminates *all* significant environmental effects.” Roanoke River Basin Ass’n v. Hudson, 940 F.2d 58, 62 (4th Cir. 1991) (emphasis added).

There is little evidence in the EA that mitigation measures will eliminate all of the project’s significant environmental effects. As discussed above, there is no assurance that the hypothetical limits considered will mitigate harm to vulnerable species. Further, the Tar River’s populations of endangered dwarf wedgemussel are “extremely vulnerable to extirpation from a single catastrophic event.”²⁷ Yet the EA does not adequately address what measures will be taken to respond to wastewater system upsets. Further, the EA does not include any information on how wastewater effluent could affect a population of endangered harperella.²⁸ An upset at the proposed Creedmoor WWTP, would have a “significant” environmental effect if it debilitated populations of dwarf wedgemussel or harperella. Without any evidence that mitigation measures will eliminate the potential for wastewater upsets to result in serious impacts to endangered and threatened species, it is simply impossible to conclude that the mitigation measures mentioned in

²⁵ Mussel survey at 5.

²⁶ Benjamin letter at 4.

²⁷ Mussel survey at 5.

²⁸ See, e.g., EA at 54.

the EA will be sufficient to eliminate all of the project's significant environmental effects, and USDA must prepare an EIS.²⁹

III. The EIS must investigate the questions left unanswered by the EA.

To comply with NEPA, the EIS must answer the many unresolved questions presented by the EA. The formal EIS process will allow for more detailed comments on what is required by law. *See, e.g.*, 40 C.F.R. §§ 1502.1 *et seq.* At this point, however, we can underscore a few areas where the EIS should provide additional information and expand upon the analysis of the EA.

In particular, the EA does not adequately address the project's impact on the Tar River's endangered, threatened, and rare species. As discussed in detail in comments sent from PTRF under separate cover, the EA and the Biological Assessment (BA) for the project do not adequately address the impact of the project during low flow conditions in the Tar; the impact on the fish species that serve as hosts for the larval dwarf wedgemussel;³⁰ the impact of biosolids disposal; and the project's indirect impact on groundwater recharge.³¹ In addition, the EIS must more fully address:

- **Purpose and Need:** The EIS must more fully explain the need for this project, especially in light of the recent letter from the South Granville Water and Sewer Authority ("SGWASA") to USDA RD disputing key assertions made in the EA.³² If it is true that "SGWASA can serve all the citizens of southern Granville County for at least the next 20 years,"³³ then the City of Creedmoor must justify the need for its project. The city should also better justify the projection that its wastewater flow will increase by over 100% in the next two decades, especially in light of the city's claims that its land use plans will constrain future development.³⁴
- **Alternatives Analysis:** Even if the wastewater projections are accurate, the EIS must significantly expand upon the current alternatives analysis. The analysis should better account for the costs of each alternative, for example. At the moment, the preferred alternative (discharge into the Tar) does not take

²⁹ In its guidance for preparing environmental reports, the USDA Rural Utilities Service provides several examples of commitments that would be classified as mitigation measures, including, "[a]void threatened and endangered species and critical habitat," and "[i]f critical habitat cannot be avoided, state that stipulations resulting from consultation with the USFWS ... will be met." USDA, Rural Utilities Service, "Guide for Preparing the Environmental Report for Water and Environmental Program Proposals," March 2008, at 54-55. Of course, the Creedmoor proposal does not claim to avoid threatened and endangered species, and the project is proceeding in the face of objections from USFWS.

³⁰ Letter from David Emmerling (Pamlico-Tar River Foundation) to Bruce Pleasant (USDA – Rural Development), January 25, 2013.

³¹ Letter from Heather Deck & David Emmerling (Pamlico-Tar River Foundation) to George Vital (USDA – Rural Development), February 12, 2013.

³² Letter from Lindsay L. Mize (South Granville Water and Sewer Authority) to George Vital (USDA – Rural Development), January 17, 2013.

³³ *Id.* at 5.

³⁴ *See, e.g.*, EA at 6, 28.

into account the costs of additional measures that would be necessary to minimize environmental harm to the endangered and threatened species in the river.³⁵ The slate of alternatives should also expand to include additional options, such as dividing wastewater flow between the City of Oxford and SGWASA, or between the City of Oxford and land application. Finally, the alternatives analysis should accurately account for the positions of local wastewater treatment entities. As described above, SGWASA has disputed the EA's description of SGWASA's future capacity, and the EA cites Raleigh's opposition to removing the proposed discharge from the Falls Lake basin, which the preferred alternative would do.³⁶

- Site-Specific Effluent Limits: The EIS should analyze the potential for applying limits on effluent constituents that are protective of sensitive aquatic species, like mussels, at all times.³⁷
- Effluent Constituents: The EIS should analyze how the presence of EDCs, pharmaceuticals, metals, and other substances in the wastewater effluent will affect the Tar River and its species,³⁸ and how the presence and effect of these substances can be minimized or eliminated.
- WWTP Upsets: The EIS should analyze what technologies and systems would be in place to not only avoid upsets, but to limit the duration of those that occur, recognizing that a single overflow event could have a disastrous effect on dwarf wedgemussel and harperella populations.
- Impacts on Harperella: The EIS should better address the potential effects of wastewater discharge on harperella.
- Cumulative Impacts: Considering that an EIS must address an action's cumulative impacts, the EIS should further analyze how an expanded wastewater system for the City of Creedmoor will affect wastewater volumes over a longer timeframe, development in the utility service area, and development outside of the service area, given that municipal and service area boundaries are not immutable.

IV. The City of Creedmoor and USDA RD risk violating the federal Endangered Species Act if they proceed with a project that jeopardizes endangered and threatened species.

The EA does not provide enough information to fully assess the project's impact on threatened and endangered species. However, Creedmoor and USDA RD must ensure that the project does not jeopardize the continued existence of federally-protected aquatic species. At this time, as noted above, USFWS is unable to conclude that the project will not adversely affect federally-protected species, namely the dwarf wedgemussel and harperella.³⁹

³⁵ Benjamin letter at 5-6.

³⁶ EA at 18.

³⁷ Benjamin letter at 5.

³⁸ *Id.*

³⁹ Benjamin letter at 1, 7.


Under Section 9 of the federal Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* (“ESA”), it is “unlawful for any person” to “take any [endangered] species within the United States” 16 U.S.C. § 1538(a)(1)(B).⁴⁰ “Take” under the ESA includes any “harm” to an endangered species, and specifically includes habitat degradation. Babbitt v. Sweet Home Chapter of Cmty. for a Great Oregon, 515 U.S. 687 (1995). It is also “unlawful for any person” to “*cause to be committed*” a taking of any endangered species. 16 U.S.C. § 1538(g) (emphasis added). Section 9 prohibits not only the actions of those who directly “take” endangered species, “but also bans those acts of a third party that bring about the acts exacting a taking.” Strahan v. Coxe, 127 F.3d 155, 163 (1st Cir. 1997).⁴¹ If Creedmoor operates, and USDA RD funds, a wastewater project that harms protected aquatic species and their habitat in the Tar River, the city and the agency will “take,” or “cause to be committed” a taking of, endangered species in violation of federal law. Because of the deficiencies described above and elaborated on in PTRF’s response to the EA, the only conclusion that can be made at this time is that construction and operation of the facility as proposed would result in the take of threatened or endangered species and violate the ESA.

V. Conclusion

Although the EA is lacking important information, it fulfills the core purpose of an EA: to help an agency determine whether a proposed project will have “significant” environmental effects. In this case, it is clear that the proposed wastewater system project for the City of Creedmoor poses significant environmental effects for the ecologically-important Tar River and its endangered species. For this reason, USDA RD must prepare an EIS that adequately analyzes the project’s impacts. We are confident that the decision-making process will only benefit from a deeper analysis of the serious potential environmental effects on the nationally significant Tar River and its threatened and endangered species.

We appreciate the opportunity to submit these comments. Please contact me at (919) 967-1450 if you have any questions.

Sincerely,



Geoffrey R. Gisler

⁴⁰ Both the City of Creedmoor and USDA RD are “persons” for purposes of the ESA. The ESA definition of “person” includes “any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.” 16 U.S.C. § 1532(13).

⁴¹ In Strahan, the State of Massachusetts was found to have exacted a taking of endangered Northern right whales through the State’s licensing and permitting of certain fishing practices. See also Sierra Club v. Yeutter, 926 F.2d 429, 438-39 (5th Cir. 1991) (finding Forest Service caused take of endangered red-cockaded woodpecker by permitting logging practices near nesting colonies); Defenders of Wildlife v. Environmental Protection Agency, 882 F.2d 1294, 1300-01 (8th Cir. 1989) (finding EPA caused take of endangered species through its registration of pesticides for use by others).

cc: (via email)
David Emmerling, PTRF
Jane Preyer, EDF
Pete Benjamin, USFWS