Sierra Club v. United States Department of the Interior: Unenforceable Triggers & Conservation Missions—the Fourth Circuit Vacates Permits for a Pipeline Crossing Endangered Species Habitats and the Blue Ridge Parkway

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I. OVERVIEW

The Atlantic Coast Pipeline (ACP) seeks to bring natural gas from the Marcellus Shale formation in West Virginia to consumers in eastern Virginia and North Carolina.[1] The project requires crossing the Blue Ridge Parkway and disturbing 11,776 acres of land, including six endangered or threatened animal species' habitats.[2] Under the Natural Gas Act, ACP applied for permits through the Federal Energy Regulatory Commission (FERC), which acted as the lead agency for coordinating permits from other government agencies.[3] FERC issued a certificate of public convenience and necessity that conditioned approval on the receipt of other agency permits.[4] Since the pipeline was to cross endangered and threatened species' habitats, FERC necessarily consulted with the U.S. Fish and Wildlife Service (FWS) about providing a biological opinion regarding the pipeline's impact on the Roanoke Logperch (a fish), Clubshell (a mussel), Rusty Patched Bumble Bee, Madison Cave Isopod (a crustacean), Indiana Bat, and Northern Long-Eared Bat.[5]

Following FERC's conditional approval of the project, FWS concluded that the pipeline would not "jeopardize the continued existence of" the six species and issued incidental take statements (ITSs) because the pipeline would adversely affect individual members of the species.[6] The ITSs for all but the perch did not use numeric take limits, instead using

1. *See* Sierra Club v. U.S. Dep't of the Interior, 899 F.3d 260, 266 (4th Cir. 2018).
2. *Id.* at 266-69.
3. *Id.* at 266-67.
4. *Id.* at 267.
5. *Id.* at 269.
6. *Id.* at 269-70.

habitat surrogates authorizing take of a "small percent" of the species in certain areas near pipeline construction.[7] Since the pipeline would intersect the Blue Ridge Parkway (BRP), it would also require a right-of-way permit.[8] The U.S. National Park Service (NPS) provided a permit consisting only of a one-sentence recitation of the agency's general authority to issue permits affecting the BRP.[9] The Sierra Club and Virginia Wilderness Committee challenged both actions as being arbitrary and capricious, and Defenders of Wildlife joined the action against FWS, while ACP[10] intervened;[11] the noted case comprised two consolidated petitions.[12]

The appeals court had already vacated the ITS (for five species) because their take limits were "vague and unenforceable"; that opinion was cursory and unreported, with the relevant facts and reasoning being left for the opinion here.[13] After consolidation of the complaints, the United States Court of Appeals for the Fourth Circuit *held* that FWS's take limits and NPS's permit were arbitrary and capricious so as to contravene their respective statutory requirements; therefore, the court vacated the five contested ITSs and the right-of-way permit. *Sierra Club v. United States Department of the Interior*, 899 F.3d 260, 295 (4th Cir. 2018).

II. BACKGROUND

The Natural Gas Act requires those seeking to build a gas facility or pipeline to obtain permits from affected federal agencies and grants FERC the responsibility of coordinating this multiagency process and issuing a final certification.[14] Whenever a federal agency action may "jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat," the Endangered Species Act (ESA) requires the germane agency to formally consult with either FWS or the National Marine Fisheries Service regarding such harmful impacts on listed species.[15] The relevant wildlife

7. *Id.* at 271.
8. *Id.* at 282.
9. *Id.* at 288.
10. Note: "ACP" is being used as a convenience to denote the pipeline project itself as well as the LLC behind it.
11. *Id.* at 266, 281 n.8.
12. *Id.* at 265.
13. *Id.* at 281; Sierra Club v. U.S. Dep't of the Interior, 722 F. Appx. 321, 322 (4th Cir. 2018).
14. 15 U.S.C §§ 717f, 717n (2018).
15. 16 U.S.C. § 1536(a)(2) (2018); 50 C.F.R. § 402.14(a) (2018).

agency (here, FWS) then must issue a biological opinion explaining how the proposed action would affect the species or its critical habitat.[16]

The ESA was established as a "means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," with a mandate that "all Federal departments and agencies shall seek to conserve endangered species and threatened species."[17] Nonetheless, Congress created a limited exception within the ESA for when a project may have only incidental impact on a critical habitat; specifically, the relevant language states that such a taking must be "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."[18] To receive reprieve from the substantial civil and criminal penalties for taking an endangered species, the consulting agency must issue an ITS that sets clear requirements for "an unacceptable level of incidental take."[19] For an ITS to have effect, its recipient—either an agency or private entity—must "report the progress of the action and its impact on the species to [the wildlife agency]" to ensure the take is within acceptable limits.[20] An ITS that "contains no numerical cap on take and fails to explain why it does not" generally violates the ESA.[21] However, an ITS can use a habitat surrogate in a specific impacted location if the consulting wildlife agency explains why it is impractical to count the members of the species and identifies some other factor that can be accurately monitored as a surrogate, such as "quantitative loss of cover, food, water quality, or symbionts."[22] Without a standard that can be monitored and a trigger that can be enforced, an ITS will likely be considered arbitrary and capricious.[23]

The Mineral Leasing Act (MLA) authorizes the Secretary of the Interior to grant right-of-way permits through any "Federal lands" for transport of fuels, subject to various conditions.[24] However, the statute

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16. 16 U.S.C. § 1536(b)(3); *see also* Bennett v. Spear, 520 U.S. 154, 158 (1989).

17. 16 U.S.C. § 1531(b), (c)(1).

18. *Id.* § 1539(a)(1)(B); *see also id.* § 1532(19) ("take" is "to harass, farm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct").

19. Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv., 273 F.3d 1229, 1249 (9th Cir. 2001); *see also* 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(g)(7), (i).

20. 50 C.F.R. § 402.14(i)(3).

21. Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt., 698 F.3d 1101, 1126-27 (9th Cir. 2012) (quoting Ore. Nat. Res. Council v. Allen, 476 F.3d 1031, 1037 (9th Cir. 2007)).

22. Interagency Cooperation—Endangered Species Act of 1973, as Amended; Incidental Take Statements, 80 Fed. Reg. 26,832, 26,834 (May 11, 2015) (codified at 50 C.F.R. § 402.14(i)(1)(i) (2018)).

23. *See, e.g.*, Wild Fish Conservancy v. Salazar, 628 F.3d 513, 531-32 (9th Cir. 2010); Miccosukee Tribe of Indians v. United States, 566 F.3d 1257, 1275 (11th Cir. 2009).

24. 30 U.S.C. § 185(a)-(y) (2018).

expressly excludes National Park System lands from the definition of "Federal lands."[25] Congress demarcated the Blue Ridge Parkway (BRP) in 1936 as a national parkway between the Shenandoah and Great Smoky Mountain National Parks.[26] The Blue Ridge Parkway Organic Act (BRPOA) authorizes the Secretary of the Interior to "issue revocable licenses or permits for rights-of-way over, across, and upon parkway lands . . . for such purposes and under such nondiscriminatory terms, regulations, and conditions as he may determine to be not inconsistent with the use of such lands for parkway purposes."[27] With general regard to national parks, the Organic Act mandates a mission of "provid[ing] for the enjoyment of the scenery, natural and historic objects, and wildlife in such a manner and by such means as will leave them unimpaired for the enjoyment of future generations."[28]

The Administrative Procedure Act (APA) provides a general standard of review for federal agency actions; specifically, the APA compels reviewing courts to set aside an agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[29] If agency actions are challenged, courts must often determine what level of deference to afford those actions.[30] If an agency action is based upon a "permissible construction of the statute," the court will defer to the agency's expertise.[31] However, an agency decision only qualifies for this deference "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[32]

In considering whether Congress granted interpretive authority to an agency, a court looks for "any of the normal indicia of legislative-type determination—i.e., those of weighing conflicting policies, considering adversarial viewpoints, promulgating forward-looking rules of general applicability."[33] Fact-bound determinations are reviewed for their "rational connection between the facts found and the choice made" to

25. *Id.* § 185(b)(1).
26. 16 U.S.C. § 460a-2 (2018).
27. *Id.* § 460a-3.
28. 54 U.S.C. § 100101(a) (2018).
29. 5 U.S.C. § 706(2)(A) (2018).
30. *See* United States v. Mead Corp., 533 U.S. 218, 226-28 (2001).
31. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984).
32. *Mead,* 533 U.S. at 226-27.
33. A.T. Massey Coal Co. v. Holland, 472 F.3d 148, 166 (4th Cir. 2006); *see also Mead,* 533 U.S. at 229.

ensure that an agency has examined the relevant data and articulated a satisfactory explanation for its action.[34] Under this standard, agency actions that "entirely failed to consider an important aspect of the problem" or relied upon inappropriate factors are generally considered arbitrary and capricious.[35]

III. COURT'S DECISION

In the noted case, the United States Court of Appeals for the Fourth Circuit affirmed that the role of the reviewing court is to "ensure that [an] agency has considered 'important aspect[s] of the problem' and rendered a decision that is at least rational."[36] In the case of the petition against FWS, the court noted that, in the absence of an ESA-specific standard of review, it would be reviewing the complaint under the general, deferential APA standard of review.[37] After dispatching a challenge to timeliness, the court approached each the two complaints in turn.[38]

Initially, the court examined the ESA requirements that ITSs contain either numerical limits or a habitat surrogate with enforceable triggers.[39] The court here ultimately explained its prior decision to vacate by examining the numerical limits and habitat surrogates of each species, finding that five of the six ITSs did not have clear enforcement standards and were thus arbitrary and capricious.[40] Emphasizing that the ITS exception is a safe harbor within the ESA, the court noted that precise take monitoring, via the establishment of a "trigger," is essential to actually enabling a safe harbor.[41] Citing well-established precedent, the Fourth Circuit stated, "Both FWS and our sister circuits have recognized that *Congress intended for this trigger to be a specific number whenever possible*."[42]

Nonetheless, because circumstances may render such precision impractical or impossible, the relevant agencies issued guidance regarding

34. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).
35. *Id.*
36. Sierra Club v. Dep't of the Interior, 899 F.3d 260, 294 (4th Cir. 2018) (quoting Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).
37. *See id.* at 270.
38. *See id*. at 267-68.
39. *Id*. at 268-72.
40. *Id*. at 281; Sierra Club v. U.S. Dep't of the Interior, 722 F. Appx. 321, 322 (4th Cir. 2018).
41. *See Sierra Club*, 899 F.3d at 270-71.
42. *Id.* at 271 (emphasis added) (citations omitted).

habitat surrogates in calculating incidental takes.[43] In particular, FWS regulations list three elements necessary for a suitable surrogate: (1) a description of the causal link—an "articulated, rational connection"—between the underlying activity and the take of listed species; (2) an explanation of the impracticality of setting a numerical take limit; and (3) "a clear standard for determining when the level of anticipated take has been exceeded."[44] The issue of whether FWS properly supplied habitat surrogates for five species—the Clubshell, Rusty Patched Bumble Bee, Madison Cave Isopod, Indiana Bat, and Northern Long-Eared Bat—was the only point of contention in the FWS suit.[45]

Before proceeding to a species-specific breakdown of the ways in which the ITSs were inadequate, the court rather succinctly disposed of FWS and the intervenor's defenses.[46] First, FWS argued that it could not provide a numeric take limit because of insufficient survey data; the court noted that this argument was tautological, further commenting that the agency had not declared the actual collection of such data to be impossible.[47] Next, FWS argued that there was insufficient time to compile survey data.[48] Again, the court rapidly dismissed the argument, stating that the agency was not, as its brief had averred, bound to complete its entire consultation within ninety days.[49] Further, "neither the statute, nor the agency's implementing regulation, nor the agency's [handbook], identify lack of time as a proper basis for concluding that setting a numerical limit is impractical."[50] Finally, the court, in essence, noted general logical errors in the arguments and, having clearly decided that the ITSs were insufficient, emphasized that the agency could not modify the statements or rely on *post hoc* rationalizations for the purposes of appeal.[51]

Having thoroughly dismissed the FWS and intervenor's arguments, the Fourth Circuit proceeded, on a species-by-species basis, to document how exactly the ITSs were inadequate relative to statutory mandates.[52] For example, the court noted that, in the case of the Clubshell, FWS had specified that a "majority" of the mussels could be taken within a fixed

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43. *Id.* (citing Interagency Cooperation—Endangered Species Act of 1973, as Amended; Incidental Take Statements, 80 Fed. Reg. 26,832, 26,839 (May 11, 2015)).
44. *Id.* at 271-72 (quoting 50 C.F.R. § 402.14(i)(1)(i) (2018)).
45. *Id.* at 272.
46. *See id.* at 272-74.
47. *Id.* at 272-73.
48. *Id.* at 273.
49. *Id.*
50. *Id.*
51. *See id.* at 273-74.
52. *See id.* at 274-81.

area without determining how large that majority may actually be;[53] for the Rusty Patched Bumble Bee, the FWS specification of "one colony and a small percent of queen bees" yielded no enforceable standard;[54] and, in the case of the Indiana Bat, as with other species, the take limit of a "small percent" of bats yielded no enforceable standard.[55] Generally, the court found that FWS failed to meet two or three of the aforementioned elements in the case of all five species; that is, out of a possible satisfaction of fifteen total elements (three each for five species), the ITSs satisfied only three.[56] Therefore, the court held that the five contested ITSs were arbitrary and capricious under the APA.[57]

Before proceeding to the merits of the second petition, which concerned NPS's authority to allow a pipeline across the Blue Ridge Parkway (BRP), the court necessarily addressed the agency's standing challenge.[58] Specifically, NPS argued that the organizational petitioners—Sierra Club and the Virginia Wilderness Committee—lacked Article III standing for want of causation and redressability vis-à-vis the NPS's permitting decision.[59] While the associational members' pleading of injury in fact seemed to be uncontested, NPS argued that the members' injuries were not fairly traceable to the BRP permitting decision because the pipeline was to cross underneath the parkway.[60] That is, the alleged injuries—harm to aesthetic and recreational values, as well as possible noise and pollution—could not be directly attributed to the BRP segment of pipeline because it would be subterranean.[61] In rejecting this argument, the Fourth Circuit stated that "the causation element of standing does not require the challenged action to be the sole, or even immediate, cause of the injury."[62] Indeed, the court found it "remarkable" that NPS would "take a litigation position that regard[ed] the premier conservation agency's role as no more than highway maintenance."[63] Succinctly, the court rejected NPS's attempt to heighten the causation burden from "fairly

53. *Id.* at 275.
54. *Id.* at 277.
55. *Id.* at 279.
56. *See id.* at 275-81.
57. *Id.* at 281.
58. *Id.* at 281-83.
59. *Id.* at 283-85.
60. *Id.* at 284 ("Specifically, NPS emphasizes that the pipeline proceeds underneath the Parkway and does not disturb the Parkway's surface as it crosses.").
61. *Id.*
62. *Id.* (citing Bennett v. Spear, 520 U.S. 154, 168-69 (1989)).
63. *Id.* at 284 n.10.

traceable" to a more robust causal link.[64] Likewise, the court dismissed NPS's contention that a rescission of its right-of-way authorization offered no guarantee of redress because the pipeline may simply be rerouted around the BRP.[65] In this regard, the court noted that such a scenario was merely speculative and, anyway, the petitioners' standing burden was not such that they needed to show an absolute level of redressability.[66]

Moving to the merits, the court first analyzed whether *Chevron* deference actually applied to the BRP decision, or whether another form of review—namely, the less deferential *Skidmore* standard[67]—was appropriate.[68] The court noted that NPS only interpreted one statutory provision in its permitting decision: 16 U.S.C. § 460a-8, which concerns the Secretary of the Interior's issuance of revocable licenses or permits for rights-of-way.[69] Thus, this was the only interpretation the court needed to analyze in determining the proper level of agency deference.[70] Applying the *Mead* doctrine, the court found NPS's permitting action lacked "virtually all" of the procedural hallmarks of legislative determination, such that it did not generate the force of law required for *Chevron* deference.[71] Since NPS also did not thoroughly evaluate the decision, provide any reasons for it, or consider contrary arguments in its one-sentence recitation of statutory authority, the court did not even afford *Skidmore* respect and proceeded to review the issues *de novo*.[72]

The court proceeded by untangling whether the MLA or the BRPOA affected NPS's authorization of the pipeline right-of-way.[73] Considering

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64. *See id.* at 284 ("We accordingly reject NPS's efforts to elevate Petitioners' burden . . . .").

65. *Id.* at 285.

66. *See id.* at 284-85.

67. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("We consider that the rulings, interpretations, and opinions of the Administrator . . . while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

68. *Sierra Club*, 899 F.3d at 286 ("The parties seem to assume, without any analysis, that NPS's interpretation of the relevant statutes is eligible for *Chevron* review.").

69. *Id.*

70. *Id.* at 287.

71. *Id.* at 287-88 (citing United States v. Mead Corp., 533 U.S. 218, 232-34 (2001)).

72. *Id.* at 288; *see also Mead*, 533 U.S. at 227-28 ("The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position.").

73. *See id.* at 288-90.

the MLA first, the Fourth Circuit ultimately determined that "the MLA neither authorizes nor precludes grants of rights-of-way across 'lands in the National Park System.'"[74] The court reached this conclusion by parsing the language of the MLA and rejecting the petitioners' application of *Food & Drug Administration v. Brown & Williamson Tobacco Corp.* as inapposite.[75] Because, in essence, the MLA expressly addressed rights-of-way on federal lands while specifically excluding national parks, the court found that the statute impliedly referred to a separate regime for rights-of-way in national parks.[76] In other words, the MLA had nothing to say about the issue at hand.[77]

Moving on to the BRPOA, the court turned to the two provisions—16 U.S.C. §§ 460a-3, a-8—in that Act that could conceivably enable the Secretary of the Interior to authorize a pipeline on national park lands.[78] Here, the court determined that NPS relied only on the more generally worded § 460a-8, which applied only to a specific segment of the BRP that was not at issue; specifically, that provision was enacted later than § 460a-3 and was concerned with an extension of the BRP that would take it to Georgia.[79] Parsing the language of the two provisions, the Fourth Circuit determined that the broad language of § 460a-8, which authorized the Secretary to "issue revocable licenses or permits for rights-of-way over, across, and upon parkway lands" largely without condition, would completely subsume the more limiting language of 460a-3.[80]

Following Supreme Court precedent disfavoring implied repeal by general amendment and limiting agency action inconsistent with conservation without direct authorization, the court refused to read § 460a-8 as "abrogating NPS's conservation mandate under § 460a-3 and 54 U.S.C. § 100101."[81]

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74. *Id.* at 289-90 (citing 30 U.S.C. § 185(b) (2018)).

75. *Id.* at 289 (citing Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133, 155-56 (2000)).

76. *Id.* ("[W]e conclude that the MLA creates a separate scheme for regulating pipeline crossings on non-park lands . . . .").

77. *See id.* at 289-90 ("[T]he MLA neither authorizes nor precludes grants of rights-of-way across 'lands in the National Park System.'" (citing 30 U.S.C. § 185(b))).

78. *Id.* at 290 (citing 16 U.S.C §§ 460a-3, 460a-8 (2018)).

79. *Id.* at 290-91 ("To harmonize and give effect to both provisions, we conclude below that § 460a-8 applies only to a specific extension of the Blue Ridge Parkway that is not at issue in this case." (citations omitted)).

80. *Id.* ("Were we to adopt [NPS and the intervenor's reading of the provision], § 460a-8 would completely swallow § 460a-3 and render it a nullity." (citations omitted)).

81. *Id.* at 291 (citing 16 U.S.C. §§ 460a-3, 460a-8 54 U.S.C. § 100101(a), (b)(2) (2018)).

Under *Securities & Exchange Commission v. Chenery Corp.*, the court "must judge the propriety of such [agency] action solely by the grounds invoked by the agency."[82] However, as noted, NPS invoked an incorrect statute (§ 460a-8, which applied only to a particular BRP extension).[83] Therefore, the court was pressed to consider the unusual issue of what to do when an agency had invoked the wrong provision while effectively reciting the text of another.[84] The court noted in this regard that, because the grounds for invoking the right-of-way powers under the two BRPOA provisions were the same, the *Chenery* doctrine did not compel a reversal of the authorization if § 460a-3 provided NPS with the requisite authority.[85] Thus, the court was compelled to fully consider the authorizing power of § 460a-3.[86]

In this regard, the opposing parties disputed two possible limitations of the § 460a-3 authorizing capacity: (1) whether the provision allowed for right-of-way grants only to "owners or lessees of adjacent lands," (the neighbors clause) and (2) whether the provision allowed for right-of-way grants for pipelines, the neighbors clause notwithstanding.[87] The Fourth Circuit, however, determined that it need not analyze these two interpretative issues because, regardless of the neighbors clause or fuel pipelines in particular, NPS did not fulfill the requirements to exercise any possible authority in this regard.[88] The court thereby avoided further interpretive confusion by determining that NPS had failed to ensure that the pipeline permit was "not inconsistent with the use of such lands for parkway purposes," including the Organic Act's general purpose of conserving natural beauty for future generations.[89]

In reviewing NPS's fact bound determination that the pipeline permit *was* consistent with the fundamental purposes of the BRP and the national park system in general, the Fourth Circuit concluded that "the agency decision [was] not accompanied by any explanation, let alone a satisfactory one."[90] In reviewing the purported explanation, the court pointed out various inconsistencies and irrational conclusions marring the

82. *Id.* (quoting Sec. & Exch. Comm'n v. Chenery Corp., 332 U.S. 194, 196 (1947)).
83. *Id.*
84. *See id.*
85. *Id.* at 292 (citing *Chenery*, 332 U.S. at 196).
86. *See id.*
87. *See id.* (citations omitted).
88. *See id.*
89. *Id.* (citations omitted).
90. *Id.* at 293.

agency's justification.[91] Clearly unimpressed with NPS in this regard, the court took the agency's "omissions" and "elemental errors" as proof that the agency did not fulfill its statutory mandate to ensure consistency with the purposes of the BRPOA, and the Organic Act generally, and held that the pipeline authorization was arbitrary and capricious.[92]

Finally, the Fourth Circuit was left to weigh the issue of remedy given the determination that the ITSs and the pipeline permit were roundly arbitrary and capricious.[93] Dispatching a challenge arguing that the Natural Gas Act (NGA) does not allow a court to vacate such agency actions, the court pointed out that the relevant NGA provision applies only to actions *preventing* the construction of a natural gas facility, not *enabling* the construction of such.[94] Therefore, given its determination that the agency actions at issue were arbitrary and capricious, the Fourth Circuit vacated the ITSs and pipeline right-of-way permit.[95]

IV. ANALYSIS

The U.S. Court of Appeals for the Fourth Circuit correctly held that the two environmental agencies abrogated their duties and disregarded their statutory requirements in approving a gas pipeline through endangered species habitats and across a national parkway.[96] Indeed, it is difficult to not see this opinion as a scathing rebuke of the agencies' actions given that the court not only found them wholly arbitrary and capricious but also made a point of emphasizing the extent of their inadequacies.[97]

Broadly, the deferential framework was ultimately consistent with the agency standards set forth in *Chevron*, *Skidmore*, and *Mead*.[98] With regard to the merits of the complaint against FWS, the court's decision was consistent with Congress's intent in enacting the ESA and, more particularly, Congress's and courts' clear preference for numerical take

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91. *See id.* at 293-94.
92. *Id.* at 294.
93. *Id.* at 295.
94. *Id.* (citation omitted).
95. *Id.*
96. *Id.* at 270, 291.
97. *See, e.g.*, *id.* at 281 (noting FWS's complete failure in establishing habitat surrogates for five species); *id.* at 284 n.10 (being, in essence, offended by NPS's dereliction of its fundamental duty to protect national parks); *id.* at 293-94 (commenting upon the near-total inadequacy of NPS's justification for the pipeline permit).
98. *See id.* at 286-88 (citations omitted) (describing the court's initiative in determining the appropriate standard of review).

limits.[99] Given the fundamental purposes of the ESA, it is imperative that a "bright line" against insufficiently justified habitat surrogates be drawn.[100] This is necessary so that ITSs remain an exceptional "safe harbor" and not a means for agencies to shirk their ESA responsibilities.[101] Here, while relying on interagency guidelines that were later codified in the Code of Federal Regulations, the court systematically delineated, species by species, how the FWS's statements were inadequate to protect the listed species in any meaningful way.[102] In so doing, the Fourth Circuit, even while appropriately affording FWS *Chevron* deference, buttressed that bright-line against unenforceable ITSs and disallowed FWS from contravening the most basic purpose of the ESA.[103] Indeed, the decision in the noted case can reasonably be read as an admonishment of FWS for irresponsible—perhaps even lazy or venal—work on behalf of the species it was tasked with protecting.[104]

With regard to the relatively perfunctory issue of standing in the complaint against NPS, the court's decision was consistent with binding precedent—the petitioners had standing for the reasons described.[105] More complex, however, was the Fourth Circuit's navigation of the possible authorizing provisions in, respectively, the MLA and BRPOA, as well as, especially, the level of deference to be afforded NPS in that aspect.[106] Indeed, it was noteworthy that the Fourth Circuit itself had to take the initiative to ascertain the appropriate standard of review for the NPS action given that the parties apparently assumed *Chevron* deference.[107] Given that the parties were lax in failing to analyze the standard of agency review, the court deftly navigated *Chevron*, *Skidmore*, and *Mead* in determining that the issue should be reviewed *de novo*.[108]

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99. *See id.* at 271 ("Both FWS and our sister circuits have recognized that Congress intended for this trigger to be a specific number whenever possible.").

100. *See, e.g.*, *id.*; *see also* Ore. Nat. Res. Council v. Allen, 476 F.3d 1031, 1040-41 (9th Cir. 2007).

101. *See, e.g.*, *Sierra Club*, 899 F.3d at 270 ("For an ITS to function as a safe harbor, FWS must set an incidental take limit that can be monitored and enforced.").

102. *See id.* at 274-81 (analyzing how, in aggregate, FWS satisfied only three out of the fifteen elements required for the habitat surrogates to be legal for all five species).

103. *See, e.g.*, *id.* at 268 ("Congress enacted the Endangered Species Act in 1973 'to protect and conserve endangered and threatened species and their habitats.'" (citation omitted)); *id.* at 281.

104. *See id.* at 281 (holding that every contested ITS was arbitrary and capricious).

105. *See id.* at 282-84 (citing, in particular, Friends of the Earth, Inc. v. Laidlaw Envtl. Servs*.,* 528 U.S. 167, 180-81 (2000)).

106. *See id.* at 286-88.

107. *Id.* at 286 ("The parties seem to assume, without any analysis, that NPS's interpretation of the relevant statutes is eligible for *Chevron* review.").

108. *See id.* at 286-88.

While the standard of review presumably would not have made a difference given the court's ultimate holding (that the permit was inconsistent with the purposes of the BRPOA), it could have, theoretically, been dispositive if NPS had offered a more reasoned explanation for the pipeline permit.[109] Thus, the court here did the yeoman's work in an important, albeit completely abstract, respect.

With regard to the court's analysis of the relevant BRPOA provisions, it appropriately accepted the petitioners' logic that 16 U.S.C. § 460a-8 must be read as applying only to a particular, later-constructed segment of the BRP.[110] This was appropriate because the logic in this respect was clear and prevented an irrational interpretation whereby one provision would gratuitously subsume another.[111] Likewise, the Fourth Circuit was on firm ground in holding that a wildlife agency is forbidden from contravening its conservation mission unless it is specifically authorized to do so.[112] In finding that NPS's mission was not swallowed and effectively repealed by the general wording of § 460a-8, the court relied on binding precedent holding that courts disfavor implied repeals and that statutes must be read in context.[113] Here, it was, essentially, obvious that the pipeline permit contrasted starkly with NPS's core duties and the purposes of the Organic Act, such that the agency could offer no suitable explanation for granting the right-of-way.[114]

V. CONCLUSION

The court reviewed the statutory requirements for issuing incidental take statements and a right-of-way and found that both FWS and NPS ignored clear congressional intent and their own agency mission statements. While it is refreshing that the judicial branch is still able to uphold the law of the land, it is certainly troubling that various executive branch officers unfaithfully executed their core duties and acted in

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109. *See id.* at 294 (finding the permitting decision to be arbitrary and capricious because it effectively offered no reasoned explanation as to how the pipeline right-of-way would not be inconsistent with the Organic Act's purposes; while the pipeline permit in this instance would seem to be an obvious contravention of the purposes of national parks, it is conceivable that the court's deference analysis could have been crucial in a more nuanced situation).

110. *See id.* at 290.

111. *See id.*

112. *See id.* at 291 (citing 54 U.S.C. § 100101(a), (b)(2) (2018)).

113. *See id.* (citing, *e.g.*, Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 664 & n.8 (2007)).

114. *See, e.g.*, *id.* at 293 ("We find this lack of explanation particularly troubling given the evidence in the record indicating that the presence of the pipeline is inconsistent with and in derogation of the purposes of the Parkway and the Park System.").

contravention of the requirements of their roles, leading to several harsh admonishments by the court here. This decision is well within Fourth Circuit and Supreme Court precedent regarding agency review, endangered species, and national parks, such that a more partisan and spiteful attempt by future Justices to overturn its holdings would require thoroughly rewriting or repealing the Endangered Species Act, the (Blue Ridge Parkway) Organic Act, the National Parks and Recreation Act, and/or the Administrative Procedure Act in a manner that could incite much bigger problems than just a single pipeline's impact on the environment. The Atlantic Coast Pipeline, as well as other fossil-fuel infrastructure projects, clearly remains a priority for the current administration; however, these agencies now have sterner guidance regarding construction through endangered or threatened species' critical habitats and national parks.

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