Defenders of Wildlife v. United States Department of the Interior: The Fourth Circuit Refuses to Back Down to Industry in their Rigid Review of Biological Opinions

I. CASE OVERVIEW

The United States Fish and Wildlife Service (FWS) released a Biological Opinion (BiOp) in connection to the construction of the Atlantic Coast Pipeline (ACP), a proposed natural gas pipeline that would extend from West Virginia, through Virginia, into North Carolina.[1] The BiOp, required under the Endangered Species Act (ESA), concluded that the pipeline would not jeopardize the continued existence of a number of endangered species that are likely to be adversely affected by the pipeline construction.[2] Specifically, the FWS concluded that the construction would not jeopardize four species: the Rusty Patched Bumble Bee (RPBB), the Indiana Bat (Ibat), the Madison Cave Isopod (MCI), and the Clubshell.[3] Within its BiOp, FWS included an Incidental Take Statement (ITS) because the agency anticipated the incidental taking (i.e., harassing or killing) of those four species resulting from the construction of the pipeline.[4]

Plaintiffs, consisting of three environmental groups, challenged the BiOp's conclusion that the pipeline would not jeopardize the continued existence of the RPBB or the Clubshell while also challenging the take limits imposed for the Ibat and the MCI.[5] The court reviewed the BiOp

1. Defs. of Wildlife v. U.S. Dep't of the Interior, 931 F.3d 339, 342 (4th Cir. 2019).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* at 344-45.

under the default standard of the Administrative Procedure Act (APA) to determine if it was "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law."[6] An agency action is arbitrary and capricious if (1) the agency relies on factors that Congress has not intended it to consider; (2) entirely fails to consider an important aspect of the problem; (3) offers an explanation for its decision that runs counter to the evidence before the agency; or (4) is so implausible that it cannot be ascribed to a difference in view of the product of agency expertise.[7] In preparing a BiOp the FWS is required to use "the best scientific and commercial data available."[8] The court assessed the agency's decision concerning each of the four species separately to find that the FWS acted arbitrarily in compiling the BiOp and the embedded ITS.[9] The Fourth Circuit *held* that the FWS arbitrarily concluded the ACP construction would not jeopardize the RPBB or the Clubshell and failed to create enforceable take limits for the Ibat and the MCI. *Defenders of Wildlife v. United States Department of the Interior,* 931 F.3d 339, 366 (4th Cir. 2019).

II. BACKGROUND

While the end results vary, most courts impose a strict standard of review when looking at projects that will impact endangered species, and when that standard is not met, the courts will disregard these studies for better or worse.[10] These studies are mandated by the ESA for any agency action that might impact listed endangered species, and the Secretary overseeing the agency action must provide a written statement.[11] That statement has been deemed a "Biological Opinion," and it must include a

6. *Id.* at 345 (quoting Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 496 (2004)).

7. *Id.* at 345 (quoting Defs. of Wildlife v. N.C. Dep't of Transp., 762 F.3d 374, 396 (4th Cir. 2014)).

8. *Id.* at 345 (quoting 16 U.S.C. § 1536(a)(2) (2012)).

9. *Id.* at 346.

10. *See, e.g.*, Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 524 F.3d 917, 938 (9th Cir. 2008) (holding that a BiOp claiming that a proposed power system would not jeopardize thirteen listed species was structurally flawed and therefore arbitrary and capricious); Dow AgroSciences LLC v. Nat'l Marine Fisheries Serv., 707 F.3d 462, 475 (4th Cir. 2013) (holding that a BiOp claiming that certain pesticides would jeopardize listed fish species lacked sufficient explanation and it was therefore arbitrary and capricious).

11. 16 U.S.C. § 1536 (b)(3)(A).

detailed summary of how the agency action will affect a listed species or their habitat.[12]

When the Secretary finds that an agency action will not jeopardize a listed species, but will result in incidental takings (i.e., harming or killing) of that species, there must be an ITS included within the BiOp that authorizes such takings.[13] This statement must specify (1) the impact of the incidental takings on each species; (2) "reasonable and prudent" measures considered necessary to minimize the impact; (3) the "terms and conditions" necessary for the agency to comply with the "reasonable and prudent measures (including, but not limited to, reporting requirements)"; and (4) the procedures to handle or dispose of the taken animals.[14] If these steps are followed, the agency is exempt from penalties for the takings.[15] In short, a BiOp that finds that a proposed project will not jeopardize the continued existence of a listed species "effectively green-lights the proposed action under the ESA, subject to the [ITS's] terms and conditions."[16]

The Fourth Circuit has upheld these requirements in *Sierra Club v. United States Department of the Interior*.[17] This case is a direct predecessor to the noted case, dealing with, *inter alia,* nearly identical issues and parties.[18] The plaintiffs in this case challenged the ITS in the BiOp issued by the FWS in connection to the proposed ACP construction as arbitrary and capricious under the APA.[19]

The plaintiffs challenged the ITS on two grounds: first, that FWS did not set numeric take limits on five threatened species; and second, they did not follow the requirements to substitute a "habitat surrogate" for a numeric limit.[20] A habitat surrogate is a method to set a take limit based on the amount (usually a percentage) of a species in a geographical region rather than by individuals.[21] The court notes that FWS is not required to set a numeric limit; however, it may only use a habitat surrogate if it (1) demonstrates a causal link between the species and the delineated

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12. Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 652 (2007) (quoting 16 U.S.C. § 1536 (b)(3)(A)).
13. Or. Nat. Res. Council v. Allen, 476 F.3d 1031, 1034 (9th Cir. 2007) (citing 16 U.S.C. § 1536 (b)(4), (o)).
14. *Id.* (citing 16 U.S.C. § 1536 (b)(4)).
15. *Id.* (citing 16 U.S.C. § 1536 (o)(2)).
16. *Id.*
17. *See generally* Sierra Club v. U.S. Dep't of the Interior, 899 F.3d 260 (4th Cir. 2018).
18. *See generally id.*
19. *Id.* at 266.
20. *Id.*
21. *Id.* at 271.

habitat; (2) shows that setting a numerical limit is not practical; and (3) sets a clear standard for determining when incidental take is exceeded.[22] The five species at issue here were the RPBB, the MCI, the Ibat, the Clubshell, and the Northern Long-Eared Bat (NLEB).[23] In their ITS, FWS set take limits such as "small percent," "majority," or "all" within the specified habitat; however, the court found that these amounts were not an enforceable limit.[24]

The court's first issue with the habitat surrogate was whether it would be impractical for FWA to establish a numeric take limit.[25] Plaintiffs pointed out that FWS had used numeric limits for some of the same species before.[26] FWS claimed that numeric limits were impossible to determine because they lacked current survey data or ACP had not yet completed the surveys.[27] The court rejected this argument, stating that "FWS cannot escape its statutory and regulatory obligations by not obtaining accurate scientific information."[28] FWS then argued that there was insufficient time to complete a reliable survey; however, the court found no authority whatsoever to support this argument.[29] Next, the court mentioned that neither FWS nor ACP agreed on what level of incidental take was allowed, leading the court to conclude that the ITS set vague and unenforceable limits.[30]

The court continued by looking at each specific species mentioned in the BiOp, since their analysis for each was slightly different.[31] They found that FWS "failed to create proper habitat surrogates, failed to explain why numeric take limits are not practical, and failed to create enforceable take limits" for the Clubshell, the RPBB, the MCI, the Ibat, and the NLEB.[32] In terms of the Clubshell, the court found that the habitat surrogate failed all three of the requirements.[33] For the RPBB, the court found that the first element was satisfied, but not the second two.[34] For the MCI, the court

22. *Id.* at 266.
23. *Id.* at 269.
24. *Id.* at 271.
25. *Id.* at 272.
26. *Id.*
27. *Id.*
28. *Id.* (citing Ctr. for Biological Diversity v. Bureau of Land Mgmt., 422 F. Supp. 2d 1115, 1138 (N.D. Cal. 2006)).
29. *Id.* at 273.
30. *Id.* at 273-74.
31. *Id.* at 272.
32. *Id.* at 281.
33. *Id.* at 276.
34. *Id.* at 277.

found, again, that the first element was satisfied, but not the second two.[35] For the Ibat, FWS failed to meet all three requirements.[36] For the NLEB, FWS satisfied the first requirement but failed to meet the second two.[37] In short, FWS acted arbitrarily when assigning habitat surrogates and in doing so, they violated the ESA, and the ITS was vacated.[38]

In *Dow Agrosciences LLC v. National Marine Fisheries Service*, the Fourth Circuit applied a similar strict standard of review to a BiOp; however, their conclusion had the opposite effect.[39] The BiOp in this case was compiled by the National Marine Fisheries Service (the service) and presented to the Environmental Protection Agency as part of the registration process for three pesticides that might impact certain listed Pacific salmonids and their habitat.[40] In the BiOp, the service claimed that the pesticides would jeopardize the continued existence of twenty-seven of twenty-eight listed salmonid species and adversely affect the critical habitat of twenty-five of twenty-six listed species.[41] By coming to this conclusion the service used "a selection of data, tests, and standards that did not appear to be logical, obvious, or even rational."[42] The court noted that the service may have had satisfactory explanations for these choices; however, they failed to include them in the BiOp or on the record.[43] The BiOp was deemed arbitrary and capricious and was vacated despite the effect the decision could have on the listed species.[44]

The Ninth Circuit has dealt with similar issues in a number of cases.[45] In *Arizona Cattle Growers' Ass'n v. United States Fish & Wildlife, Bureau of Land Management*, the Ninth Circuit discussed the legitimacy of a non-numerical take limit issued in an ITS in connection to cattle grazing and its impacts on listed species.[46] They noted that they have previously upheld

35. *Id.* at 278.
36. *Id.* at 280.
37. *Id.* at 281.
38. *Id.*
39. *See* Dow Agroscis., L.L.C. v. Nat'l Marine Fisheries Serv., 707 F.3d 462, 475 (4th Cir. 2013).
40. *Id.* at 464.
41. *Id.* at 466.
42. *Id.* at 475.
43. *Id.*
44. *Id.*
45. *See* Or. Nat. Res. Council v. Allen, 476 F.3d 1031 (9th Cir. 2007); Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 524 F.3d 917 (9th Cir. 2008); Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv., Bureau of Land Mgmt., 273 F.3d 1229 (9th Cir. 2001); Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt., 698 F.3d 1101 (9th Cir. 2012).
46. *Ariz. Cattle Growers' Ass'n*, 273 F.3d at 1250.

cases that use a mix of estimates and numbers.[47] They also mentioned that, while Congress prefers precise numerical limits, it foresaw situations where that would be impossible.[48] They did, however, note that if take limits are not based on specific numerical limits, it must be established that "no such numerical value could be practically obtained."[49] While this court never used the term "habitat surrogate," they did require the same three elements be met when substituting a numerical take limit for a surrogate.[50] They concluded that the first element was met, the second two were not, and the ITS was, thus, arbitrary and capricious.[51]

In *Oregon Natural Resource Council v. Allen*, the Ninth Circuit looked at the validity of another ITS.[52] This one was in relation to a logging operation that threatened the Northern Spotted Owl.[53] This case is slightly different because the ITS was issued after the connected BiOp was withdrawn.[54] However, it is similar in that the ITS allowed for the incidental taking of "all" Northern Spotted Owls in the area instead of a specific numeric value.[55] Focusing on the second issue, the court noted that simply allowing the taking of all owls without limit is "inadequate because it prevents the action agencies from fulfilling the monitoring function" as required by the ESA.[56] They concluded that the ITS was arbitrary and capricious for several reasons, but as is relevant here, it failed to provide a numerical limit without explaining why such a limit was impractical.[57]

The Ninth Circuit has also dealt with arbitrary no-jeopardy findings in BiOps in *National Wildlife Federation v. National Marine Fisheries Service*.[58] In this case, the National Marine Fisheries Service (NMFS) issued a BiOp in connection to a large-scale operation on a river system conducted by a power company that included dams and related facilities.[59] They concluded that it would not jeopardize thirteen listed salmonid

47. *Id.* at 1249.
48. *Id.* at 1250.
49. *Id.*
50. *Id.*
51. *Id.* at 1251.
52. *See generally* Or. Nat. Res. Council v. Allen, 476 F.3d 1031 (9th Cir. 2007).
53. *Id.* at 1032.
54. *Id.*
55. *Id.*
56. *Id.* at 1040-41.
57. *Id.* at 1041.
58. Nat'l Wildlife Fed. v. Nat'l Marine Fisheries Serv., 524 F.3d 917, 924 (9th Cir. 2008).
59. *Id.* at 922.

species in the area.[60] The court noted that "in making its jeopardy determination, the consulting agency evaluates 'the current status of the listed species or critical habitat,' the 'effects of the action,' and 'cumulative effects.'"[61] The court concluded that the district court was correct in finding that NMFS failed to make its determination of the full effects of the proposed action.[62] NMFS excluded certain impacts from the BiOp, deeming them "non-discretionary," and the court held that this was a structural flaw in the BiOp.[63] They stated that the BiOp was "little more than an analytical slight [sic] of hand, manipulating the variables to achieve a 'no jeopardy' finding."[64]

In *Miccosukee Tribe of Indians v. United States*, the Eleventh Circuit considered whether a BiOp including an ITS using "habitat markers" instead of numerical limits was arbitrary and capricious.[65] This court had a problem with the habitat markers, and although they found the other parts of the BiOp were valid, they vacated the ITS.[66] They did so because they found that Congress intended for numerical limits instead of habitat markers when practical, and they found no reason for a numerical limit to be impractical here.[67] They pointed out that population data was available, and "using habitat markers when population data is available is like turning on the weather channel to see if it is raining instead of looking out a window."[68] The court upheld the BiOp yet ordered the ITS be modified or replaced.[69]

III. COURT'S DECISION

In the noted case, the Fourth Circuit adhered to the rigid standard of review for BiOps and ITSs that it and its sister circuits have followed in the past. It refused to fast-track the ACP construction process, holding FWS to its statutory obligations.[70] Noting that it took only nineteen days after FWS resumed consultation to issue a new BiOp and ITS after it was vacated in *Sierra Club*, the court held that by "fast-tracking its decisions,

60. *Id.*
61. *Id.* at 924 (quoting 50 C.F.R. § 402.14 (g)(2)-(3) (2005)).
62. *Id.* at 926, 938.
63. *Id.* at 933.
64. *Id.*
65. Miccosukee Tribe of Indians v. United States, 566 F.3d 1257, 1264-65 (11th Cir. 2009).
66. *Id.* at 1275.
67. *Id.* at 1274.
68. *Id.* at 1275.
69. *Id.*
70. Defs. of Wildlife v. U.S. Dep't of the Interior, 931 F.3d 339, 365, 366 (4th Cir. 2019).

the agency appears to have lost sight of its mandate under the ESA: 'to protect and conserve endangered and threatened species and their habitats."[71] To reach this conclusion, the court analyzed the process FWS used to study the four noted species (omitting the NLEB for undisclosed reasons).[72]

A. The Rusty Patched Bumble Bee

Starting with the RPBB, the court considered the finding in the BiOp claiming that the ACP would not jeopardize the continued existence of the species.[73] After discussing the extreme danger of extinction the RPBB faces, it explained the analysis FWS undertook.[74] FWS established "high-potential zones," or areas that are thought "to provide a reasonable basis for describing where the species is likely to be present and where federal agencies should . . . evaluate the potential effects of their actions."[75] If a project area overlaps with a high-potential zone, the agency has two options: (1) It may survey the overlapped area to verify the presence of the RPBB, or (2) it may choose to forego the survey and assume the RPBB is present, requiring a consultation with FWS.[76] FWS found that 6.29 hectares of overlapping habitat existed and turned to option two, relying on an assumption that twenty-two nests were located in the area.[77] Although they claimed that the loss of one colony could affect the entire population, they found that the ACP could take up to twenty-two colonies and it would not jeopardize the RPBB.[78]

Plaintiffs advanced four persuasive arguments, claiming that the FWS result is arbitrary and capricious.[79] The first is that the nest density calculation used by FWS was not based on the best available information and it ignored evidence that the agency itself developed.[80] Because of the fast-tracked nature of this project, FWS did not conduct their own survey on the RPBB and instead looked to two other bumble bee species, the Buff-Tailed Bumble Bee and the Great Yellow Bumble Bee, both of which

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71. *Id.* (quoting Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 651 (2007)).
72. *Id.* at 344-45, 346.
73. *Id.* at 346.
74. *Id.* at 346-47.
75. *Id.* at 347.
76. *Id.*
77. *Id.* at 348.
78. *Id.*
79. *Id.*
80. *Id.* at 349.

are "common and abundant," unlike the RPBB.[81] FWS also took the highest numbers of the nest/hectare range of the other species and did not explain why.[82] When looking at their nest density figure, the court noted that "the agency appears to have randomly picked that number out of a hat."[83] The nest density figure was further shown to be arbitrary by other evidence compiled by FWS itself when the RPBB was added to the list of endangered species, which showed that the population was in rapid decline and there is no reasonable explanation to compare it to a much more abundant species.[84]

The next argument was that the no-jeopardy finding was arbitrary because it was at odds with FWS's own evidence that the RPBB that would be impacted are crucial to the survival of the species.[85] According to the BiOp, the projected action would impact RPBB in two ways: (1) it would indirectly reduce reproductive success, and (2) it would directly impact colony reproduction.[86] Although the number of bees claimed by FWS in the area is arbitrary, if it was correct, the BiOp's conclusion would still be arbitrary.[87] FWS itself has recognized that "every remaining population is important[ ] for the species' continued survival."[88] Because of this, the court found that FWS acted arbitrarily in determining the impacts of the ACP on the RPBB's continued existence.[89]

The following argument was that the BiOp failed to consider the overall status of the RPBB.[90] As laid out in the FWS's ESA Handbook, a status statement should be included in the BiOp to determine the effect on the species "as a whole."[91] This statement is usually multiple pages of in-depth descriptions; however, the included statement in this BiOp was only four sentences long.[92] The court stated that the BiOp's failure to consider the already precarious state of the RPBB renders the no-jeopardy finding arbitrary and subject to vacatur.[93]

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81. *Id.*
82. *Id.* at 350.
83. *Id.*
84. *Id.*
85. *Id.* at 351.
86. *Id.* at 352.
87. *Id.*
88. *Id.*
89. *Id.* at 352-53.
90. *Id.* at 353.
91. *Id.*
92. *Id.*
93. *Id.* at 354.

The final argument presented by the plaintiffs for the RPBB was that the BiOp ignored the ACP's effects on RPBB recovery.[94] While the court noted that there is a fine line between survival and recovery, a site-specific BiOp like this one still needs to address recovery impacts.[95] The BiOp did not mention recovery at all, and the court noted that "[t]he agency is not permitted to resolve the difficulty of distinguishing between survival and recovery 'by ignoring recovery needs and focusing entirely on survival.'"[96] Ultimately, the court held that the no-jeopardy finding was arbitrary and capricious because it contradicted available evidence, relied on data without providing a reasonable explanation of that reliance, failed to consider the RPBB's status, and failed to address recovery.[97]

B. The Clubshell

Next, the court turned to the Clubshell, which is a small freshwater mussel that lives in rivers and streams where it burrows two to four inches below the riverbed.[98] When heavy sedimentation occurs in the waterway, the Clubshell will experience adverse effects often resulting in their suffocation.[99] There remain only thirteen known populations of the species in twenty-one streams.[100] Although there may be over one million in number, most of them live in one river, and only seven of the thirteen populations show reproductive success.[101] The proposed ACP construction would affect the entire length of one of these streams, called Hackers Creek, where a Clubshell population is located.[102] In their previous BiOp, FWS required ACP to salvage the population and eventually reintroduce them elsewhere.[103] Two out of three of these salvage efforts were carried out in 2018, and two months later the current BiOp was issued with the no-jeopardy finding.[104]

FWS claimed that the remaining Clubshell have shown no evidence of reproductive success and are therefore not important to the recovery of

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94. *Id.*
95. *Id.* (quoting Cooling Water Intake Structure Coal. v. EPA, 905 F.3d 49, 76 (2d Cir. 2018)).
96. *Id.* (quoting Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 524 F.3d 917, 932 n.11 (9th Cir. 2008)).
97. *Id.* at 355.
98. *Id.*
99. *Id.* at 355-56.
100. *Id.* at 356.
101. *Id.*
102. *Id.*
103. *Id.* at 356-57.
104. *Id.* at 357.

the species as a whole.[105] The court found no legal authority to support this claim.[106] Although the ESA is aimed at promoting self-sustaining populations, it is not exclusive to naturally reproductive populations.[107] It considers artificial propagation, showing that a nonreproductive status is not sufficient to conclude that a species will not be jeopardized by agency action.[108] The court also found that the population will not return to pre-construction numbers even long after the sedimentation has cleared, yet the BiOp does not explain why a reduction in numbers to this population poses no jeopardy to the species.[109]

The court also recognized that FWS's sole focus on reproduction did not accord with the agency's own criteria for Clubshell recovery.[110] In their 1994 recovery plan, FWS designated certain nonreproductive species as crucial to Clubshell recovery, but in this BiOp, they failed to explain why this one is not.[111] The court was also concerned that the recovery plan, upon which they found that there are no upstream populations, is from 1994, and is outdated by their own admission.[112] FWS updated its estimate of the area in 2018 to issue this BiOp; however, they continued to rely on the outdated data to conclude that no Clubshell populations live further upstream.[113] The court also mentioned that the most recent survey effort was lacking when compared to earlier efforts.[114] The court rejected FWS's arguments and agreed with plaintiffs that the no-jeopardy finding was arbitrary and capricious.[115]

C. The Indiana Bat

The next issue in this case was the ITS and its use of surrogate habitats for the Ibat.[116] The pipeline would cross four types of Ibat habitat, but the only one at issue here is the "unoccupied summer habitat, suitable for Ibat occupation but in which Ibats have not been detected during the summer."[117] In their previous BiOp, FWS claimed that removing the trees

105. *Id.*
106. *Id.*
107. *Id.* at 358.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at 358-59.
113. *Id.*
114. *Id.*
115. *Id.* at 360.
116. *Id.*
117. *Id.*

from this area would impact the Ibat; however, in this BiOp they switched positions with no explanation.[118] They concluded that there is no need for a take limit because clearing the forest would not incidentally take any Ibats.[119] The court rejected this argument, stating that "it takes little more than common sense to deem arbitrary FWS's conclusion that clearing unoccupied yet suitable forest habitat . . . will have no impact on the species."[120] They concluded that the ITS failed to create a clear standard of when a take has been exceeded, and thus they acted arbitrarily by failing to specify the impact of incidental takes on the Ibat.[121]

D. The Madison Cave Isopod

The final issue was the take limits imposed on the MCI, a threatened freshwater subterranean crustacean that is about a half-inch in size and lives in underground caverns.[122] The court recognized the need for a habitat surrogate because the small size of the species makes a numerical limit impractical.[123] However, the issue here was the soundness of that surrogate.[124] The BiOp found that 1974 acres of MCI habitat would be impacted by the proposed construction, specifically an 11.2 acre cave that will be bisected.[125] They acknowledged that the construction would ripple out a half-mile, such that the total habitat taken would be 896.7 acres.[126] However, FWS only used the 11.2 acres that would be directly displaced as the habitat surrogate because "that is the area that [FWS] can actually measure and monitor."[127] Although they claimed this accounted for the 896.7-acre area because of the ripple effects, the ITS did not account for the take of MCI in the remainder of the 1974 acres of MCI habitat impacted by the proposed action.[128] They claimed that only MCI in the smaller area would be affected, yet the court noted that nothing in the BiOp said that, nor explained why the construction impacts would not extend into the remaining habitat.[129] Therefore, the MCI take limit was arbitrary

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118. *Id.* at 362.
119. *Id.*
120. *Id.*
121. *Id.* at 363.
122. *Id.* (quoting Sierra Club v. U.S. Dep't. of the Interior, 899 F.3d 260, 277 (4th Cir. 2018)).
123. *Id.* (quoting *Sierra Club*, 899 F.3d at 278).
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 364.
128. *Id.*
129. *Id.* at 364-65.

because it is likely that the construction would result in a higher take than set forth in the ITS, and it did not "establish a causal link between the surrogate and the take of the listed species."[130] Therefore, the take limit is unenforceable, and thus arbitrary and capricious.[131]

The court concluded that the BiOp's no-jeopardy finding was arbitrary and capricious for the RPBB and the Clubshell and the ITS failed to create enforceable take limits for the Ibat and the MCI.[132] The court refused to fast track this project, instead strictly analyzing the BiOp through the requirements of the ESA.[133] Because they found the FWS decisions arbitrary and capricious, they vacated the BiOp and the ITS with the hope that FWS will remember its statutory obligations upon reconsideration.[134]

IV. ANALYSIS

The Fourth Circuit's analysis and holding are sound in the noted case. By analyzing the BiOp and the ITS through the rigid structure laid out by the ESA, the court has upheld Congress's intent to protect threatened or endangered species and their habitats.[135] Although the ACP project was "fast-tracked," the court noted that the ESA "mandate has 'priority over the 'primary missions' of federal agencies."[136] Their analysis was consistent with previous decisions, even those that came to a different conclusion.[137] The intent of the ESA is to protect listed species, and the court in the noted case is upholding that purpose.[138]

By taking only nineteen days to revise and issue the new BiOp, FWS made it clear that they would forego their statutory mandates in lieu of fast-tracking this pipeline.[139] Although the court will likely receive criticism for blocking a major project like the ACP over the protection of

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130. *Id.* (quoting Sierra Club v. U.S. Dep't. of the Interior, 899 F.3d 260, 271 (4th Cir. 2018)).

131. *Id.*

132. *Id.* at 366.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* (quoting Tenn. Valley Auth. v. Hill, 437 U.S. 153, 185 (1978)).

137. *See* Miccosukee Tribe of Indians v. United States, 566 F.3d 1257, 1275 (11th Cir. 2009); Nat'l Wildlife Fed. v. Nat'l Marine Fisheries Serv., 524 F.3d 917, 938 (9th Cir. 2008); Or. Nat. Res. Council v. Allen, 476 F.3d 1031, 1041 (9th Cir. 2007); Dow AgroScis. LLC v. Nat'l Marine Fisheries Serv., 707 F.3d 462, 475 (4th Cir. 2013); Sierra Club v. U.S. Dep't. of the Interior, 899 F.3d 260, 295 (4th Cir. 2018).

138. *Defs. of Wildlife*, 931 F.3d at 366.

139. *Id.*

lesser known animal species that many deem insignificant, the court did their job to uphold the law and Congress's intent in passing the ESA. As seen in *Dow Agrosciences*, the court does not always decide in favor of the species; however, they do always apply a strict analysis when reviewing a BiOp.[140] The court here reasonably concluded that the BiOp and the ITS were arbitrary and capricious, not only for the sake of the threatened species, but because FWS did not fulfill their obligations when compiling these statements.[141]

The court in the noted case is correct in their holding. If they had decided this case any other way, then the ESA and its entire purpose would be diminished, and species could be put at greater risk of dying off in future projects like the ACP. Congress clearly intended for the ESA to protect these species and their habitats, and the Fourth Circuit is aptly upholding the ESA.

V. CONCLUSION

The Fourth Circuit was right to find that the BiOp and the ITS issued by the FWS in connection to the ACP were arbitrary and capricious. The methodology used by FWS in compiling these statements was incomplete or simply inadequate. Through their analysis, the court showed why these statements did not fulfill the statutory obligations laid out in the ESA.[142] This type of analysis is necessary in future cases where the ESA is challenged to protect threatened and endangered species effectively.[143]

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140. 707 F.3d at 475.

141. *Defs. of Wildlife,* 931 F.3d at 365-66.

142. *Id.* at 366.

143. *See* Nat'l Wildlife Fed. v. Nat'l Marine Fisheries Serv., 524 F.3d 917, 938 (9th Cir. 2008); *see also* Or. Nat. Res. Council v. Allen, 476 F.3d 1031, 1041 (9th Cir. 2007).

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