
THE MODERN-DAY CASE OF *THE LORAX* WITHIN THE
FOURTH CIRCUIT

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*“We trust the United States Forest Service to ‘speak for the trees, for the trees have no tongues.’”*¹

Theodor Seuss Geisel, better known as Dr. Seuss, was an illustrator who was able to turn a mixture of surrealism and a child’s classroom doodles into valuable life lessons. From using a small speck of dust and an elephant to exemplify the value of all individuals, to an authoritarian turtle who selfishly ignored the pain he caused his underlings to implicate false leadership, Dr. Seuss continually found ways to illustrate harsh realities through fictional characters and stories. The Lorax paints a pragmatic picture of environmentalism, particularly looking at the struggle environmental advocates face when battling with corporate developers. While The Lorax involved truffula trees, once-lers, and brown bar-ba-loots, a real life scenario, similar to that in The Lorax, is happening in the United States, and it involves pipelines, big energy corporations, national parks, and the Fourth Circuit Court of Appeals.

Natural gas and oil pipelines have been, and continue to be, the source of a heated debate with environmentalists and property owners on one side, and big energy companies on the other. While President Trump and executives of oil and gas companies contend that an expedited process of establishing pipelines will further the United

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¹Cowpasture River Pres. Ass’n v. Forest Serv., 911 F.3d 150, 183 (4th Cir. 2018) (quoting DR. SEUSS, *THE LORAX* 22 (1971)).

States' energy independence, recent case law within the Fourth Circuit reveals that a hastened construction process is causing far more problems than solutions. Project deadlines are consistently being pushed back and estimated costs continue to skyrocket as energy companies fight to fast-track the development process of natural gas pipelines in line with President Trump's Executive Orders. Not only are energy companies starting to speed up their processes for developing natural gas pipelines, but federal agencies, such as the United States Fish and Wildlife Service and the United States Forest Service, are rushing to assist the pipeline industry, which has, in turn, invited more legal challenges. Ultimately, President Trump's Executive Orders relating to pipelines have resulted in a backlash, allowing environmentalists to gain a foothold in courts like the Fourth Circuit and uniting affected communities in the fight against pipelines and their developers.

This Note will consider the Fourth Circuit's decisions in recent cases challenging the Trump Administration's push for an easier and more expeditious natural gas pipeline construction process. Using the Atlantic Coast Pipeline and the Mountain Valley Pipeline as primary examples, this Note will discuss how the Fourth Circuit is providing a forum for environmentalists, acting as the Lorax, to "speak for the trees" and be heard. This Note attempts to advocate for a much-needed shift in pipeline construction, making the process more deliberate, intentional, and strategic. Moreover, this Note attempts to highlight that prior to the pipeline construction process, serious consideration should be made as to whether the proposed pipelines are even necessary. Lastly, the Note asserts that despite Executive Orders and heated debates, federal agencies must stay true to their original purpose, follow their statutory guidelines, and be meticulous in their permitting processes.

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I. INTRODUCTION

Theodor Seuss Geisel, better known as Dr. Seuss, was an illustrator who was able to turn a mixture of surrealism and a child's classroom doodles into valuable life lessons.² From using a small speck of dust and an elephant to exemplify the value of all individuals,³ to an authoritarian turtle who selfishly ignored the pain he caused his underlings to implicate false leadership,⁴ Dr. Seuss continually found ways to illustrate harsh realities through fictional characters and stories.⁵ *The Lorax*, originally published in 1971, paints a pragmatic picture of environmentalism, particularly looking at the struggle environmental advocates face when battling corporate developers.⁶ While *The Lorax* involved truffula trees, once-lers, and brown bar-ba-loots,⁷ a real life scenario, similar to that in *The Lorax*, is happening in the United States and it involves pipelines, big energy corporations, national parks, and the Fourth Circuit Court of Appeals ("Fourth Circuit").

² See generally *The Artistic Legacy of Theodor Seuss Geisel*, ART DR. SEUSS COLLECTION, <https://www.drseussart.com/> (last visited Nov. 23, 2020).

³ See DR. SEUSS, HORTON HEARS A WHO (1954). Dr. Seuss published Horton Hears a Who in 1954, a time period marked by Jim Crow, racial discrimination, injustice, and inequality. See, e.g., *The 1950s*, HIST., <https://www.history.com/topics/cold-war/1950s> (last updated Apr. 17, 2020).

⁴ See DR. SEUSS, YERTLE THE TURTLE AND OTHER STORIES (1958).

⁵ See *Dr. Seuss*, BRITANNICA, <https://www.britannica.com/biography/Dr-Seuss> (last visited Nov. 23, 2020) (illustrating how Dr. Seuss used "his whimsical rhymes to convey important life lessons.").

⁶ DR. SEUSS, *THE LORAX* (1971) [hereinafter *THE LORAX*].

⁷ *Id.* at 11-13.

Throughout his candidacy, Donald Trump consistently promised that as president, he would reverse the Obama Administration's decision blocking construction of the Dakota XL Pipeline.⁸ Running on an "America First" platform that relied heavily on expanded oil and gas production in the United States, Trump envisioned that his first 100 days in office would include an "action plan" that, among other things, would roll back environmental regulations implemented by the Obama Administration.⁹ As energy independence of the United States and the promotion of jobs for American workers were two hallmarks of the "America First" energy plan during his campaign, Trump viewed the Obama Administration's regulations as key environmental and structural roadblocks that hindered the development of "vital energy infrastructure projects," including natural gas pipelines.¹⁰

It is unquestionable that President Trump favors fossil fuels over renewable energy. This is evidenced, in part, by President Trump's expressed skepticism of climate change¹¹ and his view that certain

⁸ See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 18, 2015, 4:39 PM), <https://twitter.com/realDonaldTrump/status/633739970985897984> ("If I am elected President I will immediately approve the Keystone XL pipeline. No impact on environment & lots of jobs for U.S."); Oliver Milman, *Dakota Access Pipeline Company and Donald Trump Have Close Financial Ties*, GUARDIAN (Oct. 26, 2016, 4:38 PM), <https://www.theguardian.com/us-news/2016/oct/26/donald-trump-dakota-access-pipeline-investment-energy-transfer-partners> (noting that at a recent campaign rally in Gettysburg, Pennsylvania, Donald Trump stated that "[w]e are going to allow the Keystone pipeline and so many other things to move forwards [sic]"). In 2015, President Barack Obama rejected an application to build the Keystone XL Pipeline, reasoning that it would undermine the United States' leadership on preventing climate change and would not do enough to create jobs. See Timothy Cama & Jordan Fabian, *Obama Rejects Keystone Pipeline*, HILL (Nov. 6, 2015, 12:01 PM), <https://thehill.com/policy/energy-environment/259388-obama-rejects-keystone-pipeline>.

⁹ Jennifer Yachnin, *Trump Preaches Energy Wealth to the Industry Choir*, E&E NEWS (May 27, 2016), <https://www.eenews.net/stories/1060037993>; *Trump's 100-Day Plan, Annotated: Where His Promises Stand*, NPR (Apr. 24, 2017, 12:13 PM), <https://www.npr.org/2017/04/24/520159167/trumps-100-day-action-plan-annotated>.

¹⁰ Milman, *supra* note 8; see also Yachnin, *supra* note 9 (stating that during one of his campaign speeches, Trump said that the Obama Administration's environmental regulations "have denied millions of Americans access to the energy wealth sitting right under our feet"); Scot Anderson et al., *The America First Energy Policy of the Trump Administration*, 35 J. ENERGY & NAT. RESOURCES L. 221, 221–22 (2017).

¹¹ See Jason Bressler, *Blocking Interstate Natural Gas Pipelines: How to Curb Climate Change While Strengthening the Nation's Energy System*, 44 COLUM. J. ENVTL. L. 137, 160 (2019); Jonathan Lemire et al., *Trump Spurns Science on Climate: 'Don't Think Science Knows'*, Associated Press (Sept. 14, 2020), <https://apnews.com/article/bd152cd786b58e45c61bebf2457f9930> (discussing a briefing where President Trump, in

renewable energy sources, such as wind turbines, are unreliable,¹² harmful to the environment,¹³ and decrease property values.¹⁴ Thus, his administration has been relaxing standards for pipeline approval while also attempting to expedite the process of building natural gas pipelines throughout the country.¹⁵ For example, in the first week of his presidency, President Trump issued an Executive Order—Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects—that was "specifically aimed at streamlining and speeding up environmental reviews to facilitate projects associated with 'the U.S. electric grid and telecommunications systems and repairing and upgrading critical port facilities, airports, *pipelines*, bridges, and highways."¹⁶ Despite claims from President Trump and executives of oil and gas companies that an expedited process of establishing pipelines will further the United States' energy independence, recent case law

response to the Natural Resources Agency Secretary insisting that science did not back President Trump's claim that "it will start getting cooler," stated that "I don't think science knows").

¹² In an infamous speech from 2019 delivered to factory workers in Ohio, President Trump said when the wind stops, "the televisions go off." Karen Heller, *The Story of Donald Trump's Feud with His One True Nemesis: Windmills*, WASH. POST (Aug. 15, 2019, 12:00 PM), https://www.washingtonpost.com/lifestyle/style/the-story-of-donald-trumps-feud-with-his-one-true-nemesis-windmills/2019/08/15/f637980a-be9e-11e9-b873-63ace636af08_story.html (continuing his discussion on the unreliability of wind turbines, President Trump added, "[a]nd your wives and husbands say, 'Darling, I want to watch Donald Trump on television tonight. But the wind stopped blowing and I can't watch. There's no electricity in the house, darling.'").

¹³ Cecelia Smith-Schoenwalder, *What's Really Killing Birds?*, U.S. NEWS (Dec. 24, 2019, 9:44 AM), <https://www.usnews.com/news/politics/articles/2019-12-24/donald-trump-windmills-and-the-truth-about-bird-death> ("President Donald Trump frequently takes aim at wind turbines in his effort to stall renewable energy production and keep the coal industry alive, and one of his most common complaints is the number of birds they kill."); Thomas Colson, *Trump Says Windmills Kill 'All the Birds' After Saying He Knows 'More About Wind' Than Biden*, MSN: BUS. INSIDER (Oct. 23, 2020), <https://www.msn.com/en-us/news/politics/trump-says-that-windmills-kill-all-the-birds-after-saying-he-knows-more-about-wind-than-biden/ar-BBlakekW>.

¹⁴ See Kashmiri Gander, *Donald Trump Bashes Solar Power and 'Windmills': 'When the Wind Doesn't Blow, Turn Off the Television Darling'*, NEWSWEEK (Mar. 21, 2019, 6:43 AM), <https://www.newsweek.com/donald-trump-criticizes-solar-power-windmills-turn-television-1370707>.

¹⁵ See, e.g., Anderson et al., *supra* note 10; Carol J. Miller, *For a Lump of Coal & a Drop of Oil: An Environmentalist's Critique of the Trump Administration's First Year of Energy Policies*, 36 VA. ENVTL. L.J. 185, 200–04 (2018).

¹⁶ Miller, *supra* note 15, at 203 (emphasis added) (quoting Exec. Order No. 13,766, Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects, 82 Fed. Reg. 8657 (Jan. 30, 2017)).

within the Fourth Circuit reveals that a hastened construction process is causing far more problems than solutions.¹⁷ Project deadlines are consistently being pushed back and estimated costs continue to skyrocket as energy companies fight to fast-track the development process of natural gas pipelines in line with President Trump's Executive Orders.¹⁸ Not only are energy companies starting to speed up their processes for developing natural gas pipelines, but federal agencies, such as the United States Fish and Wildlife Service ("FWS") and the United States Forest Service ("Forest Service"), are rushing to assist the pipeline industry, which has, in turn, invited more legal challenges.¹⁹ Ultimately, President Trump's Executive Orders relating to pipelines have resulted in a backlash,²⁰ allowing environmentalists to enjoy success challenging the permit process²¹ in courts like the Fourth Circuit and uniting affected communities in the fight against pipelines and their developers.

While natural gas pipelines have been the subject of previous articles, the primary focus of those articles generally relates to eminent domain and how statutes, such as the Clean Water Act, impact energy

¹⁷ See, e.g., *Defs. of Wildlife v. U.S. Dep't of the Interior*, 931 F.3d 339 (4th Cir. 2019) (arguing an opinion issued by the U.S. Fish and Wildlife Service in connection with the Atlantic Coast Pipeline was arbitrary and capricious); *Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260 (4th Cir. 2018) (challenging the enforceability of the U.S. Fish and Wildlife Services' Incidental Take Statement concerning the Atlantic Coast Pipeline).

¹⁸ On March 28, 2017, President Trump issued Executive Order 13,783, entitled "Promoting Energy Independence and Economic Growth." Ramonda C. Lyons et al., *President Trump's Treatment of Issues Impacting Oil and Natural Gas Pipelines*, 38 ENERGY & MIN. L. FOUND. § 2.04(3)(c) (2017). One of the goals of Executive Order 13,783 was to "develop America's vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production." *Id.* In April 2019, President Trump signed two Executive Orders that he claimed would further speed up construction of pipelines. See, e.g., Clifford Krauss, *Trump Signs Orders to Speed Up Oil and Gas Pipeline Construction*, N.Y. TIMES (Apr. 10, 2019), <https://www.nytimes.com/2019/04/10/business/energy-environment/trump-oil-gas-pipelines.html>.

¹⁹ Scott DiSavino & Stephanie Kelly, *Trump's Fast-Tracking of Oil Pipelines Hits Legal Roadblocks*, REUTERS (Oct. 9, 2019, 6:10 AM), <https://www.reuters.com/article/us-usa-trump-pipelines-insight/trumps-fast-tracking-of-oil-pipelines-hits-legal-roadblocks-idUSKBNIWO12L>.

²⁰ See, e.g., *id.*

²¹ While lawsuits challenging the permit process are not new, they were unsuccessful during the administration of President Trump's predecessor, Barack Obama. *Id.* (noting that plaintiffs lost five separate lawsuits alleging regulating failures during Obama's Administration, according to a Reuters review of court filings for major interstate gas pipes built since 2010."). This Note will illustrate the current success environmentalists have enjoyed in the Trump-era. See *infra* Part III.

infrastructure at the national level.²² This Note will consider the Fourth Circuit's decisions in recent cases challenging the Trump Administration's push for an easier and more expeditious natural gas pipeline construction process. Using the Atlantic Coast Pipeline and Mountain Valley Pipeline as primary examples, this Note will discuss how the Fourth Circuit is providing a forum for environmentalists, acting as the Lorax, to "speak for the trees" and be heard. This Note attempts to do three things: (1) advocate for a needed shift in pipeline construction, making the process more deliberate, intentional, and strategic; (2) highlight that prior to the pipeline construction process, serious consideration should be made as to whether the proposed pipelines are even necessary; and (3) assert that despite Executive Orders and heated debates, federal agencies must stay true to their original purpose, follow their statutory guidelines, and be meticulous in the permitting process for natural gas developers.

Part II of this Note will provide an overview of pipelines and discuss their current status in the United States. Part III will tell the story of the Atlantic Coast Pipeline and Mountain Valley Pipeline through the lens of Dr. Seuss. Comparing the environmental groups to the Lorax, this section will highlight key decisions the Fourth Circuit has delivered against pipeline developers since President Trump took office. Part IV provides suggestions for pipeline development, and Part V concludes.

II. NATURAL GAS PIPELINES AND THEIR CURRENT STATUS: SETTING THE STAGE FOR *THE LORAX*

A. *Overview and History of Natural Gas Pipelines*

Natural gas is an odorless, colorless, combustible gas.²³ Its deposits are typically found near oil deposits.²⁴ Natural gas itself was originally viewed as a nuisance to oil drillers because of its propensity to cause

²² These articles provide necessary discourse into legal issues that arise with the construction of natural gas pipelines.

²³ Alexandra B. Klass & Danielle Meinhardt, *Transporting Oil and Gas: U.S. Infrastructure Challenges*, 100 IOWA L. REV. 947, 990 (2015); see also *Natural Gas*, NAT'L GEOGRAPHIC, <https://www.nationalgeographic.org/encyclopedia/natural-gas/> (last visited Nov. 23, 2020) ("Natural gas is a fossil fuel").

²⁴ *Natural Gas*, *supra* note 23.

well blow-outs and fires.²⁵ Despite this initial understanding, by the early 1800s it was generally known that natural gas springs could produce heat and light, but the lack of transportation technology prevented natural gas from being captured and redirected for use elsewhere.²⁶ As a result, in the 1840s and 1850s there was little commercial interest in natural gas; only industries and towns located very close to gas wells could make any use of it.²⁷ The transportation issues with natural gas started to fade when the first successful natural gas pipeline was constructed in Pennsylvania in 1872.²⁸ This first natural gas pipeline was five-and-a-half miles long.²⁹ A little less than a century and a half later, the United States now has around 2.5 million miles of underground natural gas pipelines.³⁰

The vast, complex system of interstate and intrastate pipelines is one of the primary reasons why the United States is "the world leader in both consumption and production of natural gas."³¹ There are three main types of pipelines that are used to transport natural gas: (1) gathering pipelines, (2) transmission pipelines, and (3) distribution pipelines.³² After natural gas is extracted, small-diameter gathering

²⁵ Klass & Meinhardt, *supra* note 23, at 990–91. It is now understood that natural gas is necessary for oil pressurization, allowing oil to flow to the surface. *Id.*

²⁶ *Id.* at 990.

²⁷ *Id.*

²⁸ *Id.* at 991.

²⁹ *Id.*

³⁰ This is according to annual report conducted by the American Gas Association that was published on December 13, 2019. *Annual Distribution and Transmission Miles of Pipeline*, AM. GAS ASS'N (Dec. 13, 2019), <https://www.aga.org/research/data/distribution-and-transmission-miles-of-pipeline/> (follow "Summary of Distribution and Transmission Miles of Pipeline" attachment for an overview of the report); *see also Where Are the Pipelines?*, AM. PETROLEUM INST., <https://www.api.org/oil-and-natural-gas/wells-to-consumer/transporting-oil-natural-gas/pipeline/where-are-the-pipelines> (last visited Nov. 23, 2020) (providing a map of natural gas pipelines in the United States); Klass & Meinhardt, *supra* note 23, at 1003. Compared to the five-and-a-half-mile long pipeline constructed in Pennsylvania in 1872, the Rockies Express Pipeline, constructed in 2009, stretches 1,679 miles and passes through eight states. Klass & Meinhardt, *supra* note 23, at 991; *Rockies Express Pipeline – New Natural Gas Pipeline, USA*, HYDROCARBONS TECH., https://www.hydrocarbons-technology.com/projects/rockies_express/ (last visited Nov. 23, 2020).

³¹ Robert Rapier, *U.S. Increases Its Dominance in Natural Gas Production*, FORBES (July 5, 2019, 7:00 AM), <https://www.forbes.com/sites/rtrapier/2019/07/05/u-s-increases-its-dominance-in-natural-gas-production/#5fa3c346557f>.

³² *See, e.g., How Do Natural Gas Pipelines Work?*, NAT. GAS SOLUTION, <http://natural-gassolution.org/natural-gas-pipelines-work/> (last visited Nov. 23, 2020).

pipelines move the gas to a processing plant.³³ Once the gas is refined, transmission pipelines transport the gas to storage facilities and distribution centers.³⁴ Transmission pipelines are wide-diameter, long distance pipelines that use compression to transport the natural gas to its destination.³⁵ To ensure that the natural gas flowing through transmission pipelines remains pressurized, compression stations are placed at 40 to 100 mile intervals along the pipeline route.³⁶ Distribution pipelines then transport the natural gas "closer to cities and residential areas, where local distribution companies reduce the pressure of the natural gas to a level that is suitable for residences and commercial establishments."³⁷

In 1938, "in response to emerging changes in the energy market and to protect consumers from the monopoly power of the natural gas industry[.]" Congress passed the Natural Gas Act ("NGA").³⁸ The NGA currently regulates the use of natural gas and the construction of natural gas pipelines.³⁹ At the time of its enactment, the NGA gave control over the transportation of natural gas in interstate commerce to the Federal Power Commission.⁴⁰ However, when the U.S. Department of Energy was created in 1977, the Federal Power Commission was terminated and its functions, specifically those under the NGA, were transferred to the Federal Energy Regulatory Commission ("FERC").⁴¹

FERC currently "has broad authority over the approval of all natural gas pipelines," including the authority to grant the power of

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *The Transportation of Natural Gas*, NATURALGAS.ORG, <http://naturalgas.org/natural-gas/transport/> (last visited Nov. 23, 2020).

³⁷ *How Do Natural Gas Pipelines Work?*, *supra* note 32.

³⁸ Bressler, *supra* note 11, at 142.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *See id.*; *Federal Power Commission*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/environment/encyclopedias-almanacs-transcripts-and-maps/federal-power-commission> (last updated Sept. 14, 2020). According to its website, FERC is "an independent agency that . . . reviews proposals to build . . . interstate natural gas pipelines . . ." *What FERC Does*, FERC, <https://ferc.gov/about/what-ferc/what-ferc-does> (last updated Nov. 19, 2020).

eminent domain to pipeline developers.⁴² However, before FERC may grant a pipeline developer the power of eminent domain, the developer must first obtain a certificate of public convenience and necessity.⁴³ Section 7 of the NGA specifically "dictates that a pipeline can be built only if FERC determines it to be in the public interest and grants 'a certificate of public convenience and necessity.'"⁴⁴ The process of determining whether to grant such a certificate requires FERC to consider numerous factors, including "the enhancement of competitive transportation alternatives, the possibility of overbuilding, the avoidance of unnecessary disruptions to the environment, and the unneeded exercise of eminent domain."⁴⁵ In addition to the certification of public convenience and necessity under Section 7, the NGA "requires those seeking to build a gas facility or pipeline to obtain permits from affected federal agencies and [it] grants FERC the responsibility of coordinating this multiagency process"⁴⁶

If a pipeline developer obtains a certificate of public convenience and necessity from FERC along with the required permits from affected federal agencies, the developer then must "file an implementation plan with [FERC] detailing how it will carry out any required environmental mitigation, how many environmental inspectors the company will assign to the project, and what it plans to do if it is not in compliance with mitigation requirements."⁴⁷ Following the filing of the implementation plan, a pipeline developer cannot begin construction until it receives written authorization from FERC.⁴⁸ From the time construction begins until the time it is complete, a developer must file weekly reports to document inspections and compliance.⁴⁹

⁴² See, e.g., Bressler, *supra* note 11, at 142. Congress expanded the NGA to give FERC this authority after states refused "to grant the eminent domain necessary for pipeline instillation" soon after the NGA was passed. *Id.*

⁴³ *Id.*; Paul R. Yagelski, *Federal or FERC Pipeline Condemnation or Eminent Domain*, ROTHMAN GORDON, <https://www.rothmangordon.com/federal-or-ferc-pipeline-condemnation-or-eminent-domain/> (last visited Nov. 23, 2020).

⁴⁴ Bressler, *supra* note 11, at 142 (quoting 15 U.S.C. § 717f(c)(1)(A) (2018)).

⁴⁵ *Id.*; see also Klass & Meinhardt, *supra* note 23, at 1007.

⁴⁶ Daniel Stein, *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*, 32 TUL. ENVTL. L.J. 129, 130 (2018).

⁴⁷ Klass & Meinhardt, *supra* note 23, at 1007.

⁴⁸ See *id.*

⁴⁹ *Id.*

B. Current Status of Environmental Arguments

"The [continued] construction of new pipelines has pitted pro-development business and political interests against anti-pipeline land-owners and environmentalists, creating a charged atmosphere"⁵⁰ A primary argument energy companies employ to justify the continued production of natural gas is that it is the cleanest burning fossil fuel.⁵¹ While natural gas burns cleaner than all other fossil fuels,⁵² its carbon dioxide emissions do not tell the full story of its environmental impacts.⁵³

One of the key focal points for environmentalists fighting pipeline developers has been the impact of hydraulic fracturing ("fracking").⁵⁴ "Fracking is a method of injecting [a mixture of water, sand, and chemicals] deep into the earth's crust [at very high pressures] to release previously inaccessible natural-gas reserves."⁵⁵ While fracking has been a technique used to extract natural gas since the 1950s,⁵⁶ the heavy use of fracking began in the 2000s.⁵⁷ This recent "fracking boom" has played a pivotal role in expanding the United States' natural gas production.⁵⁸ Advocates in favor fracking have argued that it creates jobs, boosts manufacturing, and helps battle "global

⁵⁰ Douglas Chapman, *This Land Is Your Land? Survey Delegation Laws as a Compensable Taking*, 25 WASH. & LEE J. C.R. & SOC. JUST. 545, 547 (2019).

⁵¹ See *Natural Gas*, EXXONMOBIL, <https://corporate.exxonmobil.com/en/Energy-and-environment/Energy-resources/Natural-gas> (last visited Nov. 23, 2020) ("[N]atural gas emits significantly fewer pollutants than coal power generation, including . . . up to 60 percent fewer [greenhouse gases]."); *Providing an Efficient, Economical Energy Source Natural Gas*, CHEVRON, <https://www.chevron.com/operations/natural-gas> (last visited Nov. 23, 2020) ("Natural gas is the cleanest burning conventional fuel.").

⁵² See, e.g., Rebecca Ewing, *Pipeline Companies Target Small Farmers and Use Eminent Domain for Private Gain*, 38 N.C. CENT. L. REV. 125, 131 (2016).

⁵³ See *Environmental Impacts of Natural Gas*, UNION CONCERNED SCIENTISTS (June 19, 2014), <https://www.ucsusa.org/resources/environmental-impacts-natural-gas> ("Emissions from smokestacks and tailpipes . . . do not tell the full story.").

⁵⁴ See *id.*; Ewing, *supra* note 52; Jeremy Berke, *Here's Where Donald Trump Stands on Energy Issues*, BUS. INSIDER (Oct. 8, 2016, 1:41 PM), <https://www.businessinsider.com/trump-energy-plan-2016-10> (stating that fracking has come "under intense scrutiny for its environmental impact.").

⁵⁵ Berke, *supra* note 54; Brad Plumer, *Fracking, Explained*, VOX (July 30, 2015, 10:53 PM), <https://www.vox.com/2014/4/14/18076690/fracking>.

⁵⁶ See, e.g., Plumer, *supra* note 55.

⁵⁷ *Id.*

⁵⁸ Bressler, *supra* note 11, at 138.

warming by reducing the amount of coal we use.⁵⁹ However, numerous studies have indicated that fracking has a plethora of detrimental environmental effects, including the use of a substantial amount of water,⁶⁰ contamination of both surface water and groundwater,⁶¹ and "possible health impacts for local communities due to volatile organic compounds released through the extraction process."⁶² Fracking itself, along with the disposal of fracking wastewater by injecting it into injection wells, has also been linked to earthquakes in the United States.⁶³ Put simply, "[e]ven though fracking has the potential to provide more . . . gas resources to consumers, the process of extraction has long-lasting negative impacts on the surrounding environment."⁶⁴

Beyond the environmental impact caused by the extraction of natural gas, the construction of natural gas pipelines requires mass amounts of land to be cleared, fragmented, and destroyed.⁶⁵ This land includes individuals' property, as well as forest landscapes, roads, rivers, and other bodies of water.⁶⁶ The alteration and land disturbance stemming from this process causes irreparable harm to local ecosystems as well as fragmentation of wildlife habitats and migration patterns.⁶⁷ The clearing of a site also causes "erosion of dirt, minerals, and other harmful pollutants into nearby streams."⁶⁸ Even after the pipeline has

⁵⁹ Plumer, *supra* note 55.

⁶⁰ Ewing, *supra* note 52; *Environmental Impacts of Natural Gas*, *supra* note 53 (providing that the large volumes of water used for fracking raises water-availability concerns in some communities). The fracking process in the United States uses "billions of gallons" of water each year. Melissa Horton, *What Are the Effects of Fracking on the Environment?*, INVESTOPEDIA (May 8, 2019), <https://www.investopedia.com/ask/answers/011915/what-are-effects-fracking-environment.asp>.

⁶¹ Ewing, *supra* note 52; *Environmental Impacts of Natural Gas*, *supra* note 53. More than 1,000 chemical additives are used for fracking. *Id.* There have been documented cases of this chemical mixture of fracking fluid, along with natural gas itself, contaminating groundwater near the well site. *Id.*

⁶² Ewing, *supra* note 52.

⁶³ *Environmental Impacts of Natural Gas*, *supra* note 53 ("At least half of the 4.5 [magnitude] or larger earthquakes to strike the interior of the United States in the past decade have occurred in regions of potential injection-induced seismicity.").

⁶⁴ Horton, *supra* note 60.

⁶⁵ See *Pipeline Construction: Step by Step Guide*, FRACTRACKER ALLIANCE, <https://www.fractracker.org/resources/oil-and-gas-101/pipeline-construction/> (last visited Nov. 23, 2020) (providing a step by step overview of how transmission pipelines are built).

⁶⁶ See generally *id.* (illustrating the clearing process of land for pipeline construction).

⁶⁷ *Environmental Impacts of Natural Gas*, *supra* note 53.

⁶⁸ *Id.*

been rooted into the ground, the transportation of natural gas via pipelines results in the leakage of methane,⁶⁹ a key contributor to global warming.⁷⁰ Moreover, while the pipeline is operating, there is a constant risk of "accidents, spills, and explosions."⁷¹ Though natural gas pipeline explosions are not extremely common, they do occur.⁷² Between 2010 and 2016 alone, gas companies reported thirty-five pipeline explosions, killing a total of seventeen people and injuring eighty-six.⁷³

C. The Trump Administration's Push for Less Restrictive and More Expeditious Natural Gas Pipeline Installations in the United States

Of the many promises made during his 2016 presidential campaign, one promise that President Trump followed through with was rolling back regulations for domestic energy infrastructures such as natural gas pipelines.⁷⁴ Despite the fact that the United States became the world's largest producer of natural gas in 2011,⁷⁵ much of President Trump's tenure has focused on implementing different methods to eliminate potential roadblocks to the natural gas pipeline development process.⁷⁶

⁶⁹ *Id.*

⁷⁰ See, e.g., *Containing Methane and Its Contribution to Global Warming*, SCIENCE DAILY (Feb. 28, 2020), <https://www.sciencedaily.com/releases/2020/02/200228125234.htm>.

⁷¹ *Natural Gas Pipelines: Problems from Beginning to End*, FOOD & WATER WATCH 1, 2 (2013), <https://www.foodandwaterwatch.org/sites/default/files/Natural%20Gas%20Pipelines%20FS%20Jan%202013.pdf>.

⁷² See *Natural Gas Pipeline and Infrastructure Explosions Nationwide*, GREEN AM., <https://www.greenamerica.org/natural-gas-pipeline-and-infrastructure-explosions-nationwide> (last visited Nov. 23, 2020) (providing statistics about natural gas pipeline explosions and a list of documented explosions from June 2015 to June 2017).

⁷³ *Id.*

⁷⁴ See *Trump Promise Tracker*, WASH. POST, <https://www.washingtonpost.com/graphics/politics/trump-promise-tracker/> (last updated July 21, 2020) (tracking the progress of the promises President Trump made during his 2016 presidential campaign); *Trump's 100-Day Plan, Annotated: Where His Promises Stand*, *supra* note 9.

⁷⁵ See William Allison, *U.S. Breaks Records to Become Global Leader in Oil and Natural Gas Production*, ENERGY IN DEPTH (Aug. 20, 2019), <https://www.energyindepth.org/u-s-breaks-records-to-become-global-leader-in-oil-and-natural-gas-production/> ("The United States surpassed Russia in 2011 to become the world's largest producer of natural gas and surpassed Saudi Arabia in 2018 to become the world's largest producer of petroleum.").

⁷⁶ See *infra* text accompanying notes 77–105.

Throughout his tenure as president, President Obama's administration heavily focused on the environment.⁷⁷ Cognizant of the environmental impact resulting from the energy industry, President Obama's executive agencies aggressively and broadly expanded their regulatory missions by (1) issuing a variety of new regulations, and (2) enforcing new and old regulations "with a vigour and attention to compliance"⁷⁸ Running against this backdrop during his electoral campaign, Trump strongly opined that the Obama Administration's environmental regulations turned the United States into an "administrative state," a federal government bloated by regulations that [were] 'unnecessary' and [did] nothing more than burden industry.⁷⁹ In light of this view, a hallmark of Trump's "Make America Great Again" campaign in 2016 was his "America First" energy plan, in which he envisioned "American energy dominance [and independence]"⁸⁰ Part of this plan included a promise that during his first 100 days in office, Trump would, among other things, roll back environmental regulations implemented by the Obama Administration.⁸¹ Delivering on this promise, during his first 100 days in office "President Trump issued thirty-three executive orders, twenty-eight memoranda, and thirty proclamations."⁸² Six of those orders, two of the memoranda, and four resolutions of the Congressional Review Act "had a direct impact on environmental, energy, or conservation policy, reversing Obama-era orders and policies."⁸³ In particular, Executive Order No. 13,766 (the "Infrastructure Executive Order"), signed on January 24, 2017, was specifically "intended to streamline federal environmental review and approvals for infrastructure projects, including natural gas pipeline projects."⁸⁴ Additionally, Executive Order No. 13,807, signed 203 days after the Infrastructure Executive Order, was enacted so that "[m]ore efficient and effective Federal infrastructure decisions c[ould] transform our economy"⁸⁵

⁷⁷ See, e.g., Anderson et al., *supra* note 10, at 243.

⁷⁸ *Id.* For example, from 2009 to 2016, the EPA promulgated 3,900 new rules. *Id.*

⁷⁹ *Id.* at 244.

⁸⁰ See Timothy Cama & Devin Henry, *Trump Outlines 'America First' Energy Plan*, HILL (May 26, 2016, 4:41 PM), <https://thehill.com/policy/energy-environment/281430-trump-outlines-america-first-energy-plan>.

⁸¹ See, e.g., Yachnin, *supra* note 9.

⁸² Miller, *supra* note 15, at 200.

⁸³ *Id.* at 200-01.

⁸⁴ Anderson et al., *supra* note 10, at 254-55.

⁸⁵ Exec. Order No. 13,807, 82 Fed. Reg. 40,463 (Aug. 15, 2017).

In 2002, prior to President Trump's Executive Orders, "FERC created a voluntary pre-filing phase in its permitting process 'to facilitate and *expedite* the review of natural gas pipeline projects through early coordination with FERC and cooperating agencies."⁸⁶ This process allowed for an earlier collection of information so that there would be more coordination and a shorter overall timeline for pipeline construction.⁸⁷ "In 2012, 67% of applicants with major interstate [pipeline] proposals opted to use [this] pre-filing [process]"⁸⁸ Nonetheless, the Infrastructure Executive Order, working in conjunction with Executive Order No. 13,807, further expedited the pipeline development process.⁸⁹ Specifically, while the average time to prepare an Environmental Impact Statement ("EIS")⁹⁰ is 3.4 years, Executive Order No. 13,807 sets a firm goal of completing an EIS within 2 years from the notice of intent to prepare the EIS.⁹¹ To meet this goal, the Infrastructure Executive Order created a two-step "procedure to identify and expedite federal environmental review for high-priority projects," including pipelines.⁹² "Under the first step, any governor of a state or the head of any executive department or agency can request that the Chairman of the [White House Council on Environmental Quality ("CEQ")] determine whether an infrastructure project qualifies

⁸⁶ Klass & Meinhardt, *supra* note 23, at 1006 (emphasis added) (quoting U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-221, PIPELINE PERMITTING: INTERSTATE AND INTRASTATE NATURAL GAS PERMITTING PROCESSES INCLUDE MULTIPLE STEPS, AND TIME FRAMES VARY 12 (2013), <https://www.gao.gov/assets/660/652225.pdf>); *see also* 18 C.F.R. § 157.21 (2020) (describing the pre-filing procedures).

⁸⁷ Klass & Meinhardt, *supra* note 23, at 1006–07.

⁸⁸ *Id.* at 1008.

⁸⁹ *See* Anderson et al., *supra* note 10, at 254–55; Miller, *supra* note 15, at 203–04.

⁹⁰ An EIS "is a government document that outlines the impact of a proposed project on its surrounding environment." Tiffany Middleton, *What Is an Environmental Impact Statement?*, AM. BAR ASS'N (Dec. 17, 2018), [https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/teaching-legal-docs—what-is-an-environmental-impact-statement-/. Under the National Environmental Policy Act of 1969 \("NEPA"\), federal agencies must prepare these statements "for all federal actions significantly affecting the quality of the human environment." Anderson et al., *supra* note 10, at 236. As exemplified later in this Note, these statements "are at the heart of several major \[pipeline\] projects" and have been the subject of many lawsuits brought on behalf of environmental groups opposing pipelines. Erin Mundahl, *Environmental Impact Statements Are Front and Center of Pipeline Fights—What Is an EIS?*, INSIDESOURCES \(July 26, 2017\), \[https://www.insidesources.com/what-is-an-eis/.\]\(https://www.insidesources.com/what-is-an-eis/\)](https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/teaching-legal-docs—what-is-an-environmental-impact-statement-/)

⁹¹ *See* Miller, *supra* note 15, at 203–04 (citing Exec. Order No. 13,807, 82 Fed. Reg. 40,463, 40,464 (Aug. 15, 2017)).

⁹² *See id.* at 203; Anderson et al., *supra* note 10, at 255.

as a 'high-priority' project.⁹³ After such request has been made, the Chairman of the CEQ has thirty days to make the determination.⁹⁴ If the project is designated as a "high-priority" project, the second step requires the Chairman of the CEQ to coordinate with the head of FERC "to establish expedited procedures and deadlines for completion of environmental reviews and approvals."⁹⁵ When established deadlines are not met, the head of FERC "must provide a written explanation to the Chairman explaining the causes for delay and providing an accounting of the actions taken by the agency to complete the review as quickly as possible."⁹⁶ Although the Infrastructure Executive Order was President Trump's first Executive Order on the topic of pipelines, it certainly was not the last.

In 2019, New York's Governor Andrew Cuomo blocked a potential pipeline project, the Northeast Supply Enhancement project, finding that it would have significant impacts on water quality.⁹⁷ Governor Cuomo's authority to reject the project came from Section 401 of the Clean Water Act ("CWA"), which requires a potential pipeline developer applying for a federal license to provide FERC "with a certification from the state in which the discharge will originate that any discharge from the licensed facility will comply with applicable provisions of the CWA."⁹⁸ Governor Cuomo has acted as a pioneer in the use of the Section 401 Certification process to prevent natural gas pipelines

⁹³ Anderson et al., *supra* note 10, at 255; *see also* Miller, *supra* note 15, at 203. The CEQ is an entity within the Executive Office of the President that was established as part of the National Policy Act of 1969. Anderson, et al., *supra* note 10, at 255. The position of Chairman requires presidential appointment with the advice and consent of the Senate. *Id.*

⁹⁴ *See* Anderson et al., *supra* note 10, at 255; Miller, *supra* note 15, at 203. "This determination shall be made after consideration of the project's importance to the general welfare, value to the Nation, environmental benefits, and such other factors as the Chairman deems relevant." Exec. Order No. 13,766, 82 Fed. Reg. 8,657 (Jan. 30, 2017).

⁹⁵ Anderson et al., *supra* note 10, at 255; *see also* Miller, *supra* note 15, at 203.

⁹⁶ Anderson et al., *supra* note 10, at 255.

⁹⁷ *See, e.g.*, Marie J. French, *Cuomo Administration Rejects Williams Pipeline*, POLITICO (May 15, 2019, 10:05 PM), <https://www.politico.com/states/new-york/albany/story/2019/05/15/cuomo-administration-rejects-controversial-williams-pipeline-1017327>.

⁹⁸ George Cameron Coggins & Robert L. Glicksman, *Clean Water Act—State Certification Process*, 4 PUB. NAT. RESOURCES L. § 37:41 (2020) (citing 33 U.S.C. § 1341(a)(1)). This sentence is tailored for pipelines, but the CWA requires any applicant for a federal license to provide a certification from the state.

from being built in states.⁹⁹ President Trump did not view Governor Cuomo's decision lightly, stating that "New York is hurting the country because they're not allowing us to get those pipelines through, and that's why they're paying so much for their heating and all of the things that energy and our energy produces" ¹⁰⁰ In response, President Trump issued two Executive Orders in 2019 to further speed up construction of pipelines.¹⁰¹ One of the orders directed the Environmental Protection Agency ("EPA") to review and tighten rules to make it more difficult for states, such as New York, to interrupt pipelines by invoking provisions of the CWA.¹⁰² The other order transferred authority for approving the construction of international pipelines from the Secretary of State to the President.¹⁰³

Recently, stemming directly from President Trump's "Promoting Energy Infrastructure and Economic Growth" Executive Order in 2019, the EPA implemented a new rule that diminished a state's ability to reject large energy infrastructure projects like interstate pipelines.¹⁰⁴ The rule "requires states to make decisions within a year on water quality permits related to [pipelines]," despite the fact that states have limited resources to conduct the necessary reviews in such a short amount of time.¹⁰⁵ According to EPA Administrator, Andrew Wheeler,

⁹⁹ Daniel Markind, *Will Prior Decisions on Natural Gas Pipelines Come Back to Haunt the Governors of New York and Pennsylvania?*, FORBES (Nov. 25, 2019, 10:11 AM), <https://www.forbes.com/sites/danielmarkind/2019/11/25/will-prior-decisions-on-natural-gas-pipelines-come-back-to-haunt-the-governors-of-new-york-and-pennsylvania/#594f40c661bb>.

¹⁰⁰ Michael Bastasch, *Trump and Andrew Cuomo Prepare for a War over Natural Gas Pipelines*, DAILY CALLER (Apr. 11, 2019, 10:33 AM), <https://dailycaller.com/2019/04/11/trump-cuomo-natural-gas-pipeline/>.

¹⁰¹ See Krauss, *supra* note 18; Cat Schuknecht, *Trump Signs Executive Orders in Push to Make It Easier to Build Oil and Gas Pipelines*, NPR (Apr. 11, 2019, 9:48 AM), <https://www.npr.org/2019/04/11/712121425/trump-signs-executive-orders-in-push-to-make-it-easier-to-build-oil-and-gas-pipe>.

¹⁰² See Krauss, *supra* note 18; Schuknecht, *supra* note 101 (stating that Trump's executive orders directed the DOE and the EPA "to clarify a section of the CWA that gives states authority over their water quality permits"). This order was entitled "Promoting Energy Infrastructure and Economic Growth." Susan Phillips, *EPA Limits States' Ability to Regulate Pipelines Under the Clean Water Act*, ALLEGHENY FRONT (June 5, 2020), <https://www.allegHENYfront.org/epa-limits-states-ability-to-regulate-pipelines-under-the-clean-water-act>.

¹⁰³ Krauss, *supra* note 18. The goal of this order was to speed up projects such as the Canada-to-America Keystone XL oil pipeline, which was rejected under President Obama. *Id.*

¹⁰⁴ Phillips, *supra* note 102.

¹⁰⁵ *Id.*

the rule was enacted to "curb abuses of the [CWA] that have held our nation's energy infrastructure projects hostage . . . and to put in place clear guidelines that finally give these projects a path forward."¹⁰⁶

Executive Orders are not the only method through which President Trump makes sure his energy agenda is fulfilled. In order to demonstrate his admiration for the energy industry and push his agenda, President Trump surrounds himself with individuals such as former CEOs of major energy companies¹⁰⁷ and those who, like himself, are skeptical of climate change and favor pro-industry, anti-regulatory policy positions.¹⁰⁸

The abovementioned actions by President Trump exemplify several steps he and his administration have taken to expedite the pipeline process. As the remainder of this Note will illustrate, President Trump's push for a faster development of pipelines, in conjunction with federal agencies rushing to comply with Trump's Executive Orders, has the inadvertent effect of slowing the industry down and inviting legal challenges along the way.

III. THE ATLANTIC COAST PIPELINE AND MOUNTAIN VALLEY PIPELINE TOLD THROUGH THE LENS OF DR. SEUSS

Under the NGA, "any party 'aggrieved' by a FERC order may petition for review by the court of appeals for the circuit in which an interstate natural gas pipeline is proposed to be constructed."¹⁰⁹

¹⁰⁶ *Id.* The EPA's new rule received harsh criticism and will likely become the subject of lawsuits challenging its constitutionality because it is an "unveiled effort to rob the states of their legal authority protected under the [CWA] when it comes to pipelines." *Id.*

¹⁰⁷ Rex Tillerson, who served as the Secretary of State under President Trump from February 1, 2017, until March 13, 2018, was the former CEO of ExxonMobil. *Rex Tillerson Biography*, BIOGRAPHY, <https://www.biography.com/political-figure/rex-tillerson> (last updated Nov. 12, 2019); see also Anderson et al., *supra* note 10, at 248.

¹⁰⁸ Former EPA Administrator Scott Pruitt and former Attorney General Jeff Sessions are two examples. Anderson et al., *supra* note 10, at 244–45. Prior to Scott Pruitt's appointment as EPA Administrator, he was well known for his laissez-faire approach to regulatory enforcement and had described himself as a "leading advocate against the EPA's activist agenda." *Id.* Pruitt was also characterized as a climate-change sceptic, and a well-known friend of the energy industry. *Id.*

¹⁰⁹ Bressler, *supra* note 11, at 142–43 (citing 15 U.S.C. § 717r(a)–(b) (2018)). "A party is 'aggrieved' by a FERC order if it challenges the order under NEPA and asserts an environmental harm." *Id.* at 179 n.24 (citing *Gunpowder Riverkeeper v. Fed. Energy*

While petitions by environmentalists opposing pipelines are not new, the Fourth Circuit has received an influx of petitions since 2017.¹¹⁰ This is partly due to the fact that two of the three biggest U.S. pipeline projects during Trump's presidency, Dominion Energy's Atlantic Coast Pipeline ("ACP") and EQM Midstream Partners's Mountain Valley Pipeline ("MVP"),¹¹¹ were planned to be constructed across West Virginia, Virginia, and North Carolina,¹¹² making the Fourth Circuit the proper forum for any petitions against the ACP or MVP.¹¹³ However, as this section will demonstrate, the leading catalyst behind the influx in challenges is the Trump Administration's effort to cut red tape and speed up major pipeline projects.¹¹⁴ This effort has backfired, allowing environmental groups to enjoy success when challenging the permit process, which increases overall costs of pipelines and further delays project deadlines.¹¹⁵ Under President Obama, environmentalists alleging regulatory failures for major interstate pipelines lost five separate suits,¹¹⁶ as compared to the Trump-era, during which

Regulatory Comm'n, 807 F.3d 267, 273–74 (D.C. Cir. 2015)). "The aggrieved party can base its challenge on myriad factors, including FERC's NEPA analysis, which is reviewed according to an arbitrary and capricious standard." *Id.* (citing *Sierra Club v. Fed. Energy Regulatory Comm'n*, 867 F.3d 1357, 1367 (D.C. Cir. 2017)).

¹¹⁰ See, e.g., Anthony B. Cavender, *A Trio of Environmental Decisions from the Fourth Circuit*, GRAVEL2GAVEL (Aug. 8, 2018), <https://www.gravel2gavel.com/a-trio-of-environmental-decisions-from-the-fourth-circuit/> (stating the Fourth Circuit decided three cases in 2018 involving the ACP and MVP).

¹¹¹ Both the ACP and the MVP are natural gas pipelines. See *The Need for the ACP*, ATLANTIC COAST PIPELINE, <https://atlanticcoastpipeline.com/about/default.aspx> (on file with author); *Overview: Mountain Valley Pipeline*, MOUNTAIN VALLEY PIPELINE, <https://www.mountainvalleypipeline.info/overview/> (last visited Nov. 23, 2020).

¹¹² See *The Need for the ACP*, *supra* note III; *Overview: Mountain Valley Pipeline*, *supra* note III.

¹¹³ See, e.g., *FAQs - About the Court*, U.S. CTS., <https://www.ca4.uscourts.gov/faqs/faqs-about-the-court> (last visited Nov. 23, 2020).

¹¹⁴ See *supra* Part II(C).

¹¹⁵ DiSavino & Kelly, *supra* note 19. For example, the ACP was supposed to be completed by 2018. See Victoria Johnson, *Supreme Court to Decide on Atlantic Coast Pipeline Permit in Early Spring*, DAILY TAR HEEL (Mar. 2, 2020, 4:18 PM), <https://www.dailytarheel.com/article/2020/03/ac-pipeline-2020-0302>. However, decisions by the Fourth Circuit pushed the projected deadline back to the end of 2021. *Id.* As illustrated in this Note, the continual delays and increased costs were two key reasons for why the ACP was abandoned in 2020. See, e.g., *infra* note 152 and accompanying text.

¹¹⁶ DiSavino & Kelly, *supra* note 19 (providing that this statistic was according to a Reuters review of court filings for major interstate gas pipes built since 2010).

the Fourth Circuit alone has ruled in favor of environmentalists six times.¹¹⁷

A. *Profit Over Planet: Analogizing Dr. Seuss's The Lorax to the Current Situation with the ACP and MVP*

In a recent challenge to a permit the Forest Service granted to the developers of the ACP, authorizing the pipeline to be constructed through parts of the George Washington and Monongahela National Forests, the Fourth Circuit quoted *The Lorax*, stating that it trusted the Forest Service to "speak for the trees, for the trees have no tongues."¹¹⁸ *The Lorax*, a children's book written by Dr. Seuss and published in 1971,¹¹⁹ paints a pragmatic picture of environmentalism that, as seen in the Fourth Circuit's opinion in *Cowpasture River Preservation Ass'n v. Forest Service*, is widely applicable in the United States today. Specifically, *The Lorax* exemplifies the difficulty environmentalists face when opposing big-money corporations, the justifications such corporations employ to further their efforts in developing pipelines, and the lasting environmental impacts that can occur when profit is the primary motive.

The majority of *The Lorax* is written from the perspective of the "Once-ler," a fictional character who symbolizes a corporate executive or corporate entity.¹²⁰ The story begins with the Once-ler traveling through an untouched, lush, and vibrant forest area full of life and color.¹²¹ Instead of relishing in the natural beauty of the forest, the Once-ler saw the natural resources as a business opportunity.¹²² He immediately began cutting down the trees in the forest, turning the leaves into a clothing-type product that he sold for profit.¹²³ The Once-ler then grew his business, quickly building a factory and inviting others like him to come enjoy the success of the newly-tapped resources.¹²⁴ As Dr. Seuss was careful to illustrate, the Once-

¹¹⁷ See *infra* Part III(B) & (C).

¹¹⁸ *Cowpasture River Pres. Ass'n v. Forest Serv.*, 911 F.3d 150, 183 (4th Cir. 2018) (quoting THE LORAX, *supra* note 6).

¹¹⁹ THE LORAX, *supra* note 6.

¹²⁰ See *id.*

¹²¹ See *id.* at 11–14.

¹²² See *id.* at 15–17.

¹²³ *Id.* at 17, 23–25.

¹²⁴ *Id.* at 28–31.

ler's success and growth came at the cost of the health of the environment.¹²⁵ The pollution from the Once-ler's factory forced all animals that once flourished in the forest to vacate the land.¹²⁶ Additionally, the rapid expansion of the business caused every last tree in the forest to be cut down.¹²⁷ As the end of the story illustrates, what started as a vibrant forest was quickly turned into a barren wasteland, void of life and color.¹²⁸ Throughout the story, the Lorax, a small brown creature who "speak[s] for the trees, for the trees have no tongues,"¹²⁹ tirelessly advocated for the preservation of the environment.¹³⁰ Though the Once-ler never listened to the Lorax in the moment, the story concludes with the Once-ler regretting his actions and hoping the forest can be re-grown so that the Lorax and all the other animals can return as they once were.¹³¹

The present situation of the MVP, as well as the circumstances surrounding the ACP prior to its abandonment, draws shocking similarities to the fictional tale of *The Lorax*. One such similarity is that the pipelines, like the Once-ler's business, planned to cross previously untouched national forests and trails that provide "a haven for wildlife and recreationists alike."¹³² Prior to the project's abandonment, "[t]he ACP [was] a proposed 604.5 mile, 42-inch diameter natural gas pipeline that would stretch from West Virginia to North Carolina."¹³³ Its proposed route, which had been approved by FERC, crossed twenty-one miles of national forest land in addition to certain parts of the Appalachian National Scenic Trail ("Appalachian Trail").¹³⁴ Described in more detail:

¹²⁵ See *id.* at 39, 42, 46, 51–52, 54.

¹²⁶ *Id.* at 34–35, 39–42, 46.

¹²⁷ See *id.* at 49 ("And at that very moment, we heard a loud whack! From outside in the fields came a sickening smack of an axe on a tree. Then we heard the tree fall. *The very last Truffula Tree of them all!*").

¹²⁸ See *id.* at 49–54.

¹²⁹ *Id.* at 22.

¹³⁰ *Id.* at 22–54.

¹³¹ *Id.* at 60.

¹³² *Why National Forests*, WILDERNESS SOC'Y, <https://www.wilderness.org/articles/article/why-national-forests> (last visited Nov. 23, 2020).

¹³³ *Cowpasture River Pres. Ass'n v. Forest Serv.*, 911 F.3d 150, 155 (4th Cir. 2018); see also *The Need for the ACP*, *supra* note III.

¹³⁴ See, e.g., *Cowpasture River Pres. Ass'n*, 911 F.3d at 155. This is made up of about sixteen miles in the George Washington National Forest and five miles in the Monongahela National Forest. *Id.*

The site where the pipeline would meet the [Appalachian Trail] [was] west of Charlottesville on the edge of George Washington National Forest. The builders want[ed] to tunnel through a mountain some 700 feet below the level of the trail, which runs along the ridgetop and intertwines with the Blue Ridge Parkway. Just north of the tunnel, the trail emerges onto a rocky outcrop at Cedar Cliffs, with a spectacular view of the Shenandoah Valley far below. The pipeline route would [have] march[ed] across the valley, threading past farms and villages and then slicing through an unbroken tract of the national forest.¹³⁵

The MVP is a proposed 303 mile, 42-inch diameter natural gas pipeline that will stretch from northwestern West Virginia to southern Virginia.¹³⁶ Like the ACP, the MVP is set to cross certain national forests, such as Jefferson National Forest, as well as the Appalachian Trail.¹³⁷

Another similarity between *The Lorax* and the situations surrounding the ACP and MVP is the disregard for the voices of environmentalists and communities.¹³⁸ Since the inception of both projects, environmentalists strongly advocated against the pipelines, asserting that they would "fragment some of the most intact, forested landscapes in the Southeast"¹³⁹ and harm several threatened and endangered species.¹⁴⁰ Seemingly ignoring these concerns, the companies

¹³⁵ Gregory S. Schneider & Robert Barnes, *U.S. Supreme Court to Decide Winner in Case of Gas Pipeline vs. Appalachian Trail*, WASH. POST (Feb. 23, 2020, 12:17 PM), https://www.washingtonpost.com/local/virginia-politics/us-supreme-court-to-decide-winner-in-case-of-gas-pipeline-vs-appalachian-trail/2020/02/23/d3ead098-5334-11ea-929a-64efa7482a77_story.html (on file with author).

¹³⁶ *Overview: Mountain Valley Pipeline*, *supra* note III.

¹³⁷ *See, e.g.*, Brad McElhinny, *Federal Ruling Affects Mountain Valley Pipeline's Route Through National Forest*, METRONews (July 27, 2018, 9:04 PM), <https://wvmetronews.com/2018/07/27/federal-ruling-affects-mountain-valley-pipelines-route-through-national-forest/>.

¹³⁸ In *The Lorax*, the Once-ler ignored constant warnings from the Lorax of the harm the Once-ler was causing to the environment. THE LORAX, *supra* note 6, at 33–48. Even when the Once-ler saw first-hand that the wildlife was vacating the forest because his factory made the area inhabitable, he persisted with his business model. *Id.*

¹³⁹ *Risky and Unnecessary Natural Gas Pipelines Threaten Our Region*, SOUTHERN ENVTL. L. CTR., <https://www.southernenvironment.org/cases-and-projects/proposed-natural-gas-pipeline-threatens-scenic-western-virginia> (last visited Nov. 23, 2020).

¹⁴⁰ *See, e.g.*, Kevin Ridder, *Pipelines Continue to Face Obstacles*, APPALACHIAN VOICES: APPALACHIAN VOICE (Aug. 7, 2019), <https://appvoices.org/2019/08/07/pipelines-continue-to-face-obstacles/>; Sarah Rankin, *Developers Cancel Long-Delayed, \$8B Atlantic Coast Pipeline*, AP NEWS (July 5, 2020), <https://apnews.com/5e4dec29b0da663e6243a71aea016940> (stating that since the ACP's plan was announced in 2014, it drew "fierce opposition from many

developing the ACP and MVP routinely claimed that the proposed routes for the pipelines were "carefully designed" to minimize the overall environmental footprint.¹⁴¹ The companies also asserted that they value each landowner's property, that they would respect the concerns and opinions of community members, and that the proposed routes were developed after "meaningful engagement with landowners and communities."¹⁴² At the same time, residents of communities where the proposed pipeline routes would cross have been tirelessly fighting for their voices to be heard.¹⁴³ Additionally, landowners refusing to grant permission to have their land surveyed have been sued by the natural gas companies, who are seeking immediate access to the properties.¹⁴⁴

landowners, activists and environmental advocates, who said it would damage pristine landscapes and harm wildlife").

¹⁴¹ *The Need for the ACP*, *supra* note III (stating that the ACP will actually strengthen environmental health); *Overview: Mountain Valley Pipeline*, *supra* note III (asserting that the project developer has "a steadfast commitment to environmental protection and will conduct [its] business operations in a sustainable and environmentally responsible manner at all times").

¹⁴² *ACP Project Update and Executive Press Briefing*, ATLANTIC COAST PIPELINE (Apr. 27, 2017), <https://atlanticcoastpipeline.com/news/2017/4/27/acp-project-update-and-executive-press-briefing.aspx>; *Overview: Mountain Valley Pipeline*, *supra* note III.

¹⁴³ See *Virginia Community Rallies Against Pipeline's Compressor Station*, SOUTHERN ENVTL. L. CTR. (Sept. 5, 2018), <https://www.southernenvironment.org/news-and-press/news-feed/virginia-community-rallies-against-pipelines-compressor-station> (stating that many residents of Union Hill, a tiny community founded by formerly enslaved people following the end of the Civil War, are fighting plans to put a compressor station for the ACP near the community); Gregory S. Schneider, *Big Company, Big Dollars, Small Community: Dominion Deal Sparks Dissent in Community Facing Gas Project*, WASH. POST (Dec. 9, 2018, 9:11 PM), https://www.washingtonpost.com/local/virginia-politics/dominion-deal-sparks-dissent-in-community-facing-pipeline-project/2018/12/09/050e5f52-f99d-11e8-863c-9e2f864d47e7_story.html (noting some activities the Union Hill community has engaged in to oppose the Buckingham County compressor station); Lara Mack, *Momentous Win for Environmental Justice and Against Pipelines!*, APPALACHIAN VOICES (Jan. 9, 2020), <https://appvoices.org/2020/01/09/momentous-win-for-environmental-justice-and-against-pipelines/>.

¹⁴⁴ See, e.g., Duncan Adams, *Mountain Valley Sues Landowners to Gain Pipeline Easements and Access Through Eminent Domain*, ROANOKE TIMES (Oct. 27, 2017), https://roanoke.com/business/mountain-valley-sues-landowners-to-gain-pipeline-easements-and-access-through-eminent-domain/article_abff5d87-1aee-5a50-b3c2-b3ee0c812e44.html; Rachael Smith, *Updated: Atlantic Coast Pipeline Serving Lawsuits to Landowners*, NEWS & ADVANCE (June 9, 2015), https://newsadvance.com/nelson_county_times/news/updated-atlantic-coast-pipeline-serving-lawsuits-to-landowners/article_e5c8f8a8-0a0f-11e5-ba98-275fc2e5db15.html; Paul Woolverton, *Atlantic Coast Pipeline Sues Landowners*, FAYETTEVILLE OBSERVER,

The fact that the Lorax could only voice his concerns to the Once-ler was the Achilles heel in his effort to effectively advocate for the preservation of the environment. The lack of an impartial third party that would listen to the Lorax's concerns and act to prevent environmental harm left the Lorax "powerless against the destructive forces of the Once-ler's industrial might."¹⁴⁵ Similarly, the natural gas companies constructing the ACP and MVP employed tactics reminiscent of the Once-ler, freezing out landowners, environmentalists, and communities while continuing to fast-track the construction and development of their respective projects. Even so, environmentalists today, unlike the Lorax, have the opportunity to have their voices heard by an impartial third party, the courts.¹⁴⁶ Claims against pipelines are not new, but the ACP and MVP have primarily been planned in the Trump-era, under the expedited process described in Section II(C).¹⁴⁷ While President Trump's view was that deregulation and Executive Orders would speed up the development process of natural gas pipelines and create energy independence,¹⁴⁸ his policies have invited legal challenges, allowing environmental groups to attack the ACP and MVP more aggressively because they are starting to have success in the Fourth Circuit.¹⁴⁹ Rather than speeding up the process, the Trump Administration's Executive Orders have increased overall costs, caused constant delays,¹⁵⁰ and ultimately led to the abandonment of certain natural gas pipeline projects.¹⁵¹

<https://www.fayobserver.com/news/20171207/atlantic-coast-pipeline-sues-landowners> (last updated Dec. 8, 2017, 5:38 PM).

¹⁴⁵ Michael Wieteki, *True Access to the Courts for Citizens Working to Protect Natural Resources: Incorporating Attorney's Fees into the Minnesota Environmental Rights Act*, 14 MO. ENVTL. L. & POL'Y REV. 147, 154 (2006).

¹⁴⁶ See *supra* text accompanying note 109.

¹⁴⁷ The ACP and MVP received FERC approval in 2017. *Permitting Process*, ATLANTIC COAST PIPELINE, <https://atlanticcoastpipeline.com/construction/permitting-process.aspx> (last visited Nov. 23, 2020); *Overview: Mountain Valley Pipeline*, *supra* note 111.

¹⁴⁸ See *supra* Part II(C).

¹⁴⁹ See, e.g., DiSavino & Kelly, *supra* note 19.

¹⁵⁰ See *id.* (stating that the delays from lawsuits have caused the ACP and MVP "to increase their cost estimates by hundreds of millions of dollars").

¹⁵¹ See *infra* note 152.

B. The Fourth Circuit Providing a Forum for the Lorax's Challenges Against the Atlantic Coast Pipeline

The ACP was supposed to be completed by 2018, but the success environmentalists enjoyed in the Fourth Circuit increased costs and pushed the projected deadline so far back that the companies in charge of the pipeline abandoned the six-year project on July 5, 2020.¹⁵² Since May 2018, "federal courts and agencies have revoked eight permits required for [pipeline] project completion."¹⁵³ This subsection will analyze several recent opinions by the Fourth Circuit in which the court sided in favor of environmentalists against the ACP, illustrating how President Trump's fast-tracking development process inevitably causes shortcuts and invites legal challenges.

Prior to receiving FERC approval in late 2017, the ACP "was thoroughly reviewed by more than a dozen state and federal agencies for more than three years."¹⁵⁴ One of those agencies was the Forest Service. In 2016, when Obama was still president, the Forest Service expressed skepticism about the project, requesting alternative designs for selected areas of challenging terrain.¹⁵⁵ "Despite the Forest Service's clearly stated concerns [in 2016] regarding the adverse impacts of the ACP project, as [the] deadlines for the agency's decisions drew closer, its tenor began to change."¹⁵⁶ That change occurred after President Trump took office, when the Forest Service subsequently issued a Special Use Permit ("SUP") and Record of Decision ("ROD"), which authorized the pipeline to be constructed through parts of the George Washington and Monongahela National Forests and granted a right

¹⁵² See, e.g., Erin Cox, *Energy Companies Abandon Long-Delayed Atlantic Coast Pipeline*, WASH. POST (July 5, 2020, 6:00 PM), https://www.washingtonpost.com/local/virginia-politics/atlantic-coast-pipeline-canceled/2020/07/05/dalc0f40-bef5-1lea-b178-bb7b05b94af1_story.html. Prior to pulling the plug, the pipeline was projected to be complete in 2021 and the ACP was set to start delivering gas in early 2022. Johnson, *supra* note 115.

¹⁵³ Johnson, *supra* note 115.

¹⁵⁴ *Permitting Process*, *supra* note 147.

¹⁵⁵ DiSavino & Kelly, *supra* note 19; *Cowpasture River Pres. Ass'n v. Forest Serv.*, 911 F.3d 150, 155–59 (4th Cir. 2018).

¹⁵⁶ *Cowpasture River Pres. Ass'n*, 911 F.3d at 158; see also DiSavino & Kelly, *supra* note 19 ("[A]fter Trump took office, the Forest Service changed course, and issued permits and a waiver for the line to cross the Appalachian Trail on national forestland in Virginia.").

of way across the Appalachian Trail.¹⁵⁷ Almost immediately after this decision, several non-profit environmental groups, acting under the authority of the NGA, challenged the Forest Service's authority to grant such permits and the process taken in granting them.¹⁵⁸ The Fourth Circuit ruled in favor of the environmental groups' challenge, holding, in part, that the Forest Service violated the National Forest Management Act ("NFMA") and the National Environmental Policy Act ("NEPA").¹⁵⁹ Trusting the Forest Service to act like the Lorax and "speak for the trees," the Fourth Circuit stated that "[a] thorough review of the record leads to the necessary conclusion that the Forest Service abdicated its responsibility to preserve national forest resources."¹⁶⁰ Particularly, the court noted that "the Forest Service's serious environmental concerns . . . were suddenly, and mysteriously, assuaged in time to meet a private pipeline company's deadlines."¹⁶¹ The court found it "striking" and "inexplicable" that the Forest Service would go through the lengths it did to avoid applying its own regulation in order to accommodate the ACP project and its timeline.¹⁶²

When FERC issued the developers of the ACP a certificate of public convenience and necessity in October 2017, it conditioned its full approval of the pipeline on the ACP receiving all state and other

¹⁵⁷ *Cowpasture River Pres. Ass'n*, 911 F.3d at 160. The ROD was issued on November 17, 2017. *Id.* On January 23, 2018, the Forest Service issued the SUP and granted the right of way. *Id.*

¹⁵⁸ *Id.* Because the ACP was set to cross North Carolina, Virginia, and West Virginia, the challenge was brought in the Fourth Circuit. *See supra* text accompanying notes 109–13.

¹⁵⁹ *Cowpasture River Pres. Ass'n*, 911 F.3d at 155. The court also held that the Forest Service lacked statutory authority pursuant to the Mineral Leasing Act ("MLA") to grant a right of way across the Appalachian Trail. *Id.* Though the Supreme Court reversed this portion of the Fourth Circuit's decision, holding that the Forest Service has the authority to grant pipeline rights-of-way through lands within national forests traversed by the Appalachian Trail, it did not reverse the Fourth Circuit's determinations regarding the NFMA and NEPA violations. *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837 (2020); *see also Atlantic Coast Pipeline Problems Persist Despite Supreme Court Decision*, SOUTHERN ENVTL. L. CTR. (June 15, 2020), <https://www.southernenvironment.org/news-and-press/news-feed/atlantic-coast-pipeline-problems-persist-despite-supreme-court-decision> (noting that the Fourth Circuit, in *Cowpasture River Preservation Ass'n v. Forest Service*, vacated the Forest Service's permits on certain grounds not addressed by the Supreme Court's decision on appeal).

¹⁶⁰ *Cowpasture River Pres. Ass'n*, 911 F.3d at 183.

¹⁶¹ *Id.*

¹⁶² *Id.* at 166.

federal authorizations required for the proposed project.¹⁶³ Two of those authorizations had to come from the FWS and the U.S. National Park Service ("NPS").¹⁶⁴ In July 2017, complying with the Endangered Species Act, FERC requested formal consultation with FWS about the ACP.¹⁶⁵ When FWS concludes that a pipeline will *not* jeopardize or adversely modify habitat, but *will* adversely affect an endangered or threatened species, FWS must provide FERC with an Incidental Take Statement ("ITS") "authorizing the anticipated incidental take and specifying the 'impact of such incidental taking on the species.'"¹⁶⁶ This was the case with the ACP. Three months after FERC's request, FWS issued a Biological Opinion, concluding that that six endangered or threatened species would be adversely affected by the pipeline, but that the project as a whole would not jeopardize the continued existence of the species.¹⁶⁷ Pursuant to the Endangered Species Act, FWS then issued an ITS, setting the amount or extent of take anticipated by the ACP for each species.¹⁶⁸

Following FWS's issuance of the ITS, several environmental groups challenged the ITS as arbitrary and capricious, claiming that FWS failed to set numeric limits on the species that would be adversely affected by the pipeline and that the exception to the numeric limit requirement was inapplicable given the facts of the case.¹⁶⁹ As stated by the Fourth Circuit, FWS is not always required to set a numeric limit in an ITS.¹⁷⁰ FWS is permitted to use a "habitat

¹⁶³ *Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260, 267 (4th Cir. 2018) (quoting *Del. Riverkeeper Network v. Sec'y of the Pa. Dep't of Env'tl. Prot.*, 833 F.3d 360, 368 (3d Cir. 2016)).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 269. Under Section 7 of the Endangered Species Act, FERC must ensure that any action authorized by the agency "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." *Id.* (quoting 16 U.S.C. § 1536(a)(2) (2018)). Thus, whenever a pipeline "may affect listed species or critical habitat, FERC is required to formally consult with FWS." *Id.* (quoting 50 C.F.R. § 402.14(a) (2018)).

¹⁶⁶ *Id.* (quoting 16 U.S.C. § 1536(b)(4) (2018)).

¹⁶⁷ *Id.* The species affected were the: (1) Roanoke Logperch (a fish); (2) Clubshell (a mussel); (3) Rusty Patched Bumble Bee; (4) Madison Cave Isopod (a crustacean); (5) Indian Bat; and (6) Northern Long-Eared Bat. *Id.*

¹⁶⁸ *Id.* at 270. "Take," in this context, means kill, harm, or harass. *Id.* at 266.

¹⁶⁹ *Id.* at 266.

¹⁷⁰ *Id.*

surrogate¹⁷¹ if it can (1) demonstrate a causal link between the species and the delineated habitat; (2) show that setting a numerical limit is not practical; and (3) set a clear standard for determining when incidental take is exceeded.¹⁷² Despite FWS's contention that "there was insufficient time for [it] or ACP to develop reliable survey information regarding certain of the species,"¹⁷³ the Fourth Circuit vacated the ITS, holding that FWS's "vague and unenforceable take limits [were] arbitrary and capricious."¹⁷⁴

Shortly after the Fourth Circuit's decision vacating FWS's 2017 ITS, FERC reinitiated formal consultation with FWS to correct the ITS.¹⁷⁵ Less than three weeks later, FWS issued a new Biological Opinion and ITS.¹⁷⁶ Persistently advocating for the environment, much like the Lorax, environmental groups promptly challenged FWS's new determinations.¹⁷⁷ Again, the Fourth Circuit vacated the Biological Opinion and ITS, concluding (1) that FWS arbitrarily reached its conclusions that the ACP would not jeopardize the rusty patched bumble bee or the clubshell, and (2) that FWS failed to correct the deficiencies the court identified in its previous opinion.¹⁷⁸ The Fourth Circuit stated that it simply could not ignore the fact that "it took FWS *a mere 19 days* to issue the 2018 [Biological Opinion] and ITS after FERC resumed formal consultation with the agency"¹⁷⁹ Elaborating on this point, the court stated that "[i]n fast-tracking its decision, [FWS] appear[ed] to have lost sight of its mandate under the [Endangered Species Act]: 'to protect and conserve endangered and threatened species and their habitats.'"¹⁸⁰

As noted above, FERC conditioned its final approval of the ACP on the NPS granting a right-of-way to cross the Blue Ridge Parkway.¹⁸¹

¹⁷¹ "A habitat surrogate is a way of defining take by the amount of adversely affected habitat rather than by the number of individuals harassed or killed." *Id.* at 271.

¹⁷² *Id.* at 266.

¹⁷³ *Id.* at 273.

¹⁷⁴ *Id.* at 281.

¹⁷⁵ *Defs. of Wildlife v. U.S. Dep't of the Interior*, 931 F.3d 339, 342, 344 (4th Cir. 2019).

¹⁷⁶ *Id.*

¹⁷⁷ *See id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 365 (emphasis added).

¹⁸⁰ *Id.* at 365–66 (quoting *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 651 (2007)).

¹⁸¹ *See supra* text accompanying notes 163–64.

This is because part of the ACP's proposed pathway intersected with the Blue Ridge Parkway, a component of the National Park System that links the Shenandoah National Park in Virginia to the Great Smokey Mountains National Park in North Carolina.¹⁸² "On December 12, 2017, NPS issued a revocable permit granting right-of-way to ACP, subject to a list of terms and conditions."¹⁸³ In the same challenge to FWS's Biological Opinion and ITS, discussed *supra*, environmental groups also argued that NPS lacked the statutory authority to grant such right-of-way and that its grant "violated the statutory mandate that agency decisions not be inconsistent with the Parkway's conservation purpose."¹⁸⁴ For the purposes of this case, the Fourth Circuit assumed that NPS had the statutory authority to grant a right-of-way.¹⁸⁵ More specifically, the court held that it did not decide the issue of whether NPS had the authority because NPS did not make the requisite determination to exercise such authority.¹⁸⁶

Before NPS could properly issue a right-of-way permit to the ACP's developers, it was required to make a threshold determination that granting the right-of-way was "not inconsistent with the use of such lands for parkway purposes and the overall National Park System to which it belongs."¹⁸⁷ In this case, pursuant to NPS's General Management Plan for the Blue Ridge Parkway (which set out the Parkway's own conservation and preservation purpose), the right-of-way permit had to be accompanied by a valid determination by NPS that the ACP was "not inconsistent with the Parkway's scenic value and the public's enjoyment thereof."¹⁸⁸ Although NPS determined that the ACP right-of-way was consistent with the purposes of the Parkway, the court held that its determination was arbitrary and capricious because NPS's explanation merely recited that NPS fulfilled the requisite formalities.¹⁸⁹ The lack of explanation by NPS was troubling to

¹⁸² *Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260, 281–82 (4th Cir. 2018).

¹⁸³ *Id.* at 282.

¹⁸⁴ *Id.* at 266.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 292.

¹⁸⁷ *Id.* (internal quotations omitted). Because the National Park System's "sole mission is conservation," Congress requires any authorization of activities within the National Park System to "be consistent with [NPS's] conservation values and purposes, absent specific and direct legislation to the contrary." *Id.* (citing 54 U.S.C. § 100101(b) (2018)).

¹⁸⁸ *Id.* at 293.

¹⁸⁹ *Id.* at 293–94. The permit stated that "NPS has determined that the proposed use or occupancy of the NPS-administered lands or waters described herein for the operation

the court "given the evidence in the record indicating that the presence of the pipeline [was] inconsistent with and in derogation of the purposes of the Parkway and the Park System."¹⁹⁰

Aside from rejecting the required permits that federal agencies granted the ACP, the Fourth Circuit has also rejected permits awarded by state agencies, which further delayed the project and increased its costs. One such permit was issued by the Virginia Air Pollution and Control Board (the "Board"), which authorized the construction of an ACP compressor station in the historical community of Union Hill.¹⁹¹ The challenge was brought to the Fourth Circuit by citizen groups and environmental organizations after the Board issued a one-page approval of an air pollution permit *on the same day* that the Virginia Department of Environmental Quality ("DEQ") presented its recommendation to the Board.¹⁹² In a lengthy opinion, the Fourth Circuit concluded that the Board's decision to approve the permit was arbitrary and capricious and unsupported by substantial evidence.¹⁹³ One of the key arguments furthered by petitioners was that the Board, in approving the permit in question, failed to even consider an alternative compressor that would nearly eliminate all air pollution from the facility.¹⁹⁴ Because of the history surrounding Union Hill, and the fact that its community is predominately African-American, environmental injustice was at the heart of this case.¹⁹⁵ Accordingly, the Fourth Circuit stated that "environmental justice is not merely a box to be checked, and the Board's failure to consider the disproportionate impact on those closest to the Compressor Station resulted in a flawed analysis."¹⁹⁶

and maintenance of the Project, is consistent with the use of these lands for Parkway purposes" and provided no additional elaboration. *Id.* at 293.

¹⁹⁰ *Id.*

¹⁹¹ *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68 (4th Cir. 2020). Union Hill is a small community in Buckingham County, Virginia, that was founded by formerly enslaved people following the end of the war. See *Virginia Community Rallies Against Pipeline's Compressor Station*, *supra* note 143.

¹⁹² *Friends of Buckingham*, 947 F.3d at 71, 79–80.

¹⁹³ *Id.* at 85.

¹⁹⁴ *Id.* at 82.

¹⁹⁵ *Union Hill Citizens Overpower Unfair Atlantic Coast Pipeline*, SOUTHERN ENVTL. L. CIR. (Jan. 7, 2020), <https://www.southernenvironment.org/news-and-press/press-releases/union-hill-citizens-overpower-unfair-atlantic-coast-pipeline>.

¹⁹⁶ *Friends of Buckingham*, 947 F.3d at 92.

As the above cases illustrate, rushed decision-making by several federal and state agencies granting permits to the developers of the ACP was a contributing factor to the rejection of four permits that were required for project developers even to begin the pipeline's construction. With an objective, third-party forum available for environmental advocates and impacted communities to have their voices heard, natural gas companies cannot simply ignore what they are doing to the environment and the community as the Once-ler did to the Lorax. The cursory and inadequate review of permit applications resulted in significant delays, as construction of the ACP was halted since 2018,¹⁹⁷ and increased the projected cost of the project around thirty percent, from \$5.1 billion to around \$6.5–7 billion.¹⁹⁸ The constant delays, increased costs, and uncertainty about permitting and litigation were the direct reasons why Dominion Energy and Duke Energy abandoned the ACP in July 2020.¹⁹⁹ As the next subsection illustrates, similar results have been obtained by environmentalists challenging permits authorizing the construction of the MVP.

C. The Fourth Circuit Providing a Forum for the Lorax's Challenges Against the Mountain Valley Pipeline

The MVP "is seen by opponents as a particularly egregious example of a project that ignored environmental and community concerns."²⁰⁰ Much like the ACP, the MVP was originally expected to be complete by the end of 2018 at a cost of \$3.5 billion.²⁰¹ Although construction activities for the MVP began in early 2018,²⁰² these activities were quickly halted following two key challenges brought

¹⁹⁷ See Denise Lavoie, *Court Tosses Permit for Atlantic Coast Pipeline Station*, WHSV (Jan. 7, 2020, 1:45 PM), <https://www.wHSV.com/content/news/Court-tosses-permit-for-Atlantic-Coast-Pipeline-station-566782111.html>.

¹⁹⁸ CATHY KUNKEL & LORNE STOCKMAN, *THE VANISHING NEED FOR THE ATLANTIC COAST PIPELINE 1* (2019), https://ieefa.org/wp-content/uploads/2019/01/Atlantic-Coast-Pipeline_January-2019.pdf.

¹⁹⁹ Rankin, *supra* note 140.

²⁰⁰ Olivia Rosane, *FERC Halts Work of Mountain Valley Pipeline*, ECOWATCH (Aug. 6, 2018, 9:28 AM), <https://www.ecowatch.com/mountain-valley-pipeline-construction-halted-2593256634.html>.

²⁰¹ See, e.g., DiSavino & Kelly, *supra* note 19.

²⁰² *Mountain Valley Pipeline (MVP) Project, Virginia*, HYDROCARBONS TECH., <https://www.hydrocarbons-technology.com/projects/mountain-valley-pipeline-mvp-project-virginia> (last visited Nov. 23, 2020) (providing that construction of the MVP commenced in February 2018).

by environmental groups that same year.²⁰³ As a result of the litigation within the Fourth Circuit surrounding MVP permits, which this subsection will analyze more in depth, the projected deadline of the MVP has been pushed back to 2021 and estimated costs have risen by five percent above the initially projected cost, to around \$5.4 billion.²⁰⁴

The proposed route of the MVP spans 303.5 miles, running from West Virginia to Virginia with portions of the pipeline crossing through the Jefferson National Forest and the Weston and Gauley Bridge Turnpike Trail.²⁰⁵ As a natural gas pipeline, NGA and NEPA required FERC to issue the pipeline (1) a Certificate of Public Convenience and Necessity and (2) an EIS, prior to beginning construction.²⁰⁶ Although FERC issued a Certificate and an EIS to the MVP in 2017,²⁰⁷ the MVP was unable to commence construction because it was also required to obtain rights of way and temporary use permits from the Forest Service and the Bureau of Land Management ("BLM") in order to construct and operate the pipeline on the Jefferson National Forest and the Weston and Gauley Bridge Turnpike Trail.²⁰⁸ In December 2017, the BLM and Forest Service issued their respective Records of Decision ("ROD").²⁰⁹ The BLM's ROD granted "a 30 year 50-foot operation right of way and associated temporary use permits across 3.6 miles of the Jefferson National Forest" while the Forest

²⁰³ See DiSavino & Kelly, *supra* note 19 (stating that the Fourth Circuit stopped work of the MVP in June 2018 after a lawsuit brought by the Sierra Club and other plaintiffs). This subsection will analyze the two cases in 2018.

²⁰⁴ *MVP Prepares for Construction Completion*, BUS. WIRE (June 11, 2020, 4:30 PM), <https://www.businesswire.com/news/home/20200611005848/en/MVP-Prepares-Construction-Completion>.

²⁰⁵ *Sierra Club, Inc. v. U.S. Forest Serv.*, tpol, 587–88 (4th Cir. 2018).

²⁰⁶ *Anderson et al.*, *supra* note 10, at 236; see *supra* text accompanying notes 43–46 (discussing the requirement of a Certificate of Public Convenience and Necessity).

²⁰⁷ "On June 23, 2017, FERC issued the Final [EIS] for the MVP project." *Overview: Mountain Valley Pipeline*, *supra* note 111. On October 13, 2017, FERC issued a Certificate of Public Convenience and Necessity for MVP's pipeline project. *Sierra Club, Inc.*, 897 F.3d at 588. This was the same day FERC issued its Certificate of Public Convenience and Necessity for ACP's pipeline project. *Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260, 267 (4th Cir. 2018).

²⁰⁸ *Sierra Club, Inc.*, 897 F.3d at 588. These two agencies had to grant the rights of way and temporary use permits because the Forest Service manages the Jefferson National Forest, and the Department of the Interior delegated its responsibility to issue such permits in situations involving gas pipelines to BLM. *Id.*

²⁰⁹ *Id.* at 589.

Service's ROD ensured that Forest Service would "amend the Jefferson Forest Plan such that the MVP project would be consistent with that plan."²¹⁰

In early 2018, conservation organizations sought review of the BLM and Forest Service RODs, claiming that the federal agencies' decisions violated NEPA, NFMA, and the Mineral Leasing Act ("MLA").²¹¹ The Fourth Circuit granted the organizations' petitions for review.²¹² The court first concluded that the Forest Service acted arbitrarily and capriciously in adopting MVP's sedimentation analysis that was included in FERC's EIS.²¹³ Of particular importance on this point, the court noted that for three months, the Forest Service expressed nothing but skepticism of the Hydrologic Report,²¹⁴ particularly the figures included in the second draft.²¹⁵ Nonetheless, six months after FERC released the EIS, which "incorporated and relied upon the second draft of the Hydrologic Report," the Forest Service issued its ROD, adopting the EIS, while simultaneously providing no discussion on how its concerns with the second draft were alleviated.²¹⁶ The complete lack of any explanation for why the Forest Service abandoned its "steadfast concerns" with MVP's Hydrologic Report led to the court's conclusion that the Forest Service acted arbitrarily and capriciously.²¹⁷

The Fourth Circuit also concluded that the Forest Service acted arbitrarily and capriciously in amending the Jefferson Forest Plan.²¹⁸ Pursuant to the NFMA, when a pipeline project is not consistent with a national forest plan, the Forest Service may still approve the project so long as it amends the national forest plan so that the project will be consistent with the plan as amended.²¹⁹ Under the Forest Service's 2012 Planning Rule, the regulation that was at issue in this portion

²¹⁰ *Id.*

²¹¹ *Id.* at 587, 589.

²¹² *Id.* at 606.

²¹³ *Id.* at 596.

²¹⁴ The Hydrologic Report was the document, prepared by MVP, that assessed the impacts of erosion and sedimentation that would occur as a result of the pipeline's construction and operation in the Jefferson National Forest. *Id.* at 591.

²¹⁵ *Id.* at 591–95.

²¹⁶ *Id.* at 593–94.

²¹⁷ *Id.* at 594–95.

²¹⁸ *Id.* at 603.

²¹⁹ *Id.* at 589 (citing 16 U.S.C. § 1604(i) (2018) and 36 C.F.R. § 219.15(c) (2018)).

of the opinion, the Forest Service may amend a forest plan at any time, so long as the requirements of the 2012 Planning Rule that are directly related to the amendment are applied within the scope and scale of the amendment.²²⁰ In this case, it was undisputed that the MVP, as proposed, was not consistent with certain aspects of the Jefferson Forest Plan.²²¹ Thus, the Forest Service amended the Jefferson Forest Plan because the MVP project could not meet its requirements otherwise.²²² According to the court, the "clear purpose of the amendment [was] to lessen requirements protecting soil and riparian resources so that the pipeline project could meet those requirements."²²³ Because the 2012 Planning Rule requirements for soil, water, and riparian resources were directly related to the purpose of the Jefferson Forest Plan amendment, the Forest Service was "required to ensure that amendments to the soil and riparian standards in the Jefferson Forest Plan w[ould] comply with the NFMA and attendant regulations."²²⁴ The record failed to support a conclusion that the Forest Service fulfilled those requirements, leading the court to conclude that the Forest Service acted arbitrarily and capriciously.²²⁵

Finally, the court held that the BLM violated its obligations under the MLA when it granted the MVP project a 3.6-mile right-of-way across federal land.²²⁶ In order to minimize adverse environmental impacts and the proliferation of separate rights-of-way across federal lands, the MLA provides that the "utilization of rights-of-way in common *shall be required to the extent practical*."²²⁷ In granting the right-of-way, the BLM adopted and incorporated FERC's EIS, which concluded that a potential alternative route for the MVP "*[did] not offer a significant environmental advantage* when compared to the corresponding proposed route."²²⁸ According to the court, the BLM "entirely failed to consider an important aspect of the problem."²²⁹

²²⁰ *Id.* at 600–01 (internal citations omitted).

²²¹ *Id.* at 589.

²²² *Id.* at 603.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.* at 604–05.

²²⁷ *Id.* at 604 (citing 30 U.S.C. § 185(p) (2018)).

²²⁸ *Id.*

²²⁹ *Id.* at 605 (quoting *Def. of Wildlife v. N.C. Dep't of Transp.*, 762 F.3d 374, 396 (4th Cir. 2014)).

Significantly, rather than considering whether an existing right-of-way would be impractical, the BLM favored the MVP's proposed route by rejecting alternatives unless they were substantially better.²³⁰ Had the BLM done so, it would have favored the alternative route.²³¹ For these reasons, the Fourth Circuit vacated the BLM's decision and remanded it for re-consideration in line with the MLA's preference in utilizing existing rights of way.²³² The Fourth Circuit, clearly frustrated with the federal agencies' actions, concluded its opinion as follows:

MVP's proposed project would be the largest pipeline of its kind to cross the Jefferson National Forest. American citizens understandably place their trust in the Forest Service to protect and preserve this country's forests, and they deserve more than silent acquiescence to a pipeline company's justification for upending large swaths of national forestlands. Citizens also trust in the [BLM] to prevent undue degradation to public lands by following the dictates of the MLA.²³³

In addition to crossing the Jefferson National Forest and the Weston and Gauley Bridge Turnpike Trail, the MVP's proposed route also had the pipeline crossing 591 federal bodies of water, including four major rivers.²³⁴ "Because construction of the [MVP] [would] involve the discharge of fill material into federal waters, the [CWA] require[d] [the project's developer to] obtain clearance from the [U.S. Army Corps of Engineers (the "Corps")] before beginning construction."²³⁵ The Corps has established two methods for obtaining a permit to discharge fill material into federal waters:

First, the Corps "can issue individual permits on a case-by-case basis," through a "resource-intensive review" requiring "extensive site-specific research and documentation, promulgation of public notice, opportunity for public comment, consultation with other federal agencies, and a formal analysis justifying the ultimate decision to issue or refuse the permit." Alternatively, "interested parties can try to fit their proposed activity within the scope of an existing general permit," in this case [it was the Clean Water Act Nationwide Permit 12 ("NWP 12")], "which acts as a standing authorization for developers to undertake an entire category of activities deemed to create only minimal environmental impact."²³⁶

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.* at 605–06.

²³⁴ *Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635, 639 (4th Cir. 2018).

²³⁵ *Id.* (citing 33 U.S.C. § 1344(a) (2018)).

²³⁶ *Id.* at 639–40 (internal citations omitted).

MVP's project developers pursued the latter approach and ultimately received clearance from the Corps to discharge fill on July 3, 2018.²³⁷ Shortly after the Fourth Circuit's decision regarding the BLM and Forest Service RODs, discussed *supra*, environmental groups brought another challenge. This challenge asked the Fourth Circuit to set aside the Corps' above-mentioned verification that the MVP could proceed under the terms and conditions of NWP 12, rather than an individual permit.²³⁸ The court agreed with the environmental groups and vacated the verification in its entirety on two separate grounds.²³⁹ First, the court determined that "the Corps lacked statutory authority to substitute its own special condition 'in lieu of' a different special condition imposed by West Virginia as part of its certification of NWP 12."²⁴⁰ Rather than supplementing or revising the conditions in NWP 12, the Corps—in a somewhat expeditious manner—replaced the conditions with its own special condition.²⁴¹ This replacement directly conflicted with the Corps' regulations.²⁴²

Second, the court held that the Corps' verification ignored a requirement of the CWA without any explanation or rationale.²⁴³ Under a special condition of NWP 12, the MVP was required to obtain an individual water quality certification from the West Virginia Department of Environmental Protection ("Department").²⁴⁴ The MVP originally obtained such certification, but after the Sierra Club petitioned the Fourth Circuit to review the individual certification, the Department voluntarily vacated it.²⁴⁵ Instead of issuing a new certification, the Department then waived the requirement that the MVP had to obtain an individual water quality certification.²⁴⁶ While the Department had the authority to waive requirements of NWP 12, its waiver in this case was invalid because it did not result from the

²³⁷ *Id.* at 639, 642.

²³⁸ *Id.* at 639.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.* at 651.

²⁴² *Id.*

²⁴³ *Id.* at 652, 654.

²⁴⁴ *Id.* at 641. This is because the MVP was greater than 36 inches in diameter and was set to cross certain rivers. *Id.* at 651–52.

²⁴⁵ *Id.* at 641.

²⁴⁶ *Id.*

notice-and-comment process required by the CWA.²⁴⁷ Despite the Department's clear violation of the CWA's requirements, the Corps' verification simply stated that "[o]n 1 November 2017, [the Department] waived the requirement for Mountain Valley to obtain an [individualized permit]."²⁴⁸ Thus, without any explanation, rationale, or adversarial process in which opposing views were presented, the Corps plainly determined that a state can waive a condition imposed in a nationwide permit *without* providing public notice and soliciting public comment.²⁴⁹ The court stated that such determination, if upheld, would "constitute a back-door mechanism for a state to circumvent Congress's inten[t]" and lead to an impermissible conclusion that the MVP complied with all terms and conditions of NWP 12.²⁵⁰

These cases demonstrate how federal agencies in the Trump-era made rushed decisions in order to accommodate a proposed pipeline's fast-tracked schedule. These rushed decisions invite environmentalists, who persistently "speak for the trees," to challenge permits in courts such as the Fourth Circuit. While litigation itself inherently results in delays and increased costs, decisions from courts of appeals can exacerbate these consequences while also establishing precedent for environmentalists in the coming years. In the case of the MVP, decisions from the Fourth Circuit turned a project that was supposed to be completed in 2018 at an estimated cost of \$3.5 billion, into an estimated \$5.4 billion project that has yet to be completed.²⁵¹ The next section of this Note will address the changes natural gas pipeline developers and federal agencies must make to minimize these types of problems.

IV. SUGGESTIONS FOR PIPELINE DEVELOPMENT MOVING FORWARD

When speaking about the Fourth Circuit's decisions to reject and vacate ACP/MVP permits required for pipeline construction, D.J.

²⁴⁷ *Id.* at 653–54. Under Section 401(a)(1) of the CWA, each state "shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications." 33 U.S.C. § 1341(a)(1) (2018).

²⁴⁸ *Sierra Club*, 909 F.3d at 652.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 654.

²⁵¹ *See supra* notes 201–04 and accompanying text.

Gerken²⁵² properly noted that "[t]his is an example of what happens when dangerous projects are pushed through based on politics rather than science."²⁵³ This section attempts to provide suggestions for natural gas pipeline developers and federal agencies involved in the permitting process moving forward, advocating for the process as a whole to be more deliberate, intentional, and strategic. This section is broken down into two parts. Part A focuses on pipeline developers, suggesting that serious consideration should be made as to whether a natural gas pipeline should be installed in the first place. Factors needed in this consideration include which federal agencies will be involved, as well as the true impact that the pipeline will have on communities and landowners. Part B focuses on federal agencies, asserting that despite Executive Orders and heated debates, agencies involved in the pipeline permitting process must stay true to their original purpose, follow their statutory guidelines, and be meticulous in their permitting processes.

A. Serious Consideration of Whether a Pipeline Should Be Installed in the First Place

Seventy-seven percent of Americans believe that it is more important for the United States to develop alternative energy sources rather than continue expending fossil fuels.²⁵⁴ At the same time, natural gas companies, such as Dominion Energy and Duke Energy, claim the need for natural gas "is real and the need is now."²⁵⁵ Even if energy companies are right, and the United States—or a particular region therein—is in need of more natural gas, these companies must determine whether the need is outweighed by risks associated with litigation and the detrimental impact a pipeline can have on the environment, landowners, and communities. As the ACP demonstrates, a failure to make these types of considerations can lead to the abandonment of a pipeline project after countless years of planning,

²⁵² D.J. Gerken is an attorney at the Southern Environmental Law Center. *D.J. Gerken*, SOUTHERN ENVTL. L. CTR., <https://www.southernenvironment.org/staff/dj-gerken> (last visited Nov. 23, 2020).

²⁵³ *Id.*

²⁵⁴ Drew DeSilver, *Renewable Energy Is Growing Fast in the U.S., but Fossil Fuels Still Dominate*, PEW RES. CTR. (Jan 15, 2020), <https://www.pewresearch.org/fact-tank/2020/01/15/renewable-energy-is-growing-fast-in-the-u-s-but-fossil-fuels-still-dominate/>.

²⁵⁵ *The Need for the ACP*, *supra* note 111.

litigation, and back-and-forth disputes with landowners and communities.²⁵⁶

Factors that must be heavily considered in the ultimate determination of whether a proposed natural gas pipeline should be pursued are: (1) the federal agencies that will be involved, (2) the feasibility of obtaining permits from those agencies, and (3) whether it is likely that the agencies and pipeline developers will prevail in litigation surrounding the permits at a reasonable cost (in terms of both time and money). Prior to constructing a natural gas pipeline, a project developer must engage in a complex, multiagency process to obtain the necessary permits and certifications required by federal law.²⁵⁷ Invariably, as interstate natural gas pipelines increase in length, the number of federal agencies required to be involved will also increase.²⁵⁸ This can, in turn, heighten litigation risk from the project's inception. The cases discussed in Section III illustrate how, under the NGA, environmentalists advocating against pipelines swiftly bring challenges seeking review of permits when they believe federal agencies have not fully complied with their statutory mandates. Litigation itself is not only costly and time consuming, but a ruling in favor of environmentalists forces the pipeline developer to halt all construction as the agency restarts the permit process.²⁵⁹ Accordingly, as environmentalists act as a watchdog, carefully monitoring each step in the permit process to ensure statutory compliance and bringing a challenge to courts of appeals when they fail to do so, pipeline developers must look at which agencies will be involved and whether those agencies can grant the requisite permits that will withstand judicial scrutiny.²⁶⁰

²⁵⁶ See Cox, *supra* note 152.

²⁵⁷ See *supra* Part II(A).

²⁵⁸ As the cases in Part III of this Note illustrate, when a natural gas pipeline's projected route crosses federal lands, the agencies in charge of such lands are required to grant certain rights-of-way and permits before the pipeline can begin construction. For example, when the ACP was supposed to cross the Appalachian Trail, the project developers had to obtain a right-of-way from the Forest Service. *Cowpasture River Pres. Ass'n v. Forest Serv.*, 911 F.3d 150, 155 (4th Cir. 2018). Furthermore, when the MVP's proposed route crossed 591 federal bodies of water, the CWA required the project's developers to receive clearance from the Corps before any construction could begin. *Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635, 639 (4th Cir. 2018).

²⁵⁹ DiSavino & Kelly, *supra* note 19.

²⁶⁰ Looking at caselaw and secondary sources, pipeline developers can gain an understanding of where past projects went wrong in order to avoid those problems in the future.

Another factor that must be considered by natural gas energy companies is the true impact that pipelines can have on landowners and communities. In 2018, "a mother-daughter pair climbed into trees on their property and stayed there for five weeks to protest the MVP's route through their land."²⁶¹ This is just one of countless examples of passionate opposition from local landowners who, taking matters into their own hands, protest natural gas pipelines going through their own backyards.²⁶² When landowners refuse to cooperate, pipeline developers who do not want to alter the proposed pipeline's route will exercise the power of eminent domain, thereby forcing landowners to give up their property.²⁶³ Eminent domain proceedings may take months in court.²⁶⁴ Commentators also note that natural gas pipelines, such as the ACP and MVP, target low-income communities of color,²⁶⁵ promising that the pipeline will be a "job creator and economic game changer" in order to justify the damage the pipeline

²⁶¹ Casey O'Brien, *Resistance to Southeast Pipelines Gains Momentum*, SIERRA (Aug. 9, 2018), <https://www.sierraclub.org/sierra/resistance-to-mountain-valley-atlantic-coast-pipelines-gains-momentum>.

²⁶² See, e.g., Chapman, *supra* note 50, at 551 ("In a scene illustrative of the human impact of eminent domain seizures, a landowner was described as having stood 'as close as she could to the pipeline's right of way, marked by blue-and-white flagged stakes, and dared the men with chainsaws to keep coming."); Joe Dashiell, *Landowners File New Federal Lawsuit Challenging Mountain Valley Pipeline*, WHSV (Jan. 6, 2020, 1:24 PM), <https://www.wHSV.com/content/news/Landowners-file-new-federal-lawsuit-challenging-Mountain-Valley-Pipeline-566752081.html> (discussing a lawsuit filed by landowners in the path of the Mountain Valley Pipeline); Kelsey Wright, *Community Fights Construction of Mountain Valley Pipeline*, PULITZER CTR. (Apr. 13, 2020), <https://pulitzercenter.org/reporting/community-fights-construction-mountain-valley-pipeline> (providing examples of different ways landowners are protesting pipelines).

²⁶³ Bressler, *supra* note II, at 142 (discussing pipeline developer's power of eminent domain under the NGA).

²⁶⁴ See Lisa Sorg, *Landowners in the Path of Proposed Atlantic Coast Pipeline Look to Federal Judge for Relief*, N.C. POLY WATCH (Mar. 15, 2018), <http://www.ncpolicy-watch.com/2018/03/15/landowners-in-the-path-of-proposed-atlantic-coast-pipeline-look-to-federal-judge-for-relief/>.

²⁶⁵ See O'Brien, *supra* note 261 (noting how environmental racism and injustice are at the heart of decisions of where to locate a pipeline or its compressor station while also describing the effects pipelines have on local communities); *How Pipelines Fuel Climate Injustice*, Climate Reality Project (Oct. 1, 2019, 8:00 AM), <https://climateralityproject.org/blog/how-pipelines-fuel-climate-injustice> ("Low-income households and communities of color are more likely than more affluent and white communities to live in proximity to . . . pipeline infrastructure . . .").

will inevitably cause.²⁶⁶ For example, while Dominion Energy predicted the ACP would only create eighteen jobs directly related to the operation of the pipeline once it was in place, a key argument the company used in communities through which the pipeline would cross was that the pipeline would create upwards of 4,000 jobs in North Carolina.²⁶⁷

Ultimately, communities feel as though they are constantly ignored and "left out of the conversation."²⁶⁸ Much like landowners, the communities then have no choice but to take matters into their own hands, protesting the pipeline in an attempt to be heard.²⁶⁹ Natural gas companies must look at the delays protests and eminent domain proceedings can cause in project development. The root of this consideration should not be made from a business perspective, but from a realization that private property has an intrinsic value to its owners that simply cannot be outweighed by the "need" for energy independence.

B. Federal Agencies Must Stay True to Their Purpose

The cases discussed in Section III demonstrate how federal agencies—facing tight deadlines in line with President Trump's Executive Orders—have neglected to follow statutory mandates when granting permits relating to natural gas pipeline development. The pressures from energy companies, as well as the Trump Administration, have produced flawed permitting processes, which not only invite legal challenges from environmentalists, but also run afoul with many of the agencies' missions.²⁷⁰ For example, the Forest Service's mission is "[t]o sustain the health, diversity, and productivity of the Nation's forests and grasslands to meet the needs of present and future

²⁶⁶ *The ACP: Job Creator and Game Changer*, ATLANTIC COAST PIPELINE (June 28, 2018), <https://atlanticcoastpipeline.com/news/2018/6/28/the-acp-job-creator-and-game-changer.aspx>.

²⁶⁷ Ewing, *supra* note 52, at 130. Local communities also began to question who would be hired for these jobs after Dominion Energy contracted with an out-of-state crew, rather than a local crew, to clear the trees. O'Brien, *supra* note 261.

²⁶⁸ O'Brien, *supra* note 261.

²⁶⁹ See Grant Holub-Moorman & Frank Stasio, *Atlantic Coast Pipe Dreams, Protests and Politics*, WUNC (Dec. 10, 2019), <https://www.wunc.org/post/atlantic-coast-pipe-dreams-protests-and-politics>.

²⁷⁰ See DiSavino & Kelly, *supra* note 19.

generations."²⁷¹ But when environmentalists brought challenges to Forest Service permits, the Fourth Circuit continuously found that the Forest Service "abdicated its responsibilit[ies],"²⁷² betraying the trust Americans have in the Service by allowing developers to "upend[] large swaths of national forestlands."²⁷³ Regardless of who is serving as president, and what their agenda prioritizes, federal agencies involved in interstate natural gas pipeline development must stay true to their original purpose, follow their statutory guidelines, and be meticulous in their permitting processes. A failure to do so turns environmentalists into *de facto* regulators and leaves courts of appeals with no choice but to chastise the federal agency for submitting to political pressure and big money corporations.²⁷⁴

V. CONCLUSION

As this Note illustrates, a priority throughout President Trump's electoral campaign and presidency has been to further American energy independence. Through various Executive Orders, President Trump has sought to remove regulations that, in his view, burdened the natural gas industry by imposing unnecessary roadblocks in the pipeline construction process. However, by removing regulations in an attempt to speed up energy projects, President Trump has inadvertently slowed the process down. Project deadlines are consistently being pushed back and estimated costs continue to skyrocket as energy companies fight to fast-track the development process of natural gas pipelines in line with President Trump's Executive Orders. Not only are energy companies starting to speed up their process for developing natural gas pipelines, but federal agencies, such as the FWS and the Forest Service, are rushing to assist the pipeline industry. In turn, this has resulted in more successful legal challenges by those opposed to pipeline development. Rushed decisions lead to flawed permits, which open the door for environmentalists, acting as the Lorax to "speak for the trees,"²⁷⁵ to challenge the permits in front of an impartial third party, thereby removing politics from the equation and focusing solely on the facts and the law at issue.

²⁷¹ *About the Agency*, U.S. FOREST SERV., <https://www.fs.usda.gov/about-agency> (last visited Nov. 23, 2020).

²⁷² *Cowpasture River Pres. Ass'n v. Forest Serv.*, 911 F.3d 150, 183 (4th Cir. 2018).

²⁷³ *Sierra Club, Inc. v. U.S. Forest Serv.*, 897 F.3d 582, 606 (4th Cir. 2018).

²⁷⁴ See *supra* Parts III(B) and (C).

²⁷⁵ THE LORAX, *supra* note 6.

The ACP and MVP illustrate two examples of this. While environmentalists, landowners, and communities asserted the pipelines were unnecessary and would cause irreparable damage to the environment, the companies in charge of the projects continued pressing forward. Both pipelines were projected to be complete in 2018, but as President Trump's first term is coming to an end, the ACP has been abandoned and the MVP is projected to be completed in 2021. By reviewing the decisions the Fourth Circuit has rendered since 2018, in which the court vacated a total of eight permits needed for natural gas pipeline construction, this Note attempts to advocate for a much-needed shift in pipeline construction, making the process more deliberate, intentional, and strategic. Specifically, natural gas companies must seriously consider whether the purported benefits of a pipeline will outweigh the inevitable burdens and potential impacts surrounding litigation. Additionally, federal agencies must resort to their original purpose, allowing American citizens to trust that they will "speak for the trees" as the Lorax once did.²⁷⁶

²⁷⁶ *Id.*