ADMINISTRATIVE LAW — *CHENERY* AVOIDANCE — FOURTH CIRCUIT VACATES ENVIRONMENTAL APPROVALS FOR THE ATLANTIC COAST PIPELINE. — *Sierra Club v. U.S. Department of the Interior*, 899 F.3d 260 (4th Cir. 2018).

It is a fundamental tenet of administrative law that when a court reviews an agency's reasoning, it may consider only the agency explanation given at the time the decision was made. Known as the *Chenery*[1] doctrine, this rule prohibits a court from relying on an agency's, or its own, post hoc rationale for an agency decision.[2] Recently, in *Sierra Club v. U.S. Department of the Interior*,[3] the Fourth Circuit held that two approvals, one from the Fish and Wildlife Service and one from the National Park Service, given for the 600-mile Atlantic Coast Pipeline (ACP) were arbitrary and capricious under § 706 of the Administrative Procedure Act[4] (APA).[5] The court decided to bypass reversal under the *Chenery* doctrine at a key point in its decision but did not disclose what limit it imposed on the doctrine. The court's enigmatic *Chenery* avoidance in *Sierra Club* creates uncertainty about the Fourth Circuit's conception of the doctrine's scope.

Sierra Club concerned federal authorizations for the ACP, a proposed 600-mile pipeline that would transport natural gas across the Appalachian Mountains from West Virginia to eastern Virginia and North Carolina.[6] The pipeline received approval from the federal agency that regulates natural gas pipelines, the Federal Energy Regulatory Commission (FERC), on October 13, 2017.[7] However, FERC's approval was contingent on the ACP later obtaining independent permits and approvals from other agencies, including the Fish and Wildlife Service and the National Park Service.[8] Fish and Wildlife Service approval was needed because the pipeline could affect endangered species.[9] National Park Service approval was needed because the proposed route tunnels under 0.12 miles of the Blue Ridge Parkway, which is part of the National Park System.[10]

The Fish and Wildlife Service and the National Park Service granted the required authorizations to the ACP on October 16, 2017, and December

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[1] SEC v. Chenery Corp. (*Chenery I*), 318 U.S. 80 (1943).

[2] *Id.* at 94–95; Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1042 (2011).

[3] 899 F.3d 260 (4th Cir. 2018).

[4] 5 U.S.C. §§ 551–559, 701–706 (2012).

[5] *Sierra Club*, 899 F.3d at 266.

[6] *Id.*; Petitioners' Opening Brief at 12–13, *Sierra Club*, 899 F.3d 260 (No. 18-1082).

[7] *Sierra Club*, 899 F.3d at 266–67.

[8] *Id.* at 267.

[9] Response Brief for the Federal Respondents at 6, *Sierra Club*, 899 F.3d 260 (No. 18-1082).

[10] *Id.* at 8–9.

12, 2017, respectively.[11] The Fish and Wildlife Service determined that the pipeline might affect two plant species and six animal species protected by the Endangered Species Act of 1973[12] (ESA),[13] but issued a formal approval, called an Incidental Take Statement, that set "take"[14] limits authorizing the ACP to cause some damage to the six endangered animal species.[15] The National Park Service issued a right-of-way permit that would make the ACP the seventeenth natural gas or petroleum pipeline to cross the parkway.[16] On January 19, 2018, the Petitioners — the Sierra Club, Defenders of Wildlife, and the Virginia Wilderness Committee — challenged the Fish and Wildlife Service's Incidental Take Statement and the National Park Service's right-of-way permit in the Fourth Circuit, which had original jurisdiction.[17]

The Fourth Circuit vacated both agency decisions.[18] Writing for a unanimous panel,[19] Chief Judge Gregory articulated two distinct holdings, one regarding the Incidental Take Statement issued by the Fish and Wildlife Service and one regarding the permit issued by the National Park Service. In the first holding, Chief Judge Gregory concluded that the Fish and Wildlife Service's take limits failed to comply with the ESA and thus were arbitrary and capricious.[20] The Fourth Circuit interpreted § 7 of the ESA as requiring an Incidental Take Statement to "set a 'trigger' that can be monitored and enforced"; if an Incidental Take Statement fails to do so, it is unlawful and runs afoul of § 706(2)(A) of the APA.[21] Chief Judge Gregory explained that to meet the "trigger" requirement, the Incidental Take Statement should either set a numerical limit on the number of individual members of a species that can be harmed or establish a habitat surrogate, which sets a limit based on

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11 *Sierra Club*, 899 F.3d at 267.

12 16 U.S.C. §§ 1531–1544 (2012).

13 Response Brief of Intervenor at 9, *Sierra Club*, 899 F.3d 260 (No. 18-1082). The animal species were: Roanoke Logperch, Clubshell, Rusty Patched Bumble Bee, Madison Cave Isopod, Indiana Bat, and Northern Long-Eared Bat. Petitioners' Opening Brief, *supra* note 6, at 14.

14 The ESA defines "take" as "harass, harm, . . . wound, kill, . . . or . . . attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The Fish and Wildlife Service defines "harm" as "includ[ing] significant habitat modification or degradation where it actually kills or injures wildlife." 50 C.F.R. § 17.3 (2018).

15 *Sierra Club*, 899 F.3d at 269–70; Response Brief of Intervenor, *supra* note 13, at 9.

16 Response Brief for the Federal Respondents, *supra* note 9, at 8–10.

17 *Sierra Club*, 899 F.3d at 266, 270; Response Brief of Intervenor, *supra* note 13, at 3.

18 *Sierra Club*, 899 F.3d at 295.

19 Judge Wynn and Judge Thacker joined the opinion.

20 *Sierra Club*, 899 F.3d at 281. Unlawful agency action is necessarily arbitrary and capricious. *See* Caldwell v. Life Ins. Co. of N. Am., 287 F.3d 1276, 1282 (10th Cir. 2002); Sea-Land Serv., Inc. v. Dep't of Transp., 137 F.3d 640, 646 n.3 (D.C. Cir. 1998).

21 *Sierra Club*, 899 F.3d at 270–71 (quoting Miccosukee Tribe of Indians of Fla. v. United States, 566 F.3d 1257, 1275 (11th Cir. 2009); then citing Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife, Bureau of Land Mgmt., 273 F.3d 1229, 1249 (9th Cir. 2001); and then citing Wild Fish Conservancy v. Salazar, 628 F.3d 513, 531–32 (9th Cir. 2010)); *see* 5 U.S.C. § 706(2)(A) (2012).

"adversely affected habitat rather than by the number of individuals" harmed.[22]

Analyzing each "take" limit for the five contested animal species in turn, the Fourth Circuit determined that each failed to meet some or all of the regulatory criteria for establishing a habitat surrogate.[23] Notably, all five limits were set as a "small percent" or a "majority" of an unknown quantity of each species within a geographic area.[24] The court objected that these limits failed to provide a "clear and enforceable standard"[25] because neither the numerators nor the denominators were defined.[26]

The Fourth Circuit then held that the National Park Service's right-of-way permit was arbitrary and capricious because it failed to explain the pipeline's "consistency with values and purposes of the Blue Ridge Parkway and the overall National Park System."[27] To reach that holding, Chief Judge Gregory began by analyzing whether the National Park Service had authority to grant rights-of-way for gas pipelines. Three provisions were under dispute on this issue: the Mineral Leasing Act,[28] and 16 U.S.C. §§ 460a-3 and 460a-8 of the Blue Ridge Parkway Organic Act.[29] The court did not defer to the National Park Service's interpretation of these statutes because the permit decision did not cite, let alone interpret, two of the statutes under dispute, and because the National Park Service had only briefly mentioned the third without any analysis.[30] Thus, the court interpreted the relevant statutes de novo.[31]

The first statute in dispute, the Mineral Leasing Act, neither granted nor precluded the National Park Service's permit authority since the Act applies to "all lands owned by the United States except lands in the National Park System."[32] The court then turned to the scope of authority that the Blue Ridge Parkway Organic Act conferred to the National Park Service through the almost identically phrased § 460a-3 and § 460a-8.[33] The court used legislative history and the canon against

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[22] *Sierra Club*, 899 F.3d at 271. For example, the sixth species, the Roanoke Logperch, had a numeric take limit: 5 individuals could be injured or killed and 145 could be harmed or harassed. *Id.* at 274–75. This limit went unchallenged. *Id.* at 274.

[23] *Id.* at 274–81.

[24] *Id.* at 272, 275–81.

[25] *Id.* at 275, 279, 281.

[26] *See id.* at 271–72, 275–81.

[27] *Id.* at 294.

[28] 30 U.S.C. § 185 (2012).

[29] *Sierra Club*, 899 F.3d at 285–86.

[30] *Id.* at 286–88.

[31] *Id.*

[32] *Id.* at 288 (quoting 30 U.S.C. § 185(b)); *see also id.* at 288–89.

[33] *Compare* 16 U.S.C. § 460a-3 (2012) ("[T]he Secretary of the Interior may issue revocable licenses or permits for rights-of-way over, across, and upon parkway lands, or for the use of parkway

superfluity to interpret § 460a-8 as applying only to a never-constructed expansion of the Blue Ridge Parkway.[34] The statute, therefore, did not grant the National Park Service authority to issue a right-of-way permit for the ACP.[35] However, the court determined that § 460a-3 conferred authority upon the National Park Service to issue rights-of-way, subject to limitations including consistency with parkway purposes.[36] Although the National Park Service had relied exclusively on § 460a-8 in its permit decision, the court decided that the *Chenery* doctrine did not compel a reversal of the permit because the Agency had "essentially recited the applicable text" of § 460a-3 and "the grounds for invoking § 460a-3 and § 460a-8 are the same."[37]

Ultimately, the court vacated the permit because the National Park Service inadequately explained whether the permit met § 460a-3's requirement for consistency with parkway purposes. Applying the *Chenery* doctrine, Chief Judge Gregory considered only the explanation given by the Agency at the time it issued the permit.[38] Since the National Park Service provided no accompanying explanation for its assertion that the pipeline "is consistent" with parkway purposes, the court concluded that its decision was arbitrary and capricious.[39] The court found "this lack of explanation particularly troubling given the evidence in the record indicating that the presence of the pipeline is inconsistent with and in derogation of the purposes of the Parkway and the [National] Park System."[40] In conclusion, the court vacated the Fish and Wildlife Service's and the National Park Service's ACP approvals.[41]

The Fourth Circuit made an unusual choice to avoid remand under the *Chenery* doctrine when it allowed the National Park Service to rely, post hoc, on § 460a-3, even though the Agency claimed authority only under § 460a-8.[42] Four limits to the *Chenery* doctrine can be culled from case law; while the Fourth Circuit surely applied one of four limits

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lands by the owners or lessees of adjacent lands, for such purposes and under such nondiscriminatory terms, regulations, and conditions as he may determine to be not inconsistent with the use of such lands for parkway purposes."), *with id.* § 460a-8 ("The Secretary of the Interior may issue revocable licenses or permits for rights-of-way over, across, and upon parkway lands, or for the use of parkway lands by the owners or lessees of adjacent lands, or for such purposes and under such terms and conditions as he may determine to be consistent with the use of such lands for parkway purposes.").

[34] *See Sierra Club*, 899 F.3d at 290–91.

[35] *Id.* at 291.

[36] *Id.* at 292.

[37] *Id.* at 291.

[38] *See id.* at 292–93.

[39] *Id.* at 293–94.

[40] *Id.* at 293.

[41] *Id.* at 295.

[42] *See* Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952, 957 (2007) ("[*Chenery*] remains one of the most common grounds for judicial reversal and remand.").

to the *Chenery* doctrine, it failed to explain which one. Testing each limit against *Sierra Club* reveals that, while the court likely applied the fourth limit, its opinion created uncertainty about its interpretation of *Chenery*'s scope more broadly.

The *Chenery* doctrine restricts what reviewing courts can examine when deciding whether agency action withstands the appropriate standard of review.[43] In *Chenery*, the Supreme Court vacated an agency order because the agency had relied upon case law that the Court decided was inapplicable, rather than on an alternative law, namely the Public Utility Holding Act of 1935, which could have justified the order.[44] The Court circumscribed review of agency action to the "grounds upon which the agency acted in exercising its powers."[45] Thus, the doctrine rules out post hoc rationalizations by courts and agency lawyers[46] for why the agency action was legally sustainable.[47] In *Sierra Club*, the National Park Service similarly relied upon an inapplicable law to justify its permit. But interestingly, the court allowed an alternate statute to justify the Agency's action.

The Fourth Circuit likely applied one of four limits on *Chenery*. Considering *Sierra Club* against each limit reveals a number of plausible rationales for the court's conclusion. The first limit provides that *Chenery* does not demand remand to the agency if its rationale is of "less than ideal clarity" but nevertheless correct.[48] As long as the reviewing court determines that "the agency's path may reasonably be discerned," the agency's rationale can stand.[49] Some have characterized this as an exception to *Chenery*,[50] but, properly speaking, it is consistent with relying on only contemporaneous rationales, merely adding a "modicum of judicial benevolence."[51] It is possible that the Fourth Circuit thought that the National Park Service's rationale was unclear but discernable because it "essentially recited the applicable text" of the correct statute and the basis for granting the right-of-way permit was "identical."[52] Ultimately, it seems dubious to characterize an incorrect citation to § 460a-8

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43 Amy R. Motomura, *Rethinking Administrative Law's* Chenery *Doctrine: Lessons from Patent Appeals at the Federal Circuit*, 53 SANTA CLARA L. REV. 817, 825 (2013).

44 *Chenery I*, 318 U.S. 80, 92–95 (1943).

45 *Id.* at 95.

46 Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168–69 (1962); *see also* Magill & Vermeule, *supra* note 2, at 1043–44.

47 Motomura, *supra* note 43, at 824.

48 Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc., 419 U.S. 281, 285–86 (1974); *see* Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp., 503 U.S. 407, 420 (1992).

49 *Bowman*, 419 U.S. at 286.

50 *See, e.g.*, Motomura, *supra* note 43, at 831.

51 Henry J. Friendly, Chenery *Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 DUKE L.J. 199, 218.

52 *Sierra Club*, 899 F.3d at 291.

instead of to § 460a-3 as a lack of clarity, rather than as a mistake, so *Chenery*'s first limit likely did not apply.

A second limit arises when an agency's choice of action is compelled by statute. In this situation, courts do not remand based upon a mistaken agency rationale because the agency lacks discretion to rethink its action.[53] This limit reveals that *Chenery* operates only when the agency has discretion to choose between at least two options. *Sierra Club* does not fall outside the scope of *Chenery* on this basis because the National Park Service's choice of whether to grant the permit was uncompelled.

Applying a third limit, courts avoid *Chenery* when they deem that an agency's mistaken legal reasoning (for taking an uncompelled action) does not implicate the agency's use of discretion.[54] This might happen, for example, when an agency relies upon a mistaken legal rationale for withholding records.[55] The agency may nevertheless employ post hoc rationalizations based on the Privacy Act because this is a law that Congress has not delegated to any agency for interpretation.[56] This limit underscores one of *Chenery*'s primary purposes: avoiding intrusions upon an agency's congressionally bestowed authority to interpret certain statutes.[57] Courts apply this limit to varying degrees. While some use the limit only with laws that the agency does not administer,[58] others seem to grant agencies no discretion over questions of law.[59] This more aggressive use of the third limit is questionable given that *Chenery* itself concerned a mistake of law.[60] Some courts add to the confusion between

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[53] *See, e.g.*, Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1, 554 U.S. 527, 544–45 (2008); Friendly, *supra* note 51, at 210 ("[W]hen agency action is statutorily compelled, it does not matter that the agency which reached the decision required by law did so on a debatable or even a wrong ground, for remand in such a case would be but a useless formality." (citing Milk Transp., Inc. v. ICC, 190 F. Supp. 350 (D. Minn. 1960), *aff'd*, 368 U.S. 5 (1961) (per curiam))).

[54] *See* Margaret B. Kwoka, *Deference,* Chenery*, and FOIA*, 73 MD. L. REV. 1060, 1074–75 (2014); Stack, *supra* note 42, at 1009–10 ("The *Chenery* principle, in other words, attaches to the statutory interpretations that *Chevron* puts in an agency's hands." *Id.* at 1009.).

[55] *See, e.g.*, Louis v. U.S. Dep't of Labor, 419 F.3d 970, 977–78 (9th Cir. 2005).

[56] *Id.*

[57] *See* Stack, *supra* note 42, at 979.

[58] *See id.* at 965–66.

[59] *See, e.g.*, Ark. AFL-CIO v. FCC, 11 F.3d 1430, 1440 (8th Cir. 1993) ("[T]he Supreme Court clearly limited *Chenery* to situations in which the agency failed to make a necessary determination of fact or of policy."); *see also* Sapna Kumar, *The Accidental Agency?*, 65 FLA. L. REV. 229, 270 (2013) ("The Federal Circuit concluded that when the agency decision at issue is a question of law, with no disputed underlying factual issues, the issue is a determination of neither policy nor judgment. The court asserted that in such circumstances, *Chenery* 'not only permits [it] to supply a new legal ground for affirmance, but encourages such a resolution' . . . ." (alteration in original) (quoting *In re* Comiskey, 554 F.3d 967, 975 (Fed. Cir. 2009))); Motomura, *supra* note 43, at 827 & n.39; Stack, *supra* note 42, at 1008 & n.234.

[60] *See* Kumar, *supra* note 59, at 271 & n.297; Motomura, *supra* note 43, at 830 ("[T]hat view seems at odds with the original facts of *Chenery*, since that case involved a legal error by the SEC. Moreover, declining to apply *Chenery* to questions of law is inconsistent with other characterizations of the doctrine by the Supreme Court in dicta." (footnote omitted)). *But see* James D. Ridgway & David S. Ames,

these two possibilities by failing to state whether they consider the law to be under the agency's administration.[61]

Sierra Club does not indicate whether the Fourth Circuit applied this third limit, and if so, how aggressively. The court stated it did not decide whether the Blue Ridge Parkway Organic Act was one that the National Park Service administers.[62] A decision in the negative could have justified the premise that providing a substitute legal explanation under the Act would not intrude upon a domain of discretion reserved for the Agency. Alternatively, the Fourth Circuit may have bypassed *Chenery* because the National Park Service failed to exercise interpretive authority over the Blue Ridge Organic Act.[63] In this case, too, ignoring the National Park Service's mistaken understanding would not "substitute the [court]'s judgment for the agency's."[64] Or perhaps the court aggressively limited *Chenery* to questions of fact and policy. The court's lack of doctrinal explanation obscures whether and how this third limit applied in *Sierra Club*, leaving open the possibility that the Fourth Circuit entertains the more controversial applications of this limit.

Courts employ the "harmless error" exception as a fourth limit on *Chenery* when remand would be futile because there is no uncertainty as to the agency's future resolution.[65] Despite its widespread use, the exception sits uneasily with *Chenery* since it can justify a court supplying a variety of missing legal and factual conclusions under the assumption that the agency would have reached the same ultimate result.[66] The

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Misunderstanding Chenery *and the Problem of Reasons-or-Bases Review*, 68 SYRACUSE L. REV. 303, 304 (2018) ("[*Chenery*] applies only to . . . policy determinations and findings of legislative facts.").

[61] *See, e.g.*, N.C. Comm'n of Indian Affairs v. U.S. Dep't of Labor, 725 F.2d 238, 240 (4th Cir. 1984) (avoiding *Chenery* despite the Department of Labor's mistaken interpretation of the Comprehensive Employment and Training Act of 1973 because the court was "interpreting the scope of a federal statute and this task is not peculiar to an administrative agency" (quoting Milk Transp., Inc. v. ICC, 190 F. Supp. 350, 355 (D. Minn. 1960), *aff'd*, 368 U.S. 5 (1961) (per curiam))).

[62] *Sierra Club*, 899 F.3d at 287.

[63] *See id.* at 288.

[64] *Id.* at 291.

[65] *See, e.g.*, Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 659 (2007); Mass. Trs. of E. Gas & Fuel Assocs. v. United States, 377 U.S. 235, 248 (1964) ("[W]hen a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of decision reached, as in this instance (assuming there was such a mistake), the sought extension of [*Chenery* and its progeny] would not advance the purpose they were intended to serve."); Ngarurih v. Ashcroft, 371 F.3d 182, 190 n.8 (4th Cir. 2004); *see also* Matthew Ginsburg, *"A Nigh Endless Game of Battledore and Shuttlecock": The D.C. Circuit's Misuse of* Chenery *Remands in NLRB Cases*, 86 NEB. L. REV. 595, 613–14 (2008); Patrick J. Glen, "*To Remand, or Not to Remand":* Ventura*'s Ordinary Remand Rule and the Evolving Jurisprudence of Futility*, 10 RICH. J. GLOBAL L. & BUS. 1, 8–9 (2010); *cf.* Cal. Wilderness Coal. v. U.S. Dep't of Energy, 631 F.3d 1072, 1090–91 (9th Cir. 2011); PDK Labs. Inc. v. DEA, 438 F.3d 1184, 1197 (D.C. Cir. 2006).

[66] *E.g.*, Hackett v. Barnhart, 475 F.3d 1166, 1175 (10th Cir. 2007) ("[I]t nevertheless may be appropriate to supply a missing dispositive finding under the rubric of harmless error in the right exceptional circumstance, i.e., where . . . we could confidently say that no reasonable administrative factfinder, following the correct analysis, could have resolved the factual matter in any other way."

exception emanated from *Massachusetts Trustees of Eastern Gas & Fuel Associates v. United States*[67] and was codified in § 706 of the APA.[68] In *Massachusetts Trustees*, the Maritime Commission adopted a sliding-scale rental agreement as part of a post–World War II plan to rehabilitate the private merchant marine.[69] While the Commission had authority to impose such a plan under § 5(b) of the Merchant Marine Act of 1936, it had mistakenly relied on § 709.[70] The Supreme Court decided that it would not advance the purpose of *Chenery* to invalidate agency action "when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of decision reached, as in this instance."[71]

The National Park Service's error in relying on § 460a-8 instead of § 460a-3 similarly had no bearing on procedure or substance because the statutes sport almost identical language. Both sections authorize the National Park Service to grant rights-of-way, albeit in different geographical areas of the park, under conditions that are consistent with parkway purposes.[72] It would therefore be "an idle and useless formality" to invalidate the permit on the basis of such an error because "[t]here is not the slightest uncertainty as to the outcome."[73] The court likely applied this exception in *Sierra Club*, but, without doctrinal exposition, the exception's breadth remains ambiguous.

In sum, the Fourth Circuit had a number of tools at its disposal to limit *Chenery* but failed to disclose which, if any, of these tools it used. This omission raises questions about the technical grounds for the court's choice in *Sierra Club*. Although it seems likely that the Fourth Circuit applied the fourth *Chenery* limit, it nonetheless missed an opportunity to clarify its interpretation of the doctrine. Because the fourth limit sits in tension with the basic purpose of *Chenery*, *Sierra Club* contributes to uncertainty about the scope of the doctrine as a whole.

(quoting Allen v. Barnhart, 357 F.3d 1140, 1145 (10th Cir. 2004))); *see* Bryan C. Bond, Note, *Taking It on the* Chenery*: Should the Principles of* Chenery I *Apply in Social Security Disability Cases?*, 86 NOTRE DAME L. REV. 2157, 2165 (2011); Glen, *supra* note 65, at 54.

[67] 377 U.S. 235.

[68] 5 U.S.C. § 706 (2012); *see also* Craig Smith, Note, *Taking "Due Account" of the APA's Prejudicial-Error Rule*, 96 VA. L. REV. 1727, 1727 (2010).

[69] 377 U.S. at 238.

[70] *Id.* at 245–48.

[71] *Id.* at 248.

[72] *Sierra Club*, 899 F.3d at 290.

[73] NLRB v. Wyman-Gordon Co., 394 U.S. 759, 766 n.6 (1969) (plurality opinion); *see also* Friendly, *supra* note 51, at 220–21.