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# Casenote

## (Not So) Desperate Times Call for (Not So) Desperate Measures: The First Use of Remand Without Vacatur in the Eleventh Circuit<sup>†</sup>

### I. INTRODUCTION

In *Black Warrior Riverkeeper, Inc. v. United States Army Corps of Engineers*,<sup>1</sup> as a matter of first impression for the United States Court of Appeals for the Eleventh Circuit, the court of appeals issued “remand without vacatur.”<sup>2</sup> In civil cases, remand without vacatur applies solely to suits questioning the validity of federal administrative regulations,

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†. The Author would like to thank Professor Kamina Pinder, Mercer University Law School, for her support and assistance during the editing process of this Casenote.

1. 781 F.3d 1271 (11th Cir. 2015).

2. *Id.* at 1292. “Remand without vacatur” refers to remedy used when a court remands an administrative regulation to the trial court for further fact-finding but does not vacate or nullify the regulation until the missing facts or miscalculated data are explained or corrected. *Id.* at 1289.

and courts use this remedy sparingly. Just five circuit courts have applied remand without vacatur, and only the United States Court of Appeals for the District of Columbia has employed the remedy with any frequency.<sup>3</sup> *Black Warrior Riverkeeper* involved two environmental groups alleging the Army Corps of Engineers (the Corps) lacked justification for Nationwide Permit 21 (NWP 21),<sup>4</sup> which allowed surface mining operations in Alabama to discharge material into the Black Warrior River.<sup>5</sup>

In a two-to-one decision, the court remanded but did not vacate the permit, thereby giving the Corps an opportunity to provide additional information and avoiding the possibility of undue economic disruption to the mining companies operating under the permit.<sup>6</sup> This decision allows federal agencies to request a remand without vacatur to allow time for revisions to faulty regulations and permits. While some commentators support remand without vacatur as a means of promoting judicial efficiency, others argue it fails to hold federal agencies accountable because it moderates the repercussions associated with enacting substandard or arbitrary regulations.<sup>7</sup> Remand without vacatur is a needed remedy that applies in cases where there is minimal information

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3. The United States Court of Appeals for the First, Fifth, Ninth, District of Columbia, and Federal Circuits have used remand without vacatur. See, e.g., *Cal. Cmty's Against Toxics v. U.S. Env'tl. Prot. Agency (California Communities)*, 688 F.3d 989 (9th Cir. 2012); *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs (Veterans' Advocates)*, 260 F.3d 1365 (Fed. Cir. 2001); *Cent. Me. Power Co. v. FERC (Maine Power)*, 252 F.3d 34 (1st Cir. 2001); *Cent. & S. W. Servs., Inc. v. U.S. Env'tl. Prot. Agency (Central Services)*, 220 F.3d 683 (5th Cir. 2000); *Kennecott Copper Corp. v. U.S. Env'tl. Prot. Agency (Kennecott)*, 462 F.2d 846 (D.C. Cir. 1972). The United States Court of Appeals for the Third Circuit has indirectly employed remand without vacatur, as a result of the way the holding in *American Iron & Steel Institute v. Environmental Protection Agency* was applied, but the court did not expressly state the phrase "remand without vacatur" in the opinion. 568 F.2d 284 (3d Cir. 1977).

4. Reissuance of Nationwide Permits, 77 Fed. Reg. 10,184 (Dep't of Defense Feb. 21, 2012). The Corps first passed NWP21 entitled "surface coal mining activities" in 1982, to govern surface coal mining (also known as strip mining) operations that discharge dredged or fill materials into waters of the United States. See 47 Fed. Reg. 31,794 (Dep't of Defense July 22, 1982). The Corps has since modified and reissued the permit several times, and the current version of NWP21 contains a new provision prohibiting the destruction of more than half an acre of non-tidal water and no more than 300 linear feet of stream bed. *Black Warrior Riverkeeper*, 781 F.3d at 1276, 1277. NWP 21 consists of two main sections: NWP 21(a), which governs surface mining discharge into waterways that the 2007 version of the permit authorized and grandfathers those operations into the current version, provided certain conditions are met; and NWP 21(b), which governs all surface mining discharge the most recent 2012 reissuance of the permit authorizes. *Id.* at 1277.

5. *Black Warrior Riverkeeper*, 781 F.3d at 1277, 1278.

6. *Id.* at 1291-92.

7. See, e.g., *id.* at 1287-92; see also *supra* note 3 and accompanying text.

to base a decision impacting federal agencies, regulated entities, and the general public.<sup>8</sup>

## II. FACTUAL HISTORY

### A. Background

The Clean Water Act (CWA)<sup>9</sup> authorizes the Corps to issue permits allowing companies to discharge materials into public waters.<sup>10</sup> Before issuing a permit, the Corps must first determine the amount of pollution will not significantly affect the environment.<sup>11</sup> *Black Warrior Riverkeeper* involves one such permit, NWP21, which authorized surface mining companies to release dredge and fill materials into public waters.<sup>12</sup> The Corps revised and renewed NWP21 in 2012, limiting the area of public waters the authorized mining operations could affect.<sup>13</sup> This renewal also grandfathered in existing mining operations, including forty-one mining projects spanning twenty-seven miles of the Black Warrior River watershed in Alabama, to which the new limitations did not apply.<sup>14</sup>

Black Warrior Riverkeeper, Inc. and Defenders of Wildlife (collectively Riverkeeper)<sup>15</sup> are environmentalist groups involved in the preservation of the Black Warrior River waters, including areas of the river downstream from surface mining sites grandfathered into the reauthorized NWP21. Members of Riverkeeper reported the discharges discolored the

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8. See *Black Warrior Riverkeeper*, 781 F.3d at 1287-92.

9. 33 U.S.C. §§1251-1388 (2012). Specifically, 33 U.S.C. §1344(a)-§1344(b) governs the creation of permits for the discharge of dredge and fill material. 33 U.S.C. §§ 1344(a), 1344(b) (2012). More generally, the CWA is a federal regulation for managing the pollution levels within public bodies of water, ensuring the safety of both aquatic ecosystems and the people who use public waters. *Black Warrior Riverkeeper*, 781 F.3d at 1275-76.

10. *Black Warrior Riverkeeper*, 781 F.3d at 1275.

11. *Id.* at 1275-76.

12. *Id.* at 1276. Dredge and fill materials include the materials found in runoff and drainage from the mining site, which may contain “substantial amounts of sediment, salt, and metals.” *Id.*

13. *Id.* at 1277.

14. *Id.* Section (a) of NWP21 allows operations authorized under the 2007 version of the permit to continue to operate under the new permit so long as they comply with the terms of the old version of the permit. 77 Fed. Reg. 10,184. This permission means the operations do not have to decrease their impact zones to comply with the current version of NWP21; rather, the new version of NWP21 requires only that the authorized operations not increase the amount of watershed area affected by their operations. *Id.*

15. For simplicity, this Casenote will emulate the court of appeals by referring to the joint efforts of Black Warrior Riverkeeper, Inc. and Wildlife Defenders collectively as “Riverkeeper.”

water with sediment, negatively affecting the aesthetic, recreational enjoyment, and opportunities to observe aquatic life in the area. Riverkeeper also argued the cloudy appearance of the water causes concern about drinking the water and eating fish caught in it. Based on these reports, Riverkeeper feared the impurities might harm local wildlife and deter the public from using the river for recreation. This issue with polluted water was a particular problem in the Locust Fork of the Black Warrior River—one of the most popular whitewater rafting destinations in Alabama.<sup>16</sup>

To counter these allegations, the Corps noted its compliance with the Administrative Procedure Act (APA),<sup>17</sup> which requires publishing “statements of the general course and method” prior to the enactment of federal administrative regulations, such as the renewal of NWP21.<sup>18</sup> The general statement accompanying NWP21 explained the Corps’ rationale and concluded the cumulative environmental impact from surface mining operations would not exceed CWA limits.<sup>19</sup> Furthermore, the Corps determined that NWP21 would not have a significant effect on the environment under the provisions of the National Environmental Policy Act (NEPA),<sup>20</sup> and, therefore, the Corps need not provide a separate NEPA environmental impact statement.<sup>21</sup>

Riverkeeper disagreed with the Corps, noting several alleged deficiencies in the regulation. It asserted the most notable flaw in the general statement is a miscalculation of the amount of watershed area affected by the surface mining operations authorized by the permit. The Corps’ calculations for the general statement assumed all operations would affect no more than a half-acre portion of the river or three

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16. *Black Warrior Riverkeeper*, 781 F.3d at 1277-78, 1280.

17. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified in scattered sections of 5 U.S.C.). The APA is a federal law intended to manage the way federal regulations are examined and enacted while avoiding “procedural strait jackets” that would hinder federal agencies trying to fulfill the tasks Congress assigns. *Kennecott*, 462 F.2d at 849.

18. 5 U.S.C. § 552 (a)(1) (2012). In addition to the general statement, the APA also requires agencies to give the public an opportunity to respond to proposed regulations prior to enactment. *Id.* In *Black Warrior Riverkeeper*, the Corps argued the general statement issued with NWP21 demonstrated all potential environmental effects had been considered and none of the effects were severe enough to preclude the renewal of the permit. 781 F.3d at 1277.

19. *Black Warrior Riverkeeper*, 781 F.3d at 1277.

20. Pub. L. No. 91-190, 83 Stat. 852 (codified at 42 U.S.C. §§ 4321-4370(h) (2012)). Among other things, NEPA requires all operations with a potentially significant impact on the environment, such as the surface mining operations in the present case, to provide an “Environmental Impact Statement” detailing the anticipated effects of the operations. *Black Warrior Riverkeeper*, 781 F.3d at 1277.

21. *Black Warrior Riverkeeper*, 781 F.3d at 1277.

hundred feet of streambed. This calculation did not account for the reauthorized permits grandfathered in under NWP21(a). Approximately seventy reauthorized mining operations would affect more than the half-acre calculated in the report, and thus the amount of affected area would be greater than the area reported in the Corps' general statement.<sup>22</sup>

### B. Procedural History

On November 25, 2013, Riverkeeper filed suit against the Corps in the United States District Court for the Northern District of Alabama. Riverkeeper aimed to block the reauthorizations granted under NWP21(a) and thereby avoid further alleged discharge and environmental damage.<sup>23</sup> The complaint raised four claims: (1) the permit provides for an unlawful ten-year permit term because it grandfathered in previous operations; (2) the Corps' analysis of the impact of the permit was arbitrary and capricious; (3) the Corps' reissuance of the disputed permit was arbitrary and capricious; and (4) "the Corps' Finding of No Significant Impact under NEPA was arbitrary and capricious."<sup>24</sup> After filing the complaint, Riverkeeper moved for a preliminary injunction to prevent further reauthorizations under NWP21. It also unsuccessfully moved for summary judgment against the Corps.<sup>25</sup>

The Alabama Coal Association and several mining companies (Intervenors)<sup>26</sup> operating under NWP21 joined the action as intervenors, citing the harm an injunction would cause to their mining operations. The Corps filed a cross-motion for summary judgment, claiming the case failed on the merits. Soon thereafter, the Intervenors filed a motion to dismiss, claiming that (1) the environmentalist groups had no standing; (2) the action was barred by the doctrine of laches; and (3) the action against the Corps failed on the merits.<sup>27</sup>

The district court concluded that Riverkeeper had standing but laches barred the claims because the groups did not file suit in a timely manner. Further, the district court concluded the Corps acted neither arbitrarily nor capriciously in reauthorizing NWP21. Thus, the claim

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22. *Id.* at 1278. The Corps failed to account for the environmental impact of approximately seventy mining operations that operated under previous versions of NWP21. *Id.* at 1293.

23. *Id.* at 1278.

24. *Id.* Riverkeeper later voluntarily dismissed the claim that the Corps' issuance of NWP21 reauthorizations in the Black Warrior River watershed was arbitrary and capricious, deciding to avoid challenging the reauthorizations directly. *Id.*

25. *Id.*

26. The mining companies were MS & R Equipment Co.; Reed Minerals, Inc.; Twin Pines, LLC; and Walter Minerals, Inc. *Id.* at 1278 n.3.

27. *Id.* at 1278-79.

would have failed on the merits if laches did not bar the claims. Therefore, the district court granted summary judgment to the Corps.<sup>28</sup> Riverkeeper appealed, and in a case of first impression for the Eleventh Circuit, the court remanded without vacatur.<sup>29</sup> On October 20, 2015, approximately seven months after the remand without vacatur, the district court reviewed the case based on the updated general statement and issued summary judgment in favor of the Corps, leaving NWP21 in place.<sup>30</sup>

### III. LEGAL HISTORY

#### A. *Origin and Rationale of Remand Without Vacatur*

Remand without vacatur originated in the District of Columbia Circuit in the 1970s with *Kennecott Copper Corp. v. Environmental Protection Agency*,<sup>31</sup> when the court reasoned in that the general statement mandated in the APA might not include enough data and explanation for a court to fully understand and judge the reasonableness of a federal regulation.<sup>32</sup> The court sought a solution that would avoid placing an undue burden on agencies while holding them accountable for the rationale behind their regulations.<sup>33</sup> The court reasoned that remanding the regulation to a lower court without vacating the current version would allow the agency to expound upon the rationale behind the existing regulation, thereby avoiding the widespread effects of a shutdown of the mining companies operating under the regulation.<sup>34</sup> This avoidance prevented any undue disruption if the issue with the regulation could be equitably remedied.<sup>35</sup> The court specified that the explanation must be completed with “all reasonable expedition” to prevent the agency from stalling for an unreasonable amount of time if it does not actually have any justification for its regulation.<sup>36</sup>

There are two general scenarios in which remand without vacatur is applied: (1) where the federal regulation is “arbitrary and capricious” and the agency relied on either no factual foundation or an incorrect

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28. *Id.*

29. *Id.* at 1275, 1291.

30. *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs (Black Warrior II)*, No. 2:13-CV-02136-WMA, 2015 U.S. Dist. LEXIS 142261 (N.D. Ala. Oct. 20, 2015).

31. 462 F.2d 846 (D.C. Cir. 1972).

32. *Id.* at 850.

33. *Id.* at 848-49, 850-51.

34. *Id.* at 850-51.

35. *Id.* at 850.

36. *Id.*

factual foundation in deciding to enact the regulation; and (2) where there is no proper explanation of how the agency's decision was reached.<sup>37</sup> In determining whether to remand with or without vacatur, courts consider the significance of the missing data or explanation and the potential disruptive consequences of vacating the regulation.<sup>38</sup> If the alleged error is significant, then courts vacate the regulation and require the agency to either leave the regulation void or begin work on a new version.<sup>39</sup> Alternatively, if additional data or explanation might easily remedy the inadequacy, then remand without vacatur allows the regulation to be quickly rewritten or expounded upon.<sup>40</sup> This remedy promotes judicial efficiency and avoids disrupting the agency and entities operating under its regulations.<sup>41</sup>

*Kennecott* provides an example of remand without vacatur in instances of an allegedly arbitrary and capricious regulation. In *Kennecott*, the Kennecott Copper Corporation (Kennecott) claimed that an Environmental Protection Agency (EPA) regulation, limiting the amount of sulfur oxides a company could emit into the air, was unreasonable and unsupported by data.<sup>42</sup> The D.C. Circuit held that remand without vacatur was proper to allow the EPA to present the data it used in setting the limit on emissions and thereby demonstrate the regulation was not arbitrary and capricious but valid and based upon scientific research.<sup>43</sup>

The other instance in which courts utilize remand without vacatur is demonstrated by *International Union, United Mine Workers v. Federal Mines Safety & Health Administration*,<sup>44</sup> where the issue with the regulation was not a lack of supporting data but rather a failure to explain the logic behind the regulation.<sup>45</sup> The regulation in question was an administrative provision permitting an exception to the usual methods of ventilating a mine.<sup>46</sup> The D.C. Circuit held that the author of the order erroneously failed to properly explain his reasoning.<sup>47</sup> The court reasoned that a poor explanation of policy was not erroneous

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37. See *Int'l Union, United Mine Workers of Am. v. Fed. Mine Safety & Health Admin. (Int'l Union)*, 920 F.2d 960, 964, 966 (D.C. Cir. 1990).

38. See *id.* at 964-66, 967; *Kennecott*, 462 F.2d at 848-50.

39. See *Int'l Union*, 920 F.2d at 967.

40. See *id.*

41. *Kennecott*, 462 F.2d at 849-50.

42. *Id.* at 846-47.

43. *Id.* at 851.

44. 920 F.2d 960 (D.C. Cir. 1990).

45. *Id.* at 964, 966.

46. *Id.* at 961.

47. *Id.* at 965.



enough to require the immediate vacatur of the regulation, which would derail the mining operation and affect the company and all its employees.<sup>48</sup> Thus, the court remanded the regulation, giving the agency an opportunity to better explain the reasoning behind the regulatory decisions.<sup>49</sup>

### B. Propagation of Remand Without Vacatur

While the D.C. Circuit was the first to utilize remand without vacatur in civil litigation, the United States Court of Appeals for the First Circuit,<sup>50</sup> Fifth Circuit,<sup>51</sup> Ninth Circuit,<sup>52</sup> and Federal Circuit<sup>53</sup> have now followed suit and applied the remedy in a few civil cases.<sup>54</sup> The United States Court of Appeals for the Third Circuit has also discussed the use of remand without vacatur, but it has never expressly ordered it.<sup>55</sup> The Eleventh Circuit previously considered remand without vacatur in 2008, when mining companies requested a holding of remand without vacatur in *Sierra Club v. Flowers*.<sup>56</sup>

*Sierra Club* involved circumstances similar to those in *Black Warrior Riverkeeper*. *Sierra Club* challenged a Corps mining permit allowing the discharge of dredge and fill materials into waterways, alleging it was arbitrary and capricious. The permit allowed limestone mining, and the runoff associated with it, in an area between the Everglades National Park and Miami, Florida. *Sierra Club* asserted the Corps failed to

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48. *Id.* at 965, 967.

49. *Id.* at 964-65, 966, 967.

50. See *Maine Power*, 252 F.3d at 34 (holding that FERC was required to provide some explanation on why it was not persuaded by utilities' efforts to discredit the need for substantial charge enacted by a new FERC regulation).

51. See *Central Services*, 220 F.3d at 683 (remanding but not vacating the EPA's rule concerning use and disposal of polychlorinated biphenyls).

52. See *California Communities*, 688 F.3d at 989 (holding that remand without vacatur would prevent undue delay in the construction of a new power plant—where vacation would halt construction—while the EPA amended its regulation).

53. See *Veterans' Advocates*, 260 F.3d at 1365 (remanding without vacating to allow time for clarification and justification of a regulation that restricted the award of dependency and indemnity compensation benefits to survivors of deceased veterans).

54. See *California Communities*, 688 F.3d at 989; *Veterans' Advocates*, 260 F.3d at 1365; *Maine Power*, 252 F.3d at 34; *Central Services, Inc.* 220 F.3d at 683.

55. *Council Tree Comm'n, Inc. v. Fed. Comm'n Comm'n*, 619 F.3d 235, 238 (3d Cir. 2010). This case involved allegations that Federal Communications Commission orders, modifying rules governing small wireless telephone service providers' participation in auctions of electromagnetic spectrum, were arbitrary and capricious and should thus be vacated. *Id.* at 238. The court of appeals held that the regulation was so deficient that it must be vacated rather than remanded without vacatur. *Id.* at 258-59.

56. *Sierra Club v. Flowers* (*Sierra Club I*), 526 F.3d 1353, 1359-60, 1369 (11th Cir. 2008).

gather sufficient information prior to issuing the permit, and its general statement did not adequately address potential harm to wildlife and the public.<sup>57</sup> The district court granted summary judgment to Sierra Club, and the Corps and permittees appealed.<sup>58</sup> The permittees hoped remand without vacatur would allow the Corps time to justify the permit.<sup>59</sup>

Ultimately, the court of appeals reasoned the Corps' general statement lacked adequate justification for issuing a permit that allowed dredge and fill runoff in that watershed area, particularly with Miami's need for drinking water and the sensitive Everglades National Park nearby.<sup>60</sup> The court of appeals affirmed the district court decision, agreeing the disparity between the claimed minimal environmental harm and the actual potential for significantly greater harm to the wildlife and the public was too great to give the Corps more time to amend its data.<sup>61</sup> The court's rejection of remand without vacatur in *Sierra Club* left the possibility of remand without vacatur unsettled in the Eleventh Circuit until years later, when the environmentalist groups appealed in *Black Warrior Riverkeeper*.

#### IV. COURT'S RATIONALE

##### A. *The Majority*

The court faced three main issues: first, whether Riverkeeper had standing to bring the suit; second, whether the motion should be barred by laches; and third, whether Riverkeepers' claims should succeed on the merits.<sup>62</sup>

First, the Eleventh Circuit affirmed the district court's decision that Riverkeeper had proper standing.<sup>63</sup> To have standing, Riverkeeper needed to satisfy two main elements: (1) the groups or its members have been harmed in some tangible way and (2) the Corps renewal of NWP21 caused that harm.<sup>64</sup> A "plaintiff may show injury-in-fact by attesting that he uses, or would use more frequently, an area affected by the

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57. *Id.* at 1353, 1356, 1357, 1359.

58. *Sierra Club v. Van Antwerp (Sierra Club II)*, 362 F. App'x 100 (11th Cir. 2010).

59. *See Sierra Club I*, 526 F.3d at 1353-54.

60. *Sierra Club II*, 362 F. App'x at 102. Note, this was this case's second appearance in the court of appeals. *Id.* at 103-04. The Eleventh Circuit previously remanded it due to the trial court's improper analysis of the Corps' compliance with federal regulations. *Sierra Club I*, 526 F.3d at 1353-54. This appeal followed. *Sierra Club II*, 362 F. App'x 100.

61. *Sierra Club II*, 362 F. App'x at 102.

62. *Black Warrior Riverkeeper*, 781 F.3d at 1279, 1283, 1287.

63. *Id.* at 1283.

64. *Id.* at 1280.

alleged violations and that his aesthetic or recreational interests in the area have been harmed."<sup>65</sup> Furthermore, plaintiffs may meet the minimal threshold for causation in environmental pollution cases by showing a defendant discharged a pollutant that causes the same type of damage that presently occurs. The members of Riverkeeper's statements noting their aversion to using the discolored river recreationally demonstrated the members suffered recreational harm caused by the mining operations' discharge allowed by NWP21.<sup>66</sup> Since the surface mining operations discharged sediment and fill materials into the water, Riverkeeper also satisfied the causation requirement for standing.<sup>67</sup>

Next, the court considered whether laches should bar the claims against the Corps.<sup>68</sup> The district court reasoned the nine-to-ten-month delay in this case was "inexcusable."<sup>69</sup> It reasoned that, since Riverkeeper was challenging the renewed NWP21, Riverkeeper should have filed suit almost immediately upon the publication of the regulation's revisions.<sup>70</sup> The district court found the delay caused undue prejudice against Intervenor through expenditures made based on expectation of reauthorization under NWP21.<sup>71</sup>

The Eleventh Circuit held that the district court abused its discretion in finding that laches barred the action.<sup>72</sup> The court of appeals reasoned that Riverkeeper required time to show the injury-in-fact required for standing in court.<sup>73</sup> Accounting for Riverkeeper's need to properly gather evidence of damages, the filing delay was a few months at most, which the court deemed too narrow a window to justify a laches defense.<sup>74</sup> Additionally, the court held that the Intervenor failed to provide adequate proof of damages as the record showed only a general damage, not specific damages due to Riverkeeper's delay in filing suit.<sup>75</sup> Thus, the Eleventh Circuit held that laches did not bar the action.<sup>76</sup>

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65. *Id.* (internal quotations omitted)(quoting *Sierra Club v. Tenn. Valley Auth.*, 430 F.3d 1337, 1344 (11th Cir. 2005)).

66. *Id.*

67. *Id.* at 1281, 1283.

68. *Id.* at 1283.

69. *Id.*

70. *Id.* at 1284, 1285.

71. *Id.* at 1283.

72. *Id.*

73. *Id.* at 1284.

74. *Id.* at 1285 (stating the laches defense is most commonly reserved for delays of a year or more, rather than months).

75. *Id.* at 1286.

76. *Id.* at 1287.

After answering the two threshold questions, the court next turned to the merits of the case: whether the Corps' renewal of NWP21 was arbitrary and capricious.<sup>77</sup> Riverkeeper argued it was arbitrary and capricious for the Corps to conclude mining operations must limit discharge to avoid significant environmental harm in paragraph (b) of NWP21, but then neglect to apply those limitations to organizations covered by paragraph (a) of the same permit.<sup>78</sup> The Corps argued its conclusions were appropriate because the finding that there would be no significant environmental impact was based on the checks and balances of NWP21 as a whole, not just the new mining operations authorized by paragraph (b) of the regulation.<sup>79</sup>

Under the APA, a court must vacate any regulation that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>80</sup> In this case, the Eleventh Circuit reasoned the Corps must prove it conducted a thorough analysis of the environmental consequences of revising and renewing NWP21 to satisfy the APA standards.<sup>81</sup> However, the court held there was not enough information from the record to determine whether the Corps' findings were arbitrary and capricious under the APA standard.<sup>82</sup>

The court noted the Corps miscalculated the acreage of water affected by discharge permitted by NWP21.<sup>83</sup> The Corps admitted to the miscalculation on the eve of oral arguments, when it expressly admitted it "did not take into account that activities re-verified under paragraph (a) could impact more than a half-acre of waters of the United States."<sup>84</sup> The Corps subsequently conceded that the factual calculations were an "integral component" of its impact analysis for the regulation.<sup>85</sup> However, the Corps maintained that the other provisions within NWP21 set up a system of checks and balances for mitigation of any pollution that renders the miscalculation of acreage "harmless" in the grand scheme of NWP21's environmental impact.<sup>86</sup>

The Eleventh Circuit reasoned that, if the case were remanded, the Corps was just as likely to find the miscalculations in the initial impact report invalidated the decision to renew NWP21 as it was to find the

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77. *Id.*

78. *Id.* at 1288.

79. *Id.*

80. *Id.* (quoting 5 U.S.C. § 706 (2012)).

81. *Id.* at 1291.

82. *Id.* at 1289.

83. *Id.* at 1288.

84. *Id.*

85. *Id.* at 1289.

86. *Id.* at 1288.

miscalculations were insignificant and easily curable.<sup>87</sup> On the whole, the court explained the miscalculation did not inherently undermine the entirety of NWP21 to such an extent that the court should vacate the regulation outright.<sup>88</sup> Remand without vacatur provided an option for a moderate holding. The court considered whether that remedy would be appropriate for *Black Warrior Riverkeeper*, despite the Eleventh Circuit never using it in previous cases.<sup>89</sup>

The court recognized in the context of *Black Warrior Riverkeeper* remand without vacatur is undeniably a form of equitable relief.<sup>90</sup> The court therefore asserted its equitable powers by establishing remand without vacatur as a valid remedy in the Eleventh Circuit.<sup>91</sup> Following the reasoning of its sister courts,<sup>92</sup> the Eleventh Circuit concluded the APA guidelines permit remand without vacatur.<sup>93</sup> Therefore, the court analyzed whether the present case warranted remand without vacatur, rather than total vacation of NWP21.<sup>94</sup>

The Eleventh Circuit examined the potential impact vacating the regulation would cause in the Alabama mining industry and the potential consequences of continued environmental damage and lessened recreational use of the Black Warrior River.<sup>95</sup> *Riverkeeper* argued the damage to the mining industry should be irrelevant to the analysis of the regulation and the court should only consider the environmental impact.<sup>96</sup> However, the court disagreed, noting vacatur of the regulation would halt most of the surface mining operations in Alabama for an error in NWP21 that might be inconsequential.<sup>97</sup> Thus, the court followed the reasoning of the Ninth Circuit in cases with potentially "economically disastrous" consequences, and, even though there was no conclusive evidence in the record that vacating the regulation would be unreasonably disruptive, the court inferred the possible negative impact.<sup>98</sup>

The Eleventh Circuit reasoned the "barren" record made it nearly impossible to determine whether the miscalculations in NWP21 were

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87. *Id.* at 1289.

88. *Id.*

89. *Id.* at 1289-90.

90. *Id.* at 1290.

91. *Id.*

92. *Id.* at 1289-90; *See also supra* note 3 and accompanying text.

93. *Black Warrior Riverkeeper*, 781 F.3d at 1289-90.

94. *Id.* at 1290-91.

95. *Id.* at 1290.

96. *Id.*

97. *Id.*

98. *Id.* at 1290-91.

egregious enough to warrant voiding the permit entirely.<sup>99</sup> It declared the district court was in a better position to pursue and evaluate the essential facts and calculations needed to balance the equities.<sup>100</sup> Thus, in a two-to-one decision, the Eleventh Circuit deemed appropriate and implemented remand without vacatur for the first time in a civil case.<sup>101</sup>

The court of appeals remanded with instructions to ensure that the district court give adequate attention to the contested points.<sup>102</sup> The court of appeals instructed the Corps to thoroughly reevaluate the data it provided to justify the renewal of NWP21 and amend the calculations regarding the total acreage affected to account for the operations authorized by NWP21 because they were grandfathered in, which impacted more than half an acre each.<sup>103</sup> Additionally, the court ordered the Corps to provide the information as soon as reasonably possible.<sup>104</sup>

### B. *The Dissent*

Judge Amy Totenberg<sup>105</sup> filed a separate opinion, concurring in part and dissenting in part.<sup>106</sup> She concurred with the majority on the issues of standing and laches, but she disagreed that remand without vacatur was the best remedy based on the limited information in the record.<sup>107</sup> While the majority held there was not enough evidence to discern if the Corps' impact report was erroneous enough to completely vacate NWP21,<sup>108</sup> Judge Totenberg reasoned that the admitted miscalculations in the Corps' general statement were evidence enough of the Corps' failure to justify NWP21.<sup>109</sup> Specifically, she noted that, under the CWA, the Corps must evaluate environmental impacts and quantify

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99. *Id.* at 1291.

100. *Id.*

101. *Id.* at 1289, 1291-92.

102. *Id.* at 1291.

103. *Id.*

104. *Id.* at 1291-92. The court of appeals suggested the Corps be given, at most, one year to compile an updated report justifying NWP21. *Id.*

105. Judge Amy Totenberg is a United States District Judge for the Northern District of Georgia, sitting by designation for this appeal. *Id.* at 1292; *see also* Ga. Aquarium, Inc. v. Pritzker, No. 1:13-CV-3241-AT, 2015 U.S. Dist. LEXIS 133566, at \*151 (N.D. Ga. Sept. 28, 2015) (granting summary judgment to a regulatory agency and environmentalist intervenors who challenged the validity of an agency's denial of permit to import wildlife, based on a lack of data regarding the impact of such importation).

106. *Black Warrior Riverkeeper*, 781 F.3d at 1292-94 (Totenberg, J., dissenting).

107. *Id.* at 1292.

108. *Id.* at 1289 (majority opinion).

109. *Id.* at 1292, 1293 (Totenberg, J., dissenting).

possible damages to the environment *before* it issues any general permit.<sup>110</sup> By its own admission, the Corps did not properly calculate the affected area of watershed, and Judge Totenberg asserted that the miscalculation was more than a simple math error, but rather a fundamental flaw in the impact statement the Corps issued.<sup>111</sup> She reasoned the Corps could not possibly take into account the actual impact of the permitted mining operations if it was reviewing impact based on erroneous data.<sup>112</sup>

Furthermore, Judge Totenberg noted the supplemental document accompanying reissued NWP21 discusses the minimal environmental impact the permit will have based on the new restrictions imposed on new projects.<sup>113</sup> However, these restrictions have no impact on projects that are grandfathered into an authorization, making the Corps' failure to account for existing projects even more egregious because those projects will affect the greatest watershed area.<sup>114</sup> To Judge Totenberg, the Corps issuance of NWP21 based on a "faulty minimal impacts analysis" violated the CWA, and therefore, NWP21 should be vacated as "arbitrary, capricious, and unlawful."<sup>115</sup>

## V. IMPLICATIONS

### A. *Application of Remand Without Vacatur in the Eleventh Circuit*

A case of first impression, *Black Warrior Riverkeeper* establishes remand without vacatur as a valid remedy under the APA for future cases in the Eleventh Circuit. By determining that remand without vacatur is an equitable remedy falling within the reach of the APA, the Eleventh Circuit settles the question of whether the remedy is permitted within the circuit. Thus, in the future, the court may move faster to the discussion of whether the remedy applies, rather than debating its general validity.<sup>116</sup>

While in the instant case the regulation in question involved a need to preserve environmental interests or natural resources, remand without vacatur may be applied to litigation involving all administrative

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110. *Id.* at 1293.

111. *Id.* at 1294.

112. *Id.* Specifically, the Corps failed to account for the environmental impact of approximately seventy mining operations that operated under previous versions of NWP21. *Id.* at 1293.

113. *Id.*

114. *Id.* at 1294.

115. *Id.*

116. *Id.* at 1288-92 (majority opinion).

agencies and their regulations.<sup>117</sup> By using remand without vacatur in *Black Warrior Riverkeeper*, the court demonstrates there is a moderate remedy for those seeking to challenge the reasonableness of federal regulations in the Eleventh Circuit.<sup>118</sup>

### B. Possible Negative Ramifications of Applying Remand Without Vacatur

Now that courts have more commonly applied remand without vacatur, many federal agencies ask specifically for this more lenient remedy when appealing cases.<sup>119</sup> This tendency leads to the possibility of agencies becoming less attentive to the details of impact reports and other data required by the APA—or even ignoring such data entirely—because they are relying on remand without vacatur, which allows them time to fix any exposed deficiencies.<sup>120</sup> Such potential for abuse of the remedy highlights the necessity for courts only to apply remand without vacatur in cases where agencies demonstrate a genuine good faith effort to produce a regulation based on sound data. In an effort to create a stricter bright line rule for applying remand without vacatur, in *Council Tree Communications, Inc. v. Federal Communications Commission*,<sup>121</sup> the Third Circuit declined to apply the remedy.<sup>122</sup> The court held that the remedy should only be used in cases of minor mistakes, to avoid great industrial or economic disruption.<sup>123</sup> Perhaps this worry—that remand without vacatur will disincentivize federal agencies from thoroughly vetting the data backing regulations—is a policy reason behind why some circuit courts have not used the remedy. It might also explain why those circuits that have issued remand without vacatur tend to do so sparingly.<sup>124</sup>

### C. Positive Impact of Applying this Moderate Remedy

Remand without vacatur provides a solution that promotes two major policy interests: economic stability and efficiency. By establishing this

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117. *Id.* at 1288; see also *supra* note 3.

118. *Black Warrior Riverkeeper*, 781 F.3d at 1289-90.

119. *Council Tree*, 619 F.3d at 246; see also *Sierra Club I*, 526 F.3d at 1364-70 (Kravitch, J., dissenting).

120. See *Black Warrior Riverkeeper*, 781 F.3d at 1292 (Totenberg, J., dissenting); *Sierra Club I*, 526 F.3d at 369 (Kravitch, J., dissenting).

121. 619 F.3d 235, 258 (3d Cir. 2010).

122. *Id.* at 258.

123. *Id.*

124. See generally *supra* note 3 and accompanying text. The circuit courts utilizing remand without vacatur in civil cases have done so only once or twice, except the D.C. Circuit, which has used it a few dozen times. See, e.g., *Kennecott*, 462 F.2d 846.



new remedial option, the Eleventh Circuit follows the logic of the Ninth Circuit in recognizing that, in certain circumstances, vacating a regulation may have major economic repercussions.<sup>125</sup> Remand without vacatur provides the administrative agency some time to justify or make changes and clarifications to a regulation, rather than leave a community in need of a regulation while the entire process begins again from scratch. This remedy holds agencies accountable for the regulations they impose on the public, but it also provides a level of economic stability when such regulations are closely related to economic interests.

*Black Warrior Riverkeeper* demonstrates the benefits of a lenient outcome for cases involving federal regulations.<sup>126</sup> Pursuant to the Eleventh Circuit holding, the Corps revisited its data regarding the amount of watershed area affected by the renewal of NWP21 and recalculated to account for the mining operations grandfathered into NWP21 authorizations.<sup>127</sup> Meanwhile, the mining operations in Alabama continued operation. The Corps concluded the corrected calculations still supported the renewal of NWP21, and the restrictions and mitigations the permit required would balance any environmental harm as required by the CWA.<sup>128</sup> Therefore, the district court issued judgment in favor of the Corps and left the renewed version of NWP21 intact.<sup>129</sup>

Had NWP21 been vacated, all mining operations in Alabama would have shut down for at least a year while the Corps dedicated resources toward drafting a new regulation.<sup>130</sup> Ceasing the mining operations would have adversely affected the Intervenor, the companies relying on the Intervenor's raw materials, the workers employed by the Intervenor, and the communities in which the Intervenor operated, even though the court was unsure if the miscalculations would affect the validity of NWP21.<sup>131</sup> By giving the Corps the opportunity to recalculate before vacating NWP21, the Eleventh Circuit avoided such an undue economic disruption yet held the Corps accountable for its miscalculation.<sup>132</sup> The remedied report afforded the district court an opportunity to make an informed decision about the reasonableness of NWP21, and such knowledgeable basis prevented the Corps from investing resources

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125. See *California Communities*, 688 F.3d at 989.

126. See 2015 U.S. Dist. LEXIS 142261.

127. *Id.* at \*4.

128. *Id.* at \*4-5.

129. *Id.* at \*27.

130. See *Black Warrior Riverkeeper*, 781 F.3d at 1271; *California Communities*, 688 F.3d at 989.

131. *Black Warrior Riverkeeper*, 781 F.3d at 1290.

132. *Id.* at 1291-92.

to start the drafting process anew for a flawed, but curable, regulation.<sup>133</sup> Since the court's ruling, Riverkeeper has filed another appeal,<sup>134</sup> demonstrating that remand without vacatur fails to prevent injured parties from rechallenging the regulations or permits. Furthermore, the record is now more complete if the case goes before the court of appeals a second time, which will then allow a more comprehensive review of the principals behind the regulation, rather than the technical error of miscalculations.

Overall, remand without vacatur provides courts of appeals with another option for imparting equitable remedies. Rather than asking courts to issue holdings based on deficient data or inadequately explained policies, this remedy provides a much-needed, lenient remedy for instances when the court needs further investigation of a regulation. Remand without vacatur holds agencies accountable while preventing undue disruptions to vital operations conducted under federal regulations. Although there exists the potential to abuse the remedy and agencies might use it to stall the vacation of improper regulations, *Black Warrior Riverkeeper* demonstrates the economic constancy and regulatory efficiency that remand without vacatur promotes.

REBEKAH L. HOGG

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133. See *Black Warrior II*, 2015 U.S. Dist. LEXIS 142261.

134. *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, No. 2:13-CV-02136-WMA, 2015 U.S. Dist. LEXIS 142261 (N.D. Ala. 2015), *appeal docketed*, No. 15-14745 (11th Cir. Oct. 23, 2015).

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