No. 07-13297-F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SIERRA CLUB, NATURAL RESOURCES DEFENSE COUNCIL, INC., NATIONAL PARKS AND CONSERVATION ASSOCIATION,
Plaintiffs-Appellees,

v.

ROBERT B. FLOWERS, Chief of Engineers, Army Corps of Engineers, *et al.*,
Defendants,

and

RINKER MATERIALS OF FLORIDA, INC., MIAMI-DADE LIMESTONE PRODUCTS ASSOCIATION, INC., VECILLIO AND GROGAN, INC., TARMAC AMERICA, LLC, FLORIDA ROCK INDUSTRIES, INC., SAWGRASS ROCK QUARRY, INC., APAC-FLORIDA, INC., KENDALL PROPERTIES & INVESTMENTS,
Intervenor-Defendants-Appellants.

On Appeal From The United States
District Court For The Southern District Of Florida

BRIEF OF APPELLANTS RINKER MATERIALS OF FLORIDA, INC., MIAMI-DADE LIMESTONE PRODUCTS ASSOCIATION, INC., AND KENDALL PROPERTIES AND INVESTMENTS

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AMENDED CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Appellants Rinker Materials of Florida, Inc., Miami-Dade Limestone Products Association, Inc., and Kendall Properties and Investments submit this list, which includes the trial judge, and all attorneys, persons, associations of persons, firms, partnerships or corporations that have an interest in the outcome of this review. Additions and one correction are in boldface.

1. Achaiki Maritime Company
2. Administration & Accounting Co.
3. Aemos Cement Ltd.
4. Aeolian Maritime Company
5. Albacem S.A.
6. Alexander, Martin J., Holland & Knight LLP, Attorney for Appellant Rinker Materials of Florida, Inc.
7. Alexandria Development Co. Ltd.
8. Alexandria Portland Cement Co. S.A.E.
9. Alpert Firm, Attorneys for Plaintiffs-Appellees
10. Alpert, Stanley, Alpert Firm, Attorney for Plaintiffs-Appellees
11. Alvacim Ltd.
12. American Materials Technologies LLC
13. Antea Cement SHA

14. APAC-Atlantic, Inc.

15. APAC-Arkansas, Inc.

16. APAC Construction Communications Company

17. APAC-Florida, Inc., Appellant

18. APAC Holdings, Inc.

19. APAC-Kansas, Inc.

20. APAC, Inc.

21. APAC-Oklahoma, Inc.

22. APAC-Mississippi, Inc.

23. APAC-Missouri, Inc.

24. APAC-Southeast, Inc.

25. APAC-Tennessee, Inc.

26. APAC-Texas, Inc.

27. Aricemex, S.A.

28. ARL Development Corp.

29. ARL Services Inc.

30. Arundel Risk Managers, Inc.

31. Arundel Sand & Gravel Company

32. Atlantic Coast Materials, LLC

33. Atlantic Granite Company

34. Ave Marie Rinker Materials LLC

35. Azusa Rock, Inc.

36. Balkan Cement Enterprises Ltd.

37. Balkcem Ltd.

38. Barkett, John M.

39. Barsh, Kerri, Greenberg Traurig, P.A., Attorney for Appellant Vecellio & Grogan, Inc.

40. Baumberger, Charles H., Rossman Baumberger Reboso & Spier, Attorney for *Amicus Curiae* United Transportation Union

41. Beason, Thomas, General Counsel, Florida Dept. of Environmental Protection, Attorney for *Amicus Curiae* Florida Dept. of Environmental Protection

42. Bedell, Dittmar, DeVault, Pillans & Coxe, P.A., Attorneys for Appellant Florida Rock Industries, Inc.

43. Beni Suef Cement Co. S.A.E.

44. Berger Singerman, Attorneys for Appellant Kendall Properties and Investments

45. Bergeron, Sr., Ronald M.

46. BHJ Chemical Company, LLC

47. Blue Circle Cement Egypt S.A.E.

48. Boardman, Dorothy Lowe, U.S. Army Corps of Engineers, Attorney for Federal Defendants
49. Brooksville LLC
50. Brown, Mark A., U.S. Department of Justice, Attorney for Federal Defendants
51. Burt, Franklin G., Jorden Burt LLP, Attorney for Appellant Tarmac America, LLC
52. BWIP, Inc.
53. CAC Vero 1, LLC
54. Calizas Industriales del Carmen, S.A. de C.V.
55. CalMat Co.
56. CalMat Leasing Co.
57. Cardinal Concrete Company
58. Carolinas Cement Co. LLC
59. Cement Plus Ltd.
60. Cementara Kosjeric AD
61. CEMEX American Holdings B.V.
62. CEMEX Australia Pty Ltd.
63. CEMEX Dutch Holdings B.V.
64. CEMEX España, S.A.

65. CEMEX México, S.A. de C.V.

66. CEMEX, S.A.B. de C.V. (ticker symbol “CX”)

67. CEMEX Trademarks Holdings Ltd.

68. **Centro Distribuidor de Cemento, S.A. de C.V.**

69. Charlotte County Ports, LTD

70. Chesapeake Marine

71. Coffey Burlington (formerly Burlington, Schwiep, Kaplan & Blonsky, P.A.), Attorneys for Plaintiffs-Appellees

72. Cohen, Martin, U.S. Army Corps of Engineers, of counsel for Federal Defendants

73. Columbus Quarry LLC

74. Community Asphalt Corp.

75. Concrete Engineering Inc.

76. **Corporación Gouda, S.A. de C.V.**

77. Cow Bay, LLC

78. D C Materials, Inc.

79. Delmarva Aggregate, LLC

80. DeVault III, John A., Bedell, Dittmar, DeVault, Pillans & Coxe, P.A., Attorney for Appellant Florida Rock Industries, Inc.

81. Dodekanesos Quarries S.A.

82. Dyno Nobel

83. East Cement Trade Ltd.

84. Essex Cement Co. LLC

85. F&C Trucking

86. Flacem, LLC

87. Fintitan SRL

88. Florida Cement, Inc.

89. Florida Crushed Stone Company

90. Florida Department of Environmental Protection, *Amicus Curiae*

91. Florida Department of Transportation, *Amicus Curiae*

92. Florida Rock Industries, Inc. (ticker symbol “FRK”), Appellant

93. **Flowers, Lt. Gen. Robert B., formerly Federal Defendant (replaced by Lt. Gen. Robert L. Van Antwerp)**

94. Forman, M. Austin

95. Four MTitan Silo Co. LLC

96. FRI Bahamas, Limited

97. FRI New Brunswick, LTD

98. FRI Ready Mix of Tennessee, LLC

99. FRK Brooksville, LLC

100. FRK Flight, LLC

101. FRK Newberry, LLC

102. FRK Putnam, LLC

103. GeoSonics, Inc.

104. Gibson, Dunn & Crutcher LLP, Attorneys for Appellant Rinker Materials of Florida, Inc.

105. Glitzenstein, Eric R., Meyer Glitzenstein & Crystal, Attorney for Plaintiffs-Appellees

106. Granitoid AD

107. Gravel and Sand PIT AD

108. Greenberg Traurig, P.A., Attorneys for Appellant Vecellio & Grogan, Inc.

109. Guedes, Edward G., Greenberg Traurig, P.A., Attorney for Appellant Vecellio & Grogan, Inc.

110. Hall, H. Dale, Federal Defendant

111. Halsey, Douglas M., White & Case LLP, Attorney for Appellant Miami-Dade Limestone Products Ass'n, Inc.

112. Harper Bros. Inc.

113. Hoeveler, Hon. William M., United States District Judge

114. Holland & Knight LLP, Attorneys for Appellant Rinker Materials of Florida, Inc.

115. Honkonen, Elizabeth B., Kenny Nachwalter, P.A., Attorney for Appellant Miami-Dade Limestone Products Ass'n, Inc.

116. **Hormicemex, S.A.**

117. Hughs Property, Inc.

118. Iapetos Ltd.

119. Inkelas, Daniel, U.S. Army Corps of Engineers, of counsel for Federal Defendants

120. Interbeton Construction Materials S.A.

121. Intercement S.A.

122. Intertitan Trading International S.A.

123. Ionia S.A.

124. Jamer Materials, LTD

125. Jodrey, Donald, U.S. Department of the Interior, of counsel for Federal Defendants

126. Jorden Burt LLP, Attorneys for Appellant Tarmac America, LLC

127. Karieri AD

128. Karierni Materiali AD

129. Kendall Properties and Investments, Appellant

130. Kenny Nachwalter, P.A., Attorneys for Appellant Miami-Dade Limestone Products Ass'n, Inc.

131. Kelly Tractor

132. Kim, Joseph H., U.S. Department of Justice, Attorney for Federal Defendants

133. LafargeTitan Egyptian Inv. Ltd.

134. Lakmos S.A.

135. Landau, Nick, Office of the Chief Counsel, U.S. Army Corps of Engineers, formerly of counsel for Federal Defendants

136. LanDel/Arundel, Inc.

137. Leesem S.A.

138. Leros Quarries S.A.

139. Levine, Lawrence M., Natural Resources Defense Council, Attorney for Plaintiffs-Appellees

140. Liebesman, Lawrence, Holland & Knight LLP, Attorney for Appellant Rinker Materials of Florida, Inc.

141. LoukasTsogas Beta S.A.

142. Lovvorn, Jonathan R., formerly with Meyer & Glitzenstein, formerly Attorney for Plantiffs-Appellees

143. Ludwiszewski, Raymond B., Gibson, Dunn & Crutcher LLP, Attorney for Appellant Rinker Materials of Florida, Inc.

144. MacVicar Federico & Lamb

145. Markfield America LLC

146. Maryland Rock Industries, Inc.

147. Maryland Stone, Inc.

148. Massey Sand and Rock Co.

149. McAliley, T. Neal, White & Case LLP, Attorney for Appellant Miami-Dade Limestone Products Ass'n, Inc.

150. McKeown, Matthew J., formerly Acting Assistant Attorney General, Environment & Natural Resources Division, Attorney for Federal Defendants

151. Mechanicsville Concrete Inc.

152. MedTex Lands, Inc

153. Metro Redi-Mix LLC

154. **Mexcement Holdings, S.A. de C.V.**

155. Meyer Glitzenstein & Crystal, Attorneys for Plaintiffs-Appellees

156. Miami-Dade Limestone Products Ass'n, Inc., Appellant

157. Miami Valley Ready Mix of Florida LLC

158. Miguel de Grandy, P.A.

159. Misrieen Titan Trade & Distribution

160. Mule Pen Quarry Corp.

161. Murphy, William

162. Nachwalter, Michael, Kenny Nachwalter, P.A., Attorney for Appellant Miami-Dade Limestone Products Ass'n, Inc.

163. Naftitan S.A.

164. National Parks and Conservation Association, Plaintiff-Appellee

165. Natural Resources Defense Council, Inc., Plaintiff-Appellee

166. New Line Transport, LLC

167. **New Sunward Holdings B.V.**

168. Nieto, Gabriel H., Berger Singerman, Attorney for Appellant Kendall Properties & Investments

169. Nolichuckey Sand Co., Inc

170. North American Coal Corp.

171. Oldcastle Materials, Inc.

172. Olson, Theodore B., Gibson, Dunn & Crutcher LLP, Attorney for Appellant Rinker Materials of Florida, Inc.

173. Ovelmen, Richard J., Jorden Burt LLP, Attorney for Appellant Tarmac America, LLC

174. Palomar Transit Mix Co.

175. Pennsuco Cement Co., LLC

176. Patapsco Properties, Inc.

177. Petersen, Rafe, Holland & Knight LLP, Attorney for Appellant Rinker Materials of Florida, Inc.
178. Polikos Maritime Company
179. Producers Software, LLC
180. Quarries Corinthias S.A.
181. Quarries Gournon S.A.
182. Rancho Piedra Caliza, S.A. de C.V.
183. Ranger Construction, Inc.
184. Ranger Construction, South
185. Ranger Golf
186. Rapica Servicios Tecnicos Y Administrativos, S.A. de C.V.
187. Rave, Norman L., U.S. Department of Justice, Attorney for Federal Defendants
188. Rea Cement Ltd.
189. RECO Transportation, LLC.
190. Rinker Group Ltd.
191. Rinker Materials AM Holdings, LLC
192. Rinker Materials Corporation
193. Rinker Materials of Florida, Inc., Appellant
194. Rinker Materials Steel Framing, Inc.

195. Rinker Materials SW Florida Limestone Holdings, LLC

196. Rinker Materials SW Florida Sand Holdings, LLC

197. Rockland LLC

198. Roanoke Cement Co. LLC

199. Rossman Baumberger Reboso & Spier, Attorneys for *Amicus Curiae* United Transportation Union

200. S&G Concrete Co.

201. S&G Prestress Company

202. S&W Ready Mix Concrete Company

203. Salisbury Towing Corporation

204. Samson, S. Ansley, Natural Resources Defense Council, Attorney for Plaintiffs-Appellees

205. Samson, Daniel M., Greenberg Traurig, P.A., Attorney for Appellant Vecellio & Grogan, Inc.

206. Sansonetti, Thomas L., formerly Assistant Attorney General, Environment & Natural Resources Division, formerly Attorney for Federal Defendants

207. **Sawgrass Rock Quarry, Inc. (corrected)**

208. Scenic Hills, Inc.

209. Scherker, Elliot H., Greenberg Traurig, P.A., Attorney for Appellant Vecellio & Grogan, Inc.

210. Schwiep, Paul J., Coffey Burlington, Attorney for Plaintiffs-Appellees

211. Seley, Peter E., Gibson, Dunn & Crutcher LLP, Attorney for Appellant Rinker Materials of Florida, Inc.

212. Semler, Michael, U.S. Department of Justice, Attorney for Federal Defendants

213. Separation Technologies Canada Ltd.

214. Separation Technologies LLC

215. Separation Technologies U.K. Ltd.

216. Servicios Integrales, Gestoria Y Administracion, S.A. de C.V.

217. Sewell, Bradford H., Natural Resources Defense Council, Attorney for Plaintiffs-Appellees

218. Sharp Bros. (Greensboro, North Carolina)

219. Shook, Hardy & Bacon, LLP

220. Siegel, Adam J., U.S. Department of Justice, formerly Attorney for Federal Defendants

221. Sierra Club, Plaintiff-Appellee

222. Silverman, Marlene, Greenberg Traurig, P.A., Attorney for Appellant Vecellio & Grogan, Inc.

223. Simion, John, Assistant District Counsel, U.S. Army Corps of Engineers, Jacksonville District, of counsel for Federal Defendants

224. Soportes Tecnicos Y Administrativos, S.A. de C.V.

225. South Florida Materials Corp.

226. South Florida Petroleum Services

227. Southwest Gulf Railroad Company

228. Standard Concrete LLC

229. Statewide Transport, Inc.

230. Steel Construction Systems

231. **Sunward Acquisitions N.V.**

232. **Sunward Holdings B.V.**

233. **Sunward Investments B.V.**

234. Summit Ready Mix LLC

235. Tagarades Community Quarries S.A.

236. Tarmac America LLC, Appellant

237. TBS Enterprises, Inc.

238. TCS Materials, Inc.

239. The Arundel Corporation

240. Themis Holdings Ltd.

241. Thompson, Daniel H., Berger Singerman, Attorney for Appellant Kendall Properties & Investments

242. Tidewater Quarries, Inc.

243. Titan America LLC

244. Titan Atlantic Cement Industrial and Commercial, S.A.

245. Titan Cement International Trading S.A.

246. Titan Cement Netherlands BV

247. Titan Cement S.A.

248. Titan Cement U.K. Ltd.

249. Titan Virginia Ready Mix LLC

250. Tithys Ltd.

251. Triangle Rock Products, Inc.

252. Tripp Jr., C. Warren, Bedell, Dittmar, DeVault, Pillans & Coxe, P.A., Attorney for Appellants Florida Rock Industries, Inc.

253. TRUSA Realty LLC

254. United Transportation Union, *Amicus Curiae*

255. Usje Cementarnica AD

256. Van Antwerp, Lt. Gen. Robert L., Federal Defendant

257. Vecellio & Grogan, Inc., d/b/a White Rock Quarries and Sawgrass Rock Quarry, Inc., Appellant

258. Vecellio Group, Inc.

259. Vecenergy

260. Vecenerty BIDA

261. Vecenergy Resources

262. Virginia Concrete Company Inc.

263. Vulcan Aggregates Company, LLC

264. Vulcan Chemicals Investments, LLC

265. Vulcan Chloralkali, LLC

266. Vulcan Construction Materials, LLC

267. Vulcan Construction Materials, LP

268. Vulcan Gulf Coast Materials, Inc.

269. Vulcan Gulf Coast Materials, LLC

270. Vulcan Lands, Inc.

271. Vulcan Materials Company (ticker symbol “VMC”)

272. Vulcan Performance Chemicals, Ltd.

273. Vulica Shipping Company, Ltd.

274. Wanatah Trucking Co., Inc.

275. Weiner, Barry, U.S. Department of Justice, Attorney for Federal Defendants

276. Whitaker, Henry C., Gibson, Dunn & Crutcher LLP, Attorney for Appellant Rinker Materials of Florida, Inc.

277. White & Case LLP, Attorneys for Appellant Miami-Dade Limestone Products Ass’n, Inc.

278. White Rock Quarries

279. **Williams, Steve, formerly Federal Defendant (replaced by H. Dale Hall)**

280. Wood, Roger B., Assistant General Counsel, Florida Dept. of Transportation, Attorney for *Amicus Curiae* Florida Dept. of Transportation

281. Wooldridge, Sue Ellen, formerly Assistant Attorney General, Environment & Natural Resources Division, formerly Attorney for Federal Defendants

282. Ziatna Panega Beton EOOD

283. Zlatna Panega Cement AD

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-3, Appellants Rinker Materials of Florida, Inc., Appellant Miami-Dade Limestone Products Association, Inc., and Kendall Properties and Investments make the following statements as to corporate ownership:

Appellant Rinker Materials of Florida, Inc., is a privately held company. It is a wholly owned subsidiary of Rinker Materials Corp., a privately held company that is a wholly owned indirect subsidiary of CEMEX, S.A.B. de C.V., a publicly traded company. No other publicly traded company owns 10% or more of the stock of Rinker Materials of Florida, Inc.

Appellant Miami-Dade Limestone Products Association, Inc., is a non-profit Florida corporation. It has no parent company, nor does any company own 10% or more of its stock.

Appellant Kendall Properties and Investments is a partnership that includes no corporations. It has no parent company, nor does any publicly traded company own 10% or more of its stock.

/s/ Henry C. Whitaker
Henry C. Whitaker

STATEMENT REGARDING ORAL ARGUMENT

Appellants believe oral argument is appropriate in this case, which raises significant issues regarding subject-matter jurisdiction and the appropriate level of deference to administrative agencies in the context of environmental statutes. The Court has scheduled oral argument for November 28, 2007, in Miami, Florida.

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TABLE OF ABBREVIATIONS

APA	Administrative Procedure Act, 5 U.S.C. § 701 *et seq*.
AR___	Number for document cited from the administrative record of the U.S. Army Corps of Engineers
Corps	U.S. Army Corps of Engineers
CWA	Clean Water Act, 33 U.S.C. § 1251 *et seq.*
DE___	Docket entry number for document cited from the district court record
EIS	Environmental Impact Statement (in this case, AR614)
EPA	U.S. Environmental Protection Agency
ESA	Endangered Species Act, 16 U.S.C. § 1531 *et seq.*
FONSI	Finding Of No Significant Impact
FWS	U.S. Fish and Wildlife Service
MDLPA	Miami-Dade Limestone Products Association, Inc.
Mootness Order	One of the orders appealed from, DE372 (Mar. 27, 2007)
NEPA	National Environmental Policy Act, 42 U.S.C. § 4231 *et seq.*
PEACH	*Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Engineers*, 87 F.3d 1242 (11th Cir. 1996)
Remedies Order	One of the orders appealed from, DE387 (Jul. 13, 2007)
ROD	Record of Decision (in this case, AR1023)
SEIS	Supplemental Environmental Impact Statement
Summary Judgment Order	One of the orders appealed from, DE73 (Mar. 22, 2006)

STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER PARTIES

Pursuant to Federal Rule of Appellate Procedure 28(i), this brief adopts the Statement of the Case in the Brief of Intervening Defendants-Appellants Vecellio & Grogan, Inc., Florida Rock Industries, Inc., APAC-Florida, Inc., Sawgrass Rock Quarry, Inc., and Tarmac America, LLC ("Brief of Vecellio & Grogan *et al*.").

Moreover, to the extent that Appellant Rinker Materials of Florida, Inc. is enjoined or effectively enjoined by the district court's order from mining part of its SCL Quarry in the event that pumping in the Northwest Wellfield increases beyond 155 million gallons per day (*see* DE387, at 102 n.215; Rinker Jur. Resp. at 4–5), this brief also adopts Part III of the Argument section of the same brief, arguing that the district court erred by enjoining mining operations near the Wellfield.

STATEMENT OF JURISDICTION

The parties addressed this Court's jurisdiction in a series of filings on August 2, 2007. The Federal Defendants and Defendant-Intervenors Vecellio & Grogan, Inc., APAC-Southeast, Inc., Florida Rock Industries, Inc., and Tarmac America, LLC, explained that the district court's July 13, 2007 order, DE387 ("Remedies Order"), constituted an injunction prohibiting mining by those companies, which gives this Court jurisdiction under 28 U.S.C. § 1292(a)(1) to consider their appeals.

The separate jurisdictional response filed by Rinker Materials of Florida, Inc., Kendall Properties and Investments, and Sawgrass Rock Quarry, Inc., addressed the Court's jurisdiction over the appeals of those companies whose permits the district court vacated, but who were not subject to the immediate injunction. Those companies explained that the Court's jurisdiction to review the injunction gives it jurisdiction to consider the entire Remedies Order, including those aspects of the order that apply to parties beyond the scope of the injunction. *See* Rinker Jur. Resp. at 6–11. They also explained that, irrespective of its injunctive effect, the Remedies Order is itself a final, appealable order under 28 U.S.C. § 1291. *Id.* at 11–21. Plaintiffs' own jurisdictional response conceded a crucial part of that argument, acknowledging that their recourse going forward will not be to continue the proceedings *in this case* (as one would expect if the district court's remand was not a final order but one that maintained jurisdiction over the dispute). Instead, Plaintiffs acknowledge that they would challenge future mining by filing "a separate citizen suit" or challenging "distinct agency actions" other than the ones that formed the basis for this lawsuit. Pls.' Jur. Resp. at 8 n.5.

Both of the Defendant-Intervenors' jurisdictional responses also explained that, if the Remedies Order is not final or practically final for purposes of § 1291, then it is an appealable collateral order. *See* Rinker Jur. Resp. at 21–23; Vecellio & Grogan Jur. Resp. at 16–18.

If this Court has jurisdiction over the Remedies Order, then it also has jurisdiction over the prior Summary Judgment Order, DE73 (Mar. 22, 2006), and Mootness Order, DE372 (Mar. 27, 2007), since they were inextricably intertwined with the Remedies Order. *See* Rinker Jur. Resp. at 23–27; Fed. Defs.' Jur. Resp. at 8–10; Vecellio & Grogan Jur. Resp. at 12–16.

STATEMENT OF THE ISSUES

(1) Did Plaintiffs' claims under the Endangered Species Act become moot when they received all of the relief they requested?

(2) Did Congress waive federal sovereign immunity for suits brought against the Corps for alleged violations of the Clean Water Act, when the CWA precludes suits against the Corps and the Administrative Procedure Act waives immunity only where no other statute "impliedly forbids the relief which is sought"?

(3) Did the district court err by ordering remand and vacatur based on its own substantive evaluation of the environmental and economic impacts of mining, rather than based on a deferential review of the expert agency's decisionmaking?

(4) Did the district court err when it vacated the permits granted by the Corps without first determining whether remand without vacatur was an appropriate remedy?

(5) Do the District Judge's exceedingly strong statements about his views regarding this case, the Federal Defendants, and the Defendant-Intervenors require reassignment on remand to protect the appearance of judicial impartiality?

STATEMENT OF THE CASE

Appellants Rinker Materials of Florida, Inc. ("Rinker"), the Miami-Dade Limestone Products Association, Inc. ("MDLPA"), and Kendall Properties and Investments ("Kendall") hereby incorporate the Statement of the Case in the Brief of Vecellio & Grogan *et al*. The following overview is provided for the Court's convenience.

For more than fifty years, Florida's largest limestone quarries have operated in the Lake Belt region of South Florida's Miami-Dade County. DE73, at 31–32 & n.47; AR1028, at 35. In response to a proliferation of federal and state agencies exercising permitting authority over those quarries, a committee was formed in the early 1990s to consider long-term plans for Lake Belt mining operations and coordination of those plans with the more comprehensive Everglades restoration plan. AR614, at 847–60. Over a period of eight years, the U.S. Army Corps of Engineers ("Corps") supported that effort by evaluating the environmental impacts of 50 years of future limestone mining in the Lake Belt, and in 2000 published a lengthy Environmental Impact Statement ("EIS"). *See* AR614. In 2002, after considering the comments received on the EIS, the Corps issued a Record of

Decision ("ROD") concluding that granting Clean Water Act ("CWA") § 404 permits to mine limestone in the Lake Belt for only 10 years (rather than the requested 50 years) would be in the public interest. *See* AR1028, at 114.

Plaintiffs challenged those permits in federal district court by filing suit against the Corps' Chief of Engineers and the Director of the U.S. Fish and Wildlife Service ("FWS"), alleging that the agencies had violated the CWA, the National Environmental Policy Act ("NEPA"), the Endangered Species Act ("ESA"), and the Administrative Procedure Act ("APA"). Several of the permit holders intervened as defendants, as did the MDLPA (the members of which include permit holders).

In a March 22, 2006 order (the "Summary Judgment Order"), the district court concluded that the Corps' analysis had been inadequate to support issuance of the permits. DE73. The court granted summary judgment in favor of Plaintiffs, remanded to the Corps for preparation of a Supplemental Environmental Impact Statement ("SEIS"), and asked for further briefing to determine "the nature of the injunction, if any, which should issue." *Id.* at 185. In addition to the further briefing it requested on remedy, the district court held a hearing over a period of several months to determine what further remedy it would order.[1]

[1] Kendall intervened after the Summary Judgment Order. 3 Record 100 & 110.

While the hearing was ongoing, the Corps and FWS completed "formal consultation" regarding endangered species and issued a biological opinion regarding the wood stork, 6 Record 241, providing the relief that the Plaintiffs had requested under the ESA in their Complaint. DE26 ¶¶ 105, 108–09, p. 49. The Defendants and Defendant-Intervenors moved to dismiss Plaintiffs' ESA claims as moot. 4 Record 143; 6 Record 253. On March 27, 2007, the district court issued an order (the "Mootness Order") denying those motions. *See* DE372.

On July 13, 2007, the district court issued its last order (the "Remedies Order"), which, in addition to the ongoing remand to the Corps, ordered that all of the permits be vacated. DE387, at 171, 177. Based on the testimony of one of the Plaintiffs' witnesses at the hearing, the district court established a boundary around certain production wells in the Lake Belt within which he ordered mining immediately prohibited. *Id.* at 101–04. Outside that line, the district court stayed permit vacatur until the Corps completed its SEIS. *Id.* at 177.

The Appellants submitting this brief filed timely notices of appeal. 14 Record 391, 395, & 399.

Standards of review. The two jurisdictional issues—whether Plaintiffs' ESA claims became moot, and whether sovereign immunity bars Plaintiffs' CWA claims—are reviewed *de novo*. *AT&T Mobility, LLC v. Nat'l Ass'n for Stock Car*

Auto Racing, Inc., __ F.3d __, No. 07-12299, 2007 WL 2297832, at *3 (11th Cir. Aug 13, 2007).

With regard to Plaintiffs' NEPA and CWA claims, this Court "review[s] the district court's grant of summary judgment *de novo*, viewing the facts and drawing all reasonable inferences in favor of the nonmoving party." *Ala.-Tombigbee Rivers Coalition v. Kempthorne*, 477 F.3d 1250, 1254 (11th Cir. 2007) (citations and quotation marks omitted). And, "[o]n appeal, this court, in reviewing the administrative record, applies the same arbitrary and capricious standard of review utilized by the district court." *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 541 (11th Cir. 1996).

This Court reviews the district court's decision to vacate the permits "for abuse of discretion, reviewing underlying questions of law *de novo* and findings of fact . . . under the clearly erroneous standard." *Atlanta Journal & Constitution v. City of Atlanta Dep't of Aviation*, 442 F.3d 1283, 1287 (11th Cir. 2006).

SUMMARY OF THE ARGUMENT

The district court in this case manifestly disregarded the well-settled principle of deferential judicial review. It repeatedly invaded the province of the Corps by reweighing or disregarding evidence, by rebalancing the factors that the Corps must consider, and by directing the Corps to change—not its decisionmaking process—but its decisions. This, a district court cannot do.

But the district court also exceeded its jurisdiction by addressing ESA claims that had become moot and CWA claims for which sovereign immunity had not been waived. This overreaching by the district court also merits reversal and remand.

After the district court granted summary judgment, but before it issued its Remedies Order, the Corps and FWS completed the "formal consultation" Plaintiffs had sought pursuant to the ESA claim in their Complaint. Because that consultation irreversibly provided Plaintiffs the relief they sought, the ESA claim became moot. Yet the district court incongruously concluded that, because it had "already . . . granted summary judgment," it was too late to dismiss the ESA counts as moot. DE372, at 2. This is a fundamental error of law; a claim may become moot at any point—even while on appeal. Although divested of jurisdiction over Plaintiffs' ESA claims, the district court nonetheless relied on those claims as a basis for injunction and permit vacatur in its Remedies Order.

The district court similarly relied on Plaintiffs' claims that the Corps had violated the CWA as a basis for its Summary Judgment and Remedies Orders. But this Court concluded more than a decade ago that Congress has not waived federal sovereign immunity for such claims against the Corps. *Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Eng'rs*, 87 F.3d 1242, 1249 (11th Cir. 1996) ("*PEACH*"). Recasting Plaintiffs' claims as arising under the

APA cannot cure this error—the APA's own waiver of federal sovereign immunity does not apply when another statute (in this case the CWA) "impliedly forbids the relief which is sought." 5 U.S.C. § 702(2). Absent a waiver of sovereign immunity, the district court lacked subject-matter jurisdiction over Plaintiffs' CWA claims.

The district court's analysis of the Corps' NEPA compliance suffers from its own irretrievable flaws. First, the court ignored the Corps' decision to issue 10-year permits, instead finding inadequacies in the Corps' NEPA evaluation of the originally proposed 50-year permits, even though those 50-year permits were never granted. Even apart from that most fundamental of errors, the court repeatedly failed to apply a properly deferential standard of review to the Corps' decisionmaking. Although it conceded that deference was required, the court nonetheless approached its review *de novo*—weighing the credibility of evidence, factfinding, and reconsidering the wisdom of the Corps' policy decisions. The district court did the same with the CWA (even setting aside its lack of jurisdiction), basing its remand and vacatur on disagreements with the Corps' reasoned conclusions and substitution of its own judgment for that of the agency. By conducting its judicial review without deference to the Corps' decisionmaking, the district court committed reversible error.

The district court's Remedies Order suffered from further error. In determining that vacatur of Defendant-Intervenors' permits was required, the district court erroneously rejected remand without vacatur (a practice common in the D.C. Circuit and other federal courts of appeals) as impermissible under the APA. But remand without vacatur is grounded in the APA's reservation of judicial power to "deny relief on any . . . appropriate legal or equitable ground," 5 U.S.C. § 702(1), and is amply supported by Supreme Court precedent. To the extent that the district court actually engaged in an analysis of whether vacatur was appropriate (and it is unclear from the Remedies Order that it did), it misapplied the standard, failing to balance the likelihood that the agency's errors are correctible and the great disruption that would be caused by vacating the permits. The district court's failure to consider remand without vacatur and apply correctly its standards is an abuse of discretion warranting reversal and remand of the Remedies Order in its own right.

Finally, to the extent this Court concludes that there should be further proceedings in the district court, it should exercise its authority to reassign the case to a different District Judge. The language in the district court's lengthy opinions in this case gives ample reason to be concerned about the District Judge's ability to maintain an appearance of neutrality. The District Judge has suggested in his orders that the Corps is so conflicted and incompetent an agency that it may never

be entitled to judicial deference, and that Defendant-Intervenors (Appellants in this Court) applied illegitimate "pressure" on the Corps to grant their permits. Perhaps most tellingly, the District Judge singled out this case as the one that weighs more "heavily" on him than any other "[i]n thirty years of trying cases," and he felt it necessary to declare that despite anticipated accusations that he had abandoned his role as a neutral arbiter, he has "a clear conscience" about executing his "oath as a judicial officer" in this case. DE387, at 22 n.52, 172 n.321. Although the District Judge has no doubt spent considerable effort reviewing the record and drafting his opinions in this case—in fact, as noted above, the District Judge likely has spent far more effort reevaluating the record than was warranted by the deferential standard of review he should have applied—any loss of efficiency occasioned by reassignment would pale in comparison to the risk posed by the appearance of partiality and predisposition on remand.

ARGUMENT

I. The District Court Lacked Subject-Matter Jurisdiction Over Plaintiffs' Endangered Species Act And Clean Water Act Claims.

A. The District Court Wrongly Based Its Remedies Order On Plaintiffs' Moot ESA Claims.

"Article III of the Constitution limits federal courts to the adjudication of actual, ongoing controversies between litigants. It is not enough that a controversy existed at the time the complaint was filed . . . ." *Deakins v. Monaghan*, 484 U.S.

193, 199, 108 S.Ct. 523, 528 (1988) (citations omitted). "[I]f events that occur subsequent to the filing of a lawsuit or an appeal deprive the court of the ability to give the plaintiff or appellant meaningful relief, then the case is moot and must be dismissed." *Soliman v. United States ex rel. INS*, 296 F.3d 1237, 1242 (11th Cir. 2002) (quotation marks omitted). Thus, where a plaintiff already has received all the relief the complaint demanded, the case is moot. *See, e.g.*, *Preiser v. Newkirk*, 422 U.S. 395, 402, 95 S.Ct. 2330, 2334–35 (1975) (claim challenging a prisoner's transfer became moot when he was transferred back); *SEC v. Med. Comm. for Human Rights*, 404 U.S. 403, 404–06, 92 S.Ct. 577, 578–79 (1972) (claim seeking access to a proxy statement became moot when the defendant agreed to include the plaintiff's proposal in the next year's statement); *Westmoreland v. NTSB*, 833 F.2d 1461, 1462–63 (11th Cir. 1987).

Under these jurisdictional principles, a claim under the Endangered Species Act ("ESA") seeking to compel an agency to consult with the Fish and Wildlife Service ("FWS") becomes moot (at the very latest) when the agency and FWS complete the requested consultation. At that point "[a]n injunction ordering consultation is no longer warranted," and the claim is moot because "[t]here is no point in ordering an action that has already taken place." *S. Utah Wilderness Alliance v. Smith*, 110 F.3d 724, 728 (10th Cir. 1997).

The Fifth Circuit's decision in *Sierra Club v. Glickman*, 156 F.3d 606 (5th Cir. 1998), is illustrative. The Sierra Club alleged (among other things) that the ESA required the Secretary of Agriculture to consult with FWS before implementing a groundwater program. *See id.* at 611. After a trial, the district court directed the Secretary to complete informal ESA consultation with FWS. *See id.* at 612. While the appeal was underway, the Secretary completed a Biological Evaluation and submitted it to FWS, which concurred with the evaluation. Under the ESA regulations, that concluded the process of consultation. *See id.* at 619 (citing 50 C.F.R. § 402.13(a)).

The Fifth Circuit ruled that the appeal was moot once consultation was completed. *See id.* at 619–20. The court explained that "[b]y submitting the Biological Evaluation to FWS, the USDA clearly fulfilled whatever obligations it had as a result of the district court's order to complete informal consultation. . . . Thus, there is no relief that can be obtained from this court." *Id.* at 619.[2]

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[2] *Sierra Club* is just one of a long line of cases concluding that an ESA claim is moot once the agency completes consultation. *See, e.g.*, *Voyageurs Nat'l Park Ass'n v. Norton*, 381 F.3d 759, 765 (8th Cir. 2004) ("[A]fter the Park Service and the FWS completed their formal consultation in January, the procedural defect identified by the Association was cured and the Association's claim for relief—seeking the remedy of formal consultation—was rendered moot."); *S. Utah Wilderness Alliance*, 110 F.3d at 727–28 ("Since consultation is the only relief sought by [the plaintiff], the defendants conclude that the relief has already been obtained and an injunction would be unnecessary. We agree. . . . [W]e find this suit is mooted under [Article III and prudential mootness]

In the present case, formal consultation between the Corps and FWS was the relief Plaintiffs sought for their ESA claim, DE26 ¶¶ 105, 108–09, p. 49, and formal consultation was completed with the issuance of the biological opinion in September 2006. *See* 50 C.F.R. § 402.14(*l*)(1). As of that date, the district court no longer had jurisdiction to enter *any* remedy for these claims, which no longer presented a "case or controversy" within the meaning of Article III of the Constitution. *E.g.*, *Arizonans for Official English v. Arizona*, 520 U.S. 43, 48, 117 S.Ct. 1055, 1060 (1997) (reiterating that a federal court has "no warrant to . . . retain[] for adjudication on the merits" a claim that "ha[s] lost the essential elements of a justiciable controversy").[3]

In response to Defendants' motions to dismiss the ESA claims as moot, the district court held that the mere existence of its earlier Summary Judgment Order

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doctrine[s]."). Indeed, several courts have held that the *initiation* of consultation is enough to moot an ESA claim, because once consultation is initiated, federal regulations ensure that the government will see it through. *See, e.g.*, *Defenders of Wildlife v. Martin*, 454 F. Supp. 2d 1085, 1103–04 (E.D. Wash. 2006); *Am. Littoral Soc'y v. U.S. EPA Region*, 199 F. Supp. 2d 217, 245–47 (D.N.J. 2002); *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 82 F. Supp. 2d 1070, 1079 (D. Ariz. 2000); *Ctr. for Marine Conservation v. Brown*, 917 F. Supp. 1128, 1144 (S.D. Tex. 1996).

[3] Even if Plaintiffs had sought relief other than formal consultation, which they did not, it would have been jurisdictionally barred: ESA claims must be exhausted before the defendant agency, or the court has no jurisdiction. *E.g.*, *Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 520 (9th Cir. 1998). The "60-day notice letter" on which Plaintiffs and the district court relied to establish compliance with that exhaustion requirement (*see* DE73, at 8) described *only* the failure in consultation. AR793B, at 2 n.1.

was a sufficient answer to the question of mootness: "the Court already has granted summary judgment as to [the ESA] Counts and dismissal at this time would be inappropriate." DE372, at 2. Indeed, the district court expressly held that "even if" the defendants were correct that it could give no further relief on the ESA counts, "dismissal of these claims at this post-summary judgment stage is unwarranted." DE372, at 4.

But there is no "summary judgment exception" to mootness.[4] The court's refusal to consider the post-summary judgment completion of the formal consultation process ignored the Supreme Court's oft-repeated admonition that the Article III "case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate." *E.g.*, *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477, 110 S.Ct. 1249, 1253 (1990). It is irrelevant when the claims became moot. *See Sierra Club v. Glickman*, 156 F.3d at 612, 619 (the plaintiff's ESA claims became moot when the government concluded consultation more than two years after the trial had concluded, the district court had entered judgment, and

[4] The district court did not rely on either of the *recognized* exceptions to the mootness doctrine, and neither applies here. A challenge to an agency's failure to consult is not a quickly-dissipating controversy "capable of repetition, yet evading review." *E.g.*, *S. Utah Wilderness Alliance*, 110 F.3d at 729. Nor is this a "voluntary cessation" case in which the defendant could renege once the threat of litigation lifts. In this case, the consultation cannot be undone and thus the ESA claims are moot. *See Troiano v. Supervisor of Elections*, 382 F.3d 1276, 1285 (11th Cir. 2004).

the case had been appealed). Contrary to the district court's holding, DE372, at 2–3, Article III's requirement of a case or controversy does not lapse mid-litigation and leave a district court free to order additional remedies after the required controversy no longer exists.[5]

The district court's error in holding that entry of a summary judgment order gave perpetual life to Plaintiffs' ESA claims was far from harmless. The Remedies Order repeatedly references the Corps' violations of the ESA as grounds for ordering vacatur. *See, e.g.*, DE387, at 16 (asserting that the ESA and other statutes "compel denial of these mining permits"); *id.* at 131–32 (asserting that the loss of wood stork habitat "is directly attributable to the Defendants' violations of the ESA in the issuance of these permits and provides additional support for this Court's decision that these permits must be vacated" (footnote omitted)); *see also id.* at 171, 173. The depth of the district court's reliance on Plaintiffs' ESA claims and their emotional impact in driving vacatur is manifest in the court's choice of language. *Id.* at 132 n.254 (suggesting that the decision to vacate is supported by

[5] The district court initially suggested that it might be able to order additional relief if it found "that the Defendants have not yet remedied all of the problems noted in [the Summary Judgment Order]." DE372, at 3. The district court later corrected itself, noting that any challenges to the *adequacy* of the Biological Opinion (as opposed to its *completion*) must be brought in a new proceeding. DE387, at 123 n.241 ("Neither the [Biological Assessment], nor the [Biological Opinion], are before this Court for full judicial review, as they have not yet been challenged through the administrative process.").

the ESA's "*absolute prohibition* on destruction of critical habitat") (emphasis added);[6] *id.* at 131 (describing the death of wood storks resulting, in his view, from the Corps' ESA violations: "It is *heartbreaking* to realize, five years into these improperly issued permits, that nine nestlings already have been lost—particularly when this Court and the public were assured by the Defendants that this mining was not likely to adversely affect the wood stork or any protected species.") (emphasis added; footnote omitted).[7]

Given these statements by the district court, there is no reasonable way to extricate the district court's improper reliance on the ESA from its decision to vacate Defendant-Intervenors' permits. Accordingly, the entire Remedies Order must be reversed and remanded for consideration of remedy untainted by ESA claims outside the district court's jurisdiction. *See Joiner v. City of Dallas*, 488 F.2d 519, 520 (5th Cir. 1974) ("Although the District Court asserted other grounds for its decision, we find them so inextricably interwoven with the above concepts that they should now be fully reconsidered by the trial court."). Additionally, all

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[6] Any concern about "destruction of critical habitat" in this case is entirely misplaced—the Lake Belt has not been designated critical habitat for the wood stork under the ESA. 6 Record 241, at 14.

[7] The district court's statements about the wood stork are particularly disturbing because they reject the actual conclusion of FWS's Biological Opinion: that the net effect of allowing mining, including proposed mitigation, would be beneficial to the wood stork. 6 Record 241, at 58, 60–61. These statements also ignore the fact that FWS issued an "incidental take statement" authorizing any take of wood storks that might occur. *Id.* at 58–60.

portions of the district court's Summary Judgment and Remedies Orders addressing the merits of the moot claims should be vacated. *See, e.g.*, *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39, 71 S.Ct. 104, 106 (1950) (vacatur of the underlying decision is the "established practice" when a case becomes moot); *Al Najjar v. Ashcroft*, 273 F.3d 1330, 1340 (11th Cir. 2001) (same); *Adler v. Duval County Sch. Bd.*, 112 F.3d 1475, 1478 (11th Cir. 1997) (same, on a claim-by-claim basis).

B. The District Court Wrongly Based Its Remand And Remedies Orders On Clean Water Act Claims That Are Barred By Sovereign Immunity.

The United States cannot be sued absent a waiver of sovereign immunity "'unequivocally expressed' in . . . statutory text." *United States v. Idaho ex rel. Dir., Idaho Dep't of Water Res.*, 508 U.S. 1, 6, 113 S.Ct. 1893, 1896 (1993). The statutory text "must be strictly construed" against waiver, *Ardestani v. INS*, 502 U.S. 129, 137, 112 S.Ct. 515, 520 (1991), and must not be "enlarged beyond what the language of the statute requires," *Idaho*, 508 U.S. at 7. Here, Plaintiffs brought their CWA claim against the Federal Defendants without identifying any such waiver of sovereign immunity. And in fact, no waiver exists.

1. This Court, in *PEACH*, held that Congress has not waived sovereign immunity for suits challenging the Corps' decision to grant permits under § 404 of the CWA. *PEACH*, 87 F.3d at 1249. To the contrary, this Court found that the

CWA's citizen-suit provision, 33 U.S.C. § 1365(a)(2), authorizes suits against *only* the Administrator of the EPA for alleged failure to perform nondiscretionary acts. *Id.* Because the provision "does not refer to the Army Corps of Engineers," this Court held that "Congress did not intend to waive sovereign immunity in regard to suits against the Army Corps of Engineers under the [CWA]."[8] *Id.* That holding has since been reaffirmed. *See, e.g.*, *Hill v. Boy*, 144 F.3d 1446, 1449 n.7 (11th Cir. 1998) (following *PEACH*).

The general waiver of sovereign immunity in the Administrative Procedure Act, 5 U.S.C. § 702, does not alter this result. By its plain terms, § 702 does *not* waive sovereign immunity whenever there is "any other statute that . . . *impliedly forbids the relief which is sought*." 5 U.S.C. § 702(2) (emphasis added); *see also Sprecher v. Graber*, 716 F.2d 968, 974 (2d Cir. 1983) (". . . Congress did not intend to waive sovereign immunity . . . where 'another statute provides a form of relief which is expressly or impliedly exclusive'") (citation omitted); *Media Gen. Operations Inc. v. Herman*, 152 F. Supp. 2d 1368, 1372 (S.D. Ga. 2001). That limitation squarely applies here. *See Alliance to Save the Mattaponi v. U.S. Army Corps of Eng'rs*, Civ. A. No. 06-01268 (HHK), 2007 WL 1576317, at *3 n.3 (D.D.C. May 30, 2007) (holding that the "APA does not provide a back door for

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[8] The decision in *PEACH* expressly rejected the Fourth Circuit's contrary reading in *National Wildlife Federation v. Hanson*, 859 F.2d 313, 316 (4th Cir. 1988). *See PEACH*, 87 F.3d at 1249 n.5.

plaintiffs to raise claims *pursuant* to other statutes, such as [Clean Water Act] § 505(a)(2), which disallow such claims").

Nor can Plaintiffs plead around this Court's holding in *PEACH* and the language of § 702 by repackaging their claims as a challenge under the APA itself. DE26 ¶¶ 3, 101–04.[9] The APA does create an independent cause of action under which private plaintiffs can seek review of agency action. *See* 5 U.S.C. §§ 702, 704, 706. But by the APA's plain terms, that right of action is limited to instances in which other statutes do not preclude judicial review. First, 5 U.S.C. § 701(a)(1) makes clear that APA judicial review of agency action does not apply "to the extent that . . . statutes preclude judicial review." *See, e.g.*, *St. Andrews Park, Inc. v. U.S. Dep't of the Army Corps of Eng'rs*, 314 F. Supp. 2d 1238, 1245 n.11 (S.D. Fla. 2004) (noting that because the CWA impliedly precluded review of a cease-and-desist order issued by the Corps, § 701's limitation would bar review under the APA as well).

Second, APA suits against the United States are also subject to § 702, which—as discussed above—waives federal sovereign immunity for declaratory and injunctive relief *only* to the extent that no other statute "impliedly forbids the

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[9] In their Amended Complaint, Plaintiffs allege that the Corps' issuance of and subsequent refusal to modify or revoke the mining permits violated § 706(2) of the APA in that it was arbitrary and capricious (DE26 ¶¶ 101, 103), and they specifically assert that the district court has jurisdiction under § 706 of the APA (*id.* ¶ 3).

relief which is sought." 5 U.S.C. § 702(2); *see also Saavedra Bruno v. Albright*, 197 F.3d 1153, 1158 (D.C. Cir. 1999) (noting that actions under the APA are subject to the limitations of both § 701 and § 702(2), and that the proviso in § 702(2) qualifies the entirety of § 702, including "the portion . . . from which the presumption of reviewability is derived"); *Hansson v. Norton*, 411 F.3d 231, 234 (D.C. Cir. 2005) (explaining that a claim brought under § 704 is subject to the limits of § 702(2)). Courts have repeatedly held that claims raised under the APA are subject to this limitation in § 702; when review is impliedly precluded by another statute, it is not permitted by the APA. *See, e.g.*, *Albrecht v. Comm. on Employee Benefits*, 357 F.3d 62, 67–68 (D.C. Cir. 2004) (Tucker Act); *Neighbors for Rational Dev., Inc. v. Norton*, 379 F.3d 956, 960–61 (10th Cir. 2004) (Quiet Title Act); *Ass'n of Civilian Technicians, Inc. v. FLRA*, 283 F.3d 339, 341 (D.C. Cir. 2002) (Federal Labor Relations Act); *Ridder v. Office of Thrift Supervision*, 146 F.3d 1035, 1041–42 (D.C. Cir. 1998) (Federal Deposit Insurance Act); *Idaho Sporting Congress, Inc. v. U.S. Forest Serv.*, 92 F.3d 922, 925 (9th Cir. 1996) (Rescissions Act).

Accordingly, the APA does not permit private actions against the Corps, even though brought under the APA's review provisions, where the grounds of those actions are alleged violations of the CWA. Both before and after *PEACH*, district courts in this Circuit have observed that the implied preclusion of suits

against the Corps under the CWA is sufficient, by virtue of § 701, to bar APA review of other actions by the Corps allegedly violating the CWA. *See St. Andrews Park*, 314 F. Supp. 2d at 1245 n.11; *Banks v. Page*, 768 F. Supp. 809, 814 (S.D. Fla. 1991). Indeed, as Judge Posner suggested in *Solid Waste Agency v. U.S. Army Corps of Engineers*, 101 F.3d 503 (7th Cir. 1996), "if the only basis for a challenge to the grant of a permit were that the Corps had violated section 404 [of the CWA], to allow the challenge to go forward would be to countenance an end run around" the limits imposed by the CWA. *Id.* at 506.

2. The Supreme Court's decision in *Bennett v. Spear*, 520 U.S. 154, 117 S.Ct. 1154 (1997), although often cited for the general proposition that suits against federal agencies based on administrative action are permitted under the APA, does not mandate a different result. In *Bennett*, the plaintiffs brought an action against the Secretary of the Interior and several FWS officials under both the ESA's citizen-suit provision, 16 U.S.C. § 1540(g), which permits suits against those entities under certain circumstances, and the APA's judicial-review provisions. *See* 520 U.S. at 157, 117 S.Ct. at 1158–59. The Supreme Court concluded that although two of the plaintiffs' three claims fell outside the scope of the ESA's citizen-suit provision, these two claims could be brought under the APA. *See id.* at 171–74, 117 S.Ct. 1165–67. The Court stated that "[n]othing in the ESA's citizen-suit provision expressly precludes review under the APA, nor do

we detect anything in the statutory scheme suggesting a purpose to do so," *id.* at 175, 117 S.Ct. at 1167.

Because the statute at issue in *Bennett* did not preclude any suit against the agency defendants, as the CWA does, *Bennett* did not address at any length the limitations on APA review in § 701(a)(1) and (2).[10] As a number of courts have held since *Bennett*, however, when relief is impliedly precluded by another statute, § 702(2) continues to prevent plaintiffs from seeking the barred relief under the APA. *See, e.g.*, *Albrecht*, 357 F.3d at 67–68; *Neighbors for Rational Dev.*, 379 F.3d at 960–61; *Ass'n of Civilian Technicians*, 283 F.3d at 341; *Ridder*, 146 F.3d at 1041–42; *Idaho Sporting Congress*, 92 F.3d at 925.[11] *Bennett* provides no support

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[10] *Bennett* also did not address implied preclusion under § 702(2). *See Saavedra Bruno*, 197 F.3d at 1157–58 ("Sometimes it is suggested that § 701(a)(1) and (2) are the only exceptions to review under § 702 [citing, *inter alia*, *Bennett*]. The suggestion is, we think, not entirely accurate. As revised in 1976, § 702 itself contains another qualifying clause."). Because *Bennett* did not address this provision dealing with sovereign immunity, it also was not applying the "strict[]" standard of statutory construction that applies in that context. *Ardestani*, 502 U.S. at 137, 112 S.Ct. at 520.

[11] Although some courts have allowed APA actions against the Corps for alleged violations of the CWA, this Court has not, and such a holding would be inconsistent with the logic of *PEACH* and its post-*Bennett* reaffirmation in *Hill*. Cases concluding that the CWA does not preclude APA review largely ignore the text and structure of the APA, in particular § 702(2), and they offer virtually no analysis to justify their departure from the statutory scheme, *see, e.g.*, *Sierra Club v. U.S. Army Corps of Eng'rs*, 935 F. Supp. 1556, 1565 & n.10 (S.D. Ala. 1996); *Cascade Conservation League v. M.A. Segale, Inc.*, 921 F. Supp. 692, 697 (W.D. Wash. 1996), or they involve, like *Bennett*, an action against a defendant already subject to suit under the relevant non-APA statute, *see Or.*

for substantially altering the scheme of judicial review Congress designed when it enacted the CWA, and no support for upsetting Congress' choice to subject only the EPA—and not the Corps—to suit for alleged violations of the Clean Water Act.

The jurisdictional defect in the district court's evaluation of the CWA claims, like the defect in the district court's evaluation of the ESA claims, cannot be considered harmless.[12] The district court itself noted that it "might have reached a different conclusion" as to vacatur had the Corps addressed what the district court saw as CWA violations. DE387, at 68 n.149. Indeed, in determining a remedy in this case, the district court relied heavily on the alleged risk to drinking water from the Northwest Wellfield, which the district court thought legally relevant *only* because the Corps' alleged "disregard" for that risk

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Natural Res. Council v. U.S. Forest Serv., 834 F.2d 842, 848–50 (9th Cir. 1987).

[12] Although federal sovereign immunity was not raised in the district court below, this Court must nonetheless consider the issue on appeal. *United States v. Land, Shelby County*, 45 F.3d 397, 398 n.2 (11th Cir. 1995) ("Sovereign immunity of the United States is an issue of subject matter jurisdiction and, thus, may be raised at any time."). This is true even if the issue had been conceded by the federal defendants or by any other party. "[E]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it" or "make no contention concerning it." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 102 S.Ct. 1326, 1331 (1986) (quotation marks and citations omitted); *accord AT&T Mobility*, __ F.3d at __, 2007 WL 2297832, at *3.

"violate[d] several statutory and regulatory provisions" under the CWA. *Id.* at 62–63. The district court made it clear that it found the Corps' failure to fully consider benzene contamination under the CWA to be "the most egregious example of [the Corps'] failures." *Id.* at 171. And in the Summary Judgment Order, the district court went so far as to say that the Corps' violations of the CWA "compel my conclusion that this case must be remanded to the agency for further analysis." DE73, at 26. Given this pervasive reliance on CWA claims over which the district court lacked jurisdiction, this Court should reverse the district court's grant of summary judgment, vacate the district court's order on remedy, and remand for further review.

II. The District Court Committed Reversible Error By Failing To Defer To Agency Expertise And By Substituting Its Judgment For That Of The Corps.

In addition to the district court's improper exercise of jurisdiction over Plaintiffs' ESA and CWA claims, the court also erred by applying the wrong standard of review to its evaluation of the Corps' decisionmaking. Rather than defer to the rational conclusions reached by the expert agency on an extensive administrative record, the district court reweighed evidence, reevaluated credibility, and substituted its judgment regarding the appropriate hierarchy of environmental and economic priorities for that of the Corps.

A. The District Court Was Obligated To Conduct An Exceedingly Deferential Review Of The Corps' Decisions.

It is black-letter law that a district court must be "exceedingly deferential" to the Corps' decision to issue § 404 permits, *Fund for Animals*, 85 F.3d at 541, and that it must affirm the Corps' decision so long as the Corps "reached a conclusion that rests on a rational basis." *City of Oxford v. FAA*, 428 F.3d 1346, 1352 (11th Cir. 2005). Particularly where, as here, the analysis requires a high level of technical expertise, courts "must defer to 'the informed discretion of the responsible federal agencies,'" and "'[w]hen examining this kind of scientific determination . . . a reviewing court must generally be at its most deferential.'" *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377, 109 S.Ct. 1851, 1861 (1989) (*quoting Kleppe v. Sierra Club*, 427 U.S. 390, 412, 96 S.Ct. 2718, 2731 (1976), and *Balt. Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 103, 103 S.Ct. 2246, 2255 (1983)).

This Court, conversely, owes "no particular deference to the district court's conclusions as to whether the administrative record supports the [agency's] decision." *Druid Hills Civic Ass'n v. Fed. Highway Admin.*, 772 F.2d 700, 714 (11th Cir. 1985); *accord United States v. Garcia*, 844 F.2d 1528, 1533 n.12 (11th Cir. 1988) ("our review of an administrative record is wholly independent of that of the district court"). Rather, "[o]n appeal, this court, in reviewing the

administrative record, applies the same arbitrary and capricious standard of review utilized by the district court." *Fund for Animals*, 85 F.3d at 541.

B. The District Court's Evaluation Of The Corps' NEPA Compliance Far Exceeded The Bounds Of Appropriate Judicial Review.

"NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756–57, 124 S.Ct. 2204, 2209 (2004). Accordingly, a court's "only role is to insure that the agency has taken a 'hard look' at the environmental consequences of the proposed action." *Druid Hills*, 772 F.2d at 709. This means that agency actions may be set aside "only for substantial procedural or substantive reasons," *Fund for Animals*, 85 F.3d at 542 (quotation marks omitted), and not because the court disagrees with the agency's conclusions. *City of Oxford*, 428 F.3d at 1352 ("The agency need not have reached the same conclusion that the reviewing court would reach; the agency must merely have reached a conclusion that rests on a rational basis.").

Although the district court made token references to deference, it utterly failed to adhere to a narrow scope of review. Rather, the district court disregarded the actual federal action at issue, openly refused to afford the Corps' decisions deference, ignored or mischaracterized record evidence supporting the Corps'

conclusions, reweighed competing evidence considered by the Corps, disregarded evidence unfavorable to its conclusions, and substituted its judgment regarding environmental priorities for that of the agency. In essence, the district court's actions in this case were the precise opposite of appropriate judicial review under NEPA. *County of Suffolk v. Sec'y of the Interior*, 562 F.2d 1368, 1383 (2d Cir. 1977) ("The district court does not sit as a super-agency empowered to substitute its scientific expertise or testimony presented to it *de novo* for the evidence received and considered by the agency . . . .").

1. The District Court Analyzed A Nonexistent Agency Action.

A fundamental problem underlying the district court's evaluation of the Corps' NEPA compliance was that the district court *analyzed a nonexistent agency action*. Although the Corps initially contemplated issuing 50-year mining permits covering 15,800 acres in the Lake Belt, AR614, at 10, it never did so. The actual agency action at issue is the issuance of 10-year mining permits covering approximately 5,400 acres. DE73, at 5. That action was accompanied by an ROD incorporating an express finding of no significant impact ("FONSI"), documenting the Corps' conclusion that the 10-year permits would not have a significant negative impact on the environment. AR1028, at 113.

The district court, however, disregarded the ROD and the permits actually issued, announcing that it reviewed the Corps' action as if "these really are fifty

year permits, perhaps clothed as 10 year (or 14 year or 16 year) permits." DE73, at 104–05. Indeed, the district court analogized the 10-year permits to the first phase of a multi-phase project, concluding that "[i]t would be error for this Court to review this case without addressing the question of the fifty year plan." *Id.* at 105. In doing so, the district court ignored that the Corps deferred any action on mining after the 10-year term of the issued permits expires. Until the Corps decides to actually authorize further mining, it has no obligation to conduct an analysis of that mining under NEPA. *Sierra Club v. U.S. Army Corps of Eng'rs*, 295 F.3d 1209, 1215 (11th Cir. 2002); *Sierra Club v. Peterson*, 717 F.2d 1409, 1414–15 (D.C. Cir. 1983) (NEPA is not triggered for future decisions even though a conceptual leasing plan is in place).[13]

The district court's decision to conduct review of "fifty year permits" that had not been issued is itself legal error. It is axiomatic that "[o]nly final agency actions can be subject to judicial review." *Ga. Power Co. v. Teleport Commc'ns*

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[13] Evaluation of the "fifty year permits" colored all aspects of the district court's NEPA review. *E.g.*, DE73, at 69–73 (identifying seepage concerns about "new quarries located at the western edge of the Lake Belt" which were not authorized in the 10-year permits); *id.* at 87 (identifying concerns about mitigation because the 50-year "length of the initial period of proposed mining made economic predictions difficult"); *id.* at 68 (describing the risk of drinking water contamination from "future pits [which] will be much larger and potentially closer to the wellheads" than those in the 10-year permits); *id.* at 76–77 (criticizing the EIS's failure to evaluate future construction of "additional roads and infrastructure to support the mining [that] will be developed" over the 50-year course of mining).

Atlanta, 346 F.3d 1047, 1050 (11th Cir. 2003). The only final action taken by the Corps in this case was the issuance of 10-year permits. That the Corps had contemplated, but ultimately rejected, issuing 50-year permits does not nonetheless give rise to an obligation to by the Corps to prepare or perfect an EIS for 50-year permits. *See Kleppe*, 427 U.S. at 404 ("the mere 'contemplation' of certain action is not sufficient to require an impact statement"). Nor does the district court have authority to review any asserted failure of the Corps to fully evaluate 50-year permits when those permits have not been issued. *Nat'l Parks Conservation Ass'n v. U.S. Army Corps of Eng'rs*, 446 F. Supp. 2d 1322, 1340 (S.D. Fla. 2006) (Jordan, J.) (court has no authority under NEPA to evaluate developer's request for a five-year extension of an existing § 404 permit where the Corps has not acted on the request for extension).

This Court previously has reversed this same District Judge for requiring the NEPA evaluation of nonexistent federal actions, holding:

> NEPA does not require evaluation of hypothetical proposals, impacts and alternatives concerning a nonexistent federal proposal. This would seem to be an impossible task. If and when such activities are actually proposed, the responsible agency will have to comply with NEPA requirements, and the question of whether an EIS is required will then be addressed.

United States v. S. Fla. Water Mgt. Dist., 28 F.3d 1563, 1573 (11th Cir. 1994). Here, by remanding and ordering an SEIS to cure the deficiencies it found with the Corps' NEPA evaluation of 50-year permits *that were never issued*, the district

court has again improperly required NEPA analysis of a nonexistent federal action. This basic error, forming as it does an express predicate for all the district court's NEPA findings, requires reversal.

2. The District Court Failed To Defer To The Corps And Improperly Substituted Its Judgment For That Of The Agency.

The district court also failed—indeed, by the time of the Remedies Order, candidly refused—to apply the appropriate standard of review for Corps decisionmaking. Although acknowledging that settled authority mandated deference to expert federal agencies, the district court declared that the Corps is owed less deference than other agencies receive, because "the Corps faces an inherent conflict when attempting to regulate mining in these wetlands, since any reduction in this mining may increase the costs of these materials," which the Corps itself uses. DE387, at 19 n.44.[14] Indeed, even in the Summary Judgment Order, the district court hinted that the Corps "'is not equipped to evaluate the environmental impact of these dredging activities,'" because "'[t]hey would do a

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[14] *See also* DE387, at 22 ("[i]t may be that the power of 'economics' (i.e. financial profit to be gained from further production of building materials) unduly influenced the Corps"); *id.* at 34 n.77 (noting "the inherent conflict of interest in the Corps' enforcement of environmental laws which conflict with the agency's own construction projects" because "[i]n the present case, the Corps is a direct consumer of the limestone produced pursuant to the invalidated mining permits"); *id.* at 173 ("The Corps' role as a builder conflicted with its role as the protector of the wetlands in this case."); *id.* at 176 (stating that the "inherent conflict in the two roles the Corps attempted to play throughout this process lead[s] to a lack of confidence in this agency at this time").

disservice to their mission if they would try to act as environmental protectors.'" DE73, at 132 n.219 (quoting 117 Cong. Rec. 38854 (1991) (statement of Sen. Muskie)).

The district court also stated that the Corps should receive less deference because of the "Corps' record of admitted failures" in other, unrelated instances—including its allegedly inadequate flood-control plans for Hurricane Katrina. DE387, at 17 n.41; *id.* at 34–35 n.78 ("the Corps is an agency with serious performance deficiencies"). And the district court lambasted the Corps and FWS for what it took to be a reversal of position on whether the mining activities would be harmful to wood storks (paradoxically, prompted by the district court's own order in this case), saying that this reversal warranted the court's refusal to afford deference to the agency's decisions: "these same mining activities which were predicted to be harmless now, strikingly, support a finding of a 'take' of the endangered wood stork—all of which suggests that little deference to these agencies' actions in this case is required by this Court." *Id.* at 128; *see also id.* at 21 n.51.[15]

[15] Once again, the district court ignored the actual conclusions of the Biological Opinion. According to FWS, the "take" to which the court refers is "not likely to result in jeopardy to the species" and instead is an "incidental take" that is "not significant to the species." 6 Record 241, at 61–62.

The district court's failure to defer to the Corps' decisionmaking is apparent throughout the court's orders. For example, rather than deferring to the Corps' resolution of any evidentiary conflicts, the district court decided to weigh competing evidence itself, ignoring the Corps' conclusions. Where the Corps relied on a study of the mining industry to conclude that, due to the inferior quality of rock and the transportation costs associated with other mining areas, alternatives to Lake Belt aggregates were unavailable, *see* DE73, at 145–47, the district court credited an e-mail and a letter written by members of the Audubon Society, which speculated based on "a list of websites" that some amount of alternative rock can be imported into Florida, *see id.* at 148 (citing AR558; AR549), and concluded that "[t]he administrative record *clearly establishes* that, indeed, there are other sources for limestone rock." *Id.* at 150 (emphasis added). The district court repeated this error *ad nauseam*, impermissibly discounting the credibility of evidence provided to the Corps by the permit applicants. *See*, *e.g.*, *id.* at 169–71 (rejecting biological assessment prepared by applicants' consultant); *id*. at 100–01 n.172 (dismissing report regarding economic impacts prepared by applicants' consultant); *id*. at 117 n.195 (criticizing report on vegetation prepared by applicants' consultant).[16]

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[16] It is important to note that the Corps did not rely blindly on the permit applicants. For example, the Corps noted that the Florida Legislature itself corroborated the mining industry's study of alternatives. *See* AR614, at 11 (*citing* 1992 Fla. Laws, Ch. 92-132, § 21 ("The Legislature recognizes that

Similarly, the district court substituted its judgment for that of the Corps regarding policy priorities expressly reserved for the executive branch. For example, the district court assigned relative weights to the importance of "environmental" and "economic" factors in the NEPA analysis, decreeing that "environmental impacts are more important than economic ones," and that "economic and social impacts have lesser importance than purely environmental or ecological impacts." DE73, at 109. Not only did this re-balancing by the district court invade the province of the Corps, it also flouted controlling precedent: "Congress in enacting NEPA . . . did not require agencies to elevate environmental concerns over other appropriate considerations." *Balt. Gas & Elec.*, 462 U.S. at 97, 103 S.Ct. at 2252. "If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *N. Buckhead Civic Ass'n v. Skinner*, 903 F.2d 1533, 1540 (11th Cir. 1990).[17]

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deposits of limestone and sand suitable for production of construction aggregates, cement, and road base materials are located in limited areas of the state. [The Lake Belt] is one of the few remaining high-quality deposits in the state available for the recovery of limestone.")).

[17] The district court made the same error when it rebalanced the "public interest" factors under the CWA. *See, e.g.*, DE387, at 159–61. It disregarded the Corps' judgment, declaring that "[t]he private need of corporations to earn profits on their investments is not included in the list of relevant factors to be considered," DE387, at 160, despite the fact that CWA regulations *require* the Corps to consider "utilization of important resources," "economics," and "considerations

The district court also second-guessed the Corps' calculation of mitigation requirements for wetlands impacts, criticizing the Corps' chosen mitigation ratio as inadequate and its fees as insufficient to mitigate the proposed mining, and asserting that these failures violated NEPA. DE73, at 95–96. But these criticisms express the district court's dissatisfaction with the *result* reached by the Corps regarding mitigation—a dissatisfaction beyond the district court's purview under NEPA. *Fund for Animals*, 85 F.3d at 542 ("Administrative decisions should be set aside in this context . . . only for substantial procedural or substantive reasons as mandated by statute, . . . not simply because the court is unhappy with the result reached.") (quoting *Skinner*, 903 F.2d at 1538–40) (alterations in original). Moreover, as noted by the Supreme Court, "it would be inconsistent with NEPA's reliance on procedural mechanisms—as opposed to substantive, result-based standards—to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353, 109 S.Ct. 1835, 1847 (1989).

The district court's treatment of seepage further illustrates the errors stemming from the court's disregard for agency deference. In the EIS and ROD,

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of property ownership" in determining the public interest. 33 C.F.R. § 320.4(a)(1).

the Corps noted the possibility that the expansion of mining lakes could increase seepage of water from Everglades National Park, but concluded:

> [Seepage] impacts would be minimal and seepage control technology would mitigate. Upfront seepage mitigation for the final anticipated seepage impacts of the project is not immediately required due to the fact that the mining proceeds from east to west at a relatively slow rate affecting only a few acres each year and the CERP [Comprehensive Everglades Restoration Plan] projects are scheduled in these early years. Therefore, the permit instruments for all of the companies in the Lake Belt require the timing of the submission of the total plan for hydrologic seepage control to be discussed at the periodic reviews and not later [than] the 10-year review of the permit.

AR1028, at 53. This conclusion did not stand unsupported; it was based on 12 pages of seepage analysis in the ROD and 125 pages of detailed hydrological studies in Appendix A to the EIS. AR1028, at 41–53; AR614, at 138–263. Inexplicably, however, the district court asserted that the EIS had a "total of less than two pages of analysis" of seepage, and lacked "sufficient detail . . . in its hydrological analysis" to satisfy NEPA. DE73, at 69–70.

The district court also criticized the Corps for its failure to recognize the significance of seepage, noting that "studies suggest that mining for the entire Krome Quarry tract [the quarry on Kendall's property immediately to the east of the Everglades National Park] . . . , when compared to mining only the previously permitted lakes, may cause as much as an 11% increase . . . in seepage from the Park during the dry season." *Id.* at 35. But the district court ignored the bottom-line conclusion of those studies about the overall impact of seepage on the Park;

increased mining operations "would have *virtually no impact* on seepage from the west under most conditions and *only minimal effect* (less than 2.0%) during dry conditions." AR614, at 231 (emphases added).

The district court further criticized the Corps for using outdated scientific analyses of seepage, highlighting that some of the data used by the Corps was from 1969 and some from 1989. DE73, at 22. But the court ignored the Corps' explanation for why those data were chosen: 1969 was an extremely wet year and 1989 an extremely dry year, and for purposes of designing a hydrological model, they were needed "to bracket extreme wet and dry hydrological conditions." AR614, at 244.[18]

These are precisely the types of errors—errors that permeate the district court's two orders—that would have been avoided had the district court applied the appropriate standard of review.[19] It is for the Corps, not the district court, to

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[18] *Plaintiffs' own witness* acknowledged at the subsequent remedies hearing that the model used by the Corps was "appropriate," had been "used appropriately," and provided "a reasonable estimate of the conditions simulated." 25 Record 406, at 1106–07. Moreover, despite the concerns the district court had previously expressed about mitigation of seepage in its Summary Judgment Order, Plaintiffs' witness also conceded that "seepage management is not expected to be an issue until the mining proceeds *outside the ten-year footprint* when impacts move closer to the Everglades." *Id.* at 1115 (emphasis added).

[19] To be clear, the district court's errors were not limited to the Corps' analysis of alternatives, mitigation, and seepage. For instance, in evaluating threats of contaminated water in the wellfield, the district court rejected the Corps' balance of risk, saying the Corps "should have been more conservative as to its

evaluate the relative weight and credibility of the evidence. *See PEACH*, 87 F.3d at 1246 ("The role of the court is not to conduct its own investigation and substitute its own judgment for the administrative agency's decision."); *Pennaco Energy, Inc. v. U.S. Dep't of the Interior*, 377 F.3d 1147, 1159 (10th Cir. 2004) ("On review of an agency's decision, this court's function is not to weigh the evidence or evaluate the witnesses' credibility."); *Spiller v. White*, 352 F.3d 235, 243 (5th Cir. 2003) ("[G]overnment agencies—and not the federal courts—are the entities NEPA entrusts with weighing evidence and reaching factual conclusions."). This district court's extraordinarily extensive efforts to reanalyze and reweigh the evidence in the administrative record and to resolve conflicting facts without regard for the conclusions of the Corps are undeniable error. *First Nat'l Bank of Fayetteville v. Smith*, 508 F.2d 1371, 1378 (8th Cir. 1974) ("It is in this respect that the District Judge erred, for rather than resolving the evidentiary conflicts in favor of the Comptroller's action, he independently weighed the evidence and reached his own conclusions.").

Although it is beyond question that "[t]he reviewing court is not authorized to substitute its judgment for that of the agency concerning the wisdom or

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risks" and that "even if the probability of contamination is low . . . the consequences are great." DE73, at 67–68. Similarly, the district court criticized the Corps' technical decision that the Pennsuco wetlands were the best location for wetlands acquisition and restoration. *Id.* at 91–93.

prudence of the proposed action," *Fund for Animals*, 85 F.3d at 542, that is exactly what the district court did in this case. "NEPA itself does not mandate particular results, but simply prescribes the necessary process," *Robertson*, 490 U.S. at 350, 109 S.Ct. at 1846, yet the district court made clear that it has a result in mind—suggesting that the evidence before the Corps "compel[led] denial of these mining permits." DE387, at 16; *see also id.* at 2 n.2 (same); *id.* at 172–73 ("these permits should not have issued" and "the activities pursuant to these permits should not continue"). The district court upbraided the Corps for having "no intention of stopping these environmentally damaging activities, despite this Court's sweeping condemnation of the basis for these permits." *Id.* at 21. Indeed, at the close of its Summary Judgment Order, the district court explicitly acknowledged that it would have affirmed a denial of the permits by the Corps. DE73, at 185 n.290.

As this Court has stated, "[t]he agency need not have reached the same conclusion that the reviewing court would reach; the agency must merely have reached a conclusion that rests on a rational basis." *City of Oxford*, 428 F.3d at 1352. The district court's utter failure to adhere to its proper role in reviewing the Corps' action in this case compels reversal of the district court's orders and remand for appropriate judicial review.

C. The District Court Erred In Concluding That The Corps Had Violated The Clean Water Act.

The district court's approach to reviewing the Corps' CWA determinations suffered from errors as significant as those that plagued its approach to NEPA.[20] The district court ordered remand based on two asserted errors: (1) the Corps' decision not to hold a public hearing before issuing the permits, and (2) the Corps' inadequate evaluation of practicable alternatives. DE73, at 155–56. As to both of those asserted errors, the district court simply dismissed the Corps' conclusions and substituted its own judgment for that of the agency.

1. The District Court Substituted Its Own Judgment For That Of The Corps In Demanding Additional Public Hearings On The Permits.

The district court noted, correctly, that the Clean Water Act does not require the Corps to hold a public hearing. DE73, at 161 ("The CWA grants the Corps discretion to determine whether public hearings are held, and the Corps may decide not to hold a hearing if there is "'no valid interest to be served by a hearing.'") (citing 33 C.F.R. § 327.4(b)). The district court then held, however, that the Corps' decision not to hold its own public hearing regarding the permits was an

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[20] As noted above, in Part I.B, the district court did not have jurisdiction to consider Plaintiffs' CWA claims. That the district court did so, and in the process ignored entirely its obligation to defer to the Corps' CWA decisions, further demonstrates that the district court's orders cannot stand.

abuse of the Corps' discretion, and that "remand is necessary on that basis." DE73, at 155–56.

It is difficult to conceive of an agency decision requiring more deferential review than the Corps' decision that it has the information it deems necessary to act on a permit. *Fund for Animals*, 85 F.3d at 545 ("If the Corps determines that it has the information necessary to reach a decision and that there is 'no valid interest to be served by a hearing,' the Corps has the discretion not to hold one"). Particularly where, as here, "Plaintiffs have not specifically suggested what information [not already in the record] would have been presented" at any such hearing, it was an egregious error for the court to *presume* that new and relevant information would have come to light. DE73, at 162 & n.260 ("Presumably the County and members of the public would have provided comments on those items that had never been disclosed in the EIS and, thus, never subjected to public scrutiny."). Basing a remand on such speculation was entirely improper. *Fund for Animals*, 85 F.3d at 545.

In this case, even more so than in *Fund for Animals*, there were ample opportunities for public participation, including eight years of monthly public meetings on the Lake Belt plan and lengthy written submissions by interested

parties. *See, e.g.*, AR614, at 104; AR1023.[21] "Given the information generated from these hearings and the voluminous written information submitted to the Corps," the Corps' conclusion "that holding its own additional public hearing was unlikely to generate any new information" was entirely reasonable. *Fund for Animals*, 85 F.3d at 545. The district court's unrestrained substitution of its supposition that another hearing "presumably" would have revealed new information, for the Corps' judgment that another hearing would serve no valid purpose, is obvious error.

2. The District Court Substituted Its Judgment For That Of The Corps In Considering Whether There Are Practicable Alternatives To The Permitted Mining.

The district court also substituted its judgment for that of the Corps in concluding that practicable alternatives to Lake Belt mining exist. First, the district court incorrectly found that the Corps was required to apply a presumption to that effect. Second, the district court dismissed the Corps' entire analysis of alternatives because it was based on studies by the permit applicants. Once again, the district court stepped outside the bounds of its judicial role to conduct new factfinding and reweigh the credibility of evidence in the administrative record.

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[21] Both the EIS and the ROD described the many comments submitted, provided specific responses to the comments, and in many circumstances included permit conditions responsive to those comments. *See* AR614, at 893–920; AR1028, at 84–112.

In certain circumstances, the Section 404 Guideline applies a presumption that practicable alternatives to a project exist:

> Where the activity associated with a discharge which is proposed for a special aquatic site [such as wetlands] . . . does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e., is not "water dependent"), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise.

40 C.F.R. § 230.10(a)(3). The presumption's applicability, by its terms, turns on whether the *proposed* activity needs to be located on the "special aquatic *site in question*," a question that the Corps answered in the affirmative. The Corps rationally concluded that the project's basic purpose, "to extract limestone," AR1028, at 8, cannot be accomplished without mining where the limestone is located, and it is undisputed that the limestone deposits underlying the Lake Belt are unique in quality. *See* AR614, at 934.

The district court, on the other hand, reformulated the relevant question based on its perception of appropriate policy objectives—asking whether limestone mining *in general* requires siting in wetlands, DE73, at 142—simply disregarding the actual regulatory language about site-specificity and ignoring the practical limitations inherent in an activity involving natural resource extraction. The district court's reformulation of the relevant question is a plain error of law. *See Miccosukee Tribe v. S. Everglades Restoration Alliance*, 304 F.3d 1076, 1083, 1086 (11th Cir. 2002) (reversing district court ruling that "plain language" of

statute was "trumped by what the court perceived to be the core concern" behind the statute).

This Court considered application of 40 C.F.R. § 230.10(a)(3) in *Fund for Animals*, 85 F.3d at 543. In that case, Sarasota County proposed constructing a new landfill in wetlands. Because the Corps concluded that there were no suitable non-wetlands sites available in Sarasota County for a landfill, the Corps refused to apply the presumption that practicable alternatives existed. This Court upheld that decision, finding that the presumption of practicable alternatives applies only where a "suitable" non-wetlands site is available that would "avoid any impacts on wetlands." *Id.* Because there was no suitable upland site in Sarasota County where a landfill could be sited, this Court concluded that the presumption of practicable alternative did not apply. *Id.* at 543 ("Since the Plaintiffs have not identified an 895-acre parcel of contiguous uplands in all of Sarasota County, it is not clear that the presumption established by 40 C.F.R. § 230.10(a)(3) would ever apply in this case."). Obviously, *Fund for Animals* could not have been decided as it was if the district court's interpretation of § 230.10(a)(3) were accurate. There is no question that landfills *in general* do not need to be sited in wetlands. *Fund for Animals* stands instead for the proposition that a proposal-specific inquiry must be undertaken by the Corps to determine if the presumption of practicable alternatives applies.

The Ninth Circuit has reached the same conclusion. In an analogous situation, a timber company sought a permit to fill wetlands to construct a log storage area adjacent to its sawmill. *Friends of the Earth v. Hintz*, 800 F.2d 822, 831–32 (9th Cir. 1986). The Corps concluded that, even if "log storage" was not water-dependent *in general*, the permittee in that case had a demonstrated need to store *its* logs in a particular water-adjacent area (because storage would be "most efficiently done" near the dock site from which some of the logs would be exported). The Ninth Circuit concluded that § 230.10(a)(3) anticipates an analysis of the relationship between the *specific* activity proposed and the *specific* site in question. *Id.* at 831–32 & n.10 ("The record adequately explains why the Corps believed the fill activity was water dependent, and that explanation is rational.").

In the present case, the Corps' determination that the proposed mining requires siting in the Lake Belt is entitled to substantial deference, *see Nat'l Wildlife Fed'n v. Whistler*, 27 F.3d 1341, 1345–46 (8th Cir. 1994), and is perfectly rational where, as here, the mining companies could not simply have "relocated the entire [project] to other locations." *Id.* at 1345; *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2866 (1983) ("the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choices made'") (quoting *Burlington Truck Lines v. United States*, 371

U.S. 156, 168, 83 S.Ct. 239, 245–46 (1962)). The district court's dogged insistence to the contrary—based on an improper reformulation of federal regulations and a deviation from the binding precedent of this Court's *Fund for Animals* decision—is simply erroneous.

Moreover, regardless of whether the presumption in 40 C.F.R. § 230.10(a)(3) applies, the district court entirely discounted the Corps' further finding that no alternatives were practicable "in light of overall project purposes," *id.* § 230.10(a)(2)—here, "to provide construction-grade limestone from Miami-Dade County." AR1028, at 8; *see also, e.g., La. Wildlife Fed'n v. York*, 761 F.2d 1044, 1048 (5th Cir. 1985) ("[T]he Corps has a duty to take into account the objectives of the applicant's project."); *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1270 (10th Cir. 2004) (same). The administrative record amply demonstrates that there are *no* practicable alternatives to the Lake Belt's deposits of high-grade limestone. *See* AR614, at 923–82. The Corps properly credited this record evidence, yet the district court completely discounted it, primarily because it relied on a report by the permittees' consultant. DE73, at 24–25, 145–46, 150–151, 154. But the CWA not only contemplates information provided by permittees, 33 C.F.R. Pt. 325, App. B, 8(f)(2) ("[i]nformation required for an EIS . . . may be furnished by the applicant or a consultant employed by the applicant"); *see also* 40 C.F.R. § 1506.5(c), courts have long held that such information can

form the *exclusive* basis for Corps' decisions. *See, e.g., Friends of the Earth*, 800 F.2d at 835–36 ("The Corps is not a business consulting firm" and may therefore base its analysis "*entirely* upon information supplied by the applicant." (emphasis added)). Moreover, the district court wholly ignored the Corps' independent analysis of the entire record on the practicability of alternatives. *See* AR1028, at 35–55. The district court's refusal to defer to the Corps' weighing of the evidence regarding practicable alternatives cannot be justified.[22]

The district court's remand, based on the conclusion that the Corps violated the Clean Water Act, is predicated on a complete substitution of the district court's judgment for the agency's. The district court disregarded the Corps' discretion not to hold a public hearing where the Corps determined that a hearing would serve no valid purpose. It also ignored the Corps' rational decision that this mining project was water dependent, and then compounded that error by disregarding the substantial evidence that no practicable alternative to Lake Belt mining exists. The importance that the district court placed on these erroneous findings of CWA violations, DE73, at 26, and the central role they played in the district court's

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[22] The district court also suggested in the Remedies Order, *sua sponte*, that it was improper for the Corps to group its alternatives analysis for the various permit applicants into a single document. DE387, at 149. Nowhere do the CWA regulations contain that limitation. *Cf. Sierra Club v. U.S. Army Corps of Eng'rs*, 464 F. Supp. 2d 1171, 1220 (M.D. Fla. 2006) (alternatives for multiple discharges can be grouped for the purposes of a general permit).

decision to vacate the permits (and enjoin certain mining), DE387, at 68 n.149, 171, require reversal and remand of the district court's orders.[23]

III. The District Court Abused Its Discretion By Ordering Vacatur Of Defendant-Intervenors' Permits.

"A district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100, 116 S.Ct. 2035, 2047 (1996). In this case, the district court committed legal error when, after remanding Defendant-Intervenors' permits to the agency for the preparation of an SEIS, it also ordered that the permits be vacated altogether. The court's vacatur order was based not only on an incorrect holding that remanding to the Corps without vacatur would be contrary to the dictates of the APA, but also on an egregious truncation of the legal standard for determining whether remand without vacatur was appropriate and a disregard for the evidence presented.

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[23] The district court's efforts to bolster its conclusion that the Corps violated the CWA by citing evidence developed long after the Corps issued the permits in this case is flatly inappropriate. For example, the Remedies Order's lengthy review of evidence regarding benzene contamination—first discovered in 2005 and discussed at the remedy hearing—is simply irrelevant to the question whether the Corps' 2002 decision to issue permits violated the CWA. *See Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 384 F.3d 1163, 1176 n.16 (9th Cir. 2004) ("We cannot rely on information available only after the Corps' issuance of the 2001 ROD in evaluating whether the 2001 ROD was arbitrary and capricious or contrary to law."); *Newton County Wildlife Ass'n v. Rogers*, 141 F.3d 803, 808 (8th Cir. 1998) (refusing to consider information "not available to the Forest Service when it prepared the Environmental Assessments" in reviewing the Service's decision).

A. The District Court Improperly Rejected Remand Without Vacatur As A Potential Remedy Under The APA.

Although the APA requires agency action that is "not in accordance with law" to be "h[e]ld unlawful and set aside," 5 U.S.C. § 706(2)(A), the judicial remedy of vacatur is by no means automatic. *See Sugar Cane Growers Coop. v. Veneman*, 289 F.3d 89, 98 (D.C. Cir. 2002) (the contention that vacatur is automatic is "simply not the law"); *Cent. Me. Power Co. v. FERC*, 252 F.3d 34, 48 (1st Cir. 2001) ("A reviewing court that perceives flaws in an agency's explanation is not required automatically to set aside the inadequately explained order.").

Indeed, even when finding an agency action unlawful, the federal courts of appeals "have *commonly* remanded without vacating an agency's rule or order." *Int'l Union, United Mine Workers v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 966 (D.C. Cir. 1990) (emphasis added). Although this Court has not yet considered the practice, remand without vacatur is prevalent in the D.C. Circuit, which hears most challenges to agency action,[24] and also has been recognized by

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[24] *See, e.g., Chamber of Commerce of U.S. v. SEC*, 443 F.3d 890, 908 (D.C. Cir. 2006); *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 755–56 (D.C. Cir. 2002); *Sugar Cane Growers*, 289 F.3d at 98; *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1492 (D.C. Cir. 1995); *Am. Water Works Ass'n v. EPA*, 40 F.3d 1266, 1275 (D.C. Cir. 1994); *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993); *Int'l Union*, 920 F.2d at 967; *Rodway v. U.S. Dep't of Agric.*, 514 F.2d 809, 824 (D.C. Cir. 1975); *see also* Patricia M. Wald, *Regulation at Risk: Are Courts Part of the Solution or Most of the*

the First, Fifth, Ninth, and Federal Circuits,[25] and by leading commentators.[26] Declining to vacate, moreover, is appropriate not only "where the [agency's] failure lay in lack of reasoned decisionmaking, but also where the order was otherwise arbitrary and capricious." *Int'l Union*, 920 F.2d at 966; *see also Md. People's Counsel v. FERC*, 768 F.2d 450, 455 (D.C. Cir. 1985); *Sugar Cane Growers*, 289 F.3d at 98 (same).

Notwithstanding the widespread practice of remand without vacatur, the district court declared that it was "not inclined to suggest a new standard for administrative agency review in this Circuit, particularly when the theory rests on such a slender reed." DE387, at 32. The district court asserted that remand without vacatur is contrary to "[t]he clear language of the APA" that illegal agency action should be "set aside." *Id.* at 26 n.61 (citing *FCC v. NextWave Personal*

Problem?, 67 S. Cal. L. Rev. 621, 638 n.72 (1994) (describing remand without vacatur as the D.C. Circuit's "general practice").

[25] *See, e.g.*, *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1380–81 (Fed. Cir. 2001); *Cent. Me. Power Co. v. FERC*, 252 F.3d 34, 48 (1st Cir. 2001); *Cent. & S.W. Servs., Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1406 (9th Cir. 1995); *see also Md. Native Plant Soc'y v. U.S. Army Corps of Eng'rs*, 332 F. Supp. 2d 845, 863 (D. Md. 2004).

[26] *See, e.g.*, 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 7.13 (4th ed. 2002) (endorsing remand without vacatur); Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 Duke L.J. 291, 313 (2003).

Commc'ns, 537 U.S. 293, 300, 123 S.Ct. 832, 838 (2003)).[27] In fact, however, remand without vacatur is grounded in the express language of the APA, which provides that "[n]othing herein . . . affects . . . the power or duty of the court to dismiss any action *or deny relief on any other appropriate legal or equitable ground*." 5 U.S.C. § 702(1) (emphasis added). Furthermore, the APA expressly empowers reviewing courts to "issue all necessary and appropriate process . . . to preserve status or rights pending conclusion of the review proceedings." *Id.* § 705. As one commentator has noted, if "every action that fails the review standards of section 706 must be 'set aside,' these [other APA] provisions become difficult to explain." Levin, *supra,* at 313; *see also Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 167, 125 S.Ct. 577, 584 (2004) (explaining that courts should construe statutes to "give every word some operative effect").

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[27] Although the district court cited the Supreme Court's decision in *NextWave* for the proposition that it was bound to vacate unlawful agency action, *NextWave* had nothing to do with administrative law remedies. In the sentence invoked by the district court, *NextWave* quoted language from the APA requiring "federal courts to set aside federal agency action that is 'not in accordance with law,'—which means, of course, *any* law, and not merely those laws that the agency itself is charged with administrating." 537 U.S. at 300, 123 S.Ct. at 838 (emphasis in original; citation omitted). In other words, the Court was merely making the point that it could hold the FCC's action unlawful even though the agency had violated the Bankruptcy Code as opposed to the Communications Act. Unsurprisingly, no court has read *NextWave* as overruling *sub silentio* decades of precedent establishing and using the power to remand without vacatur.

Remand without vacatur is not only entirely consistent with the text of the APA, it "has long been supported by Supreme Court precedent." *United States v. Afshari*, 426 F.3d 1150, 1156 (9th Cir. 2005); *see also Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2529 (2007) (noting that "if the EPA's action was arbitrary and capricious, as the Ninth Circuit held, the proper course would have been to remand to the agency for clarification of its reasons"); *Hecht Co. v. Bowles*, 321 U.S. 321, 329–30, 64 S.Ct. 587 591–92 (1944) (only an "unequivocal statement of [legislative] purpose" could override "equity practice with a background of several hundred years of history"); *SEC v. Chenery Corp.*, 318 U.S. 80, 94, 63 S.Ct. 454, 462 (1943) (remanding decision to agency for further proceedings before exercising full judicial review). Neither the plain text of the APA nor the decisions of the Supreme Court can be dismissed as a "slender reed."

The district court's determination that remand without vacatur contravenes the language of the APA, and thus its conclusion that failing to vacate the permits would be an "extraordinary step," DE387, at 32, misconstrues the law. The court's unwillingness even to consider remand without vacatur as a remedial option therefore constitutes a plain abuse of discretion.

B. The District Court Misapplied The Legal Standard For Determining Whether Remand Without Vacatur Was Appropriate.

Although the district court rejected remand without vacatur as an option in the first instance, it nonetheless engaged in a one-paragraph evaluation of the remand without vacatur legal standard. DE387, at 31. To the extent the district court even applied that legal standard, it did so incorrectly.

The decision whether to vacate cannot be made on whim, but rather "depends on [1] the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and [2] the disruptive consequences of an interim change that may itself be changed." *Milk Train*, 310 F.3d at 755–56 (quotation marks omitted). In practice, this test is similar to that used to determine whether an injunction would be appropriate. *See Int'l Union*, 920 F.2d at 967 (both vacatur and injunctive relief turn on "analogous factors").

The two factors in the remand without vacatur test, the likelihood that the agency's errors are correctible and the disruption that would be caused by vacatur, must be balanced against one another. Neither factor is alone a threshold requirement. Thus, courts have declined to vacate agency action, even in the face of egregious violations of administrative law that could not be corrected, when the potential for disruption is particularly significant. *See, e.g.*, *Sugar Cane Growers*, 289 F.3d at 98 (court refused to vacate despite total failure to engage in required

rulemaking where vacatur would cause significant disruption). Similarly, courts have refused to vacate where evidence of disruption is minimal, but the deficiencies in the agency's decisionmaking are likely correctible. *See, e.g.*, *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1049 (D.C. Cir. 2002) (refusing to vacate where the disruptive consequences of vacatur may not be great, but it is probable that agency can justify its decision on remand).

The district court entirely miscast this balancing test. Without citing any authority, the Court misconstrued the first factor and declined to apply the second, cursorily reasoning that:

> Since this Court's prior [Summary Judgment] Order already found serious deficiencies in the Defendants' actions, the first part of the test cannot be satisfied and, because the test includes two parts (note the use of the conjunction 'and'), the Defendants' and Intervenors' arguments must fail.

DE387, at 31 (footnotes omitted). This analysis is woefully inadequate.

Contrary to the district court's assumption, the "seriousness" factor does not turn on whether the agency's action was unlawful, or even whether the unlawful action would have "serious" implications, but rather on whether the legal errors committed by the agency are potentially correctible. As the D.C. Circuit has explained, the seriousness prong "favors remanding rather than vacating" whenever there is "at least a serious possibility" that the agency "could correct the problem" on remand. *Milk Train*, 310 F.3d at 756 (quotation marks omitted).

Accordingly, the district court's conclusion that remand without vacatur was inappropriate because "this Court's prior Order already found serious deficiencies in the [agencies'] actions," DE387, at 31, was utterly circular—concluding in essence that the Corps could not correct the problems with its permits because its permits had problems.

The district court compounded its error by concluding that it did not even need to consider the disruption prong. Although it noted that the underlying test was a "balancing" one, DE387, at 31, it then treated the test as if each of the two factors somehow had to be "satisfied" independently. *Id.* (asserting "the first part of the test cannot be satisfied and, because the test includes two parts (note the use of the conjunction 'and'), the Defendants' and Intervenors' arguments must fail").

To the extent it addressed disruption at all, the district court improperly refused to consider the effects of vacatur on Defendant-Intervenors, asserting that "judicial review would be meaningless if the mere claim of disruptive consequences to an industry or private actor was sufficient to avoid the setting aside of improper agency conduct," and remand without vacatur "would merely result in the expansion of benefits already enjoyed by the private actors, including years of profits to which they might not otherwise have been entitled." *Id.* at 31 n.73, 32. But courts applying the correct legal standard have consistently remanded without vacatur based on the need to protect legitimate private economic

interests. *See A.L. Pharma*, 62 F.3d at 1492 (declining to vacate agency rule because that "would prove disruptive to [a pharmaceutical company], which has relied on it in good faith for over thirteen years"); *see also* Levin, *supra*, at 300 & n.31 (collecting cases). In fact, at least one court has declined to vacate a Corps § 404 permit during remand because vacatur would impose considerable costs on the permittee—a situation identical to that presented here. *Md. Native Plant Soc'y v. U.S. Army Corps of Eng'rs*, 332 F. Supp. 2d 845, 863 (D. Md. 2004) (declining to vacate permits granted by the Corps where vacatur "would have a serious economic impact.").

In short, the district court failed to correctly apply the legal test for remand without vacatur, misconstruing the first factor and ignoring the second. These failures warrant reversal and remand for a proper evaluation of remedy. *See, e.g.*, *SME Racks, Inc. v. Sistemas Mecanicos para Electronica, S.A.*, 382 F.3d 1097, 1100 (11th Cir. 2004) (reversing and remanding for application of the appropriate test, because the district court had "'abuse[d] its discretion when it fail[ed] to balance the relevant factors'") (quoting *La Seguridad v. Transytur Line*, 707 F.2d 1304, 1308 (11th Cir. 1983)); *Birmingham Steel Corp. v. TVA*, 353 F.3d 1331, 1335 (11th Cir. 2003) (stating "an abuse of discretion occurs if the judge fails to apply the proper legal standard or to follow proper procedures in making the

determination, or makes findings of fact that are clearly erroneous") (alterations and quotation marks omitted).

C. Proper Application Of The Balancing Test Demonstrates That Remand Without Vacatur Is Appropriate.

Correct application of the appropriate legal standard demonstrates that remand without vacatur is warranted in this case.

First, the errors committed by the Corps can be corrected on remand. As explained above, in Part I.A, the Corps' alleged error in not formally consulting with FWS under the ESA already has been remedied. The errors found by the district court with regard to the CWA, to the extent the court even had jurisdiction to decide the CWA claims at all, *see* Part I.B, cannot be read as irremediable. The district court's complaints that the Corps failed to apply appropriate presumptions in its analysis, DE387, at 154, 170, or to analyze alternatives adequately, *id.* at 132, 144–47, or to hold public hearings, DE73, at 161–62, are errors that are correctible by further analysis and action on remand. And the procedural NEPA errors identified by the district court are similarly fixable by further evaluation during the SEIS. *See* Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 Admin. L. Rev. 59, 75–76 (1995) ("I am not sure I have ever encountered a case in which a court held that an agency failed to comply with the duty to engage in reasoned decisionmaking in some respect, e.g., the agency failed to discuss issue X, alternative Y, or data gap Z in sufficient detail, and in which the court could

reach a good faith conclusion that there is no 'serious possibility that the [agency] will be able to substantiate its decision on remand'").

The second factor also favors remand without vacatur in this case. Vacatur and concomitant shutdown of Lake Belt mining (even temporarily) would impact a large percentage of each of the Defendant-Intervenors' operations. *See, e.g.*, 42 Record 423, at 4984–85; 45 Record 426, at 5481, 5531–34, 5546, 5555–56; 46 Record 427, at 5778, 5787. The longer the shutdown extends, the more significant the impact both on Defendant-Intervenors and on the Florida economy. *See* 47 Record 428, at 5981–87. If the quarries in the Lake Belt were shut down for an extended period, the effect on South Florida of removing the State's primary source of construction aggregate would be devastating. *See, e.g.*, *id.* at 5986 ($17 billion in lost income from a shutdown), 5986–87 ($33 billion in lost economic output), 5984–86 (direct, indirect, and induced employment effect would eliminate 280,000 jobs).[28]

By contrast, a judicial decision not to vacate the permits would have little adverse impact on the environment. The district court's discussion of environmental harm is based on its evaluation of the long-term effects of mining

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[28] The district court offhandedly dismissed the evidence substantiating these impacts as "scattered with exaggeration," DE387, at 133, yet conceded that "[t]he industry, or at least these mining companies, probably will suffer significant losses in the event that these permits are revoked." DE73, at 112.

over a fifty-year period. DE387, at 171. There is no indication that allowing decades-old mining practices to continue while the Corps completes its work on remand and issues a new record of decision would have any adverse impact whatsoever on the environment.[29]

Thus, both of the applicable legal factors favor remand without vacatur in this case, and the district court abused its discretion by refusing to enter that remedy based on its mistaken view of the law. *See Jackson v. Crosby*, 437 F.3d 1290, 1295 (11th Cir.), *cert. denied*, 127 S. Ct. 240 (2006); *Birmingham Steel Corp.*, 353 F.3d at 1335.

IV. This Case Should Be Reassigned To A Different District Judge For Any Further Proceedings In District Court.

Although this Court should reverse the district court orders and reinstate the permits, if this Court concludes that it is appropriate to remand for a re-evaluation of the summary judgment or the vacatur decisions under the appropriate legal standards, it should exercise its supervisory authority to reassign this case to a

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[29] Uncontroverted evidence presented at the remedy hearing demonstrated that continued operations during the relatively short remand period would have a "negligible effect" on contamination of the Wellfield (32 Record 413, at 2582–83; 39 Record 420, at 4433–34), would not destroy any unique or irreplaceable wetlands (38 Record 419, at 4102–03, 4111), would not cause any "take" of the wood stork (32 Record 413, at 2574–75, 2584–85; 34 Record 415, at 3070–78; 36 Record 417, at 3501, 3528–29; 38 Record 419, at 4092), and its effect on seepage would be "negligible," "just background noise," or "de minimis" (36 Record 417, at 3703, 3723; 42 Record 423, at 4850–51).

different judge. Notwithstanding the District Judge's distinguished reputation, reassignment is necessary in this unusual case because his opinions demonstrate that he has become so personally invested in his conclusions that the public could reasonably question his impartiality about the Corps (which he has suggested may never be entitled to judicial deference) and Defendant-Intervenors (which he speculated had applied illegitimate "pressure" on the Corps to make erroneous decisions).

It is well established that this Court has the supervisory authority to "'remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.'" *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1373 (11th Cir. 1997) (quoting 28 U.S.C. § 2106). Unlike recusal questions, which arise from facts "existing prior to or at the time of the judge's participation in a case," the need to use that authority to order reassignment arises "because of the judge's own conduct during his participation in a case." *United States v. Torkington*, 874 F.2d 1441, 1446 (11th Cir. 1989).

Reassignment does not require the parties or this Court to impugn or "question the district judge's actual ability, integrity, or impartiality." *Id.* at 1447. Instead, it merely "respond[s] to the appearance of a lack of neutrality and act[s] to preserve in the public mind the image of absolute impartiality and fairness of the

judiciary." *Id.*; *see also United States v. White*, 846 F.2d 678, 696 (11th Cir. 1988) (reassignment is necessary because "it is not merely of some importance but is of *fundamental* importance that justice should not only be done, but should manifestly and undoubtedly *be seen* to be done") (emphases in original; quotation marks omitted).

In deciding when to reassign cases on remand, this Court has adopted the three-factor test from the Second Circuit's decision in *United States v. Robin*, 553 F.2d 8 (2d Cir. 1977) (en banc), considering:

> (1) whether the original judge would have difficulty putting his previous views and findings aside; (2) whether reassignment is appropriate to preserve the appearance of justice; [and] (3) whether reassignment would entail waste and duplication out of proportion to gains realized from reassignment.

Torkington, 874 F.2d at 1447. Under that test, "[w]here the judge sits as the fact-finder, reassignment is the preferable course, since it avoids any rub-off of earlier error." *Robin*, 553 F.2d at 10.

This Court has routinely ordered reassignment whenever a district judge would have "great difficulty in putting aside his prior conclusions," *Torkington*, 874 F.2d at 1447, or has become "hardened against" a party and would have "tremendous difficulty putting his [prior] findings out of his mind," *White*, 846 F.2d at 696, or has made statements "indicating a perceived predisposition," *United States v. Taylor*, 972 F.2d 1247, 1252 (11th Cir. 1992), or where the

"strong language employed [in opinions] suggest[s] that the district judge may have trouble putting aside his previous views," *Chudasama*, 123 F.3d at 1373. Those results are consistent with the law elsewhere. *See*, *e.g.*, *Scherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 142 (2d Cir. 2007) ("There is little doubt that the district judge would follow our instructions as to the law on remand. However, the judge has rendered a visceral judgment on appellant's personal credibility, namely that his denial of control was 'nonsense,' 'drivel,' a 'fraud,' and a 'lie.' . . . [C]ertainly the appearance of justice would be well-served by reassignment on remand."). It is particularly "troubling" when a district court has employed words that do not merely "condemn[]" a government agency's conduct in litigation, but go far beyond and condemn that agency "as an institution." *Cobell v. Kempthorne*, 455 F.3d 317, 333–34, 335 (D.C. Cir. 2006).

The District Judge's candid statements about his deeply held personal feelings in this case reveal why reassignment is necessary. As he explained, "[i]n thirty years of trying cases," he has never "felt the weight of a decision so heavily." DE387, at 22 n.52. He suggested that the Corps should not be entitled to "any future deference in this case." *Id.* at 35 n.78; *see also id.* at 176 (stating his "lack of confidence in this agency at this time"); *id.* at 17 n.41 ("[T]he Corps is an agency to which deference should be given only after a full investigation by the Court."). That alone would cast doubt on the District Judge's ability to handle this

case impartially on remand. But he went even further, pausing to predict—based on extra-record evidence about the Corps' reported shortcomings with regard to separate projects elsewhere—that "one day" the Corps might lose altogether "the cloak provided by judicial deference as to their actions impacting environmental protection." *Id.* at 35 n.78. In addition, he included thinly veiled attacks on Defendant-Intervenors by criticizing the Corps as an institution controlled by inappropriate "pressures." *See id.* at 32 n.74 (noting industry "pressures which may temporarily have led [the Corps] astray"); *id.* at 175 (the Corps "has been subjected to overwhelming pressures to approve a questionably supported action"); *see also* DE73, at 148 n.246. He offered advisory opinions expressing his views regarding future permitting. *See* DE387, at 149–50 n.290 ("The Court leaves for another day the question of whether those proposed extensive permits were ever or could ever be appropriate, but cannot resist observing that it is impossible to imagine that such action could be approved in this area . . . ."). Recognizing his unusual conclusions, the District Judge anticipated "potential accusations" that he had violated "principles of agency deference, judicial restraint, or, perhaps, even the doctrine of separation of powers," but announced that he had "a clear conscience" about executing his "oath as a judicial officer." *Id.* at 172 n.321. Finally, he warned the parties that he was not open to reconsidering his rulings. *Id.* at 177 n.327.

Given these visceral conclusions, the first two factors of the reassignment test are satisfied. It would be very difficult for the District Judge to put his views and findings out of mind, since he has already described the case as more personally wrenching than any other in his career. Moreover, even if he could, reasonable members of the public would still harbor doubts that his conduct on remand would be impartial in light of his previous statements.

In reported cases, this Court has never declined to reassign based on the third factor ("potential waste and duplication") once it has determined that the first *or* the second factor is present. Indeed, when reassignment is otherwise necessary "to preserve the appearance of impartiality, fairness, and justice," the "loss of efficiency and economy pales in comparison." *Johnson v. Sawyer*, 120 F.3d 1307, 1334 (5th Cir. 1997). For example, even though a judge who presides over a criminal trial "often gains an intimate insight into the circumstances of the defendant's crime, which may prove uniquely useful in determining the sentence to be imposed," *Robin*, 553 F.2d at 11, this Court has often reassigned such cases for further fact-intensive hearings regarding resentencing. *E.g.*, *United States v. Martin*, 455 F.3d 1227, 1242 (11th Cir. 2006); *United States v. Remillong*, 55 F.3d 572, 577–78 (11th Cir. 1995). While the District Judge in this case has no doubt spent considerable time reviewing the record and drafting opinions, any loss of

efficiency occasioned by reassignment would "pale in comparison" to the risk posed by the appearance of partiality and predisposition.

For these reasons, this Court should exercise its supervisory authority to preserve the appearance of impartiality and fairness by reassigning this case on remand.

CONCLUSION

For the foregoing reasons, the Court should vacate the disposition of the jurisdictionally barred ESA and CWA claims; reverse the remaining aspects of the Remedies and Summary Judgment Orders; and direct that any proceedings on remand be assigned to a different judge.

August 31, 2007

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume requirement of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 15,997 words, as determined by the word-count function of Microsoft Word 2003, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and 11th Cir. R. 32-4; and

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and with the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because its text has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman font.

/s/ Henry C. Whitaker
Henry C. Whitaker
August 31, 2007

CERTIFICATE OF SERVICE

I declare that on this 31st day of August 2007, I caused the original and six copies of the foregoing Brief of Appellants Rinker Materials of Florida, Inc., Miami-Dade Limestone Products Association, Inc., and Kendall Properties and Investments to be filed with the Clerk of this Court by UPS Next Day Air directed to the following address:

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I further declare that on this 31st day of August 2007, I caused one copy of the foregoing Brief of Appellants Rinker Materials of Florida, Inc., Miami-Dade Limestone Products Association, Inc., and Kendall Properties and Investments to be served upon each of the following counsel, by UPS Next Day Air or express mail:

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