Build First, Comply Later: NEPA *Remedies and* National Parks Conservation Association v Semonite

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Abstract: *This comment analyzes* National Parks Conservation Association v Semonite *as a case study on remedy. In 2017, the Army Corps of Engineers issued a permit to Dominion to build a power line across the James River in Virginia. That power line would stretch across an area significant to the United States' founding as a nation, and which is part of the Colonial National Historic Park. But by the time the D.C. Circuit issued its opinion striking down the permit in 2019, the project had already been completed. How can a court furnish a satisfying remedy when the matter at the heart of the litigation is rendered a "fait accompli"?*

This comment will explore the two components of the court's remedy in National Parks*: remand without vacatur and the preparation of an Environmental Impact Statement. It argues that courts, and the D.C. Circuit in particular, are more likely to remand without vacating agency decisions when the decision involves a public utility. Most circuit courts consider some type of "public interest" factor in their vacatur analyses. When a public utility's permit or certificate is at issue, these courts are often concerned with how the public will be affected due to public utilities' close relationship to consumers. However, this may encourage public utilities to take advantage of this special consideration to push projects favorable to themselves. Turning to the issue of Environmental Impact Statements, this comment will discuss the importance of timeliness for the statutory purpose of the* National Environmental Policy Act. *Though the agency in this case may meet its statutory obligations by preparing an Environmental Impact Statement, the statutory purpose of* NEPA *was defeated once the project was completed. Finally, this comment will examine how the remedy in* National Parks *may encourage bad actors to contravene environmental administrative law requirements.*

Résumé: *Ce commentaire analyse* National Parks Conservation Association v Semonite *en tant qu'étude de cas sur les réparations. En 2017, le Army Corps of Engineers a octroyé un permis à Dominion pour la construction d'une ligne électrique traversant la rivière James en Virginie. Cette ligne électrique s'étendrait à travers une zone importante à la fondation des États-Unis comme nation, ladite zone faisant déjà partie du Colonial National Historic Park. Mais lorsque la D.C. Circuit a rendu son jugement annulant le permis en 2019, le projet était déjà réalisé. Comment fournir une réparation adéquate quand la problématique au cœur du litige est rendue un fait accompli ?*

Ce commentaire explore les deux éléments de la réparation octroyée par la Cour dans National Parks *: le renvoi sans annulation et la préparation d'un Environmental Impact Statement. Il soutient que les tribunaux, et la D.C. Circuit en particulier, sont plus enclins à renvoyer, sans pour autant annuler une décision administrative, lorsque celle-ci implique un service public. La plupart des circuit courts prêtent attention à un facteur « d'intérêt public » dans leurs analyses sur l'annulation. Lorsqu'un permis ou une autorisation d'un service public sont impliqués, ces tribunaux se préoccupent souvent des implications pour le public à cause de la proximité entre les services publics et leurs consommateurs. Cependant, cela peut encourager les services publics à profiter de cette attention particulière afin de faire avancer des projets qui leur sont favorables. Quant à l'enjeu des Environmental Impact Statements, ce commentaire aborde l'importance de la ponctualité en réalisant l'objectif législatif du* National Environmental Policy Act. *Même si l'organisme en l'espèce est en mesure de remplir ses obligations statutaires en préparant un Environmental Impact Statement, l'objectif législatif du* NEPA *a été sapé dès que le projet s'est achevé. Finalement, ce commentaire examine comment la réparation octroyée dans l'affaire* National Parks *pourrait encourager les mauvais joueurs à contrevenir aux obligations du droit administratif environnemental.*

***Titre en français : Construire d'abord, respecter ensuite : les réparations* NEPA *et* National Parks Conservation Association v Semonite**

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"A river is more than an amenity, it is a treasure." — Justice Holmes.[1]

1. INTRODUCTION

National Parks Conservation Association v Semonite,[2] a case out of the District of Columbia Circuit, embodies the tension underlying the competing needs of infrastructure development and the protection of natural and historic landscapes often found in cases involving the *National Environmental Policy Act* ("*NEPA*").[3] As such, this case elicited normative debates among environmental legal scholars over the appropriate remedy in environmental litigation,[4] and serves as a case study on *NEPA* remedies. In *National Parks*, the court's remedy included two components: (1) vacatur, and (2) an Environmental Impact Statement ("EIS").[5] Vacatur is the default remedy following judicial remand of an agency decision.[6] Vacatur means the "act of annulling or setting aside."[7] When an agency decision is challenged in court, the court may choose to vacate the agency's decision, thus annulling it, or choose not to vacate the decision. Remand without vacatur has been described as a court's decision "to pronounce an agency action illegal, but to allow the action to continue in effect

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1 *New Jersey v New York* (1931), 283 US 336 at 342.

2 916 F (3d) (DC Cir 2019) 1075 at 1077 [*National Parks* 2019 I].

3 42 USC § 4321ff (1970) [*NEPA*].

4 See e.g. Aaron L Nielson, "D.C. Circuit Review – Reviewed: What's the Most Common Caption?" (1 June 2019), online: *Yale Journal on Regulation*: <yalejreg.com nc/d-c-circuit-review-reviewed-most-common-case-caption/>.

5 See *National Parks Conservation Association v Semonite*, 925 F (3d) 500 (DC Cir 2019) [*National Parks* 2019 II].

6 See *National Parks Conservation Association v Semonite*, 422 F Supp (3d) 92 at 98 (DC Cir 2019) [*National Parks* 2019 III].

7 Bryan A Garner, ed, *Black's Law Dictionary*, 11th ed (St Paul, Minn: Thomson Reuters, 2019) sub verbo "vacatur".

anyway."[8] The court in *National Parks* remanded without vacatur, and thus the Army Corps of Engineers' ("Corps") permit remained in effect during the litigation. The court also mandated that the Corps complete an EIS for the "proposed" project at issue in the case—but the project had already been completed.

The decision to vacate or not to vacate on remand has many practical implications and affects agency decision making across contexts including immigration law, labour law, election regulations—and perhaps most prominently—environmental law.[9] Vacatur is considered the standard remedy in federal administrative law.[10] However, strict application of vacatur can result in harsh outcomes and heavy social costs—leading to the development of the doctrine of remand without vacatur.[11] In the modern administrative state, a single agency decision may directly implicate the rights of millions of people.[12] Jurisdictions have therefore adopted rules for determining whether to vacate or not on remand. Each involves a balancing test aimed at avoiding major disruptions unless necessitated by fatal agency mistakes.[13] In the environmental context, remand without vacatur has been used to uphold a regulation protecting an endangered species while the agency amended the regulation to comply with the *Endangered Species Act*'s[14] public comment requirements.[15] It has also been used to allow industrial development to continue despite rebukes by environmental groups, such as in *National Parks*. As a practical matter, remand without vacatur avoids agency change because agencies are unlikely to backtrack on their initial decisions and some agencies simply decline to respond to remand orders.[16]

This comment argues that courts, and the D.C. Circuit in particular, are more likely to remand without vacating an agency decision when that decision involves a public utility. Courts are often concerned with the public impact due to public utilities' close relationship to their consumers. Good faith treatment of public utilities by courts, however, incentivizes

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8 Ronald M Levin, "Vacation at Sea: Judicial Remedies and Equitable Discretion in Administrative Law" (2003) 53:2 Duke LJ 291 at 295.

9 *Ibid* at 293–94; T Alex B Folkerth, "The 'Directive' Prong: Adding to the Allied-Signal Framework for Remand Without Vacatur" (2020) 9:2 Michigan J of Environmental & Administrative L 483 ("[r]emand without vacatur has been applied or considered in many high-profile cases, including, within the last two years alone, actions involving the Dakota Access Pipeline, Deferred Access for Childhood Arrivals, the addition of a citizenship question to the national census, changes to federal student loan programs, federal elections regulations, and dozens of environmental cases" at 484–85).

10 See Levin, *supra* note 8 at 294.

11 See Nicholas Bagley, "Remedial Restraint in Administrative Law" (2017) 117:2 Colum L Rev 253 at 254–56.

12 See Levin, *supra* note 8 (discussing how the Department of Agriculture's failure to comply with proper rulemaking procedures for a 1970s food stamp program regulation would have resulted in ten million Americans losing access to the food stamp program if not for the court's decision to remand without vacatur at 298–99).

13 See Bagley, *supra* note 11 at 256; "Recent Case Decisions" (2021) 6:4 Oil & Gas, Natural Resources & Energy J 685 at 710.

14 16 USC § 1531ff (1973).

15 See Levin, *supra* note 8 at 294–95.

16 See Bagley, *supra* note 11 at 256–57; see e.g. Robert L Glicksman & Emily Hammond, "Agency Behavior and Discretion on Remand" (2017) 32:2 J of Land Use & Environmental L 483 at 484–86.

public utilities to behave less optimally in the future. Although remand without vacatur protects consumers from power outages or other shortages in the near term, it encourages actors—especially repeat actors—to take advantage of that special consideration and push projects favorable to themselves, ultimately harming the public. Remand without vacatur also undermines the statutory purpose of *NEPA*. Timeliness is an essential function of *NEPA*, but remand without vacatur permits actors to complete projects without the requisite EIS. *National Parks* therefore provides a useful case study in illustrating the large-scale implications of remand without vacatur in the public utility context.

This comment will first discuss the factual and legal background of the decisions in *National Parks*. Then, it will explore the case's remedies: vacatur and EIS. A review of other case law finds that courts are more likely to remand without vacatur for public utilities due to utilities' close connection with the public interest through the services they provide. Next, this comment will discuss the importance of the EIS's timeliness in fulfilling the statutory purpose of *NEPA*. The Corps may meet its statutory requirements by completing the EIS in *National Parks*, but *NEPA*'s statutory purpose was already defeated when the project was completed before an EIS was prepared. Finally, this comment will examine the potential consequences of this trend in decision making, given that the remedy can be a tool to encourage or deter bad actors in environmental litigation.

2. FACTUAL AND LEGAL BACKGROUND

National Parks concerned a series of electrical transmission towers that had been planned by Virginia Electric and Power Company ("Dominion") to bring reliable electrical power to certain areas of coastal Virginia.[17] This project, named the Surry-Skiffes Creek-Whealton Project, called for constructing seventeen electrical transmission towers across the historic James River.[18] The James River hosts significant historical sites from the era of the United States' founding and features the Colonial National Historic Park.[19] This project would cross the river near where Captain John Smith originally explored the "New World" in the early seventeenth century.[20] Completing the project would irreparably alter that historic landscape.[21]

Dominion applied for approval of the project from the Corps in 2013.[22] The Corps initially found, based on its preliminary review, that a full EIS would not be required.[23] As the Corps is a federal agency, it must comply with *NEPA*'s requirements.[24] *NEPA* was passed by Congress in 1969 to "declare a national policy [to] encourage productive and enjoyable harmony

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17 See *National Parks Conservation Association v Semonite*, 311 F Supp (3d) 350 at 358–59 (DC Cir 2018) [*National Parks* 2018].

18 *Ibid.*

19 *Ibid* at 359.

20 *Ibid.* Note that coastal Virginia was inhabited at that time by the Powhatan people: see Rebecca Long, "The Original Inhabitants of Our Land" (12 October 2020), online (blog): *Chesapeake Bay Foundation* <cbf.org/blogs/save-the-bay/2020/10/the-original-inhabitants-of-our-land.html>.

21 See *National Parks* 2018, *supra* note 17 at 359.

22 *Ibid.*

23 *Ibid.*

24 *Ibid* at 357.

between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man."[25] *NEPA* does not mandate particular actions, but requires certain procedural steps so that agencies make informed decisions and take a "hard look" at environmental consequences.[26] Notably, *NEPA* requires federal agencies to prepare an EIS for proposed actions "significantly affecting the quality of the human environment."[27] If an agency is unsure whether the proposed action will rise to the level of "significantly affecting" the environment, it may prepare a shorter Environmental Assessment ("EA") to determine whether an EIS is required.[28]

Following its preliminary review of the Surry-Skiffes Creek-Whealton project, the Corps issued a public notice and sought comments from the public regarding the project.[29] The Corps received thousands of comments—including from other federal agencies—concerned about the project's location.[30] The National Parks Service, for example, believed that "the impacts of the project would be significant and that an EIS was required."[31] Despite these comments, the Corps conducted an EA and issued a Finding of No Significant Impact ("FONSI") instead of preparing an EIS.[32] Afterwards, in 2017, the Corps issued a permit to Dominion to begin constructing the project.[33]

The National Parks Conservation Association and other public interest groups subsequently sued the Corps to challenge the permit's issuance.[34] Dominion joined as a defendant-intervenor in the action.[35] The plaintiffs alleged violations of *NEPA*, the *Clean Water Act*, and the *National Historic Preservation Act*.[36] This comment solely analyzes the plaintiffs' *NEPA* claims.[37]

In response to the plaintiffs' *NEPA* claims, the U.S. District Court for the District of Columbia assessed whether the Corps had followed all the procedural requirements for the EA and FONSI.[38] The court evaluated 10 "significance factors" to determine whether (1) the proposed actions "significantly affect[ed] the quality of the human environment," thus triggering the requirement for an EIS; or (2) the proposed actions did not have a significant effect, and

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25 *NEPA*, *supra* note 3, § 4321.

26 *Department of Transportation v Public Citizen*, 541 US 752 at 756 (9th Cir 2004).

27 *Ibid*; *NEPA*, *supra* note 3, § 4332(c).

28 See *National Parks* 2018, *supra* note 17 at 357; *NEPA*, *supra* note 3, § 4332(c).

29 See *National Parks* 2018, *supra* note 17 at 359.

30 See *National Parks* 2019 I, *supra* note 2 at 1080–81.

31 *National Parks* 2018, *supra* note 17 at 359.

32 *Ibid* at 360.

33 *Ibid* at 360.

34 *Ibid.*

35 *Ibid* at 359.

36 *Ibid*; *Clean Water Act*, 33 USC § 1251ff (1972); *National Historic Preservation Act*, 54 USC § 300101ff (1966).

37 See *National Parks* 2018, *supra* note 17 at 357.

38 *Ibid* at 360–61.

therefore the EA was sufficient.[39] The court found that none of the ten factors weighed in favour of the plaintiffs.[40] Thus, the human environment was not significantly affected, and an EIS was not required.[41] The plaintiffs also advanced arguments related to mitigation measures, alternatives to the proposed project, and the lack of meaningful participation in the *NEPA* process, but the court held that the Corps did not act arbitrarily and capriciously in those decisions.[42] The court ultimately granted the Corps' motion for summary judgment.[43]

The plaintiffs sought an injunction while their appeal was pending.[44] The district court denied the injunction.[45] The court was convinced that if a subsequent court found that the permit had been unlawfully issued, that court could order the removal of the towers.[46] The plaintiffs countered that "in the real world, construction of the towers will render the project a fait accompli."[47] The court also emphasized grid reliability concerns and the urgent need for electricity transmission in the area.[48] The court found that the public interest favored the towers being constructed as soon as possible.[49]

On appeal, the U.S. Court of Appeals for the District of Columbia Circuit found that the project significantly affected historical resources, and therefore an EIS was required.[50] The court stated that federal regulations, specifically 40 CFR § 1508.8, dictated that an agency's analysis of whether a project "significantly affects the quality of the human environment" must consider the project's impact on historical resources.[51] The court emphasized the extraordinary historical importance of the James River in reaching its decision.[52] It also underscored the project's controversy among both public interest organizations and government agencies as indicative of the area's importance and the project's likelihood of significantly affecting the human environment.[53] The Corps received 50,000 public comments urging it to prepare an EIS.[54] Agencies and organizations argued that the project would, among other things, "forever degrade, damage, and destroy the historic setting of these iconic resources."[55] Thus, the court found that the quality of the human environment would be significantly affected by

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39 *Ibid* at 362–63.

40 *Ibid.*

41 *Ibid* at 363.

42 *Ibid* at 370–75.

43 *Ibid* at 380–81.

44 See *National Parks Conservation Association v Semonite*, 2018 WL 3838809 (DC Dist Ct 2018).

45 *Ibid* at 3.

46 *Ibid*.

47 *Ibid*. As we will see, the plaintiffs' prediction would be proven correct.

48 *Ibid* at 2.

49 *Ibid*.

50 See *National Parks* 2019 I, *supra* note 2 at 1087.

51 *Ibid* at 1079; 40 CFR § 1508.8.

52 See *National Parks* 2019 I, *supra* note 2 at 1080, 1086–87.

53 *Ibid.*

54 *Ibid* at 1080.

55 *Ibid* at 1080–81.

the project, which triggered the requirement for an EIS under *NEPA*.[56] Ultimately, the court vacated Dominion's permit and ordered the Corps to prepare an EIS.[57]

The Corps and Dominion immediately petitioned the court for a rehearing on the issue of remedy.[58] Dominion continued construction of the project throughout the litigation and finished just before the D.C. Circuit issued its opinion.[59] The Corps and Dominion asked the court not to vacate Dominion's permit for the project while the Corps prepared the EIS.[60] The Corps pleaded that the court was not aware of the "recent factual developments regarding completion of construction and the disruption that vacating the permit would cause" when the court issued its original opinion.[61] The court sharply replied: "[t]hat, of course, is because neither petitioner bothered to advise us that construction on the project had been completed and the transmission lines electrified the week before we issued our opinion."[62] Dominion also noted that it had already invested $400 million in the towers.[63] The plaintiffs responded that Dominion and the Corps should be judicially estopped from arguing against vacatur due to representations they made at the injunction hearing regarding their ability to have the towers removed if they lost on the merits.[64] The plaintiffs asserted that Dominion now changed its stance and stressed the time, money, and effort it had invested into the project.[65] The court remanded the case to the district court, as it believed the district court was better positioned to gather additional evidence in light of this new information and determine whether vacatur remained the appropriate remedy.[66]

The district court held that the situation did not warrant vacatur.[67] First, the court found that judicial estoppel did not apply because Dominion had argued at the injunction stage that it "*could*" remove the towers if necessary, not that it "*would*."[68] Therefore, the defendants' positions were not "clearly inconsistent."[69] The court further stated that although vacatur is the standard remedy in cases involving the *Administrative Procedure Act* ("*APA*"),[70] it was not appropriate here because vacating the permit would create severe consequences.[71] These consequences included the possibility of rolling blackouts in the region that would affect hundreds of thousands of people, the lack of alternative power sources in the area, and the

56 *Ibid* at 1087.

57 *Ibid* at 1089.

58 See *National Parks* 2019 II, *supra* note 5 at 500–501.

59 *Ibid*.

60 *Ibid*.

61 *Ibid* at 501.

62 *Ibid*.

63 *Ibid* at 502.

64 *Ibid* at 501.

65 *Ibid* at 502.

66 *Ibid*.

67 See *National Parks* 2019 III, *supra* note 6 at 98–99.

68 *Ibid* at 96 [emphasis added].

69 *Ibid*.

70 5 USC § 551ff (1946) [*APA*].

71 See *National Parks* 2019 III, *supra* note 6 at 97.

"extreme" amount of wasted money.[72] The court stated that the Corps could still decide to remove the towers after the EIS was complete.[73]

While the ensuing sections will demonstrate that the court's remedy in this case is consistent with its precedent and what I identify as the public utility exception, remanding without vacatur has large-scale policy implications—it undermines the statutory purpose of *NEPA* and encourages public utilities to behave as bad actors.

3. REMEDY

National Parks raises a major issue in environmental litigation: remedy. Although the environmentalists "won" in this case—the project was found to "significantly affect" important historical resources in the area—what was the win's value given that the actual project had already been completed? The Corps now had to fully consider the "potential" impacts of electrical towers that were already making their impact in real time. This section will explore the two components of the remedy in *National Parks*. First, it will look at the use of vacatur as a remedy for *NEPA* cases. It will discuss vacatur within both D.C. Circuit and other circuit court jurisprudence. This section also examines the nature of defendant companies and argues Dominion's role as a public utility garnered the company special leeway, contributing to the court's decision not to vacate the company's underlying permit in *National Parks*. Then, this section will address the second portion of the court's remedy, the EIS requirement. While the Corps will meet its statutory obligations under *NEPA* by completing an EIS, the untimeliness of the EIS defeats *NEPA*'s statutory purpose.

3.1. Vacatur

Vacatur is the standard remedy in *APA* cases.[74] Remand without vacatur is described as "a mechanism by which courts remand back to an agency a decision in circumstances in which the court believes the agency rationale is flawed, yet declines to vacate the agency decision."[75] Remanding without vacatur is prominent in federal administrative law.[76] Administrative law scholars view this practice as a "practical compromise" by federal courts between the vigorous review of agency decisions and administrative discretion.[77] Scholars identify the social cost as one of the predominant factors in the establishment of this convention given that agency rulemaking may affect the rights of millions of people.[78]

Courts' approaches to *NEPA* and vacatur have shifted considerably over time. For example, the outcome in *National Parks* was a far cry from *Tennessee Valley Authority v Hill*.[79]

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72 *Ibid* at 101–103.

73 *Ibid* at 103.

74 *Ibid* at 98.

75 Daniel B Rodriguez, "Of Gift Horses and Great Expectations: Remands Without Vacatur in Administrative Law" (2004) 36:2 Ariz St LJ 599 at 600.

76 See Levin, *supra* note 8 at 295; Christopher J Walker, "The Lost World of the Administrative Procedure Act: A Literature Review" (2021) 28:2 Geo Mason L Rev 733 at 758.

77 Rodriguez, *supra* note 75 at 600.

78 See Levin, *supra* note 8 at 298.

79 437 US 153 (1978) [*TVA v Hill*].

In that case, Congress had appropriated millions of dollars to the Tennessee Valley Authority ("TVA") to build a dam. Despite the dam's near completion, the U.S. Supreme Court upheld the *Endangered Species Act*'s protections.[80] On the issue of remedy, the TVA asked the Court to apply the law "reasonably" and to shape a remedy that "accord[ed] with some modicum of common sense and the public weal."[81] The Court responded that its function was to apply the law, and that the law was clear that endangered species were to be given priority.[82] The Court thus halted an almost-completed project funded by Congress to uphold the environmental statute. Forty years later, the D.C. Circuit in *National Parks* faced a similar dilemma and sided with the project.

The difference in outcomes between *National Parks* and *TVA v Hill* parallel the respective views of *NEPA* over the last fifty years. When *NEPA* was signed into law by President Richard Nixon in 1970, the new law was heralded as the "Magna Carta of environmental laws."[83] The lofty aspirations exemplified by *NEPA* faded over the years as Congress and the courts considered other obligations.[84] *TVA v Hill* occurred during the early days of *NEPA*'s promises—as well as those of the *Endangered Species Act*—and the ruling is viewed as the high-water mark for *NEPA*'s expansiveness.[85] *NEPA* cases have gradually moved away from those ideals, leading to outcomes like those in *National Parks*. The remedies in *National Parks* and *TVA v Hill* are further distinguishable regarding the respective services each entity provided. The Tellico Dam at issue in *TVA v Hill* aimed to reduce flooding. The electrical transmission towers in *National Parks*, however, provide essential electrical energy to areas of coastal Virginia.

The cases below demonstrate that malleable public interest factors explain the apparent discrepancy in courts' decisions on whether to vacate. This section reviews case law involving public utilities and remand without vacatur and argues that an entity's role as a public utility induces courts to remand without vacatur. Courts give public utilities special consideration due to those public interest factors—what I call the "public utility distinction." A "public utility" is generally defined as an entity that "owns or operates facilities . . . for the generation, transmission, or distribution of electrical energy," but legal definitions of "public utility" vary by jurisdiction.[86] Public utilities typically have a closer relationship with consumers. Whether a certain company is considered a public utility may require analyzing its other dealings and relationships. Under this analysis, pipelines would generally not be considered public utilities because of their more distant connection to the public. Electricity providers, on the other hand, work directly with consumers to provide necessary electricity, and therefore are clearly considered public utilities.

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80 *Ibid* at 193–95.

81 *Ibid* at 194.

82 *Ibid* at 194–95.

83 Sam Kalen, "NEPA's Trajectory: Our Waning Environmental Charter from Nixon to Trump?" (2020) 50:5 Environmental L Reporter 10398.

84 *Ibid* ("[o]nce heralded in 1970 as the nation's Magna Carta of environmental laws, now upon its 50th anniversary, [*NEPA*'s] luster seems faded, and its future susceptible to the electoral process as well as policymakers' willingness to elevate higher priorities" at 10398).

85 *Ibid* at 10401.

86 *Utility Facilities Act*, Va Code Ann tit 56 § 56-265.1 (2021) (Virginia Code definition). To define "public utility" see e.g. 16 USC § 824(e) (2015) (Federal Energy Regulatory Commission definition).

Remanding without vacatur is an especially developed practice in the D.C. Circuit.[87] In the D.C. Circuit, courts consider the factors established in *Allied-Signal, Inc v United States Nuclear Regulatory Commission* to determine whether vacatur is appropriate.[88] The *Allied-Signal* factors require consideration of (1) "the seriousness of the order's deficiencies" and (2) "the disruptive consequences of [vacatur]."[89] A party arguing against vacatur bears the burden of proof.[90]

The district court in *National Parks* decided on remand not to vacate the permit.[91] In applying the two *Allied-Signal* factors, the court determined that the first factor, the seriousness of the order's deficiencies, indicated that vacatur should apply.[92] The court stated that the Corps' failure to prepare an EIS proved this deficiency.[93] The court found that the second factor, however, indicated that the permit should not be vacated.[94] It stated that revoking the permit would "set in motion a chain of events that could lead to the type of serious, disruptive consequences with which the second *Allied-Signal* factor is concerned."[95] The court emphasized the threat of rolling blackouts in the region due to unmet electricity demands, the project's potential as a crucial source of power in the area, and the risk of monetary waste.[96] The fact that the public would bear the greatest burden from vacating the permit weighed heavily on the court: "[i]t would be unjust to force [the hundreds of thousands of people in the region relying on this project as their power source] to bear the brunt of the harm when they are not responsible for its cause."[97] This comment will demonstrate that the case's perceived implications for the "public interest" influenced the court's decision to allow the transmission towers to continue operating.

The court sided with Dominion in *National Parks* and did not vacate the permit because Dominion is a public utility; the public relies on the company for its electricity needs. This sets a precedent for public utilities to take advantage of their position as serving the public to evade unfavorable rules. While this stance may benefit the public in the short-term to avoid immediate adverse effects of unmet electrical demand, permitting bad actors to skirt environmental requirements will ultimately cause greater harm to the public. This paradox highlights the difficulty courts face in characterizing the "public interest."

Case law in the D.C. Circuit and beyond demonstrates that a defendant's position as a public utility influences courts' considerations of vacatur as an appropriate remedy. The facts underlying *Allied-Signal* support this hypothesis. *Allied-Signal* involved two companies

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87 Levin, *supra* note 8 at 295; Walker, *supra* note 76 at 758.

88 988 F (2d) 146 at 150–51 [*Allied-Signal*]; *National Parks* 2019 III, *supra* note 6 at 99.

89 *Allied-Signal*, *supra* note 88 at 150–51; *National Parks* 2019 III, *supra* note 6 at 99.

90 See *National Parks* 2019 III, *supra* note 6 at 99.

91 *Ibid* at 98–99.

92 *Ibid* ("[i]f the first *Allied-Signal* factor were the only consideration, the standard remedy would likely apply" at 99).

93 *Ibid*.

94 *Ibid* at 100.

95 *Ibid*.

96 *Ibid* at 100–02.

97 *Ibid* at 102.

that provided fuel to nuclear power plants.[98] The court directed the Nuclear Regulatory Commission ("NRC") to exempt the companies from fees it had accrued from rule violations out of concern that the companies would pass the fee burden onto public consumers.[99] The court's reasoning in that case paralleled the district court's reasoning in *National Parks*, in which the court emphasized that it did not want the public bearing the burden for a problem it did not cause.[100] Such a situation is unique for companies like public utilities that consumers rely on.

In *Oglala Sioux Tribe v United States Nuclear Regulatory Commission*,[101] public interest factors assumed a powerful role in the D.C. Circuit's *Allied-Signal* analysis involving a public utility. In that case, the court ordered the NRC to complete an EIS, but left the power company's license to operate in place while the EIS was prepared to avoid the power company's stock price from "plummet[ing]."[102] The company had sought a license from the NRC to construct a uranium mining project in the Black Hills of South Dakota.[103] The NRC granted the license without conducting an EIS.[104] The Oglala Sioux Tribe opposed the project because the tribe had a number of burial sites and other cultural and historical sites in the area.[105] The tribe was also concerned with protecting its groundwater from mining contamination.[106] Despite the "seriousness of the order's deficiencies," the court did not vacate the license while the EIS was being completed because it would cause the company's stock price to drop if the license were vacated.[107] This suggests that the court did not want to jeopardize the economic standing of a public utility that had "reasonably relied" on the license issued by the NRC.[108] The court's analysis in that case paralleled the court's *Allied-Signal* analysis in *National Parks*, and in both cases the court did not vacate the permit while the EIS was prepared.[109]

Power plants and electrical transmission towers have been given similar treatment by courts applying the *Allied-Signal* "public interest" factor, further illustrating the connection between an entity's role as a public utility and the "public interest." In *California Communities Against Toxics v United States Environmental Protection Agency*, the Ninth Circuit remanded without vacatur to allow the construction of a power plant to continue.[110] Environmental groups challenged the Environmental Protection Agency's ("EPA") approval of an air quality

98 See *Allied-Signal*, *supra* note 88 at 148.

99 *Ibid* at 154.

100 See *National Parks* 2019 III, *supra* note 6 at 102.

101 896 F (3d) 520 (DC Cir 2018) [*Oglala Sioux*].

102 *Ibid* at 538.

103 *Ibid* at 522.

104 *Ibid* at 523.

105 *Ibid* at 524.

106 *Ibid.*

107 *Ibid* at 538 (the court also stated that the Tribe would not suffer harm "for now," but that it could seek redress if that turned out not to be true).

108 *Ibid.*

109 *Ibid*; *Allied-Signal*, *supra* note 88; *National Parks* 2019 III, *supra* note 6.

110 688 F (3d) 989 at 993–94 (9th Cir 2012) (the Court also adopted the *Allied-Signal* factors to determine whether agency action should be vacated at 992).

credit system in California and transfer of credits to a newly constructed power plant.[111] While assessing vacatur's disruptive consequences under the second *Allied-Signal* factor, the court found that vacatur would cause severe delay and other difficulties.[112] The power plant was scheduled to come online a few months after the ruling and was said to be "much needed."[113] The court's reasoning closely resembled that used in *National Parks*: "[w]ithout [the power plant], the region might not have enough power next summer, resulting in blackouts. . . . Stopping construction would also be economically disastrous. This is a billion-dollar venture employing 350 workers."[114] The court ultimately decided not to vacate the EPA's rule and allowed the company to continue constructing the plant.[115] Like electrical transmission towers, power plants directly provide electrical power for communities. This further indicates that public utilities are given "equitable relief" due to their close connection to the public interest.

The D.C. Circuit took a different approach in *Standing Rock Sioux Tribe v United States Army Corps of Engineers*. There, the court vacated a crude oil pipeline easement until the Corps prepared an EIS.[116] That pipeline required an easement from the Corps because it traveled through tribal lands.[117] The Corps issued the easement without preparing an EIS despite criticism from tribes and the public.[118] In the district court's analysis of the second *Allied-Signal* factor, the "disruptive consequences of vacatur," the court gave four reasons for vacating the easement: (1) vacatur would cause the EIS to be expedited, which would limit the economic impacts of the shutdown; (2) economic factors alone typically do not justify a decision not to vacate; (3) the purpose of *NEPA* would be subverted if companies could "build first and consider environmental consequences later"; and (4) the risk of an oil spill.[119] The circuit court affirmed vacatur.[120]

Looking at the four "disruptive consequences of vacatur" reasons justifying vacatur of the easement in *Standing Rock*, three out of the four reasons also apply to *National Parks*.[121] The remaining reason—and the distinction between *Standing Rock* and *National Parks*—was that *Standing Rock* centered on a crude oil pipeline, whereas *National Parks* involved electrical transmission towers.[122] The first two justifications for vacatur in *Standing Rock* involved economic impacts. Despite the potential in both cases for economic suffering due to vacatur, the permit in *Standing Rock* was vacated, but the permit in *National Parks* was not. In *National Parks*, Dominion had already invested $400 million in the project, and that significant sum

111 *Ibid* at 991–92.

112 *Ibid* at 993–94.

113 *Ibid.*

114 *Ibid.*

115 *Ibid.*

116 See *Standing Rock Sioux Tribe v United States Army Corps of Engineers*, 985 F (3d) 1032 at 1054 (DC Cir 2021) [*Standing Rock*].

117 *Ibid.*

118 *Ibid.*

119 *Ibid* at 1051.

120 *Ibid* at 1054.

121 See *Standing Rock*, *supra* note 116 at 1051; *National Parks* 2019 II, *supra* note 5.

122 See *Standing Rock*, *supra* note 116 at 1032; *National Parks* 2019 II, *supra* note 5 at 501.

constituted one of the reasons that the permit was *not* vacated. However, economic impacts comprised two of the given reasons *for* vacatur in *Standing Rock*, with the court emphasizing that "economic disruption . . . is not commonly a basis, standing alone, for declining to vacate agency action."[123] The third reason for vacating the easement in *Standing Rock*, that not vacating it would encourage companies to build first and consider environmental impacts later, was exactly what happened in *National Parks*. However, the court in *National Parks* chose not to vacate the permit, and consequently ignored the purpose of *NEPA*.[124]

The apparent discrepancy between the outcomes in *Standing Rock* and *National Parks* may be reconciled using the public utility distinction. The primary difference between *Standing Rock*, in which the court vacated the Corps' easement, and *National Parks*, in which the same court did not vacate the Corps' permit, was how the public would be impacted from halting the operation of an oil pipeline versus halting electrical transmission towers.[125] Interrupting electrical transmission would have a more immediate impact on the public than halting the transportation of crude oil. Electrical transmission towers directly provide the public with the electricity they rely on every day. An oil pipeline, on the other hand, is several steps removed from serving the public — oil must first be converted into fuel or other products before it may then be used by the public.[126] Thus, vacating the permit for the electrical transmission towers would have a greater and more immediate impact on the public, which justified the court's decision in *National Parks* to remand without vacatur and further supports the public utility distinction.[127]

Environmental Defense Fund v Federal Energy Regulatory Commission[128] further demonstrates the variable treatment of electricity providers, who share a direct relationship with consumers, and pipelines, who are several supply-chain stops removed from consumers. In that case, the Federal Energy Regulatory Commission issued a certificate to Spire STL Pipeline LLC to construct a natural gas pipeline.[129] Despite evidence that the pipeline was already completed and operational, and that the company had already brought eminent domain actions against one hundred entities that involved over two hundred acres of private land, the court chose to vacate the certificate.[130] The court stated that it did not want to encourage entities to "build first" and conduct environmental reviews later, citing *Standing Rock*.[131] Did the eminent domain action in *Environmental Defense Fund* alter the public interest balance in favor of vacating the certificate? Or does that case parallel *Standing Rock*, drawing a

123 *Standing Rock*, *supra* note 116 at 1051.

124 See *National Parks* 2019 III, *supra* note 6 at 103.

125 See *Standing Rock*, *supra* note 116 at 1051; *National Parks* 2019 II, *supra* note 5 at 501.

126 See "Pipeline Basics" (3 March 2022), online: *Liquid Energy Pipeline Association* <liquidenergypipelines.org/page/pipeline-basics>.

127 See *National Parks* 2019 III, *supra* note 6 at 103.

128 2 F (4) 953 at 976 (DC Cir 2021).

129 *Ibid* at 959.

130 *Ibid* at 976–77.

131 *Ibid*; *Standing Rock*, *supra* note 116.

factual distinction between new pipelines and electrical towers?[132] The public utility distinction advanced by this comment suggests that the latter hypothesis governs.

Cases involving industries that are not public utilities highlight the special status of public utilities. For example, in *Southeast Alaska Conservation Council v United States Forest Service*, a district court in the Ninth Circuit vacated the EIS for a timber project in the Tongass National Forest.[133] The court acknowledged that vacating the EIS would economically harm the timber industry and possibly cause supply-chain issues for local sawmills.[134] However, the court distinguished this case from *California Communities* and found that the harm from pausing the timber project was not equally disruptive.[135] The underlying project in *Southeast Alaska Conservation Council* was not a public utility, and therefore pausing that project had a lesser effect on the public, which caused the court to favor vacatur in its public interest considerations.[136] The court's rationale further supports the proposition that public utilities, such as power plants, are given special consideration.[137]

Despite coming to an outcome seemingly contrary to that suggested by the public utility distinction, the ruling by the First Circuit in *Town of Weymouth, Massachusetts v Massachusetts Department of Environmental Protection*[138] was consistent with this distinction. The court in that case remanded a state agency decision without vacating the underlying air permit granted to a pipeline operator.[139] Other courts, including the First Circuit, have not formally adopted the *Allied-Signal* factors, but rely on similar considerations.[140] In the First Circuit, courts weigh the "severity of the errors, the likelihood they can be mended without altering the order, and on the balance of equities and public interest considerations."[141] The court in *Weymouth* found that vacatur would have caused the pipeline to be out of commission during the New England and Canadian winter heating season, when natural gas demand peaked.[142] The court stated that this factor alone materially altered the "balance of equities and public interest considerations" in favor of remand without vacatur.[143] Similar to *National Parks*, the First Circuit issued its original opinion with the remedy of vacating the permit, and altered its remedy upon rehearing.[144] In *Weymouth*, the pipeline had a direct impact upon residents

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132 See *Standing Rock*, *supra* note 116 at 1054.

133 468 F Supp (3d) 1148 at 1155 (D Alaska 2020).

134 *Ibid.*

135 *Ibid.*

136 *Ibid.*

137 *Ibid.*

138 973 F (3d) 143 (1st Cir 2020) [*Weymouth*].

139 *Ibid* at 145.

140 See e.g. *Central Maine Power Co v United States (Energy Regulator Commission)*, 252 F (3d) 34 at 48 (1st Cir 2001) [*Central Maine*]; *Council Tree Communications Inc v United States (Communications Commission)*, 619 F (3d) 235 at 258 (3rd Cir 2010); *City Club of New York v United States Army Corps of Engineers*, 246 F Supp (3d) 860 at 872 (SD NY 2017).

141 *Central Maine*, *supra* note 140 at 48.

142 See *Weymouth*, supra note 138 at 146.

143 *Ibid.*

144 *Ibid* at 145–46.

in the Northeast.[145] Though pipelines are typically more removed from impacts on the public, the winter demand for gas in that location was so high that the pipeline would have affected consumers.[146] The court's equitable remedy thus corresponds with other decisions for public utilities, despite choosing not to vacate the pipeline's permit.[147]

Put in this broader context, the court's decision in *National Parks* aligns with repeated instances of federal courts providing favorable rulings to public utilities after considering public interest factors. This examination of the case law indicates that courts regularly remand without vacatur for ongoing projects to avoid adverse impacts on the public interest. Courts appear especially willing to remand without vacating the underlying permit for public utilities due to their close relationship with consumers.

3.2. EIS

The court's remedy in *National Parks* contained two parts: (1) remanding the agency's decision without vacatur, and (2) requiring the Corps to prepare an EIS to comply with its *NEPA* obligations.[148] This section argues the court's decision to remand without vacatur subverted *NEPA* by allowing the project to be completed without proper consideration of the environmental consequences—the entire purpose of *NEPA*. While preparing the EIS will bring the Corps into compliance with its *NEPA* obligations, the untimeliness of the EIS nullifies *NEPA*'s statutory purpose. Under *NEPA*, federal agencies must prepare an EIS for proposed federal actions "significantly affecting the quality of the human environment."[149] *National Parks* concerns an unlikely circumstance, as an EIS is supposed to be prepared *before* the proposed action takes place.[150] The court's decision to remand without vacatur undermined the second part of the remedy—preparation of the EIS—by effectively sanctioning the project. Similar decisions in future cases will continue to do the same.

The Corps originally bypassed the need to prepare an EIS by issuing a FONSI based on the initial EA.[151] The Corps likely issued the FONSI instead of an EIS due to the urgent need for additional electrical power in the region, a need Dominion stressed throughout the project's preparation.[152] The district court upheld the FONSI because it found that the Corps had seriously considered the concerns raised by other agencies.[153] The Corps had produced

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145 See generally *ibid.*

146 *Ibid* at 146.

147 *Ibid*.

148 See *National Parks* 2019 II, *supra* note 5 at 502; *National Parks* 2019 I, *supra* note 2 at 1087–88.

149 See *Kleppe v Sierra Club*, 427 US 390 at 394 (1976), citing *NEPA*, *supra* note 3, § 4332(2)(c).

150 See Gregory S Schneider, "Feds reconsidering permit for power lines near historic Jamestown, but there's a hitch: They've already been built", *The Washington Post* (18 July 2019), online: <washingtonpost.com/local/virginia-politics/feds-reconsidering-permit-for-power-lines-near-historic-jamestown-but-theres-a-hitch-theyre-already-built/2019/07/18/7c46a09a-a8af-11e9-a3a6-ab670962db05_story.html> (the Corps' regulatory chief acknowledged that this situation was a first for the Corps); "What is the National Environmental Policy Act?", online: *United States Environmental Protection Agency* <epa.gov/nepa/what-national-environmental-policy-act>.

151 See *National Parks* 2019 I, *supra* note 2 at 1079.

152 See *National Parks* 2018, *supra* note 17 at 359; *National Parks* 2019 III, *supra* note 6 at 101–03.

153 *Ibid* at 365–66.

a 400-page document containing photographs and photosimulations that visually assessed the project from various vantage points.[154] After critiques from the National Parks Service regarding missing vantage points, the Corps updated the document with eighty additional photo-simulations from those perspectives.[155] The court stated: "[u]ltimately, the Corps did enough. It engaged a reasoned analysis, consulted experts, responded to criticisms of both its methodology and conclusions, took a hard look at the potential impacts, and concluded that the impact of the Project would be 'moderate at most.' This may not satisfy the plaintiffs, but it is enough to satisfy the Court."[156]

Though the plaintiffs immediately challenged the FONSI decision, Dominion quickly built the towers after receiving the permit, leading to this unusual situation. The Corps' first public notice of the project was issued in 2014.[157] The Corps released the FONSI decision in June 2017 and issued the permit to Dominion about a month later.[158] The district court issued its initial opinion on the decision in May 2018.[159] The D.C. Circuit issued its opinion in March 2019, less than two years after the Corps issued the FONSI.[160] By that time, however, Dominion had already completed construction of the electrical towers.[161] The project was likely rushed due to Dominion's assertion that the region urgently needed additional electrical infrastructure.[162]

Timely consideration of the environmental impacts of an agency action is one of *NEPA*'s primary aims, and the court's decision to remand without vacatur in *National Parks* undermined that purpose. In *Metcalf v Daley*, the Ninth Circuit affirmed that *NEPA* requirements must be timely.[163] The United States designated the California gray whale as endangered and joined the *International Convention for the Regulation of Whaling*,[164] which prohibited whaling.[165] After the gray whale population had largely recovered, the National Oceanic and Atmospheric Administration ("NOAA") signed a contract with the Makah Indian Tribe that agreed upon an annual gray whale quota for subsistence hunting purposes.[166] A year later, NOAA prepared an EA on the proposed quota for public comment.[167] Certain marine conservation and animal rights groups sued, alleging *NEPA* violations, and asserted that a full EIS was needed in place of the EA.[168] In analyzing the plaintiffs' *NEPA* claims,

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154 *Ibid.*

155 *Ibid.*

156 *Ibid* at 368 [footnotes omitted].

157 *Ibid* at 364.

158 *Ibid* at 360.

159 *Ibid.*

160 See generally *National Parks* 2019 I, *supra* note 2.

161 See *National Parks* 2019 II, *supra* note 5 at 501.

162 See *National Parks* 2018, *supra* note 17 at 359; *National Parks* 2019 III, *supra* note 6 at 101–03.

163 214 F (3d) 1135 at 1142 (9th Cir 2000) [*Metcalf*].

164 16 USC § 916ff (1946).

165 See *Metcalf*, *supra* note 163 at 1137–38.

166 *Ibid* at 1138–39.

167 *Ibid* at 1139.

168 *Ibid* at 1140–43.

the court stated that "[p]roper timing is one of *NEPA*'s central themes. An assessment must be 'prepared early enough so that it can serve practically as an important contribution to the decision-making process and will not be used to rationalize or justify decisions already made.'"[169] NOAA prepared the EA after contractually agreeing to a quota with the tribe.[170] The court held that NOAA prepared the EA only after it had already made an "irreversible and irretrievable commitment of resources," which was "too late in the decision-making process."[171] The court's remedy required the federal defendants to prepare a new, objective EA.[172]

Metcalf highlights the importance of timing to meet the intentions underlying *NEPA*. While in *National Parks* the Corps did prepare an EA before issuing the permit (unlike the agency in *Metcalf*), timing remains a major issue in the court's prescribed remedy.[173] As the court in *Metcalf* emphasized, timing for *NEPA* requirements is crucial—"*NEPA*'s effectiveness depends entirely on involving environmental considerations in the initial decisionmaking process."[174] Requiring the Corps to conduct an EIS for Dominion's project will keep the Corps in line with *NEPA* requirements, but its effectiveness is limited now that the project has been completed.

The court's decision in *National Parks* to order the Corps to prepare an EIS while still remanding without vacatur effectively provided no relief to the plaintiffs. If the plaintiffs had sought an injunction on appeal, rather than an EIS, the case would have been dismissed as moot under federal law once the project was completed.[175] Federal courts lack jurisdiction to hear a case that does not present an ongoing controversy.[176] The issue of an EIS presents a "live controversy" regarding whether the EIS should be completed. In this case, the EIS controversy stayed "live" after the actual project was completed. The district court on remand suggested that the Corps may decide to remove the power lines or take additional mitigation measures after completing the EIS.[177] The court thus indicated that the EIS still served a valuable purpose.[178] Considering the Corps' significant investment of time, money, and effort into the project,[179] that suggestion seems doubtful. The court's decision was more like a rubber stamp, and the EIS a mere technicality, rather than a "hard look."

Thus, the Corps' preparation of the EIS serves a very limited purpose because the project at issue has already been completed. If courts continue to remand without vacating agency decisions concerning public utilities, these situations will continually resurface. To truly fulfill the *NEPA*'s statutory purpose—in which the EIS genuinely contributes to the decision-making process—courts should reconsider the use of remand without vacatur in cases involving

169 *Ibid* at 1142, quoting *Save the Yaak Committee v Block*, 840 F (2d) 714 at 718 (9th Cir 1988).

170 *Ibid* at 1143.

171 *Ibid*.

172 *Ibid* at 1146.

173 *Ibid* at 1143.

174 *Ibid* at 1145.

175 See *Neighborhood Transportation Network v Pena*, 42 F (3d) 1169 at 1172 (8th Cir 1994).

176 *Ibid.*

177 See *National Parks* 2019 III, *supra* note 6 at 103.

178 *Ibid*.

179 *Ibid*.

EISs or EAs. The courts' willingness to grant remand without vacatur encourages these entities to not take their *NEPA* responsibilities seriously and undermines *NEPA*'s statutory purpose.

4. BAD ACTOR

Public utilities will become incentivized to behave as bad actors if they continue to receive special consideration from the courts. This section analyzes how the remedies in *NEPA* cases involving public utilities will influence utilities' future behavior.[180] As the above section demonstrates, courts avoid ordering remedies against public utilities that could adversely affect the public. Since public utilities are likely to receive this good faith treatment from the courts, they may become incentivized to behave in less optimal ways in the future. While courts' good faith treatment protects the public in the short term by avoiding electrical outages or other shortages, it creates an unsettling precedent that may ultimately cause greater harm than good to the public. This treatment incentivizes repeat players to skirt technical environmental law requirements to meet corporate objectives. This in turn invokes harm on the public interest in the long run. In this section, I discuss how public utilities operate as bad actors by explaining (1) the difficulties courts encounter in holding public utilities accountable; (2) how public utilities create moral hazards; and (3) why public utilities are incentivized to overstate a region's energy needs to receive more favorable treatment.

National Parks illustrates the difficulty in holding accountable public utilities that behave as bad actors. In *National Parks*, the court was faced with the impossible decision of determining what to do with the electrical transmission towers that were already built and operational despite glaring deficiencies in their *NEPA* requirements.[181] What was the court to do—tell Dominion to take the towers down? How could the court deal with parties who abuse courts' good faith treatment, while balancing the public's stake in the resources supplied by these entities? Dominion's initial representations at the district court's injunction hearing that it could remove the towers if ruled against further complicated this difficult scenario.[182] After overcoming the plaintiffs' bid for injunctive relief on the grounds that it could have the towers removed, Dominion later argued against vacatur because of all the time and money Dominion had invested in the project.[183] Judicial estoppel is designed to "'protect the integrity of the

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180 A 'bad actor' is a person or entity that engages in criminal or wrongful acts, or takes advantage of certain regulations, processes, or privileges. Bad actors exist in all areas of the law: see e.g. Bruce J McNeil, "Bad Actors Still Want to Benefit" (2018) 24:1 J Deferred Compensation 17 at 18 (describing the slayer rule in inheritance law); Steven B Drucker, "Bad Actor Statutes: New Weapons in Environmentalists' Arsenal" (1992) 2:1 U Balt J Envtl L 73 (discussing "bad actor statutes" adopted in North Carolina and Ohio that empower the states' environmental agencies to deny permits based on entities' past behavior); Christopher K Odinet, "Banks, Break-ins, and Bad Actors in Mortgage Foreclosure" (2015) 83:4 U Cin L Rev 1155 at 1157–62 (detailing how financial institutions contributed to the housing crisis of 2007–2008); Tobias Pierce, "The Power of Attorney Problem: When a Bad Actor Has Health Care Decision-Making Power for a Loved One", *Arizona Attorney* 57:10 (June 2021) 44 (suggesting possible resolutions to physical or mental abuse by bad actors with powers of attorney of incapacitated individuals), online: <azattorneymag-digital.com/azattorneymag/202106/MobilePagedReplica.action?pm=2&folio=44#pg47>; Chiraag Bains, "'A Few Bad Apples': How the Narrative of Isolated Misconduct Distorts Civil Rights Doctrine" (2018) 93:1 Ind LJ 29 (discussing courts' approaches to addressing police misconduct).

181 See *National Parks* 2019 II, *supra* note 5.

182 *Ibid* at 501.

183 *Ibid*.

judicial process' by 'prohibiting parties from deliberately changing positions according to the exigencies of the moment.'"[184] The district court's amenableness to Dominion's argument encourages public utilities to continue to take advantage of their good faith treatment in future cases. In environmental litigation, the stakes are even higher as corporations can maximize their financial benefit by avoiding environmental law requirements.[185] Public utilities can further leverage their position as acting in the "public interest" to avoid repercussions from the court.

Dominion's behavior in *National Parks* also exemplifies a moral hazard, as it burdened the public with the cost of the risk arising from its project rather than internalizing that risk itself. A moral hazard is a situation in which one party takes a potentially lucrative risk knowing that if the risk materializes, someone else will incur some or all of the costs.[186] Dominion took a risk by constructing the towers without a completed EIS, knowing the court could order the towers removed.[187] At the same time, the public bore the costs for that risk. If the towers remained, the historic landscape was permanently altered; if the towers were removed, the public faced potential electrical blackouts.[188]

Public utilities are incentivized, in *NEPA* litigation, to heighten the perceived demand for energy to boost their position of benefiting the public interest, and therefore becoming more likely to receive good faith treatment from the courts. Dominion, like other public utilities, is a repeat player in environmental litigation. Before the electrical transmission towers in *National Parks*, the company faced criticism for other projects, such as the Atlantic Coast natural gas pipeline. In justifying the project, the company emphasized the need for energy security,[189] with Dominion originally stating that the project would address the lack of energy supply in North Carolina and Virginia following the retirement of coal-fired power plants.[190] The Atlantic Coast pipeline's route crossed the Appalachian Trail. Like in *National Parks*, federal agencies took shortcuts to approve work permits, and Dominion, along with Duke Energy, rushed to construct the project.[191] Ultimately, the U.S. Supreme Court ruled that the pipeline could cross underneath the Appalachian Trail, but it was not enough to save

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184 *New Hampshire v Maine*, 532 US 742 at 749–50 (2001) citing *Edwards v Aetna Life Insurance Co*, 690 F (2d) 595 at 598 (6th Cir 1982); *United States v McCaskey*, 9 F (3d) 368 at 378 (5th Cir 1993).

185 See Nathan Atkinson, "Do Corporations Profit from Breaking the Law? Evidence from Environmental Violations" (28 July 2022), online (pdf): *NathanAtkinson.com* <nathanatkinson.com/wp-content/uploads/2022/07/Atkinson-Environmental-2022-June.pdf>; Ashley S Deeks, "Raising the Cost of Lying: Rethinking *Erie* for Judicial Estoppel" (1997) 64:3 U Chicago L Rev 873.

186 See Charles Goodhart, "The Moral Hazard of Limited Liability" (30 July 2021), online: *Centre for Economic Policy Research: VOXEU* <voxeu.org/article/moral-hazard-limited-liability>.

187 See *National Parks* 2019 II, *supra* note 5 at 501.

188 See *National Parks* 2019 III, *supra* note 6 at 101–03.

189 See Sarah Vogelsong, "What Sank the Atlantic Coast Pipeline? It Wasn't Just Environmentalism", *Virginia Mercury* (8 July 2020), online: <virginiamercury.com/2020/07/08/what-sank-the-atlantic-coast-pipeline-it-wasnt-just-environmentalism/>.

190 See Dominion Energy, News Release, "Dominion Energy and Duke Energy Cancel the Atlantic Coast Pipeline" (5 July 2020), online: *Dominion Energy* <news.dominionenergy.com/2020-07-05-Dominion-Energy-and-Duke-Energy-Cancel-the-Atlantic-Coast-Pipeline>.

191 See Schneider, *supra* note 150.

the project.[192] Less than a month later, Dominion announced the project would be cancelled due to increased costs, uncertainty, and the project's delay.[193] The abrupt cancellation of the Atlantic Coast project casts doubt upon the need for the project in the first place. The electrical project in *National Parks* was similarly implemented to address the closure of coal-fired power plants in Yorktown, Virginia.[194] Environmental groups suggest Dominion exaggerates future energy demand to justify unnecessary projects to increase their profits.[195] Furthermore, given Dominion's grip on state and federal permitting agencies, the agencies may have accepted Dominion's assertions about an urgent energy need with a blind eye.[196]

While the court's ruling in *National Parks* protected the public in the short-term from rolling blackouts and unmet electrical demand, it set a bad precedent for public utility actors frequently involved in litigation. This precedent leads to greater harm to the public over time. For repeat players, courts should deter future bad behavior by the actor. Such deterrence would protect both the integrity of the court system and the public interest in the long-term. Robert Glicksman and Emily Hammond persuasively articulate this problem, which centers on allowing unrepentant agency officials or permit holders to avoid repercussions through remand without vacatur:

> Agency officials who are willing to flout administrative-law norms in order to pursue their substantive agendas are likely to forge ahead unless it is clear that they have much to lose if they do so. If the only consequence of violating the law is a judicial slap on the wrist in the form of a remand order, especially if the remand is without vacatur of the offending action, the message that proper administrative process is not optional may fall on deaf ears. Judges intent on promoting the rule of law need to respond . . . with remedies that have bite and that are able to convince responsible officials that timely and successful pursuit of the agency's policy agenda depends on adherence to administrative-law requirements, no matter how inconvenient they appear to be.[197]

Thus, for the public interest to truly be served, courts should less liberally remand without vacatur. Courts have an interest in promoting the rule of law and must act accordingly to prevent bad actors from misuse measures implemented to promote the public interest.

5. CONCLUSION

The Surry-Skiffes Creek-Whealton project's completion at the time of litigation complicated the court's ability to provide an adequate remedy. The D.C. Circuit ordered

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192 See Becky Sullivan & Laurel Wamsley, "Supreme Court Says Pipeline May Cross Underneath Appalachian Trail", *NPR* (15 June 2020), online: <npr.org/2020/06/15/877643195/supreme-court-says-pipeline-may-cross-underneath-appalachian-trail>.

193 See Dominion Energy, *supra* note 190.

194 See *National Parks* 2018, *supra* note 17 at 376.

195 See "Dominion Energy: Pollute to Profit" (November 2018), online (pdf): *Sierra Club* <contentdev.sierraclub.org/sites/www.sierraclub.org/files/program/documents/1925%20Dominion%20Bad%20Actor%20Mini%20Report%2005_web.pdf>.

196 See Vogelsong, *supra* note 189.

197 Robert L Glicksman & Emily Hammond, "The Administrative Law of Regulatory Slop and Strategy" (2019) 68:8 Duke LJ 1651 at 1686.

the Corps to complete an EIS, but the court did not vacate the underlying permit. Neither part of this remedy is satisfying. The district court decided not to vacate the permit to avoid the possibility of rolling blackouts that would affect hundreds of thousands of people. Case law demonstrates that courts consistently remand without vacatur in cases involving public utilities. The *Allied-Signal* factors used to determine whether to vacate emphasize public interest considerations, and courts use those considerations to choose not to vacate permits for public utilities. Other circuit courts that consider public interest factors in their vacatur decisions also remand without vacatur for public utilities. Courts' decisions protect the public from the immediate effects of unmet electrical demands but allow utility companies to avoid accountability.

National Parks is unique—perhaps in the Corps' history—as the court ordered the agency to complete an EIS on a project that had already been finished. This remedy aligned the Corps with its *NEPA* obligations, but the purpose of *NEPA* was diminished for its untimeliness. This comment's consideration of bad actors highlighted additional aspects of *National Park*'s unsatisfactory outcome. Remand without vacatur encourages public utilities to behave as bad actors because they receive good faith treatment from the courts; this holds especially true for repeat players like public utilities. Courts in the future need to provide *NEPA* remedies that protect the public from both short-term and long-term adverse consequences arising from remand without vacatur.