

Press Release from the Southern Environmental Law Center and Black Warrior Riverkeeper
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Federal Court Requires Corps to Rectify Error on Water Impacts of Coal Mining Permit along Alabama's Black Warrior River

Birmingham, AL – The U.S. Court of Appeals for the Eleventh Circuit has ruled that the U.S. Army Corps of Engineers (Corps) must rectify an error the agency made in assessing the impacts on water resources from coal mining activities under a controversial permit that authorizes unlimited mining material to be dumped into streams and wetlands in the Black Warrior River basin.

Beginning in May 2012, the Corps granted permits for limitless filling of streams and wetlands at 41 mines in the Black Warrior basin through a general approval, known as Nationwide Permit 21, rather than requiring individual review of each site as is now standard for surface coal mining activities.

The groups charge that the Corps has not fully accounted for cumulative environmental impacts allowed by the use of this permit. Over two years after the permit was issued, and a few days before oral argument in the court of appeals, the agency admitted that it had made an error in calculating the impacts of mining activities authorized by the permit, which severely undermined the agency's finding that activities under this permit had minimal cumulative impacts.

The Court has allowed the Corps an additional year to study and calculate the actual impacts to water resources allowed by Nationwide Permit 21— a period of time during which unlimited stream filling can continue under previous authorizations unless the district court orders activities to be stopped. Because the Court focused solely on this late-breaking error, it did not address the groups' main argument, which is that it is irrational for the Corps to allow these mines to fill unlimited lengths of streams, despite its 2012 finding that a 300-foot limit on stream filling is "necessary" to prevent more than minimal cumulative environmental impacts.

"We are disappointed that the Court allowed the Corps an entire year to analyze environmental impacts that should have been considered more than five years ago, before this permit was issued," said Catherine Wannamaker from the Southern Environmental Law Center. "Giving the Corps more time to justify a permit that should have never been used in the first place does not serve the public interest. We feel strongly that all 41 permits should have been put on hold during the Corps' reevaluation, and we are considering next steps at this time."

One judge on the panel disagreed with the majority and argued for vacating all 41 permits, explaining that "[t]he scope of the mistake is much broader" than a simple math error, and that "the issuance of a nationwide permit . . . based on a faulty and unsupported minimal impacts analysis" is a clear violation of the Clean Water Act

"These 41 grandfathered permits should never have been granted, because they rely on the Corps' unsupportable and undocumented assumption that burying and disturbing tens of miles of streams has only minimal cumulative effects," said Jim Hecker, Environmental Enforcement Director at Public Justice.

After suspending the use of Nationwide Permit 21 in 2010 for mining in other Appalachian states due to concerns of its impacts on water quality, the Corps strengthened the permit conditions on environmental impacts when reissuing it in 2012. However, the Corps included an arbitrary “grandfather” provision authorized by the previous version of the permit that allows the unlimited fill of streams and wetlands to continue under previous authorizations until 2017.

After estimating the provision would be used rarely, the Corps has approved around 80 total projects across the country through this loophole, over half of which are in the Black Warrior basin, a major source of drinking water for Birmingham, Tuscaloosa, and other Alabama communities.

The court found that the conservation groups were justified in taking time to fully investigate and prepare their claims, contrary to arguments made by the intervening coal companies that the duration of the groups’ investigation caused them monetary harm.

“This permit allows far too much damage to wetlands and streams along the river and its tributaries,” said Nelson Brooke, Black Warrior Riverkeeper. “The Black Warrior is home to many rare and important aquatic species and is used heavily for swimming, recreation, fishing, paddling, and boating. Protection of clean water and its upland sources are vital to downstream uses.”

When the permit was reissued in May 2012, over 145,000 linear feet of streams (approximately 27 miles) in the Black Warrior basin were authorized for fill of mining material under Nationwide Permit 21, even though the Corps has recognized in other contexts that stream fills can compromise water quality and wildlife habitat.

“Streams and wetlands play an integral role in protecting the overall health of the river by filtering out pollution and sediment,” said Michael Senatore, from Defenders of Wildlife. “Continuing to dump massive amounts of rock, soil and chemical waste into these delicate water bodies could ultimately cover and permanently destroy them, resulting in catastrophic habitat loss for fish and wildlife and serious impacts for downstream communities that rely on the Black Warrior watershed for their drinking water.”

Black Warrior Riverkeeper, Defenders of Wildlife, the Southern Environmental Law Center and Public Justice filed a lawsuit in November 2013, charging that the Corps’ issuance of Nationwide Permit 21 fails to comply with federal requirements for surface mining without the detailed study and analysis of cumulative impacts required by the Clean Water Act and the National Environmental Policy Act. The case is *Black Warrior Riverkeeper v. U.S. Army Corps of Engineers*, No. 14-12357 (11th Cir.).

In two prior lawsuits brought by Public Justice against the Corps in Kentucky and West Virginia, federal courts have already declared Nationwide Permit 21 to be in violation of these laws.

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About the Southern Environmental Law Center:

The Southern Environmental Law Center is a regional nonprofit using the power of the law to protect the health and environment of the Southeast (Virginia, Tennessee, North and South Carolina, Georgia, and Alabama). Founded in 1986, SELC's team of nearly 60 legal and policy experts represent more than 100 partner groups on issues of climate change and energy, air and water quality, forests, the coast and wetlands, transportation, and land use. www.SouthernEnvironment.org

About Black Warrior Riverkeeper:

Black Warrior Riverkeeper’s mission is to protect and restore the Black Warrior River and its tributaries. The citizen-based nonprofit organization holds polluters accountable because all deserve clean water for drinking, swimming, recreation, fishing, and wildlife habitat throughout the Black Warrior River watershed. Learn more at www.BlackWarriorRiver.org

About Defenders of Wildlife:

Defenders of Wildlife is dedicated to the protection of all native animals and plants in their natural communities. With more than 1 million members and activists, Defenders of Wildlife is a leading advocate for innovative solutions to safeguard our wildlife heritage for generations to come. For more information, visit www.defenders.org

About Public Justice:

Public Justice is a national public interest law firm dedicated to using creative litigation to advance the public good, protect consumers, employees, civil rights and the environment. For more information, visit www.publicjustice.net