



The Shadow Rule

The little-known, judge-made administrative-remand rule can control access to federal appellate courts. It makes the courts more efficient and gives agencies space to correct their errors, but it also hamstringing litigants and can undermine environmental protection



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IT WOULD be only a slight overstatement to say that environmental law is administrative law. Even toxic-tort and Superfund attorneys usually end up making, informing, challenging, defending, or at least writing about the decisions of administrative agencies at some point. For many of the rest of us, administrative law is our *raison d'être*, the class we wished we had paid more attention to in law school.

Despite the significant overlap between environmental and administrative law, very few environmental lawyers, even litigators, know about the administrative-remand rule. The what? Exactly. It is a prudential (judge-made) rule for cases in which a federal district court holds unlawful and remands (i.e., sends back) an agency rule or decision for further decisionmaking under the federal Administrative Procedure Act. The rule provides that, in most such cases, only the agency may appeal the remand. Other parties to an action who object to the grant, nature, or scope of a remand to an agency, including plaintiffs and non-agency defendants, must wait for the agency to issue a new decision. The rule prevails in all 13 federal courts of appeals, though in different forms and, in a few circuits, to different degrees. The rule is thus a doorman, and in determining who steps through, the rule also determines in significant part the substantive administrative law that comes out of the circuit courts. Yet the administrative-remand rule flies under most environmental lawyers' radar, even the radar of academic specialists.

Why? And so what? It has taken me nearly twenty years to understand the significance of the administrative-remand rule and to write about it. My hope is that, by the end of this article, you agree that the rule matters for environmental lawyers and their clients and warrants our field's scrutiny. The rule helps avoid needless appeals and gives space to agencies to correct their decisions. But it also has significant downsides for litigants and environmental protection. Some reform, whether congressional or prudential, is warranted.

Let's get into it. If environmental law is largely about administrative law, it is even more about stories. Stories, that is, about places and the people who live in or near them. Environmental lawyers know why we tell stories: they are the principal means through which people understand the world and try to persuade others, including judges. This fact is true even where a story has little bearing on the

merits of a case—think of the Irish setter who makes a brief cameo in a brief written by now-Chief Justice Roberts in *Alaska v. EPA*. The dog had nothing to do with Best Available Control Technology under the Clean Air Act, but it made that near-impenetrable topic more accessible and humanized Roberts's client, the Red Dog Mine. As law professor James McElhaney once observed, stories about places and people (and dogs) lend meaning to the otherwise “dry assemblages” of rules and facts that can obscure what legal disputes are really about.

There is no territory more parched than the intersection of federal appellate jurisdiction and administrative law, where the administrative-remand rule quietly sits. *Any* story would make it more interesting and relatable. The story I'll share, the one that got me exercised about the rule nearly twenty years ago, is about a place called Hope Valley. The valley is a gem in California's Sierra Nevada mountains, offering opportunities for quiet and solitude that are increasingly absent in the bustling Lake Tahoe area just to the north. Historically the valley was a thruway for gold miners and for Mormons returning from the Mexican-American War. Before that, before the valley and its features came to bear the names and language of Europeans—Hope Valley, Carson Pass, Hawkins and Pickett peaks—they were the home of the federally recognized Washoe Tribe of Nevada and California, whose members still reside nearby. For millennia the Washoe would pass through the valley along a trail they called Pewéceli's Trail, named for a central character in the tribe's creation story.

Over time Pewéceli's Trail became Forestdale Road, and over time Forestdale Road became something else: the focal point of a legal dispute between cross-country skiers, snowmobilers, and the U.S. Forest Service, which manages Hope Valley as part of the Humboldt-Toiyabe National Forest. In 2000, a group of skiers sued the Forest Service over its decision to allow, or rather not to prohibit, snowmobiles on Forestdale Road. Snowmobiles, especially those in use 25 years ago, can be noisy, polluting, and largely incompatible with cross-country skiing.

The Forest Service, like other federal land-management agencies, has the unenviable task of deciding which uses of public lands to allow where and when. Usually that means splitting the baby, and often it means legal action. In Hope Valley it meant both. Forestdale Road provides the easiest access into Hope Valley in the winter. The Forest Service,

in deciding that it lacked the authority to bar snowmobiles along the road (on the theory that the local county has a legal right to the road's use and control), effectively consigned much of the valley to significant snowmobile use for the then-foreseeable future.

The skiers sued, and they won—barely. In *Friends of Hope Valley v. U.S. Forest Service*, the U.S. District Court for the Eastern District of California held that the Forest Service needed to redo its environmental analysis because it had relied on “unscientific and unreliable” surveys to poll the opinions of skiers, snowmobilers, and other recreationists. The skiers had argued that the Forest Service didn't have enough information about user conflicts, but they hadn't said anything about any surveys. The court ruled for the Forest Service on the skiers' other claims, including whether the Forest Service had jurisdiction over Forestdale Road.

To the skiers, this “win” was anything but. Just about every environmental lawyer knows that a remand to an agency to more thoroughly study some narrow environmental impact under the National Environmental Policy Act is almost always an exercise in explanation. A better one, that is, by the agency for the decision it already made. For the agency, it is usually just a headache; for an environmental plaintiff, it is at most a press release. (I exaggerate, but only slightly.) Knowing this, and frustrated that the district court ignored their real concerns, the skiers appealed.

The Forest Service, critically, did not. That choice enabled me, as the agency's lawyer then at the U.S. Department of Justice, to argue that the Ninth Circuit was obliged to dismiss the skiers' appeal for lack of jurisdiction pursuant to the administrative-remand rule. I had stumbled upon the rule in my research when writing my brief, and I stumbled into a hostile panel of jurists when it came time for oral argument. (“Jurists,” not “judges,” because former Justice Sandra Day O'Connor, just recently retired, was sitting by designation on the panel.) All three jurists were reliable votes for the government, so I was surprised when all three gave me a hard time at the lectern. Their frustration was understandable, though; the administrative-remand rule precluded them from reviewing a remand that made little sense.

I and the rule ultimately won, but should we have? In researching and writing this article, as well as a longer article in the *Stanford Law Review* (forthcoming), my uneasiness about the outcome has been

alternately assuaged and inflamed. Where had the administrative-remand rule come from? Were there exceptions? Did the rule make sense? And what did the rule mean for environmental lawyers and environmental protection?

LET'S BEGIN with the administrative-remand rule's origins, development, and current status. (My findings in this section are based on reading and analyzing over 250 Supreme Court and circuit court decisions and scores of related secondary sources. Better I than you.) The rule is an outgrowth of the final-judgment rule, under which only final decisions of the district courts are final and therefore appealable. That rule predates probably everyone other than Pewećeli. Today the final-judgment rule is enshrined in 28 U.S.C. § 1291, with the exceptions federal litigators know well in § 1292 and a few other places like Federal Rule of Civil Procedure 54(b). The Supreme Court and federal courts of appeals generally adore the final-judgment rule; it ensures a “healthy legal system” by preventing piecemeal appeals, preserves district courts' “special role in managing ongoing litigation,” and prevents harassment through litigation.

The remand rule is the same thing, just in the administrative-law context. Again, it provides that only agencies may appeal remands. The rule has the same rationales as the final-judgment rule, plus two more. First, agencies should get a chance to correct their mistakes. Second, only agencies may appeal remands because only agencies might be deprived of review altogether if they cannot. Think about it this way: If a remand forces an agency to grant a plaintiff the relief it seeks, or to apply an erroneous legal rule or standard to that effect, after the remand there will no longer be a live case or controversy. The agency will have granted relief it cannot take back, and the agency will have lost its only opportunity to argue that the district court got it wrong. No such risk exists for a plaintiff or non-agency defendant, who can seek review of or defend the agency's new decision following the remand process.

By 1989, all 13 courts of appeals had adopted this rule. The courts had spent the prior two decades or so formulating the rule, relying on seminal Supreme Court decisions about the final-judgment rule and exceptions to it. Their rationales and legal support sometimes varied, but always they agreed on the basic idea: remands were not final for pur-

Who Benefits From This Judge-Made Rule?

In a hidden and dark corner of administrative law—and one that often impacts environmental law—lie the uses (or misuses) of the administrative-remand rule. For environmental consultants or lawyers who work intensely to prepare comments for a new rulemaking, the judge-made administrative-remand rule is a Serbonian Bog that makes challenging a new federal regulation yet more intractable than ordinary. The rule permits an agency (and only the agency) to obtain a judicial remand of a prior rule for further consideration. The potential impacts of that exclusion are large.

For a practicing lawyer, however, the question is: How does this rule play out in current environmental law? Consider the curious case of *Ohio v. EPA*, decided in 2024—and what happened thereafter. In that case, a majority of the Supreme Court found that it was “likely” that EPA’s issuance of a rule under the Clean Air Act’s so-called Good Neighbor Policy was invalid on procedural grounds.

Specifically, the majority held that the agency had failed because it “offer[ed] no reasoned response” to certain comments on its final rule. Those comments including assertions that the agency’s final rule imposing a Federal Implementation Plan did not account for instances in which not all of the 23 states envisioned in the rule ended up being actually covered by it. This issue was not adequately addressed by EPA in its responses to comments and therefore, the Court held that the states (and other private parties) applying for a stay of the final rule were likely to prevail based on the agencies’ failure to supply “a satisfactory explanation for its action.”

It might be said that the proverbial handwriting was on the



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wall. For the Court’s majority, EPA had failed to give a satisfactory explanation of its Federal Implementation Plan and, after a remand to the Court of Appeals for the D.C. Circuit, the FIP rule was inevitably headed to the capacious wastebin of regulations rejected by the nation’s highest court.

Then, a funny thing happened.

The D.C. Circuit got a request from EPA for an administrative remand of the rule back to the agency. The court of appeals granted that request in September 2024. EPA then published a new decision that it claimed addressed the perceived gaps in its prior rule. It will come as no surprise that the agency’s additional documentation found that the original rule, even with fewer than all 23 states participating, was still justified.

The state of Ohio (and others) who had just won a Supreme Court victory staying the rule howled about the unfairness of this administrative remand—even before EPA completed its mandated additional review. Instead, they sought Supreme Court review of the circuit court’s administrative-remand order. The co-petitioners, including Ohio, Indiana, Kentucky, and West Virginia, put the question presented as one involving

administrative remand issues:

“Whether the Clean Air Act permits remand to the EPA to supplement the administrative record with new information and justifications after a rule is promulgated.” The (renewed) petitioners argued that the remand back to the agency was an evasion of the Supreme Court’s earlier opinion: “Finally, the remand here could be seen by some to defy this Court’s clear directive—to consider the merits of the agency’s action on the existing record—at the emergency-review stage in this very case.”

The federal respondents argued that this type of administrative remand was perfectly consistent with Supreme Court precedent and, further, that EPA’s prompt action in this case precluded any claim of undue delay by the agency. The Supreme Court denied the petition of the states for certiorari in January 2025.

It remains to be seen whether a review of the merits of EPA’s Good Neighbor Rule, as supplemented last December, will result in upholding that rule. At this juncture, however, the environmental lawyer has a very recent and instructive example of the use of administrative remand, at least in the Clean Air Act context.

poses of appeal except as to agencies. This uniform rule, apart from reinforcing the Supreme Court's generally restrictive view of appellate jurisdiction, was a truce of efficiency; as the federal courts faced ever more decisions from a burgeoning administrative state, the rule gave agencies space to make decisions while saving appellate courts from the burden of reviewing countless remands.

But truces are fragile, and the lines between the judiciary and the executive are ever-shifting. "The overriding purpose behind almost every doctrine in administrative law is to control the exercise of agency discretion," law professor Rachel E. Barkow observes. Given this, and given federal judges' general propensity to draw lines and then move them, the administrative-remand rule has become much less fixed since 1989. Today, in some circuits (namely the Third, Sixth, Eighth, and Eleventh), the rule remains unbroken: only agencies may appeal remands. But in others (the D.C., First, and Ninth), it is now possible for non-agency parties to appeal remands in certain, if somewhat unpredictable, circumstances. In the remaining circuits, the appealability of remands by non-agency parties sits somewhere between theoretically possible and anyone's guess.

To complicate matters further, the form the administrative-remand rule takes in each circuit varies. Some circuits have no real test at all, some have tests that are only half-formed, and some have complex, multi-factorial tests that feel chillingly close to a law-school exam. Moreover, in the Ninth Circuit, the test is ever-changing, morphing from a set of "requirements" to one of "considerations" and back again, and yielding different outcomes in factually similar cases.

The result is a practitioner's nightmare. If you're an agency lawyer, in many circuits the rule is no longer the absolute bar you (and previously, I) could count on to bar an appeal where your agency client accepts the remand. If you represent plaintiffs or non-agency defendants, you may now have a shot at appeal even if the agency accepts a remand, but it depends on the circuit and even, in some circuits, the case.

And the factors and rationales you must grab hold of to figure out your options vary from circuit to circuit. If you represent plaintiffs, and you have a choice as to venue (as is commonly the case with federal-agency defendants), should you factor into your choice whether your client could appeal a remand (for example, if you are likely to fare better

on appeal than in the trial court)? And given all this uncertainty, how do you counsel your client, either at the beginning of a case or following the remand, around whether an appeal of a remand is possible or advisable? All this counsels in favor of reform, and in particular of a uniform administrative-remand rule that provides more clarity and certainty.

AS IMPORTANT as these legal-practice considerations are, I want to return to and focus on the real nub of this article: how the administrative-remand rule serves (and *dis*-serves) environmental protection. It was an environmental case that got me interested in the rule, and it is in environmental law where the rule can be especially consequential.

Most cases that produce remands to administrative agencies are straightforward. The remand correlates to the plaintiff's claims, the agency undertakes new proceedings to fix the error(s), and the agency timely issues a revised or new decision that either addresses the plaintiff's concerns or narrows the issues for further judicial review. In these cases the administrative-remand rule works as intended.

But what about a case like *Hope Valley*? There the district court's remand bore little resemblance to the plaintiffs' claims, setting up a likely wasted administrative proceeding that could take months (or even years) to complete. The D.C., First, and Ninth circuits have made their versions of the administrative-remand rule more flexible primarily in response to such "meaningless" and "protracted" remands. To my surprise, *Hope Valley* ended up being a poster-child for the administrative-remand rule: despite the district court's narrow and odd decision, on remand the Forest Service started from square one and arrived at a new, widely accepted winter-recreation plan that remains in place today.

But other cases with weird remands haven't turned out so well. In one, the remand offered the plaintiff relief it never sought (which is worse than *Hope Valley*, where the skiers got the remand they wanted, just on a ground they did not advance). In a second case, the agency told the court that it couldn't give the plaintiff the relief the remand required and wouldn't do so even if it could. In a third, the remand required a process that was incapable of giving relief to the plaintiffs. In a fourth case, the agency had already completed much of the (faulty) remand process by the time the circuit considered

The Rule—and Agency Risk Management

Climbers with a summit in mind prepare assiduously. Preparations place a premium on fitness and mountain skills. But the high peaks are also filled with so-called “objective dangers.” These are the risks posed by weather, rockfall, and avalanches. Unlike expertise and vigor that individuals can develop, climbers have no control over the dangers posed by nature.

In litigation the objective danger is the court itself. Attorneys can master facts and law, but once a lawyer steps into a court, the judge is in control. Appellate courts are especially dangerous. These courts create precedents.

No party has more at stake in litigation than the federal government and the Justice Department lawyers who handle the bulk of the cases in the federal courts have historically worked hard to mitigate or eliminate risk to the institutional interests of the United States.

One tool, important to risk management is the administrative-remand rule, which can limit, in litigation against federal agencies, access to courts. In short, the rule provides that remands to an agency are generally final only as to the agency. In other words, in litigation under the federal Administrative Procedure Act, only the federal government can appeal from a decision that remands a rule or order back to the agency.

I spent 33 years as an appellate lawyer in the Environment & Natural Resources Division of the Department of Justice. I found one key component of my job was making recommendations to the solicitor general as to when the United States should appeal an adverse decision. The responsibility for deciding when to appeal and on what issues is committed



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to the solicitor general. This is an important function.

The United States is in federal court more than any other litigant, and federal agencies including environmental agencies lose many cases. Some cases they plainly deserve to lose. Perhaps the record is insufficient to support the agency decision, or the agency in its decisionmaking process has completely overlooked some aspect of the problem. In those cases, a remand to the agency makes far more sense than appeal. After all, the solution may be as simple as providing some additional explanation. If the agency were instead to appeal, and assert that its legal analysis is sufficient it risks creating an adverse circuit precedent.

When an agency accepts a remand, it retains control of its process, and Justice Department and judicial resources are preserved. But what happens if another party, the plaintiff or an intervenor, appeals? At this juncture things get complicated.

Consider for example a rule to delist a charismatic species like the gray wolf from the protections of the Endangered Species Act. For purposes of this discussion assume that wildlife groups have challenged

the rule and livestock interests—concerned about wolf predation on sheep and cows—have intervened to defend the agency’s rule. If the government declines to appeal and the administrative-remand rule does not apply, then defendant intervenors may be permitted to pursue an appeal even if the United States does not.

This may shift an agency’s calculus regarding the value of an appeal. Does the Fish and Wildlife Service, for example, want to concede to an intervenor and the defense of the act in the appellate court? That could be risky, since the intervenor does not administer the act and its arguments about the meaning of the ESA will reflect only the interests of the livestock industry. An agency is far more likely to accept a remand when it can be assured that no other party could appeal. And if the agency is going to redo its decision, a judicial resolution is premature.

The administrative-remand rule, in short, plays a critical role in allowing the federal government to manage risk and has the salutary effect of keeping premature controversies out of courts. The contours of the rule will continue to evolve, but often fewer cases in the courts of appeals is better for everyone.

the case. And in several more cases, the agencies let ungodly amounts of time (five years in one instance) pass without even beginning new administrative proceedings. In each of these cases the relevant court of appeals (rightly) allowed the plaintiff(s) to appeal the remand despite the administrative-remand rule, and in so doing made the rule more flexible.

Meaningless and protracted remands aren't the only concern. You may know or vaguely recall that remand with vacatur—i.e., the agency can't apply or enforce its decision during the remand—is the normal remedy under the Administrative Procedure Act. In *Hope Valley*, the district court adhered to that tradition, which meant the Forest Service reinstituted a long-derelict “travel map” that made neither the skiers nor the snowmobilers happy. In another case—say, if the prior travel map had instituted no controls on snowmobiles—vacatur might have led to not only unhappiness but also significant, lasting environmental harm during the remand proceeding. This situation so concerned two Ninth Circuit judges in 2023—in yes, an environmental case—that they called upon their court to revisit the administrative-remand rule in the future. A panel of Second Circuit judges has expressed similar concerns.

Finally, the administrative-remand rule can wreak havoc even in cases without vacatur. More and more district courts are granting remands while leaving the remanded decisions in place (a trend that has led to much hand-wringing among legal scholars). Again, an agency can take years to reach a new decision. All the while the plaintiff must endure a decision it claims (and the district court has concluded) violates the law, and all the parties must endure the uncertainty of not knowing what the agency will decide on remand. And leaving in place a decision a court has found unlawful may itself cause environmental harm.

In its purest, most rigid form (no appeals of remands by non-agency parties), the administrative-remand rule takes no account of any of these circumstances. The circuits that have blurred the rule have done so to try to correct that omission or ones like it, to forestall the injustices non-agency parties face from being unable to appeal a senseless or harmful remand. Not coincidentally, these circuits see the most challenges to agency rules and decisions. And not coincidentally (further underscoring that environmental lawyers should care), the majority of the cases in which the circuits have

blurred the administrative-remand rule have been environmental law cases.

THE RULE has broader implications for environmental protection, apart from specific cases. Consider two. First, we are in the first year of yet another new presidential administration. Neither that fact nor the changes in environmental protection we can expect are novel. But we are already seeing that the tenor and extent of those changes feel and likely are different. In the past, new presidents respected many of the decisions and rules of their predecessors; in more recent years, efforts at wide-ranging, wholesale change are the norm. We've seen this trend in agency rules (the Forest Service, the White House Council on Environmental Quality's NEPA regulations) and agency decisions (EPA's greenhouse gas regulations, resource extraction from public lands).

So far, there is not much evidence that the administrative-remand rule is being used to augment these politicized about-faces, but I fear it is only a matter of time. How? If an agency under one administration makes a decision that is challenged and remanded, the same agency under a subsequent administration could use the rule to abandon the prior decision and reach a new one. The key is that plaintiffs and non-agency defendants could not appeal, and so would have no means to object other than during the administrative proceeding on the remand (if there even is one). Agencies already engage in this practice using settlement agreements. However, barring an appeal of a remand does not require the

court's or another party's consent, which makes it a more powerful tool for using the courts to reverse a predecessor's policies. You may say I'm reaching, but many of us said that of many other things just eight years ago.

Additionally, as directive as new administrations can be, much of the work that agencies undertake to implement and enforce our environmental laws remains free from direct presidential interference. (That, too, may change.) Such

agency freedom has been largely true of judicial interference, too, but we all know that the Supreme Court's current conservative majority seems hell-bent on hobbling the federal administrative state. The Court's recent decisions, from killing *Chevron* to strengthening the murky major questions doctrine, are naked efforts to check agency power. Here

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the administrative-remand rule is a bulwark against judicial intervention—it gives space to agencies to make decisions. A less rigid version of the rule—one that allows more appeals by non-agency parties, and thus greater judicial review of agency decisionmaking—could erode that space and give more power to judges to affect (or effect) policy choices. More broadly, a weaker rule could contribute to growing judicial, and perhaps popular, distrust of agencies and governmental institutions writ large.

The administrative-remand rule is therefore like a shadow; it operates in the background, but it has profound effects on the amount of sunlight that reaches the understory of administrative-agency decisionmaking. Many remands that remain in the dark, shrouded from appellate review, belong there; they resolve fairly and efficiently on their own. But some remands—those that likely would result in a wasted agency proceeding, or take too long, or cause environmental harm, or are used in a way that further politicizes agency decisionmaking—those remands would benefit from the rule's being pulled back and more sunlight let in. And even where the darkness makes sense, where we want a more rigid rule to insulate the daily business of agencies from judicial review, that rule should still be more transparent and predictable than it is now.

WHAT WOULD such a revised rule look like? What form of an administrative-remand rule would maximize benefits and minimize costs? And how would such a rule come about? To begin with, we need a uniform rule, one that allows agencies and non-agencies alike to roughly know who may appeal a remand and when. As much as I respect the circuits' self-determination, it isn't fair or workable for a non-agency party to be able to appeal a remand in one circuit but have no chance of doing so in another. That state of affairs also undermines the regularity of agency decisionmaking and may contribute to forum-shopping.

Uniformity isn't enough, however. We had that in 1989, when every circuit barred appeals by non-agency parties. But, as I've laid out above, there are cases where non-agency parties should be allowed to appeal, and a growing (if still small) number of judges agree. A new, uniform rule should reflect but regularize this permissive trend, always allowing ap-

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peals of remands by agencies and capturing the circumstances where non-agency appeals might also be warranted. In my view, those circumstances boil down to a remand that resolves an important and distinct legal issue, and involves any of the following, where: an effectively final decision leaves little for the court and agency to do; later review would be precluded without immediate review; there is a likely wasted administrative proceeding; or immediate appellate review is urgent, usually because the remand creates a substantial risk of irreparable harm during the remand proceedings.

There are three ways such a rule could come about. Congress amends the Administrative Procedure Act or the laws that set forth what constitutes a final judgment (namely 28 U.S.C. §§ 1291-1292). Or the Supreme Court promulgates a new final-judgment rule (using the Court's authority in 28 U.S.C. §§ 2702(c) or 1292(e)). Or, finally, the Supreme Court issues a decision in a specific case involving the administrative-remand rule. The third option is the least attractive; the Court's decision would probably be unhelpfully narrow or broad, and who knows what the current Court would actually do.

Absent such reform, the courts and environmental lawyers can do two things. First, district courts can craft better remands. Remands under the Administrative Procedure Act are rightly supposed to be non-prescriptive, but judges can do more to tailor their decisions to the issues and concerns motivating a case, with clearer factual findings and legal conclusions. Lawyers, in turn, can help themselves by asserting clear claims and arguments.

Second, lawyers can push the administrative-remand rule to be more flexible—to allow appeals of remands by non-agency parties—in appropriate cases. In circuits where the rule is fully formed and binding, en banc review might be required to change the circuit's precedent. But maybe not; some three-judge panels have made do without it. Continued case-by-case adjudication would not solve the transparency, inconsistency, and unpredictability concerns I have identified, but it would at least allow judges the freedom to eschew strict rules in favor of flexibility and justice in appropriate cases.

Whatever the vehicle for reform, the administrative-remand rule warrants it. The rule is profoundly important for environmental lawyers and their clients, quietly shaping not only the fate of many cases but also of the environment we seek to protect. 🌱