

NOT YET SCHEDULED FOR ORAL ARGUMENT

Nos. 04-5221, 04-5222, 04-5223, & 04-5224
(Consolidated Cases)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF HOMEBUILDERS, ET AL.,

Plaintiff-Appellants,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,

Defendant-Appellees,

and

NATIONAL WILDLIFE FEDERATION, ET AL.,

Intervenor-Defendant-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INITIAL BRIEF FOR THE FEDERAL APPELLEES

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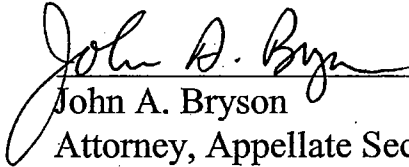
CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and amici. – All parties and amici appearing before this Court are listed in Appellants' Opening Brief.

B. Rulings under review. – All references to the matters at issue appear in Appellants' Opening Brief.

C. Related Cases. – The matter under review has not previously been before this Court. Federal appellees are not aware of any related cases within the meaning of Cir. Rule 28(a)(1)(C).

Respectfully submitted,


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GLOSSARY

Agencies	United States Army Corps of Engineers and United States Environmental Protection Agency
APA	Administrative Procedures Act, §§ 5 U.S.C. 551 <u>et. seq.</u>
Br.	Appellants' Opening Brief
CWA	Clean Water Act of 1972, 33 U.S.C. §§ 1251-1387
EPA	United States Environmental Protection Agency
JA	Joint Appendix
NPDES	National Pollution Discharge Elimination System, 33 U.S.C. § 1342 of the Clean Water Act of 1972

JURISDICTIONAL STATEMENT

A. Jurisdiction of the district court. – Appellants asserted that the district court had jurisdiction under 28 U.S.C. § 1331 (Second Amended Complaint in No. 1:01-cv-00274 at 3; First Amended Complaint in No. 1:01-cv-00320 at 3; JA). For the reasons set out *infra*, pp. 21-40, the appellees submit the district court lacked subject matter jurisdiction over plaintiffs' claims.

B. Jurisdiction of the court of appeals. – This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291. The district court's judgment dismissing the complaint was entered on March 31, 2004 (3/31/04 Order & Docket Sheet; JA). Notices of appeal were filed by Appellants on May 27, 2004, and May 28, 2004, within the time allowed by Rule 4(a)(1)(B) (Notices of Appeal; JA), and on June 10, 2004, by the cross-appellants Sierra Club, North Carolina Wildlife Federation, and the National Wildlife Federation, within the time allowed by Rule 4(a)(3) (Notices of Appeal; JA).

QUESTION PRESENTED

Whether a facial challenge to the regulation defining “discharge of dredged material” for purposes of Section 404 of the Clean Water Act was ripe for review where the determination of whether particular activities result in a regulated

discharge, or only result in the unregulated incidental fallback of dredged material, will be resolved on a case-by-case basis in the Section 404 permitting process.

STATEMENT OF THE CASE

A. Nature of the case and proceedings below. – The initial complaint was filed by the plaintiff-appellant National Association of Home Builders on February 6, 2001, in Docket No. 1:01-cv-00274-JR (Complaint; JA). The plaintiff-appellant National Stone, Sand and Gravel Association filed its complaint on February 12, 2001, in Docket No. 1:01-cv-00320-JR (Complaint; JA), and amended that complaint on April 24, 2001, to include the American Road and Transportation Builders Association as a plaintiff (Docket Sheet in No. 1:01-cv-00320-JR # 11; JA), and on April 17, 2002, to include the Nationwide Public Projects Coalition as a plaintiff (Second Amended Complaint, 4/17/02; JA). The district court consolidated the two cases on May 31, 2001 (5/31/01 Order & Docket Sheet; JA).

The plaintiffs' complaints challenged the issuance by the United States Army Corps of Engineers and the United States Environmental Protection Agency ("the Agencies") of regulations modifying certain portions of the regulatory definition of "discharge of dredged material" for purposes of the permitting program established by Section 404 of the Clean Water Act ("CWA"), 33 U.S.C.

§ 1344 (Complaints; JA). See 66 Fed. Reg. 4550 (Jan. 17, 2001) (promulgating amendments to 33 C.F.R. § 323.2(d) and 40 C.F.R. § 232.2) (“Rule” or “Final Rule”). On cross-motions for summary judgment, the district court ruled that the challenge was not ripe for review and dismissed the action (Order, March 31, 2004; JA).

B. Statutory and regulatory background. – Congress enacted the Federal Water Pollution Control Amendments of 1972, also known as the Clean Water Act (“CWA”), 33 U.S.C. §§ 1251-1387, to “restore and maintain the chemical, physical, and biological integrity of the Nation's waters.” 33 U.S.C. § 1251(a). The Act's stated objectives evince a “broad, systemic view of the goal of maintaining and improving water quality.” United States v. Riverside Bayview Homes, 474 U.S. 121, 132 (1985).

The cornerstone of the CWA is 33 U.S.C. § 1311(a), which imposes a blanket prohibition on the “discharge of any pollutant by any person,” unless in compliance with the Act. The CWA defines the phrase “discharge of a pollutant” to include “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12). The term “pollutant” includes “dredged spoil,” “rock,” “sand,” “cellar dirt,” “biological materials” and “solid waste,” 33 U.S.C. § 1362(6), and has been held to include earthen materials that are removed during

excavation, ditching, and other landclearing operations. See Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 922 (5th Cir. 1983). A “point source” is “any discernable, confined and discrete conveyance * * * from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). Bulldozers, backhoes, and other earth-moving equipment qualify as “point sources.” See United States v. Tull, 615 F. Supp. 610 (E.D. Va. 1983), aff'd, 769 F.2d 182 (4th Cir. 1985), rev'd on other grounds, 481 U.S. 412 (1987). The CWA defines the term “navigable waters” broadly to mean the “waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7). The Agencies have interpreted the term “waters of the United States” to encompass certain wetlands. 33 C.F.R. § 328.3. See Riverside Bayview, 474 U.S. at 133 (“the evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term ‘waters’ to encompass [adjacent] wetlands”). See also Solid Waste Agency of Northern Cook County v. Corp., 531 U.S. 159, 167 (2001) (“Congress’ concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands [that are] ‘inseparably bound up with the ‘waters’ of the United States’”) (quoting Riverside Bayview, 474 U.S. at 134).

The CWA establishes two permitting programs to authorize otherwise prohibited discharges. The relevant program here is the program under CWA § 404, which authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue a permit “for the discharge of dredged or fill material into the navigable waters at specified disposal sites.” 33 U.S.C. § 1344(a).^{1/} The Agencies’ regulations define the term “dredged material” as “material that is excavated or dredged from waters of the United States.” 33 C.F.R. § 323.2(c); 40 C.F.R. § 232.2.

1. Discharge of dredged material – The key issue in this case involves the phrase “discharge of dredged material.” As noted above, the “discharge of a pollutant” means “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12). Similarly, the phrase “discharge of dredged material” means the “addition” of dredged material. 33 C.F.R. § 323.2(d); 40 C.F.R. § 232.2. The term “addition” does not require that dredged material be added from off-site. The redeposit of such material within waters of the United States can be an “addition.” National Mining Association v. United States Army

^{1/} Discharges of pollutants other than dredged or fill material must be authorized by a permit issued by EPA (or a State with an approved program) through the CWA's National Pollutant Discharge Elimination System (“NPDES”) under 33 U.S.C. § 1342. See National Wildlife Federation v. Gorsuch, 693 F.2d 156, 164-65 (D.C. Cir. 1982).

Corps of Engineers (“NMA”), 145 F.3d 1399, 1405-06 n.6 (“Even the plaintiffs concede that under a broad reading of the term ‘redeposit,’ ‘a redeposit could be an addition to a new location and thus a discharge.’”). Moreover, courts under a variety of circumstances in enforcement actions have held that the redeposit of material within waters of the United States constitutes the “discharge” or “addition” of pollutants that is regulated by the CWA. See, e.g., United States v. Deaton, 209 F.3d 331, 335 (4th Cir. 2000) (the redeposit of excavated material in wetlands within waters of the United States on the sides of an area being excavated -- a practice commonly referred to as “sidecasting” – is a discharge of a pollutant); United States v. M.C.C. of Florida, Inc., 772 F.2d 1501, 1506 (11th Cir. 1985), vacated in part on other grounds, 481 U.S. 1034 (1987) (the use of a boat’s propellor to dredge and redeposit vegetation and sediment onto the adjacent sea grass beds – commonly referred to as “propwashing” or “prop-dredging” – constitutes the discharge of a pollutant); United States v. Huebner, 752 F.2d 1235, 1243 (7th Cir. 1985) (the use of a bulldozer to move dirt within wetlands to level the area constitutes a discharge).

At the same time, not all redeposits constitute discharges. Some redeposits are of such a nature that they constitute mere “incidental fallback” and are not regulated under the CWA. NMA, 145 F.3d at 1405 (recognizing that the CWA

regulates some redeposits but holding that it does not regulate “incidental fallback”).

2. The Agencies’ original interpretation of “discharge of dredged material”

– Until 1993, the Agencies did not regulate de minimis discharges from various kinds of equipment during normal dredging operations. In 1981, a Corps regulatory guidance letter stated, “De minimis discharge occurring during normal dredging operations, such as the drippings from a dragline bucket, is not considered to be a Section 404 discharge.” Corps Regulatory Guidance Letter 81-04, at 1 (JA).

Consistent with this guidance, in 1986, the Corps regulations were revised to state that the term “discharge of dredged material” did not include “de minimis, incidental soil movement occurring during normal dredging operations.” 51 Fed. Reg. at 41,232 (codified at 33 U.S.C. § 323.2(d)). The accompanying preamble discussion explained that “incidental fallback” from normal dredging operations was not regulated under the CWA:

Section 404 clearly directs the Corps to regulate the discharge of dredged material, not the dredging itself. Dredging operations cannot be performed without some fallback. However, if we were to define this fallback as a “discharge of dredged material,” we would, in effect, be adding the regulation of dredging to section 404 which we do not believe was the intent of Congress. We have consistently

provided guidance to our field offices since 1977 that incidental fallback is not an activity regulated under section 404.

51 Fed. Reg. 41,206, 41,210 (November 13, 1986). The Agencies' position was further explained in a 1990 guidance letter concerning the use of mechanized equipment, such as backhoes and bulldozers, to clear land. This guidance letter stated that mechanized landclearing generally results in regulated redeposits:

[M]echanized landclearing activities in [wetlands within the jurisdiction of the CWA] result in a redeposition of soil that is subject to regulation under section 404. Some limited exceptions may occur, such as cutting trees above the soil's surface with a chain saw, but as a general rule, mechanized landclearing is a regulated activity.

Corp Regulatory Guidance Letter 90-05, at 1 (JA).

In short, until 1993, the Agencies' position was that "incidental fallback" associated with normal dredging operations was not regulated under the CWA, but that other redeposits – such as the land leveling mentioned in the 1984 guidance and the mechanized landclearing mentioned in the 1990 guidance – were regulated.

3. The Tulloch Rule and the AMC/NMA challenge – In 1993, the Agencies issued a regulation known as the "Tulloch Rule." 58 Fed. Reg. 45,008 (August 25, 1993).²¹ In the Tulloch Rule, the Agencies broadly defined the term "discharge of

²¹ The Tulloch Rule got its name because it was promulgated following settlement (continued...)

dredged material” as including “any redeposit” of dredged material. 58 Fed. Reg. at 45,037 (discharge of dredged material includes “any addition, including any redeposit, of dredged material, including excavated material, into waters of the U.S. which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation that destroys or degrades waters of the U.S.”).

Several industry associations challenged the revised definition of the term “discharge of dredged material.” In 1997, the district court ruled that the 1993 regulation exceeded the Agencies’ authority under the CWA because it impermissibly regulated “incidental fallback” of dredged material, and the Court enjoined the Agencies from applying or enforcing the regulation. American Mining Congress v. United States Army Corps of Engineers, 951 F. Supp. 267 (D.D.C. 1997) (“AMC”). That ruling was affirmed by this Court in NMA, *supra*, which specifically noted that “we do not hold that the Corps may not legally regulate some forms of redeposit under its [CWA] § 404 permitting authority. We hold only that by asserting jurisdiction over ‘any redeposit,’ including incidental

²(...continued)
of a case called North Carolina Wildlife Federation v. Tulloch (E.D.N.C. 1992).

fallback, the Tulloch Rule outruns the Corps's statutory authority." 145 F.3d at 1405.

4. The 1999 rulemaking – In 1999, the Agencies issued a new final rule modifying the definition of “discharge of dredged material” to respond to the decision in NMA, and to ensure compliance with the district court’s injunction. 64 Fed. Reg. 25,120 (May 10, 1999). Specifically, the 1999 rule modified the definition of “discharge of dredged material” to remove the reference to “any redeposit” and to add language expressly stating that the “discharge of dredged material” does not include “incidental fallback.” 64 Fed. Reg. at 25,123 (discharge of dredged material defined as including “redeposit of dredged material other than incidental fallback”).

Following the promulgation of the 1999 rule, Appellant National Association of Homebuilders and others filed a motion with the district court to compel compliance with the 1997 AMC injunction, arguing, among other things, that the 1999 rule violated the 1997 injunction by asserting unqualified authority to regulate mechanized landclearing. The district court denied the motion, finding that the 1999 rule was consistent with both this Court’s decision and the district court’s injunction in AMC, and this Court’s affirming opinion in NMA. American Mining Congress v. U.S. Army Corps of Engineers, 120 F. Supp. 2d 23, 29-30

(D.D.C. 2000). Specifically, the 2000 AMC decision held that the 1999 Rule was consistent with the earlier NMA and AMC decisions because the Agencies no longer claimed that “any redeposit” was regulated and, in fact, expressly disclaimed CWA jurisdiction over redeposits that involved only incidental fallback. 120 F. Supp. 2d at 29 (“Inasmuch as this Court in AMC, and the Court of Appeals in NMA, invalidated the Tulloch Rule because it regulated incidental fallback, the Court’s order enjoining the agencies from applying or enforcing the Tulloch Rule must be understood to bar the agencies from regulating incidental fallback.”). Further, the 2000 AMC decision noted that the Agencies had announced their intention to conduct further rulemaking to more clearly delineate the distinction between regulable redeposits and incidental fallback and, in the absence of a clear line distinguishing regulable redeposits from incidental fallback, the Agencies were entitled to make that determination on a case-by-case basis. 120 F. Supp. 2d at 29-30 (citing S.E.C. v. Chenery Corp., 332 U.S. 194, 203 (1947), for the proposition that “agency has discretion to choose between proceeding by general rule or adjudication.”).

5. The development of the Final Rule – In August 2000, the Agencies published a proposed rule that would have created a rebuttable presumption that regulable redeposits would result from mechanized landclearing, ditching,

channelization, in-stream mining, or other mechanized excavation activity in waters of the United States, unless the party proposing such activity proved otherwise:

A discharge of dredged material shall be presumed to result from mechanized landclearing, ditching, channelization, in-stream mining, or other mechanized excavation activity in waters of the United States. This presumption is rebutted if the party proposing such an activity demonstrates that only incidental fallback will result from its activity.

65 Fed. Reg. 50,108, 50,117 (Aug. 16, 2000) (stating proposed language for 33 C.F.R. §232.2(d)(2) and 40 C.F.R. § 323.2 (definition of “discharge of dredged material” at (2)). Further, the proposed rule preamble discussed in detail how the courts had interpreted the phrase “incidental fallback,” and in numerous places discussed the factors that distinguish regulable redeposits from incidental fallback, including volume and location of redeposits and the relationship of incidental fallback to excavation activities. The proposed rule did not include a regulatory definition for incidental fallback.

The response to the 2000 proposed rule was extensive, with the Agencies receiving approximately 9,650 comments. This included approximately 9,500 individual or form letters from the general public expressing overall support for the rule or requesting that it be strengthened. Further, the Agencies received about

150 comments from organizations, state or local agencies, and commercial entities. Of these, 75 provided detailed comments, with approximately 50 expressing opposition to the rule. 66 Fed. Reg. 4550, 4551-52 (Jan. 17, 2001).

After carefully considering all of the comments, the Agencies determined that the operation of mechanized earth-moving equipment in waters of the United States typically results in regulable redeposits but that there would be instances where the particular equipment used in a project and the way that it is operated would result in no more than incidental fallback. The Agencies modified the proposed rule in response to comments in two significant ways.

First, the Final Rule eliminated the proposed rule's reference to a rebuttable presumption. Instead, the Final Rule states the Agencies' expectation that earth-moving machines will usually (but not always) result in regulable redeposits:

The Corps and EPA regard the use of mechanized earth-moving equipment to conduct landclearing, ditching, channelization, in-stream mining or other earth-moving activity in waters of the United States as resulting in a discharge of dredged material unless project specific evidence shows that the activity results in only incidental fallback.

66 Fed. Reg. at 4575 (promulgating 33 C.F.R. § 323.2(d)(2)(i) and 40 C.F.R. § 232.2 (definition of "discharge of dredged material," in (2)(i))). Further, to address the comments that the rebuttable presumption proposal inappropriately

shifted a burden of proof onto the regulated community, the final rule deleted the proposed rule language that stated, “This presumption is rebutted if the party proposing such an activity demonstrates that only incidental fallback will result from its activity”, 65 Fed. Reg. at 50,117, and replaced it with a statement that provided that “project specific evidence [could] show[] that the activity results in only incidental fallback.” 66 Fed. Reg. at 4575. This language change eliminated the reference to the project proponent’s burden to submit information to the Agencies. Instead, the Final Rule provides that the Agencies will look at all information to determine whether the project results in incidental fallback. 66 Fed. Reg. at 4552.^{3/} Also, to make it absolutely clear that the final rule was not creating any burden of proof, the final rule expressly stated that: “This paragraph (i) does not and is not intended to shift any burden in any administrative or judicial

^{3/} The Final Rule Preamble stated:

[T]he rule language has been clarified to make it more evident that we will not look to project proponents alone to provide information that only incidental fallback results. Thus, the rule language now refers to “project-specific evidence show[ing] that the activity results in only incidental fallback.” While this might consist in large part of information from project proponents, we also will look to all available information, such as that in agency project files or information gained from site visits, when determining if a discharge of dredged material results.

66 Fed. Reg. at 4552.

proceeding under the CWA.” 66 Fed. Reg. at 4575 (33 U.S.C. § 323.2(d)(2)(i) and 40 C.F.R. § 232.2(2)(i)).

Second, in response to the widespread request for a regulatory definition of “incidental fallback,” the Agencies included a definition of “incidental fallback” that focused on volume of the redeposit, the location of the redeposit and relationship of the redeposit to excavation activity:

Incidental fallback is the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal. Examples of incidental fallback include soil that is disturbed when dirt is shoveled and the back-spill that comes off the bucket when such small volume of soil or dirt falls into substantially the same place from which it was initially removed.

66 Fed. Reg. at 4575 (promulgating 33 C.F.R. § 323.2(d)(2)(ii) and 40 C.F.R. § 232.2 (definition of “discharge of dredged material” in (2)(ii))). This definition of incidental fallback was based on the meaning of that phrase as used in this Court’s decision in NMA and the district court’s AMC decisions and the factors that the Agencies and commenters (including the Appellants bringing this challenge) had addressed during the rulemaking.

Although the Rule provides important clarification of the distinction between regulable redeposits and incidental fallback, it does not create a “bright line” test. While the Agencies considered establishing such a test, they concluded

that this was not feasible or defensible. In response to comments suggesting the need for a bright line defining when the volume and/or location of redeposit would trigger regulation, the Agencies stated, “[w]e are not aware of, nor have commenters suggested, a sound technical or legal basis on which to establish brightline quantifiable limits on such factors.” 66 Fed. Reg. at 4566. The Agencies concluded that whether a specific activity results in regulable redeposits or only incidental fallback is a project-specific question that cannot be conclusively determined on a generic basis for any category of earth-moving activity.^{4/} Thus, while the Rule contains a definition of incidental fallback reflecting the relevant caselaw and the Agencies’ expectation that mechanized earth-moving activities typically cause regulated redeposits, it leaves the question of whether any particular activity is regulated to case-by-case decision-making by the Agencies and the courts.

^{4/} See, e.g., 66 Fed. Reg. at 4553 (“Because of the fact-specific nature of the assessment of [the relevant] factors, and their interrelated nature, we do not believe it to be feasible or appropriate to establish hard and fast cut-off points for each of these factors. Rather, the totality of the factors will be considered in each case.”) and 4562 (“It is difficult to give generalized conclusions regarding specific subcategories of activities or practices, particularly where the description lacks detail. Whether a particular activity results in a discharge, or only incidental fallback, necessarily depends upon the particular circumstances of how that activity is conducted, and as a result, today’s final rule allows for project-specific considerations.”).

C. The district court decision – The district court dismissed the action for lack of ripeness (JA). National Association of Home Builders v. United States Army Corps of Engineers, 311 F. Supp.2d 91, 102 (D.D.C. 2004). The court first concluded that the issues raised by Appellants were not fit for judicial resolution at this time (JA). 311 F. Supp.2d at 97-99. While agreeing with Appellants that the case involved purely legal issues and that the Agencies’ action was final, the court decided that the “court and the agencies would benefit from letting the questions presented here ‘arise in some more concrete and final form’” (JA). 311 F. Supp.2d at 98, quoting State Farm Mutual Auto Insurance Co. v. Dole, 802 F.2d 474, 479 (D.C. Cir. 1986). Noting that the Agencies clearly may regulate some redeposits and clearly may not regulate “incidental fallback,” the court relied on the fact that the Final Rule “sets up a framework for deciding on a case-by-case basis whether a permit will be required” (JA). 311 F. Supp.2d at 98. Accordingly, the case was governed by the principle that judicial review would “stand on much surer footing in the context of a specific application of the regulation * * *.” (JA). 311 F. Supp.2d at 98, quoting Sprint Corporation v. FCC, 331 F.3d 952, 956 (D.C. Cir. 2003).

The court also rejected Appellants’ claim of hardship (JA). 311 F. Supp.2d at 99-101. The court concluded that any uncertainty in whether a permit would be

required for Appellants' activities did not rise to the level of direct and immediate harm necessary to make their legal challenge ripe. The court held that the potential impact of the uncertainty on Appellants' investment and business planning did not constitute hardship, citing National Park Hospitality Association v. Department of the Interior, 538 U.S. 803, 811-812 (2003) (JA). 311 F. Supp.2d at 100. Nor were Appellants faced with clear-cut requirements that mandated immediate compliance (JA). 311 F. Supp.2d at 99-100. Rather, they faced the possibility that the Corps of Engineers would conclude that their activities required a permit, and they would have the opportunity to challenge that determination (JA). Ibid.^{5f}

For these reasons, the district court ruled that the Appellants' challenge was not ripe for review. Treating the Agencies' motion for summary judgment as a motion to dismiss, the district court entered judgment under Rule 12(b)(1), Fed. R. Civ. P., dismissing the action for lack of jurisdiction (Mem. at 24; Order, 3/31/04; JA). 311 F. Supp.2d at 102.

^{5f} The district court also ruled that a procedural claim that the Final Rule was not promulgated with adequate notice and comment was not ripe. The court concluded that this claim would also benefit from being considered in the context of a specific application of the regulation. 311 F. Supp.2d at 101-102.

SUMMARY OF ARGUMENT

1. The district court correctly applied the established test for ripeness, properly weighing the factors of whether the issues were fit for judicial resolution and whether there would be a hardship if review was withheld. Numerous decisions of the Supreme Court and this Court establish that the ripeness analysis is not weighted by a general presumption of reviewability of agency action under the Administrative Procedure Act, and the district court properly followed the analysis used in those decisions. Moreover, there is no presumption that facial challenges to agency regulations are ripe before those rules are applied in a particular case.

2. Appellants' abstract attack on the theoretical reach of the Rule is not yet fit for judicial resolution because the Rule calls for a case-by-case determination whether a specific redeposit of dredged material is a regulated discharge or an unregulated instance of incidental fallback. The Rule does not assume that all earthmoving activities result in regulated discharges. Unless and until the Rule is challenged in a concrete setting, a reviewing court lacks the information necessary to determine whether the Agencies have overreached. This case is controlled by the long line of this Court's decisions recognizing that where an agency regulation is structured such that the agency retains the discretion to apply the rule on case-

by-case basis, challenges to the rule must await its application in a particular case. Appellants' attempt to escape this conclusion by limiting their challenge to self-selected parts of the Rule must be rejected. Because the Rule as a whole addresses the distinction between regulable redeposits and incidental fallback by providing a framework for making decisions in particular cases, the framework must be considered as a whole and in the context of a specific application of the Rule.

3. Finally, Appellants have not satisfied the hardship prong of the ripeness test. The Rule imposes no immediate compliance requirements on Appellants and does not add new permitting requirements or procedural hurdles. While Appellants must continue to comply with the CWA's prohibition on discharges without permits, that obligation is imposed by statute and the Rule does not add to the burden of compliance.

Nor does the planning uncertainty associated with a case-by-case determination constitute sufficient hardship. Further, Appellants have the opportunity to consult with the Corps of Engineers regarding whether their planned activities will require a permit, and they may challenge the Corps' determinations by appealing any final permit decision or raising a defense in an enforcement action. Appellants have not shown that they have suffered the

requisite “immediate, direct, and significant” harm that would make their challenge ripe.

ARGUMENT

THE CHALLENGE TO THE FINAL RULE IS NOT RIPE FOR REVIEW

A. Standard of review. – On review of a dismissal under Rule 12(b)(1), this Court applies a de novo standard of review to the district court’s application of law to undisputed fact. Artis v. Greenspan, 158 F.3d 1301, 1305-1306 (D.C. Cir. 1998); Herbert v. National Academy of Sciences, 974 F.2d 192, 197 (D.C. Cir. 1992). In evaluating the motion to dismiss, the district court must accept the factual allegations in the complaint as true and draw all reasonable inferences in favor of plaintiffs. Walker v. Jones, 733 F.2d 933, 925-926 (D.C. Cir. 1984). See Artis v. Greenspan, 158 F.3d at 1306. While the complaint is to be construed liberally, the court need not accept factual inferences drawn by plaintiffs if those inferences are not supported by facts alleged in the complaint, nor must the court accept the plaintiffs’ legal conclusions. National Treasury Employees Union v. United States, 101 F.3d 1423, 1430 (D.C. Cir. 1996); Kowal v. MCI Communication Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994).

B. Appellants’ challenge to the final rule does not meet the test for ripeness.

– The ripeness limitation on the jurisdiction of the Federal courts derives from

Article III's requirement for a case or controversy as well as prudential reasons for limiting the exercise of that jurisdiction. National Park Hospitality Ass'n, 538 U.S. at 807-808. The ripeness doctrine "prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over policies" as well as "protect[ing] agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way." Abbott Laboratories v. Gardner, 387 U.S. 136, 148 (1967). There are two factors that determine whether a claim is ripe: the "fitness of the issues for judicial decision" and the "hardship to the parties of withholding court consideration." Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 733 (1998); Wyoming Outdoor Council v. United States Forest Serv., 165 F.3d 43, 48 (D.C. Cir. 1999).

Contrary to appellants' argument (Br. 12-14), the district court correctly applied the ripeness test. There is no merit to Appellants' suggestion that a general presumption of reviewability of agency action under the APA should have tipped the balance in favor of review of their challenge. That presumption does not affect consideration given to the ripeness factors. In Abbott Laboratories v. Gardner and its companion case, Toilet Goods Association v. Gardner, the Supreme Court considered the reviewability of certain regulations issued by the Food and Drug Administration under the Federal Food, Drug and Cosmetic Act.

387 U.S. at 136-137; 387 U.S. at 158-160. In Abbott Laboratories, the Court resolved the issue whether that statute precluded judicial review by relying in part on the presumption of reviewability and concluded review was not precluded. The Court, however, then examined the issue of ripeness separately by weighing the fitness of the issues for judicial decision and the hardship to the parties of withholding review. 387 U.S. at 139-140, 148-156. The Court concluded in that case that the challenges to the regulations were ripe, but the Court reached the opposite conclusion for the regulations challenged in Toilet Goods Association. There is no indication in these decisions that the weighing of the factors was affected by any general presumption of reviewability. And in Reno v. Catholic Social Services, Inc., the Court expressly recognized that “the presumption of available judicial review is subject to [the] implicit limitation” of the ripeness doctrine. 509 U.S. 43, 57 (1993).

Further, the Supreme Court’s subsequent decisions have consistently resolved ripeness issues by analyzing the application of the two factors, in the same manner as the district court employed here. See, e.g., National Park Hospitality Ass’n v. Department of the Interior, 538 U.S. 803, 807-812 (2003); Ohio Forestry Association v. Sierra Club, 523 U.S. 726, 732-733 (1998); Reno, 509 U.S. at 57-65. This Court’s decisions approach the ripeness analysis in the

same manner. See e.g., Sprint Corporation, 331 F.3d at 956-958; Clean Air Implementation Project v. EPA, 150 F.3d 1200, 1204-1206 (D.C. Cir. 1998); Office of Communication of the United Church of Christ v. FCC, 826 F.2d 101, 105-110 (D.C. Cir. 1987); State Farm Mutual Automobile Insurance, 802 F.2d at 479-480 (D.C. Cir. 1986). The district court correctly followed the same path here.

Furthermore, there is no merit to appellants' suggestion (Br. 13-15) that "facial" challenges to regulations are ripe without consideration of the fitness of the issues and the hardship factors. The Supreme Court and this Court have on numerous occasions reviewed facial challenges to statutes or regulations and determined some were ripe and others were not by application of those factors. See, e.g., Ohio Forestry Ass'n v. Sierra Club, *supra*; EPA v. Nat'l Crushed Stone Ass'n, 449 U.S. 64, 72 n.12 (1980) (applying Abbott Labs. factors); Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 200-01 (1983) (same); Atlantic States Legal Found. v. EPA, 325 F.3d 281, 284 (D.C. Cir. 2003) (stating that "even purely legal issues may be unfit for review" when they "rest[] upon contingent future events that may not occur as anticipated, or indeed may not occur at all" and rejecting as unripe a facial challenge to EPA regulations as violating the permit requirement in the Resource Conservation and

Recovery Act and the public's right to notice); Louisiana Env't'l Action Network v. EPA, 87 F.3d 1379, 1381-85 (D.C. Cir. 1996) (rejecting as unripe a facial challenge to EPA delegation rules as violating the Clean Air Act). As the Supreme Court has recently reiterated:

“Absent [a statutory provision providing for immediate judicial review], a regulation is not ordinarily considered the type of agency action ‘ripe’ for judicial review under the [Administrative Procedure Act (APA)] until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant’s situation in a fashion that harms or threatens to harm him.”

National Park Hospitality Ass’n, 538 U.S. at 808 (quoting Lujan v. National Wildlife Federation, 497 U.S. 871, 891 (1990)). Accordingly, a facial challenge does not require the application of any different ripeness analysis.

As we show below, Appellants have failed to establish that their challenge to the Final Rule is ripe for review. First, Appellants’ abstract attack on the theoretical reach of the Rule is not yet fit for judicial resolution. Unless and until the Rule is challenged in a concrete setting, a reviewing court lacks the information necessary to determine whether the Agencies have overreached. Second, Appellants cannot show that they have suffered the requisite “immediate, direct, and significant” harm necessary to outweigh the lack of fitness. Cronin v. Federal Aviation Admin., 73 F.3d 1126, 1133 (D.C. Cir. 1996).

1. The issues presented by Appellants are not fit for judicial resolution at this time. – In determining whether an issue is fit for judicial review, courts examine whether the issue is “purely legal,” whether the court’s consideration of the issue would benefit from a more concrete setting, and whether agency action is final. Sprint Corporation 331 F.3d at 956; Clean Air Implementation Project, 150 F.3d at 1204. The Agencies do not dispute that the Rule is final, or that it clarifies the Agencies’ views regarding the distinction between a regulable redeposit and incidental fallback, or that the general question of the extent of the Agencies’ regulatory authority under the Clean Water Act is one of law. As the Supreme Court has recently reaffirmed, however, this does not mean that the Rule is necessarily ripe for review. See National Park Hospitality Ass’n, 538 U.S. at 812 (concluding that even though issue was purely legal, and challenged regulation represented final agency action, case was not fit for judicial review because “further factual development would significantly advance our ability to deal with the legal issues presented”) (citation omitted). Decisions in this circuit consistently stand for the principle that regulations that allow the agency to use its discretion in applying a rule on a case-by-case basis are not fit for judicial resolution absent an agency determination. The district court here correctly concluded that the issues were not fit for judicial resolution because the Rule “sets

up a framework for deciding on a case-by-case basis whether a permit will be required” and Appellants’ challenge would be best addressed in that context. 311 F. Supp.2d at 98.

It is important to bear in mind what the Rule does, which is, as the Agencies explained, to refine the definition of “discharge of dredged material” to “clarify what types of activities [the Agencies] believe are likely to result in regulable discharges.” 66 Fed. Reg. at 4552 (emphasis added). The determination of whether a regulable discharge has occurred will, however, be made individually, based on a “case-by-case consideration” of the “fact-specific” details of a particular project. 66 Fed. Reg. at 4553; see also *id.* at 4562 (noting that “[w]hether a particular activity results in a discharge, or only incidental fallback, necessarily depends upon the particular circumstances of how that activity is conducted”).

Appellants argue (Br. 18) that the Agencies “lack statutory authority to enact a rule that assumes that all earth-moving activities in regulated waters result in ‘additions’ of pollutants.” Appellants thus contend that the Rule, taken in the abstract, necessarily and inevitably reaches even those earth-moving activities that produce only incidental fallback and that therefore are beyond the Corps’s jurisdiction. The critical flaw in this argument (in terms of ripeness) is that the

Rule cannot be taken in the abstract – as the Agencies explained, determining whether a given project does or does not result in a regulable discharge will require a case-by-case, fact-specific analysis.

This Court has on numerous occasions applied the principle that where an agency regulation is structured such that the agency retains the discretion to apply the rule on case-by-case basis, challenges to the rule must await its application in a particular case. Thus, in Sprint Corporation, the FCC amended its regulations concerning the creation of telephone area codes to lift a ban on specialized overlay area codes and entertain applications for such codes on a case-by-case basis. 331 F.3d at 953-955. The Court held that it would not entertain generalized challenges to the regulation, concluding that judicial review must be deferred until the agency had applied its discretion in a particular case. 331 F.3d at 956-958.

Similarly, in Clean Air Implementation Project, plaintiffs challenged a rule that allowed the use of “any credible evidence” to demonstrate compliance with Clean Air Act performance standards. 150 F.3d at 1202. Pre-existing regulations required the use of specific test methods. Id. The new rule did not define or otherwise limit the types of evidence that would be considered “credible.” This Court dismissed the challenge as unripe, explaining that until the “credible evidence” rule was actually applied, it was impossible to determine whether EPA

had tacitly imposed more stringent standards without following rulemaking procedures:

For all we know, application of EPA's credible evidence rule in the place of a reference test may potentially affect some standards but not others. Moreover, credible evidence is not a closed set. Given the universe of all possible evidence that might be considered "credible," it is impossible for us to decide now what impact the rule will have * * *. An enforcement action brought on the basis of credible evidence would, we believe, provide the factual development necessary to determine whether the new rule has affected whatever existing standard is involved. Until then, we have the classic institutional reason to postpone review: we need to wait for a rule to be applied to see what its effect will be.

Id. at 1205 (internal quotations omitted) (1990).⁶⁷

And in Office of Communication of the United Church of Christ v. FCC, 826 F.2d 101 (D.C. Cir. 1987), this Court considered a challenge to a Federal Communications Commission Policy Statement that asserted the authority to allow a truncated process for license transfers in situations where there was a contested

⁶⁷ See also Diamond Shamrock Corp. v. Costle, 580 F.2d 670, 674 (D.C. Cir. 1978) (dismissing pre-enforcement challenge to regulations as unripe, and noting that "[j]udicial review is generally facilitated by waiting until administrative policy is implemented for then a court can be freed, at least in part, from theorizing about how a rule will be applied and what its effect will be"); National Ass'n of Regulatory Utility Commissioners v. Department of Energy, 851 F.2d 1424, 1428 (D.C. Cir. 1988) (declining to review cost allocation method in part because "DOE has not applied its cost allocation method in a way that would allow us to consider, by examining its 'concrete effects and implications,' whether it is consistent with the [Nuclear Waste Policy] Act").

attempt to acquire control of a corporate license-holder by a tender offer. The Policy Statement set out the likely terms for a temporary license transfer in that situation but stated that the agency was providing a framework for future decisions and was not intended to foreclose the Commission from adopting a different approach in particular proceedings. 826 F.2d at 103. This Court held that a claim that the Commission lacked statutory authority to allow such a process was not ripe for review. 826 F.2d at 104-110. The Court noted that:

“A facial, purely legal challenge is both more difficult and less worthwhile when the [regulatory] prescription challenged is discretionary. To hold the provision invalid on its face, a court would have to conclude that the provision stands in conflict with the statute regardless of how the agency exercises its discretion. Before so ruling, a court would be obliged to perceive and consider the various ways in which the agency might use its discretion.”

826 F.2d at 105, quoting Action Alliance of Senior Citizens v. Heckler, 789 F.2d 931, 941 (D.C. Cir. 1986) (emendation in original). The Court further explained that:

Were we to decide the issue of statutory authority now, as framed by the parties, we would have to decide whether no tender offer or every tender offer would fit under [the statute.] But the correct answer to this question – and perhaps even the Commission’s ultimate legally binding answer – could also be “some.” * * *. We are not here presented with a case that enables us to reflect the complexities underlying tender offers for communications licensees in any meaningful way.

Id. at 106.

In the instant case, the Agencies have similarly written a rule that says that not all earth-moving activities are subject to regulation and that not all earth-moving activities are excluded from regulation, but that “some” earth-moving activities are subject to regulation. Further, whether a particular activity is subject to regulation will be determined on a case-by-case basis. Just as in Office of Communication, appellants’ claim that Agencies have exceeded the authority granted by the CWA cannot be evaluated “in any meaningful way” before the rule is applied in a specific case.

As the Agencies have explained, they do not intend to regulate “incidental fallback” – but they do intend to regulate non-incidental discharges resulting from mechanized earth-moving activities. Determining what constitutes “incidental fallback” and what constitutes a regulable discharge will require a project-specific, case-by-case analysis that takes into account all relevant evidence:

[T]he determination of whether an activity results in a regulable discharge of dredged material or produces only incidental fallback involves consideration of the location and the amount of the redeposit. Because of the fact-specific nature of the assessment of these factors, and their interrelated nature, we do not believe it to be feasible or appropriate to establish hard and fast cut-off points for each of these factors. Rather, the totality of the factors will be considered in each case.

66 Fed. Reg. at 4553. Factors to be considered in making the “incidental fallback” determination may include (1) whether material is redistributed beyond the place of excavation; (2) whether dredged material is suspended or disturbed so that it resettles beyond the place of excavation; (3) whether the operation results in the release of previously sequestered pollutants into the environment; (4) whether dredged material is relocated horizontally and/or vertically; and (5) the volume of material that is redeposited. 66 Fed. Reg. 4553; see also 66 Fed. Reg. 4566 (factors relevant to determining whether there has been a regulable discharge or merely incidental fallback “are inter-twined with one another, and do not lend themselves to a segregable hard and fast quantification * * *”).

Due to the highly fact-specific nature of the “incidental fallback” analysis, it is not possible to review the Rule in the abstract, nor does Appellants’ challenge to the Rule present a purely legal issue. There is no evidence in the administrative record that the Rule is being applied (let alone misapplied) in a concrete, factual setting. Unless and until the Rule is applied to a specific set of facts, the Court can do no more than “[theorize] about how [the] rule will be applied and what its effect will be.” Diamond Shamrock, 580 F.2d at 674. Appellants’ challenge to the Rule is therefore unripe, and should be dismissed.

Appellants attempt (Br. 17, 19-22) to escape this conclusion with the claim that their challenge is limited to whether the Agencies have the statutory authority to issue a rule that “regards” earth-moving activities as regulated and to include the “small” volume qualification on the definition of “incidental fallback.” They also assert that the district court erroneously took the “myopic view” of focusing on the “unless” provision that exempts “incidental fallback” from regulation.

This deconstruction of the Rule is wholly artificial and provides no basis for allowing a challenge to the Rule before it is applied. As we have shown, the Rule does not assume that all earth-moving activities are subject to regulation. Rather, the Rule states the Agencies’ expectation that such activities would be regulated unless they result in only incidental fallback. Indeed, this Court recognized in NMA redeposits of dredged material within waters of the United States can be an “addition” and therefore subject to Section 404. NMA, 145 F.3d at 1405-06 (“Even the plaintiffs concede that under a broad reading of the term ‘redeposit,’ ‘a redeposit could be an addition to a new location and thus a discharge.’”); 145 F.3d at 1402 n.6 (recognizing that sidecasting is a regulated activity). Accordingly, the Rule addresses the distinction between regulable redeposits and incidental fallback by providing a framework for making decisions in particular cases, a framework

that must be considered as a whole and in the context of a specific application of the Rule.

In addition, contrary to Appellants' claim (Br. 21-22), the "unless" clause is far from superfluous in that framework. It is an integral, and inseparable, part of the Rule since it identifies the circumstances when such activities are not subject to regulation. Appellants' cannot make an unripe challenge to a regulation ripe by treating such critical language as if it were not there.

Similarly, Appellants' quarrel with the inclusion of the "small volume" qualifier for the definition of "incidental fallback" takes issue with only one of the factors identified as relevant to the application of that term to specific operations. The definition also requires consideration of whether the redeposit is incidental to excavation activity and whether it falls back to substantially the same place as where the material is removed. Moreover, the Agencies wrote the definition in response to this Court's ruling in NMA that "incidental fallback" does not create a discharge regulated under the CWA because it does not represent an "addition" of a pollutant to the waters of the United States. Accordingly, what constitutes "incidental fallback," and therefore is not an "addition," is a question that is part and parcel of the application of the rest of the Rule.

Further, the Agencies' choice to limit the application of the definition of "incidental fallback" to "small volumes" is fully consistent with this Court's decision in NMA. See 145 F.3d at 1404 ("addition" does not cover the situation where material is removed "and a small portion of it happens to fall back.").

Under the Rule, whether any particular redeposit is small enough to satisfy this factor in the definition will be determined on a case-by-case basis, along with consideration of the other applicable factors, and subject to judicial review at that time. Once again, Appellants' claim presents issues that are best resolved in the concrete setting of a specific application of the Rule.⁷

2. Appellants have not shown sufficient hardship to make their challenge ripe. – As demonstrated above, there is a strong interest in postponing review of the Rule until it is applied in a specific factual context. When that is the case, review must be postponed unless a plaintiff can demonstrate immediate, direct,

⁷ In a footnote (Br. 22 n.17), Appellants assert the district court also should not have deferred consideration of their procedural challenge that the Rule was issued without adequate notice and comment. A cursory argument made only in a footnote need not be considered by the Court. Hutchins v. District of Columbia, 188 F.3d 531, 539 n.3 (D.C. Cir. 1999) (en banc). See Cement Kiln Recycling Coalition v. EPA, 255 F.3d 855, 869 (D.C. Cir. 2001); Washington Legal Clinic for the Homeless v. Barry, 107 F.3d 32, 39 (D.C. Cir. 1997). In any event, the district court did not err in its judgment that this issue was related to the real-world application of the Rule and should also be deferred as a matter of judicial economy. See National Association of Regulatory Utility Commissioners, 851 F.2d at 1430.

and significant hardship. See National Association, 851 F.2d at 1429; Cronin, 73 F.3d at 1133. Appellants cannot meet this burden.

The Rule does not require any immediate action by Appellants and thus does not cause appellants the kind of “hardship” required to render a claim ripe. See Ohio Forestry, 523 U.S. at 733 (finding no hardship to plaintiffs where challenged plan did not “command anyone to do anything or to refrain from doing anything * * * grant, withhold, or modify any formal legal license, power, or authority * * * subject anyone to any civil or criminal liability * * * [or] create * * * legal rights or obligations”). What the Rule does do is clarify the framework the Agencies will use to evaluate mechanized earth-moving activities. Anyone who is considering engaging in earth-moving activity within the waters of the United States will thus need to consider the Rule (along with all other pertinent regulations) in assessing whether or not that activity will require a discharge permit. A party that concludes that its activities will not result in a discharge is still free to proceed without a permit. See National Park Hospitality Ass’n, 538 U.S. at 810 (finding no hardship where a party is “free to conduct its business as it sees fit.”). If the Agencies believe otherwise, and bring an enforcement proceeding against that party, the burden will remain on the Agencies (as it would in any enforcement proceeding) to prove that discharges have occurred.

Nor does the Rule add new permitting requirements or procedural hurdles. The Rule omits the rebuttable presumption language contained in the proposed rule, and expressly states that it shifts no burden of proof. 66 Fed. Reg. at 4575 (33 C.F.R. § 323.2(d)(2)(i)); 40 C.F.R. § 232.2 (definition of “discharge of dredged material” at (2)(i)). While Appellants must continue to comply with the CWA prohibition against discharges without permits, that obligation is imposed by the statute and this Rule does not add to Appellants’ burden of compliance.

Thus, this case does not present circumstances where courts have allowed pre-enforcement review because plaintiffs are faced with a choice between complying with a straightforward, clear cut agency directive and risking an enforcement proceeding. See, e.g., Abbott Labs, 387 U.S. at 153-154 (regulations required specific changes to labels, advertising materials, and promotional materials; if changes were not made, drug would be considered misbranded); Barrick Goldstrike Mines Inc. v. Browner, 215 F.3d 45 (D. C. Cir. 2000) (EPA had stated in guidance that chemicals in waste rock were not eligible for de minimis exemption from EPCRA reporting requirements; if miner did not comply with reporting requirements, it risked sanctions). Nor is this a case where plaintiffs have been adversely affected because the regulation in question had actually been applied against them, as was the case in Better Government

Association v. Department of State, 780 F.2d 86, 89-90, 93 (D.C. Cir. 1986)

(finding ripe challenges to guidelines for waiving fees under the Freedom of Information Act that had been initially applied to deny plaintiffs a waiver but later reversed). Appellants have not identified any instance in which the Rule has been applied adversely to them.

Appellants argue (Br. 30-31) that the case-by-case approach adopted in the Rule leaves them with no way to know whether their earth-moving activities are or are not regulated. The uncertainty that Appellants complain of, however, is no more than the reality facing any party potentially subject to a complex regulatory scheme. It is not always possible to draw a bright line between regulated and unregulated activities, and there will always be cases in which a potentially regulated party has to make a judgment call. As the Supreme Court recently explained in National Park Hospitality Association, regulatory uncertainty alone does not constitute a significant hardship:

Petitioner contends that delaying judicial resolution of this issue will result in real harm because the applicability vel non of the CDA is one of the factors a concessioner takes into account when preparing its bid for NPS concession contracts. Petitioner's argument appears to be that mere uncertainty as to the validity of a legal rule constitutes a hardship for purposes of the ripeness analysis. We are not persuaded. If we were to follow petitioner's logic, courts would soon be overwhelmed with requests for what essentially would be advisory opinions because most business transactions could be priced more

accurately if even a small portion of existing legal uncertainties were resolved. In short, petitioner has failed to demonstrate that deferring judicial review will result in real hardship.

538 U.S. at 811-812 (footnote omitted; emphasis added).^{8/} This Court recently cited and followed National Park Hospitality Association in concluding that the uncertainty associated with an agency's shift to case-by-case determinations did not create sufficient hardship to the plaintiffs to make their claims ripe. Sprint Corporation, 331 F.3d at 958. The same conclusion applies to Appellants.

Appellants claim (Br. 30-31) that as a practical matter, they are now forced to seek discharge permits or proceed without a permit and risk fines and penalties every time they engage in earth-moving activities. This assertion is based in part on the false assumption that the Rule shifts the burden of proof and thus requires a project operator to affirmatively prove that his project will not result in a regulable discharge. Furthermore, seeking a permit is not the only way for Appellants to resolve their uncertainty; a less-drastic alternative would be to seek guidance from the Corps before undertaking a proposed project. See 66 Fed. Reg. at 4568

^{8/} Contrary to Appellants' contention (Br. 28), the Supreme Court's determination that such planning uncertainty was not sufficient hardship did not turn on the fact that the agency issuing the interpretive guideline was not empowered to administer the statute at issue.

(Agencies “strongly recommend” that anyone proposing earth-moving projects contact Corps in advance).

Finally, any landowner or developer will have the opportunity to challenge specific determinations by the Corps, either by appealing a permit decision or by raising a defense in an enforcement action. See Clean Air, 150 F.3d at 1205 (if the “credible evidence” rule in fact altered emission standards, petitioners could raise that as defense in any enforcement action); see also Diamond Shamrock, 580 F.2d at 673 (denying review where regulations did not have “immediate and practical” impact; judicial review would be available once regulations were applied in permit proceeding). Appellants would undoubtedly prefer to resolve this matter now, in a single lawsuit, rather than waiting to challenge the Rule as it is applied to specific situations. This desire does not, however, rise to the level of hardship necessary to justify review. Ohio Forestry Ass’n, 523 U.S. at 734-735; Clean Air, 150 F.3d at 1206 (fact that it would be easier and cheaper to bring a single lawsuit rather than defending enforcement actions did not justify review in otherwise unripe case); see also Cronin, 73 F.3d at 1133 (declining review where only hardship appellants

would suffer was burden of having to file another lawsuit). Appellants' substantive claims were therefore properly dismissed as unripe.^{2/}

CONCLUSION

For the reasons set out above, the judgment of the district court should be affirmed.

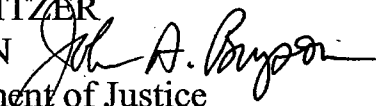
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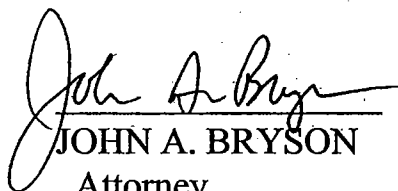
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^{2/} Finally, the amicus curiae Pacific Legal Foundation urges the Court, if it concludes the challenge is ripe, to address and decide the merits. The Appellants, however, have not briefed the merits and request that a remand to the district court if they are successful on this appeal. Under these circumstances, the Court should not consider the argument of the amicus curiae. See e.g., Eldred v. Ashcroft, 255 F.3d 849 (D.C. Cir. 2001) (arguments of amicus not raised by any party not ordinarily considered).

CERTIFICATE OF COMPLIANCE

I certify that pursuant Rule 32(a)(7)(C), Fed. R. App. P., the attached Final Brief for the Appellees is proportionately spaced, has a typeface of 14 points or more, was prepared using Corel WordPerfect Version 9.0, and contains 9,417 words.



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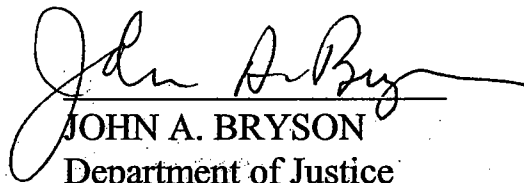
I hereby certify that two copies of the foregoing Initial Brief for the Federal Appellees were served this 1st day of June, 2005, by first-class mail, postage prepaid, on the following counsel of record:

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