

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF HOME BUILDERS,)	
)	
Plaintiff,)	
)	
v.)	Civil No. 01-274 JR
)	(and consolidated case
)	Civil No. 01-320 JR)
)	
UNITED STATES ARMY CORPS OF ENGINEERS, et al.,)	
)	
Defendants.)	

**CROSS-MOTION OF INTERVENOR-DEFENDANTS
NATIONAL WILDLIFE FEDERATION, ET AL.,
FOR SUMMARY JUDGMENT**

Pursuant to Fed. R. Civ. P. 56, intervenor-defendants National Wildlife Federation, North Carolina Wildlife Federation, and Sierra Club (collectively "NWF") hereby move that the Court enter summary judgment for them in each of the above-captioned consolidated actions. There is no genuine issue as to any material fact, and NWF is entitled to judgment as a matter of law. A memorandum in support (with exhibits), proposed order, and statement of material facts as to which there is no genuine issue accompany this motion.

DATED: May 1, 2003.

Respectfully submitted,

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National Wildlife Federation,
North Carolina Wildlife Federation, and
Sierra Club

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ORDER

Upon consideration of the motions for summary judgment by plaintiff National Association of Home Builders (in No. 01-274) and plaintiffs National Stone, Sand and Gravel Association, *et al.* (in No. 01-320), and the cross-motion by intervenor-defendants National Wildlife Federation, North Carolina Wildlife Federation, and Sierra Club (collectively "NWF") for summary judgment in each of those two actions, the Court being fully advised in the premises, it is hereby

ORDERED that NWF's cross-motion for summary judgment is granted and plaintiffs' motions for summary judgment are denied, and that summary judgment is hereby entered for NWF in Nos. 01-274 and 01-320, and against plaintiffs in those two actions.

DATED this ___ day of _____ 2003.

James Robertson
United States District Judge

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**INTERVENOR-DEFENDANTS' STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE ISSUE**

Pursuant to D.D.C. Rule LCvR 7.1(h), intervenor-defendants National Wildlife Federation, North Carolina Wildlife Federation, and Sierra Club note that there are no material facts in this case. See, e.g., Marshall County Health Care Authority v. Shalala, 988 F.2d 1221, 1226 (D.C. Cir. 1993) ("Appellants ... overlook the character of the questions before the district court when an agency action is challenged. The entire case on review is a question of law, and only a question of law.").

DATED: May 1, 2003.

Respectfully submitted,

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**MEMORANDUM OF INTERVENOR-DEFENDANTS
NATIONAL WILDLIFE FEDERATION, ET AL.,
(1) IN OPPOSITION TO PLAINTIFFS'
MOTIONS FOR SUMMARY JUDGMENT, AND
(2) IN SUPPORT OF NWF'S CROSS-MOTION
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May 1, 2003

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Intervenor-defendants National Wildlife Federation, North Carolina Wildlife Federation, and Sierra Club (collectively "NWF") submit this memorandum (1) in opposition to the motions for summary judgment by plaintiff National Association of Home Builders (in No. 01-274) and plaintiffs National Stone, Sand and Gravel Association, *et al.* (in No. 01-320), and (2) in support of NWF's cross-motion for summary judgment.

In the interest of avoiding repetition, NWF generally relies (without necessarily agreeing with every aspect) on the statement of the case and arguments made by defendants United States Army Corps of Engineers and Environmental Protection Agency (collectively "the agencies"). NWF writes separately to draw the Court's attention to additional points and authorities relevant to resolution of plaintiffs' claims.

SUMMARY OF ARGUMENT

In the guise of a facial challenge to a Clean Water Act regulation promulgated by the agencies in 2001, 66 Fed. Reg. 4550 (January 17, 2001) ("2001 Rule"), plaintiffs launch a broad-ranging attack on key safeguards against damage and destruction of our precious aquatic resources -- including wetlands, streams, rivers, and lakes. However, as a threshold matter, plaintiffs' claims are not properly before this Court, because those claims seek review of agency action that either (1) is assigned to the exclusive jurisdiction of the courts of appeals under Clean Water Act § 509, or (2) is unripe, and that plaintiffs lack standing to challenge.

Even if the Court could properly entertain plaintiffs' claims, those claims must nonetheless fail. To overturn a regulation in a facial challenge, it does not suffice for a plaintiff to point to some situations in which the agency might apply the regulation unlawfully. *A fortiori*, plaintiffs' facial challenge must be rejected here, where they have pointed to no specific situations in which the rule would lead to regulation of activities that are outside the agencies' statutory authority.

Moreover, plaintiffs' arguments are based on an untenable interpretation of the Clean Water Act -- an interpretation in conflict with the D.C. Circuit's decision addressing the predecessor to the 2001 Rule, *National Mining Assn. v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998), as well as with two decades of jurisprudence from various circuits around the country. By broadly questioning regulation of redeposits, plaintiffs ignore Congress' express statutory mandate to regulate discharge of "dredged ... material" and "dredged spoil." Because dredged material and spoil inherently come from United States waters, any discharge of those materials necessarily involves a redeposit. The caselaw in the D.C. Circuit and other courts

broadly endorses regulation of redeposits -- including those that move dredged material mere inches or feet away from the point of excavation.

While the D.C. Circuit has held that Clean Water Act § 404 does not encompass "incidental fallback," the rule under review expressly exempts such fallback from regulation. Not satisfied, plaintiffs have broadened their attack beyond incidental fallback. This attempt by plaintiffs to move the goalposts after a decade of rulemaking and adjudication should not be entertained by the Court -- and, if entertained, should be rejected as contrary to the Act and caselaw.

Plaintiffs' argument that the 2001 Rule shifts the burden of proof to regulated entities is refuted by the language of the rule itself. Their request that the Court order the agencies to promulgate a more specific rule should likewise be rejected. Given that the Act does not require the agencies to promulgate any regulatory definition of the statutory phrase at issue here, plaintiffs' attempt to posit a duty to promulgate a specific regulation must *a fortiori* be rejected.

Finally, plaintiffs' claim that the 2001 Rule disrupts the balance of federal-state relations, and thus implicates the Tenth Amendment, must be rejected. Protecting United States waters from the destruction and degradation associated with activities such as mining and the construction of major infrastructure is well within the legitimate sphere of federal authority.

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE NOT PROPERLY BEFORE THIS COURT.

A. If the 2001 Rule Is a § 301 Rule, Then It Is Reviewable Solely in the Court of Appeals, and This Court Lacks Jurisdiction.

Section 509(b)(1) of the Act assigns certain specified actions of the EPA Administrator to the courts of appeals for direct review. 33 U.S.C. § 1369(b)(1). For those agency actions covered by the courts of appeals' § 509(b)(1) jurisdiction, district courts lack review jurisdiction. *See,*

e.g., *American Paper Inst. v. Train*, 543 F.2d 328, 332-33, 334 (D.C. Cir. 1976) (court affirms district court's dismissal of claims that were within scope of § 509: "Section 509 ... establishes that the United States courts of appeal have exclusive jurisdiction to review the Administrator's actions in promulgating effluent limitations under Section 301.") (emphasis added); *American Canoe Assn. v. USEPA*, 30 F. Supp. 2d 908, 924 (E.D. Va. 1998) (having found claim to be within the scope of § 509, district court dismisses).

The D.C. Circuit has emphasized the breadth of the court of appeals' § 509 jurisdiction, especially in reviewing national regulations. *See, e.g.*, *American Frozen Food Inst. v. Train*, 539 F.2d 107, 124 (D.C. Cir. 1976) ("Review of all standards (including § 301 effluent limitations) promulgated by the Administrator is provided for in the various United States Courts of Appeals by § 509 of the Act.") (emphasis added); *Natural Resources Defense Council v. USEPA*, 673 F.2d 400, 405 & n.15 (D.C. Cir. 1982) (court rejects challenge to § 509 jurisdiction, emphasizing that "[n]ational uniformity, an important goal in dealing with broad regulations, is best served by initial review in a court of appeals," and that "[o]ur decision ... follows the lead of the Supreme Court in according section 509(b)(1) a practical rather than a cramped construction") (emphasis added).

Under § 509(b)(1), the courts of appeals have review jurisdiction over "the Administrator's action ... (E) in approving or promulgating any effluent limitation or other limitation under section 1311" -- i.e., under CWA § 301. To the extent the 2001 Rule directly determines whether a discharge is prohibited or not, it constitutes an "effluent limitation,"¹ or at a

¹ A rule that prohibits or constrains the discharge of dredged material constitutes an effluent limitation under the Act and implementing regulations. *See* CWA § 502(11), 33 U.S.C. § 1362(11) (defining effluent limitation as "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other (... footnote continued next page)

minimum fits within § 509(b)(1)(E)'s broad reference to "any ... other limitation."² Moreover, to the extent the rule defines the availability of an exemption from the discharge prohibition, it would likewise be an effluent limitation or other limitation. *See, e.g., Natural Resources Defense Council v. USEPA*, 656 F.2d 768, 775 (D.C. Cir. 1981) (court rejects challenge to § 509 jurisdiction, finding the challenged regulations to be effluent limitations because "[a]s a practical matter they restrict the discharge of sewage by limiting the availability of a variance") (emphasis added).

Applicability of § 509(b)(1)(E) hinges not only on whether the 2001 Rule is an "effluent limitation or other limitation," but also on whether it is an effluent limitation or other limitation "under section [301]." To be sure, the rule construes a phrase ("discharge of dredged ... material") that appears in § 404(a), not in § 301, and the rule's "authority" section cites only § 404, not § 301. 66 Fed. Reg. 4575. However, the Clean Water Act includes at least two provisions expressly linking § 404 with § 301.

First, § 301(a) prohibits the discharge of any pollutant by any person "[e]xcept as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 [404]." (Emphasis added.) Second, § 404(p) provides that "[c]ompliance with a permit issued pursuant to

(... footnote continued from previous page)
constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance") (emphasis added); 40 C.F.R. § 232.2 (defining "effluent" to include "dredged material").

² *See, e.g., Natural Resources Defense Council v. USEPA*, 673 F.2d 400, 405, 404 n.11 (D.C. Cir. 1982) (court finds § 509 jurisdiction over regulations that are "far more general" than those reviewed in prior cases and "rest dominantly on policy choices": "Because § 509(b)(1)(E) provides for our review of both effluent limitations and other limitations, we see no need to determine that the CPRs [consolidated permit regulations] are one or the other. It suffices that they fit within the statutory disjunctive phrase.").

this section ... shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311 [301], 1317, and 1343 of this title." (Emphasis added.) Thus, by express operation of the statute, any rule that defines the scope of the § 404 exemption from the § 301(a) discharge prohibition necessarily defines the scope of that discharge prohibition itself. In short, the 2001 Rule is not only an effluent standard or limitation -- it is an effluent standard or limitation under § 301.

This conclusion is further confirmed by the litigation challenging the 1993 Tulloch rule. Like the 2001 Rule, the 1993 rule defined the term "discharge of dredged ... material" in § 404(a), and cited only § 404 in its authority section. 58 Fed. Reg. 45036-37 (Aug. 25, 1993). Nonetheless, the agencies in defending the rule, and this Court in overturning the rule, invoked § 301. *See American Mining Congress v. U.S. Army Corps of Engineers*, 951 F. Supp. 267, 272 (D.D.C. 1997) ("The agencies contend that the authority to regulate incidental fallback is included in their § 301(a) authority to regulate all discharges of pollutants.") (emphasis added), *id.* ("The Court concludes that neither § 301 nor § 404 covers incidental fallback.") (emphasis added).

Moreover, in the present case, plaintiffs interpret the 2001 Rule as defining the circumstances in which industry is prohibited from discharging without a permit. See, *e.g.*, NAHB Mem. 1, 11; NSSGA Mem. 1-2, 10-13. If that is what the rule does, then it must be a § 301 rule. As noted above, § 404 is not the source of the prohibition on discharges, but rather offers dischargers an opportunity to obtain a permit exempting them from the discharge prohibition imposed by § 301.

If -- given these statutory provisions and these statements by the agencies, the Court, and plaintiffs -- the rule constitutes an "effluent limitation or other limitation under section [301],"

then "the Administrator's action ... in approving or promulgating" the rule is reviewable only in the courts of appeals, under § 509(b)(1)(E). On that basis, plaintiffs' challenge to the EPA-promulgated portion of the 2001 Rule must be dismissed for lack of jurisdiction.

In addition, because the court of appeals would have ancillary jurisdiction over a challenge to the Corps-promulgated provisions of the rule,³ plaintiffs' claims addressing those provisions should likewise be dismissed. In the alternative, even if the Corps-promulgated provisions could not have been placed before the court of appeals, plaintiffs' challenge to those provisions must still be dismissed for lack of standing. If the EPA-promulgated portions of the regulation are within the court of appeals' § 509 jurisdiction (and thus not subject to challenge here), a claim solely against the Corps-promulgated portions will not redress plaintiffs' injury. Even if plaintiffs were to succeed in overturning the Corps regulation, the virtually identically worded EPA provisions -- and the prohibition they impose on plaintiffs' members -- would remain.⁴

B. If the 2001 Rule Is *Not* a § 301 Rule, Then Plaintiffs' Claims Must Be Dismissed On Ripeness and/or Standing Grounds.

If on the other hand the 2001 Rule is not a § 301 rule, then plaintiffs' claims must still be dismissed, because those claims are unripe and plaintiffs lack standing.

³ See *American Iron & Steel Inst. v. EPA*, 115 F.3d 979, 986 (D.C. Cir. 1997) (asserting jurisdiction over non-509(b)(1) claims that were "ancillary" to § 509(b)(1) claims). Cf. *National Wildlife Federation v. Hanson*, 859 F.2d 313, 316 (4th Cir. 1988) (under CWA § 505(a)(2), 33 U.S.C. § 1365(a)(2), which -- like § 509(b)(1) -- provides for suits against "the Administrator," Corps was properly joined as an additional defendant).

⁴ At this point, plaintiffs could not achieve redress by pursuing concurrent challenges in different courts (*i.e.*, by challenging the EPA provisions in the court of appeals, and the Corps provisions in district court). The 120-day § 509(b)(1) statute of limitations has expired with respect to the 2001 Rule.

Ripeness. The Supreme Court has held that "a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the 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." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891 (1990) (emphasis added). The present case presents only facial -- not as-applied -- challenges to the 2001 Rule, and thus fits squarely within *Lujan's* unripeness principle.

Lujan noted two exceptions to the general unripeness of facial challenges to regulations, but -- if the 2001 Rule is not a § 301 rule -- neither of these exceptions applies.

First, *Lujan* noted that "[s]ome statutes permit broad regulations to serve as the 'agency action,' and thus to be the object of judicial review directly, even before the concrete effects normally required for APA review are felt." *Id.* The Clean Water Act contains just such a provision: § 509(b)(1), which specifies various agency actions that are to be reviewed directly in the courts of appeals within 120 days. However, if the 2001 Rule is not a § 301 rule, then § 509(b)(1) -- and the congressional preference for prompt facial review embodied in it -- do not apply. Accordingly, the first exception to *Lujan's* unripeness principle is unavailable.

Second, *Lujan* noted that "a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately" is ripe for immediate review. 497 U.S. at 891. Initially, one must ask whether the 2001 Rule, which defines a statutory phrase, constitutes a "substantive" rule -- or instead an interpretive rule. *See, e.g.*, 5 U.S.C. § 552(a)(1)(D) (contrasting "substantive rules of general applicability" with, *inter alia*, "interpretations of general applicability") (emphasis added). Even if the rule is substantive, however, this second *Lujan* exception still does not apply.

Specifically, if the 2001 Rule is not a § 301 rule -- if it is only a rule under § 404 -- then it does not require plaintiffs to adjust their conduct. As indicated above, it is § 301 that requires such an adjustment, by imposing a broad prohibition on "any discharge." § 301(a).

In short, neither of the two *Lujan* exceptions is applicable. Accordingly, *Lujan's* general rule that "a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review" applies, and requires dismissal of plaintiffs' claims.

Standing. To meet Article III standing requirements, plaintiffs must show that they "have suffered a concrete and particularized injury" that is "(1) actual or imminent, (2) caused by, or fairly traceable to an act that [they] challenge[] in the instant litigation, and (3) redressable by the court." *Utility Air Regulatory Group v. EPA*, 320 F.3d 272, 277 (D.C. Cir. 2003) (internal quotations omitted). As noted above, the prohibition on discharge stems from § 301(a). Thus, if the 2001 Rule is not a § 301 rule, then plaintiffs' alleged injury (the requirement to obtain a permit as a prerequisite to redepositing dredged material in U.S. waters) is not traceable to that rule, and would not be redressed by overturning that rule. If the § 301(a) discharge prohibition is not at issue in this case, and will stand independently of the outcome in this case, plaintiffs lack standing.

II. PLAINTIFFS HAVE NOT MET THE STANDARD GOVERNING FACIAL CHALLENGES.

Even if the Court concludes it can entertain plaintiffs' claims, those claims nonetheless fail on the merits to satisfy the standard governing facial challenges. Specifically, in a case decided after *NMA*, the D.C. Circuit has held that even where a rule is susceptible to being applied unlawfully, a facial challenge will not necessarily succeed. In *Amfac Resorts v. U.S.*

Dept. of the Interior, 282 F.3d 818 (D.C. Cir. 2002),⁵ the D.C. Circuit set forth two possible tests for judging facial challenges. It did not find it necessary to choose between them, because under either approach, plaintiffs' facial challenges failed. The same result should obtain here.

Under the stricter test, a facial challenge must fail if the challenged regulation "is not invalid in all its applications," while under the more lenient test, the challenge must fail if the regulation "is invalid in only some of its applications." *Amfac*, 282 F.3d at 827 (emphasis added). In explaining why plaintiffs in *Amfac* failed even the more lenient standard, the D.C. Circuit noted that "on the face of the regulations, the most we can imagine is that in some applications -- depending on how the Park Service administers the LSI regulations -- there may be a conflict with the statute." *Id.* 833 (emphasis added). However, "[t]hat is not a sufficient basis for holding the regulations unlawful on their face." *Id.* (emphasis added).

Here too, plaintiffs' facial challenge must fail, even under the more lenient standard. While discussing the various factors that the agencies cited in the regulation and preamble (distance from point of excavation, amount of material redeposited, etc.), plaintiffs point to no specific set of facts under which (1) the 2001 Rule would require a permit, but (2) the Act would not. Even plaintiffs' extra-record declarations, which are not properly before the Court,⁶ contain no such example. Thus, plaintiffs' facial challenge must fail.

⁵ The Supreme Court granted certiorari, 123 S. Ct. 549, apparently on portions of the D.C. Circuit's opinion other than those discussed in the present brief. *See* 2002 U.S. Lexis Briefs 196, at *I.

⁶ Extra-record declarations are permissible for purposes of documenting standing, *Amfac*, 282 F.3d at 830, but not for addressing the merits of a facial challenge. *Id.* 831 ("the district court refused to consider, in this facial challenge, affidavits not submitted as part of the administrative record, and so shall we") (citation omitted).

III. PLAINTIFFS HAVE NOT SHOWN THAT THE 2001 RULE REGULATES STATUTORILY EXEMPT ACTIVITIES.

In *NMA*, the D.C. Circuit affirmed reversal of the Tulloch rule because "faithful application [of the rule] would carry the agency beyond its statutory mandate." 145 F.3d at 1408 (emphasis in original). Plaintiffs have made no such showing here.

A. The Rule Regulates the Discharge -- i.e., "Addition" - of Pollutants.

Contrary to plaintiffs' suggestion that the agencies have disregarded the statutory requirement of an "addition," the rule expressly preserves preexisting regulatory language recognizing that a "discharge of dredged material" occurs only where an addition is present. 33 C.F.R. § 323.2(d)(1); 40 C.F.R. § 232.2. Thus, at issue in this case is not whether the agencies can regulate absent an "addition," but rather what constitutes an addition.

Plaintiffs fail to show that the agencies read that statutory term too broadly. To the contrary, their briefs advance maximalist -- and meritless -- attempts to broaden the scope of the *NMA* decision.

(1) Plaintiffs' Attempt to Broaden the Scope of *NMA* Beyond Incidental Fallback Should Be Rejected.

Plaintiffs advance an absurdly narrow view of the term "addition," opposing regulation not only of "incidental fallback," but also of a wide array of earthmoving activities in wetlands and other U.S. waters. In NAHB's words, "[e]arth-moving cannot validly be regarded as a discharge." NAHB Mem. 19 (internal quotations omitted). *Accord*, NSSGA Mem. 18.

These arguments go well beyond the "incidental fallback" addressed in *NMA*. There, attacking a rule that broadly regulated "any" redeposit of dredged material, NAHB and NSSGA raised a single substantive issue: "Whether the incidental fallback that accompanies excavation and landclearing activities constitutes the 'discharge' of dredged material under Section 404 of

the Clean Water Act." Brief of Appellees National Mining Association, *et al.*, in D.C. Cir. 97-5099 (filed November 19, 1997), at 1 (emphasis added), Ex. A hereto.⁷ Thus, NAHB and NSSGA raised no issue before the D.C. Circuit concerning any redeposits other than incidental fallback.

After the D.C. Circuit issued a ruling addressing incidental fallback (the only substantive issue NAHB and NSSGA had placed before it), the agencies -- at considerable time and expense on their part and on the part of members of the public who submitted comments -- have promulgated a rule designed to implement the D.C. Circuit's ruling. That rule expressly excludes incidental fallback from regulation -- thus granting NAHB and NSSGA the only substantive objective they advocated to the D.C. Circuit in *NMA*. Yet plaintiffs are not satisfied, and have escalated their demands, arguing that even though the 2001 Rule exempts incidental fallback, other activities beyond incidental fallback should be exempted too. Paradoxically, although the rule they challenge here is narrower than the Tulloch rule, plaintiffs' attack on it is broader.

The Court should reject this eleventh-hour attempt to move the goalposts after a decade of rulemaking and litigation. Indeed, that is just what this Court did three years ago when, after *NMA*, NAHB returned to this Court with a post-judgment motion to enforce its injunction against the Tulloch rule. Although the agencies had promulgated an initial remand regulation that (like the subsequent regulation at issue here) expressly exempted incidental fallback, NAHB was not satisfied, and urged this Court to broadly bar the agencies from regulating earthmoving activities. *American Mining Congress v. U.S. Army Corps of Engineers*, 120 F. Supp. 2d 23, 26 (D.D.C.

⁷ The only other issue NAHB and NSSGA raised was "[w]hether the district court improperly granted permanent injunctive relief." *NMA Br. in D.C. Cir. 97-5099*, at 1.

2000). The Court declined to do so, finding that the D.C. Circuit's *NMA* decision -- as well as this Court's own decision in *AMC* -- addressed only incidental fallback:

In *AMC*, the Court enjoined the agencies from applying or enforcing the Tulloch Rule because it concluded that they had exceeded their authority under the CWA by regulating incidental fallback. The Court's analysis clearly focused on the impermissibility of regulating incidental fallback. In *NMA*, the Court of Appeals agreed that the agencies had exceeded their statutory authority by regulating incidental fallback.

Id. 28 (emphasis added; footnote and citations omitted). Here as well, the Court should reject plaintiffs' attempt to broaden *NMA* to include redeposits beyond incidental fallback.

(2) Plaintiffs' Broad Attempt to Exclude Earth-Moving Redeposits from Regulation Conflicts with the Act and Caselaw.

Even if the Court considers plaintiffs' broad attack on regulation of redeposits associated with earth-moving, that attack should be rejected on the merits. Plaintiffs attempt to assign the term "addition" an untenably narrow reading that disregards other statutory language, and shunts aside decades of caselaw. For example, they broadly advocate exemption of earthmoving activities, *see* p. 11, *supra*, arguing that "no ordinary person would think that stirring a bowl of cereal adds milk or cereal." NAHB Mem. 13.

Such arguments ignore the language of § 404(a) itself, which expressly addresses discharges of "dredged ... material." *Accord*, § 502(6) (defining "pollutant" to include "dredged spoil"). Because all dredged material originates in U.S. waters,⁸ any discharge of such material is by definition a redeposit. Thus, NAHB's cereal analogy -- and any other argument suggesting

⁸ 33 C.F.R. § 323.2(c) (Corps regulation, in effect since before the 1993 Tulloch rule and not challenged in this litigation, states that "[t]he term dredged material means material that is excavated or dredged from waters of the United States") (emphasis added).

that regulation of redeposits is inherently suspect under § 404 -- must be rejected as fundamentally contrary to § 404's (and § 502(6)'s) own language.⁹

As Senator Ellender observed, in introducing the 1972 floor amendment that first proposed assigning dredged material permitting authority to the Corps: "The disposal of dredged material does not involve the introduction of new pollutants; it merely moves the material from one location to another." 117 Cong. Rec. 38853 (Nov. 2, 1971) (emphasis added), *quoted in AMC*, 951 F. Supp. at 273. *Accord. id.* 38854 (Sen. Ellender: "moving spoil material from one place in the waterway to another, without the interjection of new pollutants") (emphasis added). Thus, the Fifth Circuit long ago noted that pollutants need not "come from an external source in order to constitute a discharge," because "'dredged' material is by definition material that comes from the water itself. A requirement that all pollutants must come from outside sources would effectively remove the dredge-and-fill provision from the statute." *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897, 924 n.43 (5th Cir. 1983) (emphasis added).

⁹ The Corps and EPA correctly explain that the § 402 cases cited by plaintiffs do not consider the nature of dredged material, which inherently comes from U.S. waters. Corps/EPA Mem. 38 n.19 (quoting *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897, 924 n.43 (5th Cir. 1983), which expressly distinguished § 402 caselaw). Moreover, in one of the § 402 cases, the D.C. Circuit held that the statutory term "addition" can permissibly be read -- as the agencies have done in the 2001 Rule -- as encompassing situations where there is no introduction of pollutants from an outside source. *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 174-75 (D.C. Cir. 1982) (where two competing interpretations of the Act were urged upon the court, under which an addition occurs (1) when water passes through a dam into the river below, or (2) only if the point source introduces pollutants "from the outside world," the court held that "the language of the statute permits either construction") (emphasis added). Moreover, the D.C. Circuit -- citing § 502's reference to an "addition" -- recently found that an increase in the volume of water flowing through a dam constitutes a "discharge." *Alabama Rivers Alliance v. FERC*, 2003 U.S. App. Lexis 6980, *20-22 (D.C. Cir. April 11, 2003). Such an increase, of course, introduces no material from an outside source.

The 1977 Amendments further confirm the error in plaintiffs' broad attack on regulation of earthmoving. Reflecting strong congressional intent to protect wetlands,¹⁰ those amendments enacted narrowly drawn and conditional exemptions for certain kinds of earthmoving-related discharges in certain circumstances, § 404(f)(1), but provided that those same discharges must obtain a permit where impacts on U.S. waters would be significant. § 404(f)(2).¹¹ *See* 123 Cong. Rec. 39188 (December 15, 1977) (Senator Muskie) (the § 404(f) exemptions encompass "those narrowly defined activities that cause little or no adverse effects either individually or cumulatively."). *Accord, id.* 39211 (Senator Wallop); *id.* 38997 (Congressman Harsha).

¹⁰ *See, e.g.*, 123 Cong. Rec. 26718 (August 4, 1977) (Senator Baker states: "Section 404 represents an essential tool for moderating the degradation, and sometimes the irrevocable destruction, of aquatic areas that naturally control the quality of water, including those vital areas of shallow water known as wetlands."); 26716 (Senator Chafee states that "discharges of dredged or fill materials ... are potentially destructive to the integrity of wetlands, streams, and rivers, and must be regulated if we are to reach the national goal of restoring the quality of our waters"); 26720 (Senator Muskie states: "There is no question that the systematic destruction of the Nation's wetlands is causing serious permanent ecological damage. ... The wetlands and bays, the estuaries and deltas are the Nation's most biologically active areas. ... They represent a principal source of food supply. They are the spawning grounds for much of the fish and shellfish which populate the oceans, and they are passages for numerous upland game fish. They also provide nesting areas for a myriad of species of birds and wildlife."); 26713 (Senator Hart opposes a floor amendment that "will remove 98 percent of all the rivers, streams, and lakes from the protection program which the Congress has adopted. It will remove 85 percent of the wetland areas of this country from this kind of necessary national and Federal protection."); 38994 (December 15, 1977) (Congressman Lehman states: "One of my primary concerns [with the House bill] was the weakening of the authority of the Corps of Engineers over dredge and fill activities in our Nation's wetlands. The conference report fortunately recognizes the importance of protecting the wetlands[, which] ... provide us with \$140 billion worth of flood protection and water purification services.").

¹¹ Section 404(f)(2) provides: "Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section." (Emphasis added.)

Tellingly, among the discharges that require a permit in the event of significant aquatic impacts are several that involve earthmoving within the same area, rather than introducing material from an outside source. These include, for example, discharges associated with "plowing" and "the maintenance of drainage ditches." § 404(f)(1)(A) and (C).

Moreover, Congress worded § 404(f)(1)(C) narrowly to encompass only the "maintenance," but not the construction, of drainage ditches. Thus, Congress confirmed that ditch construction -- which involves earthmoving over short distances -- lacks even a conditional exemption from the Act's permit requirement.¹² Congress's treatment of ditch construction further refutes plaintiffs' broad claim that earthmoving within the same general area involves no discharges.

Finally, the 1977 Amendments added an exemption for agricultural drainage, but phrased it narrowly to cover only "minor drainage." § 404(f)(1)(A) (emphasis added). The drafters explained that "[t]he exemption for minor drainage does not apply to the drainage of swampland or other wetlands." S. Rep. 370, 95th Cong., 1st Sess. 76 (1977).¹³ Congress' intent to regulate discharges associated with agricultural drainage activities -- which likewise typically involve earthmoving over short distances -- offers yet further evidence against plaintiffs' broad claim that short-distance earthmoving involves no discharge at all.

¹² See 123 Cong. Rec. 26712 (August 4, 1977) (in response to inquiry from Senator Bentsen, floor manager Senator Muskie confirms that the § 404(f) exemption does not encompass the construction of drainage ditches).

¹³ See also 123 Cong. Rec. 26767 (August 4, 1977) (Senator Muskie, discussing the minor agricultural drainage exemption, confirmed that permits are required "where ditches or channels are dredged in a swamp, marsh, bog, or other truly aquatic area"); *id.* (Senator Dole, though a proponent of much broader exemptions than those included in the Senate bill, states: "I agree that the construction of major canals and waterways designed to modify significantly or to drain an entire swamp or marshland should not fall within the category of 'minor drainage.'").

In short, the 1977 Amendments confirm the plain meaning of the 1972 Act: introduction of pollutants from an outside source is not a prerequisite to an "addition," and earthmoving activities do add pollutants. That conclusion was confirmed by the D.C. Circuit in *NMA*. 145 F.3d at 1405 (plowing and ditch maintenance "may ... produce actual discharges, i.e., additions of pollutants"). It is likewise supported by two decades of jurisprudence from other courts recognizing jurisdiction over earthmoving. Corps/EPA Mem. 28, 39 (citing cases).¹⁴

Plaintiffs' sweeping attack on regulation of earthmoving runs directly counter to the 1972 Act, the 1977 Amendments, and the jurisprudence of the D.C. Circuit and other federal courts. Their arguments should be rejected.¹⁵

¹⁴ *Save Our Community v. USEPA*, 971 F.2d 1155 (5th Cir. 1992), *cited in* NSSGA Br. 19 n.14, NAHB Br. 16, did not question *Avoyelles'* holding that redeposits are properly subject to regulation, but instead found that the record on appeal did not show that there had been redeposits. *Id.* 1167. Absent evidence of redeposit, the Fifth Circuit confronted only "the narrow issue whether the removal of water from wetlands constitutes a discharge." *Id.* 1165 (emphasis added). Likewise, *North Carolina v. FERC*, 112 F.3d 1175, 1187-89 (D.C. Cir. 1997), *cited in* NAHB Mem. 19, involved the removal of water, not the redeposit of dredged material -- and, moreover, was subsequently distinguished by the D.C. Circuit in *Alabama Rivers Alliance*. *See* p. 14 n.9, *supra*.

¹⁵ Included among the arguments the Court should reject is NSSGA's suggestion that "inadvertent" discharges are somehow exempt from regulation. *See* NSSGA Mem. 21. *Accord, id.* 10 (suggesting earthmoving should be exempt where "no material is deliberately put back" into U.S. waters) (emphasis added). The Act's broad language prohibiting discharges makes no exemption for inadvertent discharges, *see* §§ 301(a), 502(12), 404(a), and indeed the Act expressly confirms that "incidental" discharges are subject to regulation. § 404(f)(2). *See also Minnehaha Creek Watershed District v. Hoffman*, 597 F.2d 617, 627 (8th Cir. 1979) ("We ... find no justification in the Act for the District Court's determination that whether the discharge of a particular substance listed in § 502(6) constitutes the discharge of a 'pollutant' under the Act depends upon the purpose for which the discharge is made."); *United States v. Earth Sciences*, 599 F.2d 368, 374 (10th Cir. 1979) ("The regulatory provisions of the FWPCA were written without regard to intentionality, ... making the person responsible for the discharge of any pollutant strictly liable."); *United States v. Sinclair Oil Co.*, 767 F. Supp. 200, 205 (D. Mont. 1990) (same).

(3) The 2001 Rule's Definition of Incidental Fallback Does Not Regulate Too Broadly.

Apart from their broad arguments concerning earthmoving, plaintiffs argue that the agencies have interpreted the term "incidental fallback" too narrowly. For example, NSSGA apparently believes that any redeposit within the "same general location" constitutes incidental fallback and is thus exempt. *See* NSSGA Mem. 24. *Accord, id.* 20 ("same general area"). *See also id.* 19 ("For there to be a discharge or addition, the material must be affirmatively relocated from one site and dropped or deposited at another.") (emphasis added). This position clearly misstates *NMA*, which twice characterized incidental fallback far more narrowly, indicating that the term denotes redeposits that return dredged material to "substantially the same spot" -- or "virtually to the spot" -- from which the material was excavated. 145 F.3d at 1401, 1403 (emphasis added).

Likewise, *NMA* specifically confirms that § 404 properly encompasses redeposits associated with "sidecasting" (*i.e.*, excavating a ditch by placing the excavated material "by the side of" the ditch), "plowing," and "ditch maintenance." 145 F.3d at 1402, 1405, 1407. The amount of relocation associated with each of these activities is minimal -- on the order of inches or feet. Certainly these activities do not entail moving redeposits outside of the "same general location" (NSSGA Mem. 24) where they were excavated. *See, e.g.*, Ex. B hereto (photographs, drawn from administrative record Doc. #NDm10, showing ditches flanked by immediately adjacent sidecast material).

Thus, in defining incidental fallback as encompassing only those redeposits that fall back to "substantially the same place" as the initial removal (66 Fed. Reg. 4575 (emphasis added)), the 2001 Rule does not overregulate. Indeed, had the Rule simply adopted the exact term used by the D.C. Circuit in *NMA* -- "spot" -- the result would have been a narrower, not a broader, definition

of incidental fallback. Plaintiffs can hardly complain that the agencies' rule adopted a broader term ("place") in defining the incidental fallback exemption. Thus, they cannot show that "faithful application" of the 2001 Rule would regulate redeposits that are statutorily exempt. *See NMA*, 145 F.3d at 1408 (emphasis omitted).

B. Plaintiffs Have Not Shown that the 2001 Rule Shifts the Burden of Proof.

Plaintiffs repeatedly argue that the 2001 Rule improperly establishes a presumption concerning the regulability of redeposits, and shifts the burden of proof on that issue. NAHB Mem. 11, 15, 20, 23; NSSGA Mem. 10, 24-26. As plaintiffs themselves recognize, however, the express presumption in the proposed rule was omitted from the final rule. *Compare* 65 Fed. Reg. 50117 *with* 66 Fed. Reg. 4575. Moreover, the final rule expressly cautions that it "does not and is not intended to shift any burden in any administrative or judicial proceeding under the CWA." 66 Fed. Reg. 4575. The agencies' brief confirms that no burden-shifting was intended. Corps/EPA Mem. 22-24.

Plaintiffs have not shown that burden-shifting would be improper. However, given that the rule does not attempt any such shift, plaintiffs once again cannot show that "faithful application" of the rule will regulate conduct that is outside the statute's reach.

C. Plaintiffs Have No Right to a More Specific Regulation.

Plaintiffs protest that the 2001 Rule does not more specifically define incidental fallback, allegedly leaving too much to be decided by agency officials on a case-by-case basis. NSSGA Mem. 27-31; NAHB Mem. 23-24. But the Clean Water Act does not even require the agencies to promulgate any definition of the statutory term "discharge of dredged ... material." Absent such a mandate, plaintiffs cannot credibly claim that the agencies transgressed the Act by promulgating a definition that is too general. *See, e.g., Amfac*, 282 F.3d at 832 (rejecting argument that "it was

incumbent upon the Park Service to add a gloss to the statutory definition": "While agencies may have leeway in interpreting the statutes they administer, there is no rule of law compelling them to embellish what Congress has enacted."¹⁶ Plaintiffs' dissatisfaction with the uncertainty involved in a case-by-case approach (NSSGA Mem. 13-14, 28-31; NAHB Mem. 23-24) offers no basis for creating a duty to "embellish" the statute where Congress imposed none.

Moreover, the uncertainty involved in the final rule is no greater than that associated with its predecessor. The initial post-*NMA* rule, like the rule challenged here, relied on a case-by-case approach, 64 Fed. Reg. 25121 (May 10, 1999) ("Deciding when a particular redeposit is subject to CWA jurisdiction will require a case-by-case evaluation, based on the particular facts of each case."), and indeed offered less guidance about the meaning of incidental fallback than the rule challenged here. *See id.* 25123. Plaintiffs' challenge to the 1999 rule having been rejected by this Court, *AMC II*, 120 F. Supp. 2d at 28-30, their challenge to its more detailed successor must *a fortiori* fail also.

Plaintiffs may be dissatisfied with the case-by-case approach adopted in the 2001 Rule, which leaves ultimate decisions on the scope of the Act to be made by Corps regional officials. However, in the past industry has shown no hesitation about consulting those officials to obtain advance guidance on which activities require a permit. *See, e.g.*, 58 Fed. Reg. 45016 (Aug. 25, 1993) (describing a major development project whose proponent repeatedly consulted with Corps officials as the project proceeded, to obtain Corps' position on whether the various phases

¹⁶ Even where a statute does direct an agency to promulgate implementing regulations, courts defer to the agency's choice concerning the appropriate level of generality of those regulations. *See, e.g., New Mexico v. EPA*, 114 F.3d 290, 293 (D.C. Cir. 1997); *American Trucking Assns. v. USDOT*, 166 F.3d 374, 379-80 (D.C. Cir. 1999); *Animal Legal Defense Fund v. Natl. Assn. for Biomedical Research*, 204 F.3d 229, 235 (D.C. Cir. 2000).

of the project would require a CWA permit). In any event, as shown above, plaintiffs have no entitlement to a more specific nationwide rule.

IV. PLAINTIFFS' TENTH AMENDMENT CHALLENGE IS MERITLESS.

NSSGA asserts a Tenth Amendment claim, arguing that the 2001 Rule "upsets the careful balance between state and federal power," and therefore is invalid absent a "clear statement" that "Congress intended the statutory term 'discharge' to encompass activities such as excavation or other routine land uses." NSSGA Mem. 38.

NSSGA cites no basis, however, for asserting that constitutionally driven clear statement principles govern the agencies' efforts to protect the "waters of the United States" (§ 502(7)) from serious environmental damage. Certainly a Supreme Court decision addressing waters that may not be covered by the Act¹⁷ offers no basis for limiting the strong federal interest in protecting waters that are covered -- including rivers, lakes, streams and wetlands.

By NSSGA's own description (at 11-12), its members undertake major earthmoving activities in United States waters, including mining as well as construction of infrastructure such as roads and airports. The impact of such projects on United States waters can be profound, encompassing release of pollutants harmful to humans and aquatic life; destruction of habitat for fish and wildlife; and increased risk of downstream flooding.¹⁸ NSSGA's suggestion that such projects are "routine" (NSSGA Mem. 38) in no way diminishes the strong federal interest in preventing their serious impacts on United States waters. After all, piping untreated sewage and

¹⁷ See *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), cited in NSSGA Mem. 37.

¹⁸ See, e.g., *United States v. Deaton*, 209 F.3d 331, 336 (4th Cir. 2000); *United States v. Riverside Bayview Homes*, 474 U.S. 121, 134-35 (1985).

industrial effluent into rivers was "routine" before passage of the Act, but NSSGA presumably would not argue that federalism concerns are implicated by regulating those practices.

Indeed, invocation of Tenth Amendment principles here would reduce them to a caricature. Surely the applicability of constitutionally driven clear statement canons cannot turn on such minutiae as whether excavated earth is moved out of the "same general location" before being redeposited (NSSGA Mem. 24) or whether discharges are accomplished in a "single discrete action" with excavation (*id.* 21). In either case, waters of the United States – in whose protection there is a legitimate federal interest – are destroyed or damaged.

In any event, for reasons stated above and in the agencies' memorandum, the interpretation urged by plaintiffs is not a "reasonably available" reading of the Act, and thus must be rejected even if this case were judged under clear statement principles. *See, e.g., Whitman v. American Trucking Assns.*, 531 U.S. 457, 471 (2001).

CONCLUSION

For the foregoing reasons, NWF respectfully requests that the Court deny plaintiffs' motions for summary judgment, grant NWF's cross-motion for summary judgment, and dismiss plaintiffs' complaints in their entirety.

DATED: May 1, 2003.

Respectfully submitted,

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INDEX TO EXHIBITS

- Exhibit A Excerpt from industry brief in National Mining Association v. U.S. Army Corps of Engineers, D.C. Cir. No. 97-5099 (November 19, 1997)
- Exhibit B Excerpt from attachments to Administrative Record Document # NDm10

EXHIBIT A

Excerpt from industry brief in
National Mining Association v. U.S. Army Corps of Engineers,
D.C. Cir. No. 97-5099 (November 19, 1997)

(CORRECTED)
ORAL ARGUMENT SCHEDULED FOR JANUARY 9, 1998
IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-5099
(and consolidated case 97-5112)

NATIONAL MINING ASSOCIATION, *et al.*,

Appellees,

v.

U.S. ARMY CORPS OF ENGINEERS, *et al.*,
and NATIONAL WILDLIFE FEDERATION, *et al.*,

Appellants.

On Appeal from a Final Judgment of the
United States District Court for the District of Columbia

Brief of Appellees National Mining Association, *et al.*

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ORAL ARGUMENT SCHEDULED FOR JANUARY 9, 1998

STATUTES AND REGULATIONS

Except for the statutes and regulations included in the attached addendum, all applicable statutes and regulations are contained in the addenda to the Brief of the Federal Appellants and the Brief of Appellants National Wildlife Federation, *et al.*

STATEMENT OF THE ISSUES

1. Whether the incidental fallback that accompanies excavation and landclearing activities constitutes the "discharge" of dredged material under Section 404 of the Clean Water Act.
2. Whether the district court improperly granted permanent injunctive relief.

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings, and Disposition in the Court Below.

This is an appeal of a district court decision holding that the U.S. Army Corps of Engineers ("Corps") and the U.S. Environmental Protection Agency ("EPA") ("the agencies") exceeded their authority under Section 404 of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1344, when they adopted a rule expanding the definition of the term "discharge of dredged material." American Mining Congress v. U.S. Army Corps of Eng'rs, 951 F. Supp. 267 (D.D.C. 1997). The rule is known as the "Tulloch rule" because it resulted from the settlement of North Carolina Wildlife Fed'n v. Tulloch, No. C90-713-CIV-5-BO (E.D.N.C. 1992). Where previously the agencies only regulated "any addition of dredged material," the Tulloch rule extended their authority to "any redeposit of . . . excavated material incidental to any activity, including mechanized landclearing, ditching, channelization or other excavation." 33 C.F.R. § 323.2.

EXHIBIT B

Excerpt from attachments to Administrative Record
Document # NDm10



CERTIFICATE OF SERVICE

I hereby certify that the foregoing Cross-Motion of Intervenor-Defendants National Wildlife Federation, *et al.*, for Summary Judgment, and accompanying proposed order, memorandum (with exhibits) and statement of material facts, have been served by United States first-class mail this 1st day of May, 2003, upon the following:

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