

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RECEIVED

JUN 14 2 40 PM '01

NATIONAL ASSOCIATION OF HOME BUILDERS,
Plaintiff,

v.

UNITED STATES ARMY CORPS
OF ENGINEERS, *et al.*,
Defendants,

NATURAL RESOURCES DEFENSE COUNCIL, *et al.*,
Intervenor-Defendants.

N. MAYOR... LINGTON
U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Action No. 00-379 TPJ
(and consolidated cases
00-558 TPJ and 00-1404 TPJ)

MEMORANDUM OF INTERVENOR-DEFENDANTS
NATURAL RESOURCES DEFENSE COUNCIL AND SIERRA CLUB
(1) IN SUPPORT OF CROSS-MOTION
FOR SUMMARY JUDGMENT, AND
(2) IN OPPOSITION TO
PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

Intervenor-Defendants Natural Resources Defense Council and Sierra Club
submit this memorandum in support of their cross-motion for summary judgment and in
opposition to Plaintiffs' motions for summary judgment.

INTRODUCTION

In these cases, industry trade groups challenge government-issued Clean Water
Act permits that authorize pollutant discharges into the nation's rivers, streams, and
wetlands.¹ These industry groups complain that those permits are not permissive enough,

¹ Plaintiffs are National Association of Home Builders ("NAHB"), National Stone Association
(recently renamed the National Stone, Sand and Gravel Association), American Road and
Transportation Builders Association, and Nationwide Public Projects Coalition (collectively,
"NSA"), and National Federation of Independent Business ("NFIB," collectively with co-plaintiff
Wayne Newnam, a home builder and NFIB member).

and should provide much greater permission to pollute. In contrast, Intervenor-Defendants are concerned that the permits are too harmful to the environment, and have intervened to defend against Plaintiffs' efforts to obtain permits that would produce even greater harm.

The goal of the Clean Water Act (the "CWA" or "Act"), 33 U.S.C. §§ 1251 *et seq.*, is to "restore, maintain, and protect the chemical, physical, and biological integrity of the Nation's waters." CWA § 101(a), 33 U.S.C. § 1251(a). To achieve that goal, the most fundamental provision of the Act establishes a baseline standard that "the discharge of any pollutant by any person shall be unlawful." CWA § 301(a), 33 U.S.C. § 1311(a). That baseline prohibition of discharges is subject only to certain specific exceptions.² The exception relevant to these cases is for discharges made in compliance with § 404 of the Act. Section 404 provides that the U.S. Army Corps of Engineers may issue permits to discharge dredged or fill material into waters of the United States. Under § 404(a), the Corps may issue to applicants standard individual permits for such discharges. CWA § 404(a), 33 U.S.C. § 1344(a).

Under § 404(e), the Corps "may," but is not obligated to, "issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment." CWA § 404(e)(1), 33 U.S.C. § 1344(e)(1). "No general permit issued

² Those exceptions were intended to be temporary: the Act declares a national goal that the discharge of pollutants into the waters of the United States be eliminated by 1985. CWA § 101(a)(1), 33 U.S.C. § 1251(a)(1).

under this subsection shall be for a period of more than five years after the date of its issuance.” CWA §§ 404(e)(2), 33 U.S.C. § 1344(e)(2).

General permits issued under § 404(e) — specifically, the package of new permits and permit modifications designed to replace the expired Nationwide Permit 26 (“NWP 26”) — are the focus of this litigation. NWP 26 authorized discharges into a broad set of waters by location (waters above the headwaters,³ and isolated waters) rather than by category of activity. Mounting evidence of the serious destruction of wetlands caused by NWP 26 prompted the Corps to let it expire.

Plaintiffs’ central objection is that the Corps allowed NWP 26 to expire and did not reissue it. They contend that the Replacement Permits Package is invalid, and ask that NWP 26 be reinstated in its stead.

Plaintiffs’ contentions are premised upon a fundamental misunderstanding of the Clean Water Act, and of § 404 and the Corps’ role in particular. In their view, § 404(e) grants them an entitlement to the nationwide permit of their choice, and any less permissive nationwide permit is a burden wrongly imposed upon them. Not so.

Rather, § 404(e) simply grants the Corps the authority, not a duty, to issue general permits: “the Secretary may . . . issue general permits . . . for any category of activities involving dredged or fill material . . .” CWA § 404(e)(1), 33 U.S.C. § 1344(e)(1) (emphasis added). Plaintiffs’ reading of the Act would delete that “may” and replace it with “shall.” See NSA Br. at 29 (the Replacement Permit “rule clearly violates Congress’ intent in enacting section 404(e) and its direction to the Corps to develop a

³ The “headwaters” are those waters located above the point on a stream where the average annual flow is less than five cubic feet per second. 33 C.F.R. § 330.2(d).

streamlined permit program”); NAHB Br. at 43 (“Congress has directed that there be a streamlined program for minimal effects projects, and the Corps must give effect to that clear Congressional intent”) (emphases added). Plaintiffs are wrong: § 404(e)’s use of “may” rather than “shall” reveals that Congress issued no such directive. *See, e.g., U.S. v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655, 662 (1973) (Corps not required to issue a permit, or even establish a permitting program, under § 13 of the Rivers and Harbors Act: “the Secretary need not necessarily permit the deposit, for the proviso makes the Secretary’s authority discretionary—*i.e.*, the proviso provides that the Secretary ‘may permit’ the deposit”); *U.S. v. Alaska*, 503 U.S. 569 (1992) (quoting *Pennsylvania Industrial* and construing the Corps’ authority not to issue permits under § 10 of the Rivers and Harbors Act as equally discretionary); *see also, e.g., Bragg v. Robertson*, 54 F. Supp. 2d 653, 665 (S.D. W.Va. 1999) (“companies’ expectations regarding the [§ 404] permitting process . . . are not rights established by contract, statute or regulation. Instead, they are simple expectations and assumptions that cannot bind and prevent the Corps from exercising its administrative discretion and duties”), *rev’d in part on other grounds*, 248 F.3d 275 (4th Cir. 2001).

Aside from transforming “may” to “shall,” Plaintiffs mangle the statutory text in another important way as well. Specifically, although the term “streamlined” appears nowhere in the text of § 404, Plaintiffs collectively employ the term more than two dozen times, and they also make much of a projected increase of the Corps’ workload. They are asking this Court to substitute a “streamlining” standard of their own making for the standard expressly set forth in the statute: whether authorized activities cause no more

than “minimal adverse environmental effects” and are “similar in nature.” CWA § 404(e)(1), 33 U.S.C. §1344(e)(1).

Finally, Plaintiffs characterize the new and modified NWP as burdens imposed upon them by the Corps. *See, e.g.*, NAHB Br. at 8 (“The Replacement Permits . . . became vehicles for the Corps to *impose* all sorts of new regulatory requirements on routine, everyday activities” that destroy wetlands and degrade streams) (emphasis in original); NSA Br. at 10 (lamenting “[t]he additional burdens and limitations under the Rule”). To the contrary, the NWP program is not an imposition or a burden — it is an exemption from the CWA’s baseline ban on pollutant discharges, and also from the baseline individual permit process established under § 404(a). *Monongahela Power Co. v. Marsh*, 809 F.2d 41, 50 (D.C. Cir. 1987) (“The exemptions to Section 404(a)’s permit program may be briefly categorized. First, the Corps of Engineers may issue general permits in lieu of requiring individual applications . . .”). The Corps has tried to make this point to industry, stating that “[p]ermit applicants must recognize that NWPs are optional permits and if the applicant believes that the NWPs are too restrictive, then he or she can apply for authorization through the individual permit process.” 64 Fed. Reg. 39,273. NAHB’s response was to mock “the agency’s self-perceived largesse,” NAHB Br. at 10 n.8, and to compare the Corps to Marie Antoinette. *Id.* at 43. As discussed above, that response flies in the face of the Act’s text and purpose.

By contrast, the Corps’ response recognizes the statutory provisions that the Corps “may” (not must) issue general permits, and that general permits are limited by express statutory criteria that do not include streamlining, but that prohibit the issuance of permits allowing more than minimal adverse environmental impacts.

ARGUMENT

I. DENIAL OF GENERAL PERMIT AUTHORIZATION IS NEITHER “FINAL AGENCY ACTION” NOR RIPE FOR REVIEW.

No Final Agency Action. Plaintiffs’ claims must be dismissed because they allege no “final agency action.” Judicial review is available under the Regulatory Flexibility Act (“RFA”) and the Administrative Procedure Act (“APA”) only for “final agency action.” 5 U.S.C. §§ 611(a)(1), 704.⁴ Because the new and modified NWRPs do not deny any authorization with finality, the Corps’s issuance of the Replacement Permits Package is not “the sort of ‘deprivation of a right’ or ‘imposition of an obligation’ that constitutes final agency action” for purposes of Plaintiffs’ claims. *See Aluminum Co. of America v. U.S.*, 790 F.2d 938, 941-42 (D.C. Cir. 1986).⁵

The denial of authorization under a general permit is not a final agency action because it “has no binding legal effect” on a “potential permittee,” who may proceed to apply for and receive authorization for a discharge under § 404(a)’s individual permit process. *Avella v. U.S. Army Corps of Engineers*, 1990 WL 84499 at *1 (S.D. Fla. Jan. 22, 1990) (dismissing for lack of final agency action a complaint that the Corps

⁴ This lack of finality is fatal to Plaintiffs’ claims whether the APA’s and RFA’s judicial review provisions are jurisdictional (*see, e.g., Independent Petroleum Ass’n of America v. Babbitt*, 235 F.3d 588, 594 (D.C. Cir. 2001)), or not (*see Califano v. Sanders*, 430 U.S. 99 (1977); *Bruno v. Albright*, 197 F.3d 1153, 1162 (D.C. Cir. 1999)).

⁵ Plaintiffs’ claims concern activities that are not authorized by the Replacement Permits Package, but which might later be authorized by individual permits. By contrast, those activities that the Replacement Permits Package does authorize may proceed without any further action by the Corps. Therefore, the Replacement Permits Package is indubitably a final agency action with respect to the activities that it does authorize. *See, e.g., Sierra Club v. Pena*, 915 F. Supp. 1381, 1392 (N.D. Ohio 1996) (“It is clear . . . that the district courts have jurisdiction under the APA to review the Secretary’s decision that a permit may issue” (citations omitted)), *aff’d sub nom. Sierra Club v. Slater*, 120 F.3d 623 (6th Cir. 1997).

improperly denied authorization under a NWP), *aff'd without op.*, 916 F.2d 721 (11th Cir. 1990). *Accord, Lotz Realty Co. v. U.S.*, 757 F. Supp. 692, 695-96 (E.D. Va. 1990) (Corps' denial of authorization under NWP 26 "has no binding legal effect on the [applicant] as a potential permittee" (quoting *Avella*)); *Industrial Highway Corp. v. Danielson*, 796 F. Supp. 121, 127 (D. N.J. 1992) (denial of authorization under a general permit "can in no real sense be described as 'definitive'"), *aff'd*, 995 F.2d 217 (3d Cir. 1993); *Bragg v. Robertson, supra*, 54 F. Supp.2d at 664 ("Before an agency makes a final determination on the individual permit, no final agency action has occurred" (citing *Industrial Highway*)).⁶

Similarly, Corps orders to cease and desist from discharging are not final agency actions unless and until the Corps seeks to enforce them. *See Lotz, supra*, 757 F. Supp. at 695 (likening pre-enforcement review of a compliance order to review of denial of NWP authorization); *see also, e.g., Fercom Aquaculture Corp. v. U.S.*, 740 F. Supp. 736, 740 (E.D. Mo. 1990) ("In this case, agency fines are only one potential action listed in the letter. An equally potential result appears to be allowing Fercom to continue with its activities after receiving the proper § 404 permit"); *Ryeth v. U.S. E.P.A.*, 13 F.3d 227, 231 (7th Cir. 1993) ("[t]he cease-and-desist letter is not 'final agency action'" (quoting *Howell*

⁶ One circuit court has held that denial of authorization under a nationwide permit was reviewable, concluding without explanation that the denial of NWP authorization was a "separate matter" from the availability of an individual permit. *Riverside Irrigation Dist. v. Stipo*, 658 F.2d 762, 768 (10th Cir. 1981). *Stipo* has not been followed, and even within the Tenth Circuit its reach has been limited to denial of authorization for a specific project proposal. *Child v. U.S.*, 851 F. Supp. 1527, 1534 (D. Utah 1994) (in suit challenging the Corps' assertion of jurisdiction over wetlands, since "Plaintiffs have not sought approval for a particular project, it is completely speculative whether such approval would be granted or denied. Thus, there is no clear, concrete dispute to be decided, as there was in [*Stipo*]"). Similarly, here Plaintiff trade organizations complain not that particular projects have been denied authorization, but more generally about the anticipated impact of the Replacement Permits Package on their members' activities in the future.

v. U.S. Army Corps of Engineers, 794 F. Supp. 1072, 1075 (D. N.M. 1992)); *Leslie Salt Co. v. U.S.*, 789 F. Supp. 1030, 1033 (N.D. Cal. 1991) (Corps' cease-and-desist letters "create no penalties and no obligations not already imposed by the act"); *Route 26 Development Ass'n v. U.S. Government*, 753 F. Supp. 533, 540 (D. Del. 1990) ("Resolution of the problem might be achieved by granting an after-the-fact [§ 404(a)] permit"), *aff'd without op.*, 961 F.2d 1568 (3d Cir. 1992).

Ripeness. This lack of finality also requires that Plaintiffs' claims be dismissed as unripe for review. The D.C. Circuit has explained that "ripeness is imposed to assure that the issues are fit for resolution, i.e., . . . the challenged agency action is sufficiently final to assure that a real controversy exists." *Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers*, 714 F.2d 163, 168 (D.C. Cir. 1983) (emphasis in original) (citations and internal quotation marks omitted). Because the Replacement Permits Package denies no authorization with finality, Plaintiffs' claims are "not 'fit[] . . . for judicial decision'" under the ripeness doctrine. *See Wyoming Outdoor Council v. U.S. Forest Service*, 165 F.3d 43, 50 (D.C. Cir. 1999) (rejecting NEPA challenge to oil and gas leasing procedures as unripe when no leases had yet been issued (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967))). The Corps may authorize by individual permit a discharge for any activity not covered by the NWP's, so Plaintiffs' claims fail to satisfy "the usually unspoken element of the rationale underlying ripeness doctrine: If we do not decide it now, we may never need to." *Id.* at 1431.

As the numerous cases above show, the Corps' issuance of the Replacement Permits Package is neither a final agency action nor ripe for review.

II. THIS COURT CANNOT REINSTATE NWP 26.

Because the Corps' issuance of the Replacement Permits Package is not a final agency action and is unripe, this Court should grant summary judgment in favor of Intervenor-Defendants. In the alternative, Plaintiffs' pleas must be rejected on other grounds. Whatever this Court's views about the merits of Plaintiffs' claims, one thing must be clear at the outset: this Court cannot grant Plaintiffs their desired remedy, the reinstatement of NWP 26.

A. NWP 26 Expired And This Court Lacks Authority To Order Its Reissuance.

1. *Far From Having Been Revoked, NWP 26 Expired.*

Plaintiffs' request for reinstatement is premised upon a fundamentally erroneous characterization of what the Corps has done: NAHB says that "the Corps revoked NWP 26." NAHB Br. at 2; *see also id.* at 13, 14, 33.

To the contrary, as NAHB itself concedes elsewhere in its brief, the Corps "allowed NWP 26 to expire." NAHB Br. at 34, 44; *see also id.* at 11 ("NWP 26 finally expired" on June 7, 2000). NWP 26 therefore "no longer ha[s] any practical or legal effect." *Trustees for Alaska v. U.S. E.P.A.*, 749 F.2d 549, 554 (9th Cir. 1984) (describing expired CWA § 402 permits). Because NWP 26 expired, it is now "null and void." 33 C.F.R. § 330.6(b) (Corps regulations on expiration of nationwide permits).⁷

⁷ NAHB's only support for its contention that the Corps revoked NWP 26 is a cite to 61 Fed. Reg. at 65,875. NAHB Br. at 33 n.31. The only reference on that page to revocation is the statement that "Nationwide Permit 26 will automatically expire 2 years from today's date unless otherwise modified or revoked." (emphasis added). Far from supporting NAHB's argument, this quote refutes it, by evidencing the Corps' position that NWP 26 would expire unless modified or revoked.

Revocation and expiration are markedly different. Revocation means canceling a permit before its expiration date. Because NWP's directly authorize certain activities, under the Corps' regulations it must notify the public of a proposed revocation and seek public comment before revoking such an authorization. 33 C.F.R. §§ 330.4(e), 330.5.

By contrast, no procedure is required for a permit to expire. By its own terms, NWP 26 automatically expired on December 13, 1998. 61 Fed. Reg. 65,875 ("Nationwide Permit 26 will automatically expire 2 years from today's date unless otherwise modified or revoked"); 61 Fed. Reg. 67,324 ("Note, this NWP will expire on December 13, 1998"). In October 1998 and again in September 1999, December 1999, and March 2000, the Corps purported to "extend" the expiration date of NWP 26.⁸ See 65 Fed. Reg. 12,818. At the very latest, pursuant to the terms of the March 2000 "extension," NWP 26 automatically expired on June 5, 2000, as even NAHB concedes. NAHB Br. at 11 ("NWP 26 finally expired that same day").

That automatic expiration is fatal to NAHB's attempt to ascribe the demise of NWP 26 to an affirmative act of revocation by the Corps — a revocation allegedly premised upon the Corps' belief that its statutory jurisdiction extended to all isolated waters inhabited by migratory birds. See NAHB Br. at 14, citing *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 121 S. Ct. 675 (2001) ("*SWANCC*"). NAHB argues at length that the Corps' mistaken understanding of its

⁸ Because NWP expired by its own terms and was not reissued in compliance with applicable procedures and standards, those purported extensions were unlawful. See Comments of Natural Resources Defense Council dated September 3, 1996, 1996AR.PRTG#2083, and July 30, 1998, AR.PRT6-0537. Exhibits 1-2. (Cites to the "1996AR" are to the 1996 documents added to the administrative record in response to Intervenor-Defendants' Motion to Supplement the Record. Because pages are not individually Bates-numbered, the number at the end of a cite refers to the document's number in the index of the 1996AR).

jurisdiction “undermines the Corps’ initial, threshold decision to revoke NWP 26 and infects nearly every decision that followed.” NAHB Br. at 16. However, the Corps’ pre-*SWANNC* understanding of its jurisdiction is simply irrelevant, because NWP 26 expired automatically.

This conclusion is also fatal to NAHB’s further argument that the Corps did not make the findings that § 404(e)(2) requires for the revocation of a permit. NAHB Br. at 34. The Corps did not need to make the findings needed for revocation because it did not revoke NWP 26.

2. ***A Nationwide Permit Can Be Issued Only By The Corps, In Its Discretion, And Only Upon The Making Of Statutorily-Required Determinations.***

Because NWP 26 has expired and is now null and void, this Court cannot “enjoin the expiration of NWP 26” as NAHB and NFIB request in their complaints. NAHB Supp. Compl., Prayer for Relief ¶ 6; NFIB Compl., Prayers for Relief ¶ 3. *See also* NSA First Amended Compl., Prayer for Relief ¶ 5 (asking this Court to “enjoin the Corps from eliminating NWP 26”). Because it is too late to enjoin the permit’s expiration, any such purported retroactive injunction would actually reissue NWP 26. This Court lacks the authority to issue or reissue a nationwide permit, which is a power that Congress granted only to the Corps in § 404(e).

Nor does this Court have the authority to order the Corps to reissue NWP 26 (assuming *arguendo* Plaintiffs’ prayers for relief may be read to so request), for two reasons. First, doing so would usurp the agency’s authority under § 404(e) to determine

which activities, if any, to authorize by general permit. The statutory term “may” cannot be transformed by judicial fiat into a “shall.”

Second, the Corps cannot issue a general permit unless it first “determines that the activities [authorized by the permit] are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse impact on the environment.” CWA § 404(e)(1), 33 U.S.C. §1344(e)(1) (emphasis added). The Corps has made no such determinations about the reissuance of NWP 26. Even supposing *arguendo* that NWP 26 would authorize activities similar in nature and would cause no more than minimal environmental harm, it still could not be reissued because the Corps must first so determine. See, e.g., *Her Majesty the Queen in Right of Ontario v. U.S. E.P.A.*, 912 F.2d 1525, 1529, 1534 (D.C. Cir. 1990) (under Clean Air Act provision requiring an EPA “finding” to trigger pollution control requirements, Administrator’s statements to Senators did not constitute a “finding”); *Environmental Defense Fund v. Thomas*, 870 F.2d 892, 899 (2d Cir. 1989) (under Clean Air Act provision requiring EPA to revise air quality standards “as may be appropriate,” EPA statements did not show that agency “impliedly found revision to be ‘appropriate’”). Here, the Corps has made no such determinations.

B. NWP 26 Fails To Meet The Requirements Of § 404(e) And Thus Cannot Be Reinstated.

Even if the fatal obstacles discussed above could be overlooked, Plaintiffs’ request for reinstatement of NWP 26 must still fail because the permit would violate § 404(e). NWP 26 fails to comply with § 404(e)’s mandate that it not authorize any

category of activities causing more than minimal adverse environmental effects, or that are not similar in nature.

1. ***NWP 26 Would Cause More Than Minimal Adverse Environmental Effects.***

NWP 26 authorized activities that caused more than minimal adverse environmental effects, and would do so again if reissued. In 1996, the Corps implicitly conceded that point. It “acknowledge[d] the concerns, expressed principally by the natural resources agencies and environmental groups, for the potential level of adverse effects resulting from NWP 26 in its present form The Corps agrees that the level of cumulative adverse effects must be reduced and more effectively mitigated.” 61 Fed. Reg. 65,890. The Corps concluded that “eventual replacement of NWP 26 is necessary in order to ensure that in the future no more than minimal adverse effects occur to the waters of the United States, both individually and cumulatively.” *Id.* at 65,891 (emphases added). By a legally dubious action purportedly undertaken to provide “fairness to the regulated public,” the Corps phased out NWP 26 by reissuing it for two years in a “more restrictive and environmentally sensitive form” (reducing the direct areal impact limit to 3 acres and requiring pre-construction notification to the Corps for direct impacts greater than 1/3 acre). *Id.*

Even in that more restrictive and environmentally sensitive form, NWP 26 continued to authorize activities causing more than minimal adverse environmental effects. Specifically, the new NWP 26 continued to authorize the great majority of the activities that the prior version had authorized. Corps data showed that only 10.5% of the activities authorized under NWP 26 had directly impacted more than 3 acres.

1996AR.PRTA#108. Exh. 3. Other data generated by a Corps database had indicated that only 6.6% of fills authorized by NWP 26 were over 3 acres, and that they accounted for only 18% of the total acreage filled. Moreover, those data did not reflect fills smaller than 1 acre: the Corps lacked data about such fills because at that time NWP 26 required no pre-construction notification for them. See Letter of September 3, 1996 from National Wildlife Federation at 44, 1996AR.PRTG#2165. Exh. 4.

Thus, although reducing the acreage limit did reduce the sum total of acres impacted by eliminating especially large fills, it did not minimize the widespread and grave environmental damage caused by the vast majority of fills: those with direct areal impacts under three acres.⁹ As a result, the adverse effects of those smaller fills continued after NWP 26 was reissued with a 3-acre limit.¹⁰

⁹ Before the Corps reissued NWP 26, government natural resources agencies and other commenters warned that more than minimal adverse effects would continue to occur under the lower acreage limits. See, e.g., Letter of July 19, 1996 from U.S. Fish and Wildlife Service, Pennsylvania Ecological Services Field Office at 1, 1996AR.PRTE#12 (agency believes “that NWP 26 does not meet the definition of a general permit, i.e., the individual and cumulative impacts are not minor. . . . Small fills (less than ½ acre in size) are the cause of most wetlands losses in Pennsylvania, and, we suspect, elsewhere”); Letter of September 11, 1996 from U.S. Department of the Interior, Office of Environmental Policy and Compliance at 16, 1996AR.PRTE#43 (“many valuable wetlands . . . are less than 1 acre in size, and resource agency input is critical to identify projects that would adversely affect such high-value areas and which should be evaluated through the individual permit process”); Letter of August 16, 1996 from National Marine Fisheries Service, Attachment at 4, 1996AR.PRTE#19 (“NMFS is convinced that the reauthorization of this NWP . . . with allowance for filling of up to ½ acre without agency review coordination would perpetuate the significant loss of aquatic resources”); Letter of August 30, 1996 from Washington Department of Ecology at 3-4, 1996AR.PRTG#2443 (“We see significant losses occurring with current implementation at one acre threshold let alone 3, 5 or 10 acre threshold. Most current wetland losses occur with less than one acre filled. Some significant wetland losses occur 0.25 acres at a time”). Exhs. 5-8.

¹⁰ For example, a letter from eighteen scientists commented that “[s]mall [acreage] impacts can have significant effects. . . . [The Corps’ NWP approach appears] to rest on the scientifically invalid assumption that small conversions – in particular those under one or three acres – do not have significant environmental effects. Abundant research shows that small, often ephemeral wetlands or streams play special ecological roles that other, larger wetlands cannot.” Letter of August 26, 1998 from Joy B. Zedler, Ph.D., *et al.* at 1, AR.PRT6-2674. See also, e.g., Letter of July 20, 1998 from Washington Department of Fish and Wildlife at 1, AR.PRT6-0899

If NWP 26 were to be reissued again, the more-than-minimal magnitude of those adverse effects would be unaffected by the recent *SWANCC* decision. *SWANCC* held that certain isolated waters fall outside the scope of the Corps' § 404's jurisdiction. NAHB contends that because of *SWANCC*, "the Corps' assessment of the effects of fills authorized under NWP 26 and its decisions whether to extend, modify, or revoke NWP 26 have necessarily considered the effects of fills in isolated waters." NAHB Br. at 13. However, NWP 26 authorized discharges into tributaries and adjacent wetlands above the headwaters as well as into isolated waters, and there is ample evidence in the record that even if limited to discharges into tributaries and adjacent wetlands above the headwaters, NWP 26 would still cause more than minimal adverse environmental impacts.¹¹ Indeed, a number of government natural resources agencies and other commenters specifically referenced the critical importance of protecting streams and wetlands above the headwaters.¹² There can be no serious doubt that — even excluding isolated wetlands —

("Cumulative effects of small wetland losses would continue to impact fish [if NWP 26's expiration date were postponed] . . . Even individual projects authorized under Nationwide Permit [*sic*] could have significant consequences"); Letter of August 24, 1998 from Florida Department of Environmental Protection at 1, AR.PRT6-3280 (noting that in 1997, Florida denied CWA § 401 water quality certification for NWP 26 because it "had the potential to authorize more than minimal individual and cumulative impacts to wetlands"); Letter of August 28, 1998 from Missouri Department of Natural Resources at 1, AR.PRT6-3448 (Corps' replacement permits as then proposed "appear to have the same flaws as the existing NWP 26: they are too broad and have the potential for easily permitting more than minimal impacts"). Exhs. 9-12.

¹¹ Nothing in *SWANCC* suggests that tributaries above the headwaters are outside the Corps' jurisdiction. The Court had previously upheld the regulation that "extends the Corps' authority under § 404 to all wetlands adjacent to navigable or interstate waters and their tributaries." *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 129 (1985) (emphasis added). *SWANCC* recognized the continuing authority of *Riverside Bayview Homes*, but declined to extend its holding to encompass certain isolated waters inhabited by migratory birds. See *SWANCC*, 121 S. Ct. at 680, 682-83.

¹² See, e.g., Letter of September 3, 1996 from South Dakota Department of Game, Fish and Parks at 3, 1996AR.PRTG#2220 ("We have long been concerned with the use and overuse of NWP 26 for activities in headwater streams . . . Cumulative impacts to such streams and

the reissuance of NWP 26 for discharges into tributaries and adjacent wetlands above the headwaters would lead to more than minimal adverse environmental impacts.

Even if this Court does not believe it could definitively find the impacts to be more than minimal, at the very least the compelling corroboration in the record of the magnitude of those impacts underscores what was shown above: absent findings by the Corps that the minimal impacts standard is met, NWP 26 cannot be reissued.

2. *NWP 26 Would Authorize Activities Not Similar in Nature.*

Section 404(e) allows the issuance of a general permit for a “category of activities involving discharges” only if “the activities in such category are similar in nature.” CWA § 404(e)(1), 33 U.S.C. § 1344(e)(1). In violation of the Act, NWP 26 authorized activities of any nature — no matter how dissimilar — as long as the associated discharges were into waters above the headwaters or into isolated waters. The record confirms that the regulated community used NWP 26 for a number of categories of activities quite dissimilar in nature, including but not limited to:

- residential developments;
- transportation activities;

associated impacts to riparian areas have gone unchecked primarily due to the liberal application of NWP 26”); Letter of August 30, 1996 from Ohio Environmental Protection Agency at 3-4, 1996AR.PRTG#2222 (“More than 67% of all stream miles in Ohio are headwater streams. . . . Adequate protection for these valuable resources is very important”); Letter of September 3, 1996 from National Oceanic and Atmospheric Administration, Attachment at 7, 1996AR.PRTE#34 (“headwater wetlands provide crucial habitat for important marine species”); Letter of August 15, 1996 from Indiana Department of Natural Resources at 3, 1996AR.PRTG#308 (“Headwaters of streams and creeks in Indiana are often extremely important to fish production and rearing . . . These are also areas where good water quality must begin”); Letter of September 3, 1996 from New York Department of Environmental Conservation, Attachment at 4, 1996AR.PRTG#2430 (“Small wetlands at or above the headwaters are still vital to New York’s resources”). Exhs. 13-17.

- agricultural activities;
- retail developments;
- industrial developments;
- stormwater facilities;
- impoundments;
- institutional facilities;
- mining activities; and
- channel modification activities.

63 Fed. Reg. 36,041.

Thus, Plaintiffs cannot seriously contend that NWP 26 satisfied § 404(e)'s "activities similar in nature" requirement. Indeed, NSA argues that two types of mining, both of which were authorized under NWP 26, are not activities sufficiently similar in nature to be authorized by the same general permit. NSA Br. at 21-22. The Corps itself implicitly concedes the illegality of NWP 26: "The new and modified NWPs authorize many of the same activities that NWP 26 authorized, but the new and modified NWPs are activity-specific." 65 Fed. Reg. 12,818. NWP 26 was unlawful when it existed, and therefore neither this Court nor the Corps can lawfully reinstate it.

Even if this Court does not believe it could definitively find the authorized activities to be dissimilar in nature, at the very least NWP 26's facial lack of activity-specific authorization, and the documentation in the record that NWP 26 was in fact used for activities quite dissimilar in nature, underscore the point discussed above: absent

findings by the Corps that the “similar in nature” standard is met, NWP 26 cannot be reissued.

III. THE ONLY AVAILABLE REMEDY IS STRIKING OR REMANDING THE REPLACEMENTS PERMITS PACKAGE.

In addition to the reinstatement of NWP 26, Plaintiffs ask that the Replacement Permits Package be struck. If this Court finds that the Replacement Permits Package is unlawful, “the ordinary result is that the [Package is] vacated . . .” *See National Mining Ass’n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (citation omitted). If this Court finds that that the Replacement Permits Package is unsupported by the record, then “the proper course . . . is to remand to the agency for additional investigation or explanation.” *See County of Los Angeles v. Shalala*, 192 F.3d 1005, 1023 (D.C. Cir. 1999) (citation omitted). In either event, Plaintiffs’ claims can generate only one remedy: striking or remanding the entire Replacement Permits Package.

Plaintiffs challenge certain environmentally protective conditions in the Package. However, those conditions are included in the Package to ensure compliance with the minimal impact requirement of § 404(e). If this Court were to strike or remand those conditions, then the authorizations for the discharges must also be struck or remanded. Given the posture of this case, the Replacement Permits Package must either be upheld, or be struck or remanded, in its entirety.

To uphold the discharge authorizations while striking or remanding the mitigative conditions would produce a set of expansive NWPs that the Corps did not intend to issue — thus improperly putting this Court in the position of performing “an essentially

administrative function.” See *North Carolina v. F.E.R.C.*, 730 F.2d 790, 796 (D.C. Cir. 1984) (citation omitted). The Replacement Permits Package authorizes discharges into a far broader set of waters than did NWP 26, which was limited to waters that are isolated or are above a stream’s headwaters. In contrast, most of the new NWPs authorize activities in a much more expansive set of waters: all “non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters.” See, e.g., NWP 40 at 65 Fed. Reg. 12890. Consider the Potomac River. Under NWP 26, the only portion of the river subject to discharges was above the headwaters in West Virginia. Under the new permits, hundreds of additional miles of the river — extending from West Virginia to Washington, DC — are vulnerable to NWP discharges.

In addition to encompassing a broader array of waters, the Replacement Permits Package expanded authorizations under some previously existing NWPs in other ways as well. For example:

- NWP 3 was expanded to authorize the removal of accumulated sediment in the vicinity of existing structures, and to authorize activities associated with the restoration of uplands damaged by storms, floods, or other events (65 Fed. Reg. 12, 841);
- NWP 7 was expanded to authorize maintenance excavation, including dredging, to remove accumulated sediments from outfall structures and associated intake structures and canals (65 Fed. Reg. 12, 843);
- NWP 12 was expanded to authorize utility line substations, foundations for utility line towers, poles, and anchors, and permanent access roads for the construction and maintenance of utility lines (*id.*); and

- NWP 40 was expanded to authorize discharges into non-tidal wetlands for the purpose of increasing agricultural production (65 Fed. Reg. 12, 851).

To mitigate the anticipated adverse effects of these and other expanded authorizations, and to mitigate the documented adverse effects of existing authorizations, the Corps included certain environmentally protective provisions within the Replacement Permits Package. Those provisions are integral to the Package, and fundamental principles of administrative law preclude their severance. “Severance and affirmance of a portion of an administrative regulation is improper if there is ‘substantial doubt’ that the agency would have adopted the severed portion on its own.” *Davis County Solid Waste Mgmt. v. U.S. E.P.A.*, 108 F.3d 1454, 1459 (D.C. Cir. 1997), quoting *North Carolina v. F.E.R.C.*, *supra*, 730 F.2d at 795-96. More than substantial doubt exists here.

“Whether the offending portion of a regulation is severable depends on the intent of the agency and upon whether the remainder of the regulation could function sensibly without the stricken provision.” *MD/DC/DE Broadcasters Ass’n v. F.C.C.*, 236 F.3d 13, 22 (D.C. Cir. 2001) (citation omitted). Here, the Corps made clear that as regards the new NWPs, the environmentally protective provisions of the Replacement Permits Package were critical to the Corps’ determination that the authorized activities would cause no more than minimal adverse environmental effects.¹³ Likewise, as regards the existing NWPs, the Corps determined that without the environmentally protective provisions being added to the Replacement Permits Package, the authorized activities would “have an adverse impact on the environment or such activities [would be] more

¹³ By contrast, if citizens were to challenge any given NWP authorization as unlawful, it could be severed from the Package and struck. As discussed above, the Corps “may,” but is not obligated to, authorize activities by general permit. Therefore, unlike the mitigative conditions, no particular authorization is integral to the legality of the Package, so any authorization is severable.

appropriately authorized by individual permits.” CWA § 404(e)(2), 33 U.S.C. § 1344(e)(2). The Corps stated, for example:

- “The new and modified NWP’s, including the new and modified general conditions, will more clearly address individual and cumulative adverse effects on the aquatic environment and ensure that those adverse effects are minimal . . . [W]e believe it is necessary to add certain conditions to the NWP’s to address potential adverse impacts to the aquatic environment” (65 Fed. Reg. 12,820);
- “[W]e have made several important changes to the new and modified NWP’s. For most of these NWP’s, we have established a 1/2 acre limit. Notification to the district engineer will be required for most activities that result in the loss of greater than 1/10 acre of waters of the United States. For NWP’s 39, 40, 42, and 43, we have established a 300 linear foot limit for filling and excavating streambeds . . . We believe the changes are necessary to ensure the statutory requirement that general permits, including NWP’s, will have no more than minimal adverse effects on the aquatic environment” (*id.* at 12,819);
- “The new and modified NWP’s will not result in significant losses of wetlands because they are conditioned to require prospective permittees to avoid and minimize impacts to waters of the United States” (*id.* at 12,821).

It is thus “impossible to determine from this record” that the Corps would have issued the new NWP’s and expanded existing ones without the mitigative conditions.

Accordingly, the provisions are not severable. *See Chemical Mfrs. Ass’n v. U.S. E.P.A.*, 217 F.3d 861, 867-68 (D.C. Cir. 2000). To uphold the authorizations without the

environmentally protective portions of the Package would be to “exercise an essentially administrative function” for which this Court lacks authority. *North Carolina, supra*, 730 F.2d at 796 (citation omitted). Moreover, the new and expanded discharge authorizations could not “function sensibly” without the conditions, because the authorizations would result in more than minimal adverse environmental effects, in contravention of § 404(e).

IV. THE CORPS HAS THE AUTHORITY TO PROTECT THE ENVIRONMENT BY CONDITIONING PERMITS.

NAHB and NSA argue that the Corps lacks authority to condition the use of nationwide permits upon compliance with three specific measures designed to mitigate adverse environmental impacts. They contend that the Corps lacks authority to “impose” the mitigative conditions concerning water quality management plans in states with water quality protection programs that do not require such plans, and concerning vegetated buffers for projects in or near open waters. NAHB Br. at 34-38, NSA Br. at 36-40. They also challenge a general condition restricting NWP-authorized discharges within the 100-year floodplain. NSA Br. at 30-36; NAHB Br. at 28-31. Plaintiffs’ arguments are meritless.

A. The Corps Has The Authority To Condition the Permits.

The conditions do not “impose” anything on Plaintiffs and their respective members, but simply limit the scope of an exemption from the individual permit program established by the statute itself. *Monongahela Power Co., supra*, 809 F.2d at 50 (the NWP program is an “exemption[] to Section 404(a)’s permit program”). A limitation on an exemption is not an “imposition,” and conditioning the use of that exemption upon

compliance with measures to prevent more than minimal adverse impacts to the environment is certainly within the Corps' authority under § 404(e).

Moreover, the conditions are valid even if evaluated by the same criteria as conditions upon individual permits. The Supreme Court explained the Corps' authority to condition individual permits in *United States v. Alaska, supra*. The State of Alaska applied to the Corps for a permit to construct port facilities under CWA § 404 and under § 10 of the Rivers and Harbors Act. 503 U.S. at 572. The Department of the Interior objected to the permit's issuance because the construction of the port facilities would cause an "artificial accretion to the legal coast line," which in turn could extend seaward the federal-state boundary if Alaska were to lodge a claim pursuant to the Submerged Lands Act. *Id.* at 573. The Corps conditioned the permit upon Alaska's waiver of any claim to the submerged lands within the extended boundary. *Id.*

A unanimous Court, having noted that the issuance or denial of the permit lay within the Corps' discretion, upheld the condition, explaining that:

[i]t would make little sense, and be inconsistent with Congress' intent, to hold that the Corps may legitimately prohibit construction of a port facility, and yet to deny it the authority to seek the less drastic alternative of conditioning issuance of a permit on the State's disclaimer of rights to submerged lands.

Id. at 591.

That commonsense insight is lost on Plaintiffs. The Corps has the authority to decline to issue any nationwide permit for any given category of activities. Yet Plaintiffs would "deny it the authority to seek the less drastic alternative of conditioning issuance of a permit" on measures designed to protect the environment pursuant to § 404(e).

The principle stated in *Alaska* is alone sufficient to require rejection of Plaintiffs' challenges to the Corps' authority to condition permits. As discussed below, those challenges must be rejected for other reasons as well.

B. For Other Reasons, Plaintiffs' Challenges To The Referenced Permit Conditions Must Be Rejected.

1. *Vegetated Buffers.*

NSA argues that the upland buffer condition improperly expands the Corps' jurisdiction to areas that are not "waters," which violates an alleged requirement that "any conditions imposed in a permit must themselves be related to the discharge." *U.S. v. Mango*, 199 F.3d 85, 93 (2d Cir. 1999), quoted in NSA Br. at 39. NSA's argument is baseless. First, as shown above, *Alaska* clearly affirms the Corps' ability to add conditions to a permit that it could properly deny.

Second, the *Mango* test is inapplicable here, where the permits are general ones issued under § 404(e). *Mango* concerned an individual permit issued under § 404(a), which authorizes the Secretary to issue permits for "the discharge of dredged or fill material . . ." CWA § 404(a), 33 U.S.C. § 1344(a). In contrast, the express language of § 404(e) directs the Corps to consider the environmental effects of, and authorizes the issuance of permits for, "activities," not "discharges." See CWA § 404(e)(1), 33 U.S.C. § 1344(e)(1) ("the Secretary may . . . issue general permits . . . for any category of activities . . . if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects . . .") (emphases added); see also, e.g., NAHB Br. at 11 ("In determining whether to issue, restrict, reissue, or withhold a

general permit, the Corps is required to assess the activities that it regulates”) (emphasis added).¹⁴

Third, even under the *Mango* standard, the buffer condition is well within the Corps’ authority: “If a condition requiring the defendants to take measures on dry land reasonably relates to a discharge into the navigable waters, it is valid.” 199 F.3d at 94. See also *Waterwatch of Oregon v. U.S. Army Corps of Engineers*, 2000 WL 1100059 at *9 (D. Or. June 7, 1999) (applying *Mango*’s “reasonably relates” test and upholding fish-protective conditions in permits for construction and operation of pump station, including a limit on acreage irrigated by water from the pump).

Conditions designed to protect water quality, such as the vegetated buffer condition, clearly are reasonably related to a permittee’s discharge. For instance, if a developer fills part of a wetland adjacent to a stream, that fill decreases the wetland’s ability to filter sediment, nutrients, and other pollutants from surface runoff and to slow the flow of such runoff before it enters the stream. That adverse effect upon the stream may be mitigated somewhat by a vegetated buffer, because such “buffers next to streams and other open waters provide many of the same functions that wetlands provide . . . [They] provide the following functions: . . . Reduce adverse effects to water quality by removing nutrients and pollutants from surface runoff . . . [M]oderate storm flows to streams, which reduces downstream flooding and degradation of aquatic habitat . . .

¹⁴ Of course, no permit is required unless the jurisdictional threshold requirement — the existence of a discharge — is met. *National Mining Ass’n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1403 (D.C. Cir. 1998); cf. *PUD No. 1 of Jefferson County v. Washington Dep’t of Ecology*, 511 U.S. 700, 711-12 (1994) (“[CWA] § 401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied”). Once that jurisdictional threshold is crossed, however, § 404(e) expressly directs the Corps to focus on “activities” in deciding which general permits to issue.

[T]rap sediments, thereby reducing degradation of the substrate that provides habitat for fish and other aquatic organisms . . .” 65 Fed. Reg. at 12833.

Thus, it is simply nonsensical to contend, as NSA does, that the buffer condition is “in no way related to the regulated activity of the discharge into the wetlands, despite any similarity in functional protection.” NSA Br. at 39 (emphasis added). Filled former wetlands can no longer provide the functions of slowing water flow and filtering water, but an uplands vegetated buffer — although it cannot replace the value of the lost wetlands — may to some extent limit the adverse effects of that loss by performing similar functions.¹⁵

¹⁵ The record amply corroborates the water quality protection value of vegetated buffers. For instance, EPA — the Corps’ partner agency in administering the § 404 program (*see, e.g.*, §§ 404(b), (c)) — stated that it “fully supports the intent of [General Condition 9] to ensure effective protection of water quality. . . . The requirement for vegetated buffers . . . [should be expanded] to ensure that the water quality function provided by wetlands is not diminished.” Letter of September 9, 1998 from U.S. Environmental Protection Agency, Office of Water, Attachment at 29, AR.PRT6-5227; *see also, e.g.*, Letter of August 31, 1998 from New York State Department of Environmental Conservation, Attachment at 2, AR.PRT6-4463 (“we believe these buffers are critical to maintaining the functional integrity of wetlands”); Welsh, U.S. Forest Service, RIPARIAN FOREST BUFFERS: FUNCTION AND DESIGN FOR PROTECTION AND ENHANCEMENT OF WATER RESOURCES, AR.PRT1-1740 (“Streamside forests can be effective in removing excess nutrients and sediment from surface runoff and shallow groundwater . . . Streamside forests can also ameliorate the effects of some pesticides”); Chagrin River Watershed Partners, Inc., RIPARIAN BUFFERS: TECHNICAL INFORMATION FOR DECISIONMAKERS, AR.PRT6-2799, 2802 (“riparian buffers provide: ▪ Flood Control ▪ Erosion Control ▪ Nonpoint Source Pollution Control ▪ Groundwater Purification ▪ Ecosystem Protection”); Kunzman, Bennett & Johnson, National Park Service, RIPARIAN ECOSYSTEMS: VALUES AND FUNCTIONS, AR.PRT6-5001 (“Riparianlands . . . share biological and physicochemical . . . values with wetlands”); Svejcar, RIPARIAN ZONES: 1) WHAT ARE THEY AND HOW DO THEY WORK?, AR.PRT1-1772 (“Vegetation along streams and lakes may be important in the ‘filtering’ of water before it reaches flowing or standing bodies of water”); Gilliam, RIPARIAN WETLANDS AND WATER QUALITY, AR.PTR1-1818 (research demonstrates that “riparian areas in native vegetation are very important for water quality preservation”). Exhs. 18-24.

2. **100-Year Floodplain.**

NSA argues that the Corps lacks statutory authority to regulate discharges in the 100-year floodplain, and also argues that the general condition concerning certain floodplain activities is arbitrary. NSA Br. at 30-36; *see also* NAHB Br. at 28-31 (arguing that the floodplain condition is arbitrary and irrational). These arguments are wrong.

Corps Authority in the Floodplain. The Corps's floodplain condition does not purport to regulate dry land, but rather, regulates discharges into waters located within the 100-year floodplain. Regulation of discharges of dredged or fill material into waters of the United States is within the core focus of § 404. *See, e.g.*, CWA §§ 404(a), 404(e)(1), 33 U.S.C. §§ 1344(a), 1344(e)(1).

NSA contends that the floodplain condition imposes “restrictions that are . . . inconsistent with the authority granted to the Corps pursuant to the CWA . . .” NSA Br. at 30. That argument is meritless. NSA makes little effort to argue its position, which seems to be that with the floodplain condition the Corps usurps “broad land use regulatory authority to engraft the Corps onto local regulatory decisions.” *Id.*

Taken to its logical conclusion, NSA's position is absurd: that the Corps lacks authority to regulate discharges into waters of the United States wherever such regulation may have some effect upon land use. That is simply not the law. The Corps' floodplain condition is concerned not with “land use,” but with discharges into waters, and the law is clear that — like all other non-isolated waters — those in the floodplain are plainly within the Corps' jurisdiction. *Riverside Bayview Homes, supra*, 474 U.S. 121, 133-34

(wetlands adjacent to navigable waters are within the Corps' § 404 jurisdiction because they are ecologically and hydrologically related to navigable waters).¹⁶

Nonarbitrariness of Floodplain Condition. The administrative record belies Plaintiffs' contention that the provision concerning floodplain discharges is arbitrary. The Federal Emergency Management Agency ("FEMA") — the federal agency responsible for protecting life and property from floods and other natural disasters — recommended that the Corps not authorize any development activities within the 100-year floodplain except by § 404(a) individual permits. Letter of September 10, 1998 from FEMA, AR.PRT6-5191-96. Exh. 28. FEMA stated that it "has serious concerns about the proposed NWP program. Many of the development activities authorized under this proposal could have significant adverse impacts on the Nation's floodplains that would potentially result in increased flood damages," and emphasized that the Corps should "ensure that actions do not harm the natural resources and functions of the floodplains or increase flood damages . . ." *Id.* at 5195. The record also reflects strong

¹⁶ A river's floodplain is, by definition, periodically inundated by that river. 44 C.F.R. § 9.4 (FEMA regulations provide: "*Floodplain* means the lowland and relatively flat areas adjoining inland and coastal waters including, at a minimum, that area subject to a one percent or greater chance of flooding in any given year . . . *Flood* or *flooding* means a general and temporary condition of partial or complete inundation of normally dry land areas from the overflow of inland and/or tidal waters, and/or the unusual and rapid accumulation or runoff of surface waters from any source"). That waters within that floodplain are ecologically and hydrologically related to the river is beyond dispute. *See, e.g.*, Letter of January 7, 1999 from U.S. Department of the Interior, AR.PRT4-2084 ("We support the Corps' effort to limit the use of NWPs within the 100-year floodplain. Floodplain protection is not only vital to protecting public health and safety, it is essential to maintaining fluvial processes and biological functions of riverine systems"); Letter of October 29, 1998 from The Suquamish Tribe, Fisheries Department, AR.PRT4-0036 ("The Tribe also concurs with restrictions on the use of NWPs within the 100-year floodplain. Aquatic resources within the floodplain provide critical water storage for streams that support treaty-reserved resources"); McArthur, AQUATIC AND TERRESTRIAL LINKAGES: FLOODPLAIN FUNCTIONS, AR.PTR6-5030 *et seq.* Exhs. 25-27.

support for floodplain protection from numerous federal, state, and tribal natural resources agencies with relevant experience and expertise.¹⁷

Both NAHB and NSA quote a December 1999 Corps document questioning the proposed floodplain condition. NAHB Br. at 30; NSA Br. at 36 (quoting AR.PRT1-0994-95 (Exh. 34)). Those quotes are out of context: the proposed condition they discuss differed from the condition that the Corps ultimately included in the final Replacement Permits Package. The original proposal would have restricted NWP-authorized discharges in the entire 100-year floodplain. AR.PRT1-0994-95. In response to public and agency comments, the Corps modified the proposal, such that the condition as finally adopted does not prohibit NWP-authorized fills above the headwaters in the “flood fringe” (*i.e.*, the outer region of the floodplain where the flood risk is generally the lowest).¹⁸ 65 Fed. Reg. 12,818 at 12,876-77.¹⁹

NSA also points to speculation in the same December 1999 document that the proposed restriction of NWP use may cause floodplain impacts to increase, because the

¹⁷ A non-exhaustive list includes, for example, U.S. E.P.A. Office of Water (AR.PRT6-5198); The Suquamish Tribe Fisheries Department (AR.PRT4-0036); Illinois Department of Natural Resources (AR.PRT4-0698); Missouri Department of Natural Resources (AR.PRT2-6543); Washington Department of Ecology (AR.PRT2-2566); Indiana Department of Environmental Management (AR.PRT4-1472); Walker River Paiute Tribe (AR.PRT4-1479). Exhs. 18; 26; 29-33.

¹⁸ A schematic at AR.PRT1-1157 shows the difference between the floodway and the flood fringe. Exh. 35. *See also* 44 C.F.R. § 9.4 (defining “floodway” and “flood fringe”).

¹⁹ NSA quotes a draft document for the proposition that “the current NWP program already provides adequate protection to wetlands within 100-year floodplains through the PCN notification process, regional conditioning, and the ability to exercise discretionary authority.” NSA Br. at 36 n.41, quoting AR.PRT1-1055. Exh. 36. However, immediately above the quoted text, that same draft Corps document states that the “Corps agrees that General Condition 27 should . . . allow[] fills within the flood fringe, and restrict[] fills in the regulatory floodway . . .”). AR.PRT1-1055. Allowing fills within the flood fringe above the headwaters, and restricting NWP-authorized fills in the regulatory floodway, is precisely what the final floodplain condition does. 65 Fed. Reg. 12,876-77.

Corps is not constrained by particular acreage limits when issuing individual permits. NSA Br. at 36 (quoting AR.PRT1-0996). But if the Corps is not adequately protecting the environment under § 404(a), it is breaking the law. Specifically, it is ignoring its statutory obligation to comply with the environmentally protective guidelines established under § 404(b), and with the floodplain protection requirements of the Corps' own regulations. *See* 33 C.F.R. § 320.4(l).

Such agency malfeasance in issuing individual permits under § 404(a) is irrelevant to this Court's task of determining whether the challenged § 404(e) general permits are arbitrary, capricious, or otherwise unlawful. If there were malfeasance in the Corps' administration of the § 404(a) program, the proper remedy would be changing the Corps' approach to § 404(a), not subverting the environmentally protective requirements of § 404(e) by issuing permits that violate those requirements.²⁰

Especially in view of the strong support by FEMA and other federal, state, and tribal resources agencies for the floodplain condition, the Corps' adoption of that condition cannot be seen as arbitrary.

3. *Water Quality Protection*

Plaintiffs object to certain water quality protection provisions in General Condition 9, and claim that the Corps ventured beyond its statutory authority in adopting

²⁰ *See, e.g., Whitman v. American Trucking Assn's*, 121 S. Ct. 903, 911 n.4 (2001) ("Respondents' speculation that the EPA is secretly [conducting unauthorized cost-benefit analysis] without telling anyone is irrelevant to our interpretive inquiry. If such an allegation could be proved, it would be grounds for vacating the NAAQS, because the Administrator had not followed the law . . . It would not, however, be grounds for this Court's changing the law" (citations omitted)).

the condition. NAHB Br. at 34-36; NSA Br. at 36-38. They contend, as NSA puts it, that the condition "intrudes upon the exclusive authority granted to the states to regulate water quality" under CWA § 401. NSA Br. at 37.

NWPs are permits issued under the Clean Water Act, and it is ludicrous to contend that the Corps cannot condition their use upon measures designed to keep water clean. Section 401 does not grant "exclusive authority to the states to regulate water quality" as NSA argues. Water quality is a central concern of the entire CWA, which is administered not only by states, but also by the U.S. EPA, the Coast Guard, and of course the Corps.

That central concern for water quality is reflected in § 401, which expressly states that "[n]othing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements." 33 U.S.C. § 1341(b). Plaintiffs cannot seriously contend that § 404 lacks "water quality requirements." For example, § 404 discharges must comply with the environmental protection guidelines established by EPA under § 404(b). *See* 33 U.S.C. § 1344(b); 40 C.F.R. Pt. 230. Similarly, EPA can veto a § 404 permit for a discharge that would "have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas . . . wildlife, or recreational areas." 33 U.S.C. § 1344(c). And, of course, water quality is a central focus of § 404(e)'s requirement that activities conducted under general permits "cause only minimal adverse environmental effects."²¹

²¹ In discussing the 1977 CWA Amendments to § 404, which include §404(e), Congress reiterated that water quality concerns were a central purpose of establishing the § 404 permit program. "Section 404 [of the 1972 CWA] required a permit program to control the adverse effects caused by point source discharges of dredged or fill material into navigable waters

Section 401 requires that an applicant for a federal license to discharge into waters of the United States must obtain certification from the state that the discharge will not violate state water quality standards. 33 U.S.C. § 1341. Section 401 says nothing that reserves to the states the ability to “regulate water quality,” so long as the water quality standards set by the states are met. The suggestion that the Corps cannot condition a Clean Water Act permit upon compliance with measures designed to protect water quality is simply not plausible.²²

4. ***The Tenth Amendment Does Not Speak To Whether Discharges Should Be Authorized By Individual Federal Permits Or General Federal Permits.***

NSA argues that the referenced conditions in the Replacement Permits Package violate the Tenth Amendment by impinging upon local authority over land use planning. NSA Br. at 49. This argument must fail.

including: (1) the destruction and degradation of aquatic resources . . . ; and (2) the contamination of water resources with dredged or fill material that contains toxic substances. The committee amendment is designed to reaffirm this intent . . .” S. Rep. No. 95-370, at 74-75, *reprinted in* 4 Sen. Comm. on Env’t and Pub. Works, 95th Cong., 2d Sess., *A Legislative History of the Clean Water Act of 1977*, at 707-08 (Comm. Print 1978).

²² NSA quotes a Corps regulation stating in pertinent part that § 401 certifications “will be considered conclusive with respect to water quality considerations” under certain circumstances. NSA Br. at 37 (quoting 33 C.F.R. § 320.4(d)). That quote is misleading: the regulation quoted applies to Corps evaluations of permit applications — *i.e.*, it is relevant only to § 404(a) individual permits, not to § 404(e) general permits, for which prospective permittees need not submit any applications. Section 404(e), unlike § 404(a), has a minimal environmental effects standard that often is more stringent than state water quality standards. Moreover, the very regulation cited by NSA provides that § 401 certifications are not to be considered conclusive where “EPA advises of other water quality aspects to be taken into consideration.” 33 C.F.R. § 320.4(d). EPA has so advised in the § 404(b) guidelines (with which all § 404 permits must comply), in which EPA set forth a number of water quality aspects to be taken into consideration. *See, e.g.*, 40 C.F.R. §§ 230.7(a); 230.10(c) (addressing various aspects of degradation of waters). The regulation cited by NSA thus refutes NSA’s federalism argument: by prescribing a role for EPA, it shows the Corps’ view that water quality is indeed a proper matter of federal concern.

NSA's Tenth Amendment claim, like the claims that the permit conditions are beyond the Corps' statutory jurisdiction, mischaracterizes the Replacement Permits Package. The Package does not intrude into state powers, but simply distinguishes between activities that can proceed under one sort of federal permit (nationwide), and those that require authorization under another sort of federal permit (individual). As demonstrated above, the Corps has ample authority to attach conditions to federal permits that it has the authority to deny. *See United States v. Alaska, supra* (the Corps has authority to condition a permit on state's waiver of claim to what otherwise would have been state lands). Indeed, the NWP program is an "exemption" from § 404(a)'s baseline individual permit program. *Monongahela Power Co., supra*, 809 F.2d at 50.

Notwithstanding *Alaska* and other clear precedent, NSA's argument seems to be that the Tenth Amendment confers upon states exclusive jurisdiction over matters that could affect land use decisions. There is no basis for such an expansive reading of the Tenth Amendment. Indeed, the Supreme Court unanimously rejected a Tenth Amendment challenge to a federal law affecting land use, even though the extent of federal "intrusion" was much more extensive than here. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 266, 291 (1981) (upholding statute restricting surface mining and requiring reclamation of mined lands, and rejecting the "suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States' exercise of their police powers" (citations omitted)). *See also Commonwealth of Virginia v. Browner*, 80 F.3d 869, 880-83 (4th Cir. 1996) (following *Hodel* and rejecting Tenth Amendment challenge to Clean Air Act); *Strahan v. Coxe*, 939 F. Supp.

963, 979-80 (D. Mass. 1996) (rejecting Tenth Amendment defense to Endangered Species Act suit challenging state fishing regulations), *aff'd* 127 F.3d 155, 170 (1st Cir. 1997).

In support of its Tenth Amendment argument, NSA cites *SWANCC* for the proposition that “local authority over land use must be preserved, absent clear Congressional direction to the contrary.” NSA Br. at 50. But *SWANCC* rested on statutory — not constitutional — grounds, and thus offers no support for NSA’s Tenth Amendment challenge. *See* 121 S. Ct. 675 at 677-78.

NSA also points to *SWANCC*’s discussion of CWA § 101(b), which states in pertinent part that “[i]t is the policy of Congress to recognize, preserve, and protect the primary responsibilities of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . .” 33 U.S.C. § 1251(b). However, § 101(b), like the Tenth Amendment, does not “plainly limit[] the jurisdiction of the Corps” to issue permit conditions requiring water quality management plans, floodplain protection, and upland vegetative buffers. *See* NSA Br. at 49 (citing § 510 but quoting § 101(b)). As noted above, the *SWANCC* opinion was concerned with whether a federal CWA permit requirement should apply at all to certain waters. The NWPs at issue here, by contrast, are limited to waters of the United States (*see* 65 Fed. Reg. at 12,830: “If the activity does not involve . . . a discharge of dredged or fill material into waters of the United States, . . . no Corps permit is necessary to conduct the activity”), which are by definition subject to the § 404 federal permit requirement. CWA § 502(7), 33 U.S.C. § 1362(7). As indicated above, the NWP decision challenged here simply addresses what kind of federal permit

— individual or general — applies to activities involving discharges into those jurisdictional waters.

Where waters are clearly within the Corps' jurisdiction, § 101 does not trump the specific environmental protection mandates of the CWA, such as that of § 404(e). See *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 178 & n.67 (D.C. Cir. 1977) (§ 101(g), which includes language much more protective of states' authority than that in § 101(b), "was not intended to take precedence over 'legitimate and necessary water quality considerations'"); *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 513 (10th Cir. 1985) (rejecting § 101(g) challenge to Corps' denial of NWP authorization).

Given controlling Tenth Amendment precedent and the proper construction of CWA § 101, NSA's contention that the Replacement Permits Package unlawfully intrudes upon states' rights is simply untenable.

V. THE CORPS HAS THE AUTHORITY TO REGULATE DISCHARGES ASSOCIATED WITH EXCAVATION ACTIVITIES

NSA also argues that the "Replacement Permits exceed the Corps' jurisdiction by attempting to regulate 'excavation' activities." NSA Br. at 17. NSA charges that the "Replacement Permits essentially attempt to reanimate the Tulloch rule" which was set aside in *National Mining Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998). The Tulloch rule defined the "discharge" of dredged material to include "any redeposit," including any redeposit of dredged material associated with excavation and landclearing activities. The court affirmed the setting aside of the Tulloch rule, holding that regulated discharges do not include "incidental fallback." *Id.* at 1404. Incidental

fallback occurs when dredged material is redeposited “virtually to the spot from which it came.” *Id.* at 1403.

Excavation activities often result in regulated discharges. *See, e.g., U.S. v. Deaton*, 209 F.3d 331 (4th Cir. 2000) (ditch excavation that results in redeposit of dredged material alongside of the ditch is properly subject to § 404 regulation); *National Mining Ass’n*, 145 F.3d at 1405 (“plowing, ditching, maintenance, and the like . . . may produce actual discharges”), 1407 (“Most discharges in these three categories [“mechanized landclearing,” “fallback at various distances from the point of removal,” and “resuspension of dredged material in a body of water”] would appear to have been regulable by the Corps before the enactment of the *Tulloch* Rule”). When they do, a § 404 permit is required. At the same time, nothing in the Replacement Permits Package requires a permit for those activities not involving a discharge. The Replacement Permits Package preamble made that very point in response to industry comments, explaining that the Package “addresses only NWP, and in no way affects or alters that geographic or activities-based jurisdiction of the CWA nor is it intended to create new policy related to such jurisdiction . . . No permit is required for excavation activities that do not meet the definition of discharge of dredged or fill material.” 65 Fed. Reg. 12,822-23. The Package thus does not, as NSA claims, “sweep in’ certain activities that do not involve discharges.” NSA Br. at 17. It simply distinguishes those activities involving discharges that may be conducted pursuant to a nationwide permit from those requiring an individual permit.

VI. THE CORPS HAS THE AUTHORITY TO REGULATE DISCHARGES INTO EPHEMERAL STREAMS

NSA argues that the Replacement Permits Package is an “assertion of jurisdiction over discharges into ephemeral streams” which “violates the CWA and is in direct conflict with the Supreme Court’s recent decision” in *SWANCC*. NSA Br. at 13-14. That argument is unfounded. As already explained in the context of NSA’s Tulloch rule argument, the Replacement Permits Package does not attempt to alter the boundaries of the Corps’ jurisdiction, but rather simply identifies categories of activities which — when the Corps does have jurisdiction — may proceed under general rather than individual permits.

The Corps previously had asserted jurisdiction over “tributaries to [navigable and interstate waters],” 33 C.F.R. § 328.3(a)(5), which courts have upheld. See *Riverside Bayview Homes*, 474 U.S. 121, 129 (“The regulation [being upheld] extends the Corps’ authority under § 404 to all wetlands adjacent to navigable or interstate waters and their tributaries” (emphasis added)). Accord, e.g., *U.S. v. TGR Corp.*, 171 F.3d 762, 764-5 (1999); *U.S. v. Ashland Oil and Transp. Co.*, 504 F.2d 1317, 1329 (6th Cir. 1974). See also *Quivira Mining Co. v. U.S. E.P.A.*, 765 F.2d 126, 130 (10th Cir. 1985) (frequently dry arroyos are “waters of the United States” because “during times of intense rainfall, there can be a surface connection between the Arroyo del Puerto, San Mateo Creek, and navigable-in-fact streams”); *Driscoll v. Adams*, 181 F.3d 1285, 1291 (11th Cir. 1999) (CWA applies to small-volume stream flowing only intermittently), *reh’g and reh’g en banc denied without op.*, 196 F.3d 1263 (11th Cir. 1999).

SWANCC does not diminish the Corps’ jurisdiction over such waters. The Court in *SWANCC* declined to extend *Riverside Bayview Homes* to certain isolated, intrastate

waters used as habitat by migratory birds. 121 S. Ct. 675, 682-83. That holding does not affect the applicability of *Riverside Bayview Homes* to ephemeral tributaries. Ephemeral tributaries are not isolated waters: as the Corps explained, “[e]phemeral streams that are part of an interstate surface tributary system are waters of the United States, because they are an integral part of that surface tributary system, which supports interstate commerce.” 65 Fed. Reg. 12823 (emphasis added). In a recent post-*SWANCC* case factually analogous to ephemeral streams, the Ninth Circuit held that irrigation canals intermittently connected to natural streams “are not ‘isolated waters’ such as those that the Court [in *SWANCC*] concluded were outside the jurisdiction of the Clean Water Act . . . [because] they are connected as tributaries to other ‘waters of the United States.’” *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001). *Accord*, *U.S. v. Buday*, 138 F. Supp. 2d 1282, 2001 WL 363702 at *5-*9 (D. Mont. April 11, 2001) (distinguishing *SWANCC* and holding that “waters of the United States” includes tributary streams that are not navigable-in-fact); *see also Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81, 119 (E.D.N.Y. 2001) (confirming, in a post-*SWANCC* decision, that the CWA applies to tributaries that are not navigable-in-fact).

VII. PLAINTIFFS’ REGULATORY FLEXIBILITY ACT CHALLENGE MUST BE REJECTED ON FINALITY GROUNDS AND BECAUSE THE REPLACEMENT PERMITS PACKAGE DOES NOT VIOLATE THE RFA.

NAHB and NFIB both charge that the Replacement Permits Package violates the Regulatory Flexibility Act (“RFA”), 5 U.S.C. §§ 601 *et seq.*, because the Corps failed to observe RFA procedural requirements designed to protect the interests of small businesses. However, judicial review is available under the RFA only for “final agency

actions,” 5 U.S.C. § 611(a)(1), and as demonstrated above in Part I, the issuance of the Replacement Permits Package was not a final denial of authorization to discharge.

Plaintiffs thus fail to state a claim that is cognizable under the RFA.

In any event, the requirements of the RFA do not apply to the Replacement Permits Package, because the new and modified permits “themselves impose no regulations on small entities.” *American Trucking Ass’ns v. Browner*, 175 F.3d 1027 at 1046 (air quality standards regulate small entities only indirectly, by affecting states’ air pollution control plans, so RFA procedures not required), *modified on reh’g on other grounds* 195 F.3d 4 (D.C. Cir. 1999), *rev’d in part on other grounds sub nom.* 121 S. Ct. 903 (2001); *see also Mid-Tex Elec. Coop., Inc. v. F.E.R.C.*, 773 F.2d 327, 340-343 (D.C. Cir. 1985) (because rule directly regulated only large utilities, agency did not violate RFA by failing to consider rule’s impact on utilities’ small business customers).

As explained at length above, the NWP program is not an imposition or a burden on small entities. Rather, as the D.C. Circuit has recognized, the NWP program is an “exemption” to Section 404(a)’s permit program.” *Monongahela Power Co.*, *supra*, 809 F.2d at 50 (emphasis added). Because a small business may apply for an individual permit for any activity not authorized by a general permit, the denial of authorization for an activity under the NWPs “has no binding legal effect on a potential permittee.” *Lotz Realty Co.*, *supra*, 757 F. Supp. at 695-96 (quoting *Avella*, *supra*, 1990 WL 84499 at *1). Plaintiffs’ members may suffer the additional cost and inconvenience of § 404(a) applications, but that results from the Act’s baseline ban on discharges of pollutants (*see* 33 U.S.C. § 1311), not the Replacement Permits Package. An exemption from the Act’s

ban on discharges and from the § 404(a) permitting process does not become an imposition merely because it is a less expansive exemption than Plaintiffs wish.

VIII. THE REPLACEMENT PERMITS PACKAGE DOES NOT VIOLATE THE NONDELEGATION DOCTRINE

Plaintiff NAHB argues that the Replacement Permits Package is unconstitutional because the Corps has read § 404 to allow for “unfettered discretion to adopt, or not, an NWP program or a particular NWP,” which is tantamount to the legislative authority reserved to Congress. NAHB Br. at 23-25. NAHB’s argument is undermined by a recent Supreme Court opinion holding that an agency’s construction of a statute has no bearing upon whether the statute unlawfully delegates legislative authority to the agency.

American Trucking Ass’ns, supra. The lower court had held that EPA’s interpretation of a statute violated the nondelegation doctrine because EPA did not state an intelligible principle guiding its discretion. 121 S. Ct. at 912, citing 175 F.3d 1027 at 1034, 1038. The Supreme Court reversed, stating “[w]e have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute . . . Whether a statute delegates legislative power is a question for the courts, and an agency’s voluntary self-denial has no bearing upon the answer.” *Id.*

Here, NAHB contends not that § 404 itself is unconstitutional — but only that the Corps’ construction of it is unconstitutional. As shown by *American Trucking Ass’ns*, that contention is baseless.

IX. CONCLUSION

For all the foregoing reasons, Intervenor-Defendants' motion for summary judgment should be granted, and Plaintiffs' motions for summary judgment should be denied.

DATED: June 14, 2001

Respectfully submitted,



J. Todd Hutchins (DC Bar No. 458468)
Howard I. Fox (DC Bar No. 322198)
Earthjustice Legal Defense Fund
1625 Massachusetts Ave., NW, Suite 702
Washington, DC 20036
Tel: 202-667-4500
Fax: 202-667-2356

Attorneys for Intervenor-Defendants Natural
Resources Defense Council and Sierra
Club