

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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DISTRICT OF COLUMBIA  
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NATIONAL ASSOCIATION OF HOME BUILDERS,  
Plaintiff,

v.

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

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

NANCY M.  
MAYER-WHITTINGTON  
CLERK

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

**REPLY MEMORANDUM OF INTERVENOR-DEFENDANTS**  
**NATURAL RESOURCES DEFENSE COUNCIL AND SIERRA CLUB**  
**IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT**

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## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS .....	<i>i</i>
INTRODUCTION.....	1
ARGUMENT.....	3
I. NWP 26 HAS EXPIRED AND CANNOT BE REISSUED .....	3
A. NWP 26 Has Expired.....	3
B. This Court Cannot Reinstate NWP 26 or Order the Corps to Do So .....	5
II. THE DENIAL OR CONDITIONING OF A GENERAL PERMIT AUTHORIZATION IS NOT A "FINAL AGENCY ACTION," NOR IS IT RIPE FOR JUDICIAL REVIEW.....	8
III. THE REPLACEMENT PERMITS PACKAGE DOES NOT ATTEMPT TO EXPAND THE CORPS' § 404 JURISDICTION .....	12
IV. CONCLUSION .....	20

Intervenor-Defendants Natural Resources Defense Council and Sierra Club  
("Environmental Intervenors") submit this reply memorandum in support of their cross-motion for summary judgment.

### INTRODUCTION

Plaintiffs' oppositions are remarkable for their failure to address directly the key points raised in Environmental Intervenors' cross-motion. Those key points, which are fatal to Plaintiffs' claims, are that:

- This Court cannot "enjoin the expiration" of NWP 26 because the permit has already expired. Contrary to their opening briefs' concessions that NWP 26 has expired, Plaintiffs now argue that it has not expired because certain projects that were "grandfathered" may still proceed under NWP 26 authorization. They neglect to mention, however, that the grandfather authorization was granted only for projects (1) that commenced before the NWP 26's expiration date, or (2) for which permittees had submitted pre-construction notification ("PCN") to the Corps by March 9, 2000. Thus, for all projects that did not commence before the permit's expiration date or for which permittees did not submit PCN by March 9, 2000 — *i.e.*, all projects at issue in this case — NWP 26 by its own terms has expired and is now null and void. In addition, because NWP 26 expired automatically, the Corps' pre-SWANCC understanding of its jurisdiction had no causal connection to the permit's expiration. Plaintiffs' argument that SWANCC invalidates the expiration of NWP 26, or otherwise supports their challenge to the Replacement Permits Package, must thus be rejected.

- This Court cannot reinstate NWP 26 because doing so would circumvent the unambiguous statutory requirements for the reissuance of a nationwide permit. The Act makes clear that only the Corps — not this Court — is authorized to issue a nationwide permit. The Act also expressly provides that the Corps “may” — not must — issue such a permit, and that to do so the Corps must find that the permit (1) would cause no more than minimal adverse individual and cumulative environmental impacts, and (2) would authorize a category of activities that are “similar in nature.” The Corps made no such findings, and there is nothing in the record that would support such findings.

- Plaintiffs’ claims challenge no “final agency action” and are not ripe for review. Plaintiffs’ attempts to show otherwise overlook the dispositive point that for any discharge not authorized by a NWP, a would-be discharger can still seek authorization by applying for a standard individual permit. Furthermore, there is no merit to Plaintiffs’ claims that the new and modified NWPs “impose” prohibitions upon certain activities involving discharges. To the contrary, the prohibition on discharges is imposed by the most fundamental provision of the Clean Water Act, which establishes a baseline mandate that “the discharge of any pollutant by any person shall be unlawful.” Permits are exceptions to that baseline prohibition — that is, they are, as their name indicates, permits to discharge, not prohibitions.

- Nothing in the Replacement Permits Package alters or purports to alter the scope of the Corps’ jurisdiction. The Package simply delineates which activities — if they are within the Corps’ jurisdiction — may proceed under general rather than individual permits. It does not require any permit for any activity outside the Corps’

jurisdiction, and likewise does not intrude upon matters exclusively reserved to the jurisdiction of the states.

- The express language of the Act, and controlling precedent, demonstrate that the Corps has the authority to condition permits upon compliance with measures designed to protect the environment.

For these reasons, Plaintiffs' claims must be rejected.

## ARGUMENT

### I. NWP 26 HAS EXPIRED AND CANNOT BE REISSUED.

#### A. NWP 26 Has Expired.

Plaintiffs conceded in their opening briefs that the Corps “allowed NWP 26 to expire.” National Association of Home Builders’ (“NAHB”) Opening Br. at 34; *see also id.* at 11 (“NWP 26 finally expired” on June 7, 2000).; National Sand, Stone and Gravel Association, *et al.* (“NSSGA”) Opening Br. at 7 n.6 (“The Replacement Permits became effective on June 7, 2000 and NWP 26 expired on that same day”). Now, perhaps recognizing that this Court cannot reinstate (or order the Corps to reinstate) an expired permit, Plaintiffs instead contend that “the statement that [NWP 26 has] . . . expired is blatantly misleading.” NSSGA Reply Br. at 27 n.17.<sup>1</sup> Whom were Plaintiffs trying to mislead with their own opening briefs?

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<sup>1</sup> NAHB and NSSGA have expressly adopted the arguments in each other’s briefs. *See* NAHB Reply Br. at 36; NSSGA Reply Br. at 1.

In reality, NWP 26 made clear by its own terms that it expired automatically, at the very latest on June 5, 2000. *See* 65 Fed. Reg. 12,818.<sup>2</sup> Thus, to truly “restore the *status quo ante*” as Plaintiffs’ request, *see* NSSGA Reply Br. at 26; NAHB Reply Br. at 2, would simply be to strike the Replacement Permits Package, such that neither NWP 26 nor the Replacement Permits would exist.

Plaintiffs claim erroneously that, because the Replacement Permits Package included a “grandfather” provision, NWP 26 has not expired. *See* NSSGA Reply Br. at 27-28; NAHB Br. at 35-36. The Corps grandfathered only those NWP 26-eligible projects that (1) had commenced before NWP 26’s expiration, or (2) for which permittees submitted pre-construction notification (“PCN”) before March 9, 2000. As to all other projects, NWP 26 expired by its own terms and the Corps does not “treat NWP 26 as an effective nationwide permit.” Because NWP 26 no longer exists as to the nongrandfathered projects, granting Plaintiffs’ request to apply NWP 26 to such projects would constitute the issuance of a new NWP 26 — which exceeds this Court’s authority. *See* Part I.B. below.

Finally, the recent Supreme Court decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 121 S. Ct. 675 (2001) (“*SWANCC*”) is irrelevant to NWP 26’s expiration, which occurred automatically. Contrary to Plaintiffs’ misstatement, the Corps did not “revoke” NWP 26 because of its concern for waters later held by *SWANCC* to be outside the Corps’ jurisdiction. NAHB Reply Br. at 15. As already demonstrated, NWP 26 was not “revoked,” but instead expired automatically by its own terms. *See* NRDC Opening Br. at 9-11. Thus, the permit

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<sup>2</sup> In reality, NWP 26 expired on December 13, 1998, and its subsequent purported “extensions” were unlawful. *See* NRDC Opening Br. at 10 & n.8.

expired not because of the Corps' view of its jurisdiction over certain isolated waters, but simply because of the passage of time.

Stating that NWP 26 expired is thus far from "misleading" as Plaintiffs charge. To the contrary, as discussed below, the permit's expiration confirms why Plaintiffs cannot have their desired remedy, the reinstatement of NWP 26.

**B. This Court Cannot Reinstate NWP 26 or Order the Corps to Do So.**

Because NWP 26 has expired, its reinstatement would constitute the reissuance of the permit. Congress granted the authority to issue or reissue a nationwide permit only to the Corps — not the courts. *See* CWA § 404(e), 33 U.S.C. § 1344(e). Congress also made clear that the Corps "may" — not must — issue or reissue any given NWP. Thus, this Court's equitable power to fashion a remedy is limited by the express terms of the CWA. *See, e.g., Antone v. Block*, 661 F.2d 230, 235 (D.C. Cir. 1981) ("a district court's remedial powers are necessarily limited by a clear and valid legislative command counseling against the contemplated judicial action") (citation omitted); *LaShawn A. v. Barry*, 144 F.3d 847, 853 (D.C. Cir. 1998) (same); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (court's equitable discretion is limited where "Congress [has] intermeve[d] or control[led] the exercise of the courts' discretion"). Because § 404(e) clearly reserves to the Corps the authority to issue or reissue a general permit — which the Corps "may" but is not obligated to do — this Court's power to reissue NWP 26 has been "displaced . . . by a clear and valid legislative command." *U.S. v. Oakland Cannabis Buyers Coop.*, 121 S. Ct. 1711, 1720 (2001). This Court thus lacks the authority to reinstate NWP 26, as well as the authority to order the Corps to do so.

Moreover, the Corps cannot issue or reissue 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). Because the Corps has made no such determinations about the reissuance of NWP 26, reissuance of that permit, even by the Corps itself, would violate the express terms of the statute. Once again, this Court’s equitable power has been “displaced . . . by a clear and valid legislative command.” *Oakland Cannabis Buyers Coop.*, *supra*, 121 S. Ct at 1720.

Plaintiffs argue that the Corps made the statutorily-prescribed findings implicitly: the Corps’ decision to grandfather certain projects, they claim, “amounts to a recognition that the continuation of NWP 26 would not have ‘more than minimal’ adverse impacts . . . . Thus, this Court would not be substituting its judgment for that of the Corps regarding findings under section 404(e) if it reinstated NWP 26 for a limited time because the Corps has already made such findings.” NSSGA Reply Br. at 28-29. This argument is meritless.

First, even if the Corps had made such findings, that would not entitle Plaintiffs to the reissuance of NWP 26. Even where the Corps has made the statutorily prescribed findings, the authority to issue NWPs is still statutorily assigned to the Corps, not this Court. Also, the Act expressly provides that, even where the Corps has made the threshold findings, it “may” — not must — issue a NWP.

In any event, the Corps simply has not made the requisite findings. Plaintiffs argue that the Corps’ decision to grandfather certain projects necessarily implies that the

Corps found NWP 26 to satisfy § 404(e)'s minimal effects requirement. To the contrary, if the mere act of issuing a general permit were deemed to satisfy the findings requirement, that would eviscerate the Act's mandate that the Corps issue no 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 effects on the environment." CWA § 404(e)(1), 33 U.S.C. § 1344(e)(1). Because §404(e)(1) speaks directly "to the precise question at issue, we must give effect to Congress' unambiguously expressed intent" that the agency actually make the requisite findings. *See, e.g., Cyprus Emerald Resources Corp. v. Federal Mine Safety & Health Review Comm'n*, 195 F.3d 42, 45 (D.C. Cir. 1999) (reversing and remanding agency decision because agency failed to make statutorily required "finding that there has been a violation of a mandatory health or safety standard") (internal brackets, quotation marks, and citations omitted).

Finally, Plaintiffs do not even attempt to argue that NWP 26, if reinstated, would satisfy § 404(e)'s requirement that a general permit authorize only a "category of activities" that are "similar in nature." CWA § 404(e)(1), 33 U.S.C. § 1344(e)(1). The record amply documents that NWP 26 authorized a number of activities quite dissimilar in nature. *See* NRDC Opening Br. at 16-18. NWP 26 was illegal when it was in effect, and would be illegal if reissued, because it authorized activities based on location (isolated waters or waters above a stream's headwaters), rather than based on type of activity.

Because NWP 26 was never legally valid under § 404(e)'s "minimal effects" and "similar activities" standards, its grandfather provision — like its several post-1996

“extensions” — is unlawful. Plaintiffs ask this Court to compound one illegality (the grandfathering of certain unlawfully authorized projects) with a far more serious one (the reinstatement of NWP 26).

**II. THE DENIAL OR CONDITIONING OF A GENERAL PERMIT AUTHORIZATION IS NOT A “FINAL AGENCY ACTION,” NOR IS IT RIPE FOR JUDICIAL REVIEW.**

**Finality.** Plaintiffs try mightily to show that they challenge a ripe, final agency action, but their efforts fall short of the mark. Because approval for any given dredge or fill project may be sought by application for an individual permit under § 404(a), the denial or conditioning of authorization under a § 404(e) general permit does not deny or condition permission for such a project with finality.

In other words, Plaintiffs do not challenge any conclusive, substantive outcome; rather, they challenge only the process by which the Corps distinguishes between permissible uses of general permits versus those of individual permits. Plaintiffs themselves concede this point, arguing that an applicant for a CWA-based permit for discharges previously authorized by NWP 26 “must now follow a different legal process to obtain authority to dredge or fill between one-half and three acres.” National Federation of Independent Business *et al.* (“NFIB”) Reply Br. at 13 (emphasis added).<sup>3</sup> As long as there remains an alternative “legal process to obtain authority” by individual permit, denial of authorization under the NWPs does not determine with finality whether any

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<sup>3</sup> NAHB expressly adopts NFIB’s arguments, *see* NAHB Reply Br. at 33 n.20, and therefore so does NSSGA. NSSGA Reply Br. at 1 (“NSSGA Incorporates by reference the Opposition/Reply Memorandum filed by National Association of Home Builders”).

given project will be denied authorization or will be subject to the conditions applicable to NWP.

Numerous judicial decisions confirm this principle, holding that the denial of authorization of a project under a general permit is not a final agency action because the applicant may still apply for an individual permit. *See* NRDC Opening Br. at 6-8. Plaintiffs make little effort to explain away this precedent, and indeed, wholly ignore almost all of it. The only such case that Plaintiffs mention is cited by them for the proposition that “[t]he initial promulgation, or ‘granting,’ of an NWP is an action separate and distinct from the later decision whether an individual applicant is eligible to proceed under an NWP,” from which Plaintiffs conclude that the initial promulgation of a nationwide permit somehow is therefore a final agency action subject to judicial review. NAHB Reply Br. at 5 (citing *Industrial Highway Corp. v. Danielson*, 796 F. Supp. 121, 127 (D. N.J. 1992), *aff’d* 995 F.2d 217 (3d Cir. 1993)). However, in each instance a prospective permittee may apply for an individual permit for any project not authorized by the NWP. Therefore, for purposes of judicial review, the denial or conditioning of NWP authorization is not final agency action.

Plaintiffs also argue that “if this Court does not hear the Plaintiffs’ claims now, they will likely never be heard at all.” NAHB Br. at 6. This argument must be rejected. Congress was entitled to establish a statutory scheme that focuses judicial review on the bottom-line issue (whether an applicant may proceed with a specific discharge, and under what conditions) rather than on what process (general permit or individual permit) is used to decide whether to authorize or condition discharges.

Plaintiffs' resort to judicial precedent is unavailing. Here, applicants have a second bite at the apple — *i.e.*, the opportunity to apply for and be granted an individual permit — that was missing from Plaintiffs' cited cases. *See, e.g., American Forest & Paper Ass'n v. EPA*, 137 F.3d 291 (5<sup>th</sup> Cir. 1998) (reviewing challenge to rule requiring veto of certain CWA § 402 individual permits, where no alternative process for obtaining permits existed) (cited in NAHB Reply Br. at 14); *Columbia Broadcasting System, Inc. v. U.S.*, 316 U.S. 407 (1942) (reviewing challenge to rule requiring denial of certain individual radio station broadcast licenses, where no alternative process for obtaining permits existed) (cited in NAHB Reply Br. at 13).<sup>4</sup>

Indeed, most of the cases relied upon by Plaintiffs involved challenges to the grant of a permit or permit authorization — not the denial. A grant of authorization to discharge is a reviewable final agency action, because the permittee can proceed without further regulatory approval.<sup>5</sup> By contrast, denial of authorization under a NWP is not

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<sup>4</sup> An exception is *Riverside Irrigation District v. Stipo*, 658 F.2d 762 (10<sup>th</sup> Cir. 1981), the only case found by the Parties in which a court ruled that denial of authorization for a project under a nationwide permit was reviewable. *See* NRDC Opening Br. at 7 n.6. The Tenth Circuit offered no explanation for its ruling — much less a cogent reason for not following the abundant contrary precedent — and even within the Tenth Circuit *Stipo*'s reach has been limited to the denial of authorization for a specific project proposal. *Child v. U.S.*, 851 F. Supp. 1527, 1534 (D. Utah 1994). Plaintiffs' facial challenge to the Replacement Permits Package, of course, specifies no particular project that is not authorized by the NWPs, and thus does not fall within the scope of *Stipo* as applied within the Tenth Circuit itself.

<sup>5</sup> *See, e.g., Alaska Center for the Environment v. West*, 157 F.3d 680 (9<sup>th</sup> Cir. 1998) (reviewing environmentalists' challenge to five general permits) (cited in NAHB Reply Br. at 12 n.6); *Sierra Club v. Pena*, 915 F. Supp. 1381, 1392 (N.D. Ohio 1996) ("the district courts have jurisdiction under APA to review" environmentalists' challenge to the Secretary's decision that a § 404 permit may issue) (cited in NAHB Reply Br. at 4-5 & n.2), *aff'd sub nom. Sierra Club v. Slater*, 120 F.3d 623 (6<sup>th</sup> Cir. 1997); *Alaska Center for the Environment v. West*, 31 F. Supp. 2d 714, 718 (D. Alaska 1998) (reviewing environmentalists' challenge to issuance of NWP 29) (cited in NAHB Reply Br. at 4, 5, 12 n.6).

final action, because the opportunity to apply for an individual permit offers prospective permittees a second bite at the apple. See NRDC Opening Br. at 6 n.5.<sup>6</sup>

**Ripeness.** Because — as shown above — denial or conditioning of a NWP authorization is not final agency action, such denial or conditioning is also unripe. See, e.g., *Public Citizen v. Office of the U.S. Trade Representative*, 970 F.2d 916, 921 (D.C. Cir. 1992) (“in the context of APA review [the] criterion of ripeness also requires final agency action”) (citations omitted); *Michigan Public Power Agency v. FERC*, 963 F.2d 1574, 1581 (D.C. Cir. 1992) (“the finality of the agency’s action [is] a prerequisite” to “the fitness of the issues for adjudication” prong of the ripeness test) (citation omitted); *Better Government Ass’n v. U.S. Department of State*, 780 F.2d 86, 88 (D.C. Cir. 1986) (“final agency action” is among the “crucial prerequisites to ripeness”). Thus, because Plaintiffs challenge no final agency action, their claims are unripe.

Plaintiffs argue that the Replacement Permits Package causes their members hardship that ripens their claims. NAHB Reply Br. at 9-15. However, “there is no general hardship exception to the finality requirement.” *Public Citizen, supra*, 970 F.2d at 922 (emphasis added).

In any event, Plaintiffs cannot show that they would suffer hardship if this Court declined to consider their claims. No adverse legal consequences to Plaintiffs’ members flow from the Corps’ issuance of the Replacement Permits Package. That Package is just what it says it is: a set of permits that grant permission to discharge. To the extent that Plaintiffs’ members are adversely affected — *i.e.*, to the extent they are barred from filling wetlands or streams — that effect comes not from the denial or conditioning of

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<sup>6</sup> This case does not involve any of the exceptions to the finality requirement. See, e.g., *Sierra Club v. Thomas*, 828 F.2d 783, 792-97 (D.C. Cir. 1987).

NWPs, but from the CWA itself. The heart and soul of the CWA is § 301(a)'s baseline mandate that, except as provided elsewhere in the Act, "the discharge of any pollutant by any person shall be unlawful." CWA § 301(a), 33 U.S.C. § 1311(a). Thus, it is from the Act itself that any legal consequences will flow. Section 404 permits, including NWPs, simply grant permittees an "exemption" by permitting them to discharge dredged or fill material. *Monongahela Power Co. v. Marsh*, 809 F.2d 41, 50 (D.C. Cir. 1987).

Moreover, even supposing *arguendo* that NWPs themselves prohibit certain discharges, the NWPs would still not cause hardship because, as discussed above, the individual permit process allows Plaintiffs' members a second bite at the apple for any desired discharge not authorized by a general permit.

### III. THE REPLACEMENT PERMITS PACKAGE DOES NOT ATTEMPT TO EXPAND THE CORPS' § 404 JURISDICTION

The preamble to the Replacement Permits Package expressly stated that the Package "addresses only NWPs, and in no way affects or alters the geographic or activities-based jurisdiction of the CWA nor is it intended to create new policy related to such jurisdiction." 65 Fed. Reg. 12822-23 (emphasis added). The Package thus does not, as Plaintiffs claim, define the scope of § 301(a)'s prohibition on discharges, or decide jurisdictional issues concerning the activities or waters covered by § 404.

**Excavation Activities.** This Court may easily dispose of Plaintiffs' claim that the Replacement Permits Package is an attempt to expand the Corps' jurisdiction by unlawfully regulating excavation activities. Instead, the Package simply identifies, from

the universe of activities that already are within the Corps' jurisdiction, a subset that may proceed under NWP's rather than individual permits.

Plaintiffs charge that the Package's "consistent references to 'excavation' is [*sic*] an underhanded means of expanding the definition of 'discharge.'" NSSGA Reply Br. at 17. Not so. The Package consistently refers to excavation activities not for any underhanded or devious purpose, but rather, because in many instances, excavation activities result in discharges. *See, e.g., National Mining Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1405 (D.C. Cir. 1998) ("plowing, ditching, maintenance, and the like . . . may produce actual discharges"); *U.S. v. Deaton*, 209 F.3d 331 (4<sup>th</sup> Cir. 2000) (redeposit of dredged material alongside ditch during ditch excavation constituted a "discharge").

When excavation activities involve discharges, a § 404 permit is required, but the Replacement Permits Package does not require a permit for those activities not involving a discharge. As stated above, the Package's preamble expressly states that the Package does not, and does not purport to, alter the Corps' jurisdiction. Thus, Plaintiffs' claim that the Package "provide[s] an expanded definition of its jurisdiction" to include all excavation activities is demonstrably false. From the universe of excavation activities involving discharges, the Package merely defines a subset that may be conducted pursuant to a nationwide permit, rather than individual permit.

**Ephemeral Streams.** Plaintiffs launch a similar attack, equally meritless, upon the Replacement Permit Package's treatment of discharges into ephemeral streams, which they contend conflicts with the recent *SWANCC* decision. NSSGA Reply Br. at 11. To the contrary, the Replacement Permit Package does not purport to alter the scope of the

Corps' jurisdiction. Rather, from the universe of activities involving discharges into jurisdictional waters,<sup>7</sup> the Replacement Permit Package simply defines a subset that may proceed by general (rather than individual) permits.

Plaintiffs contend that, by using an "ordinary high water mark" test to define ephemeral streams for purposes of the NWPs, the Corps has "essentially 'swept in' all ephemeral streams under the CWA" in excess of the Corps' proper jurisdiction. NSSGA Reply Br. at 12. Plaintiffs further contend that Corps regulations do not include ephemeral streams within jurisdictional "waters of the United States" because the term "intermittent," but not "ephemeral," appears in 33 C.F.R. § 328.3(a)(3). Plaintiffs are wrong. Far from being a "calculated expansion of section 404 jurisdiction [that] works a monumental change to the entire Corps regulatory program," NSSGA Reply Br. at 11-12, the Replacement Permits Package's treatment of ephemeral streams has no effect whatsoever on the Corps' jurisdiction.

Before the Replacement Permits Package was published, the Corps already had asserted jurisdiction over "tributaries to" jurisdictional waters, including tributaries to those intermittent waters and other waters identified in the regulatory subsection cited by Plaintiffs (33 C.F.R. § 328.3(a)(3)). See 33 C.F.R. § 328.3(a)(5) (1999). Thus, Corps regulations already asserted jurisdiction over tributary waters such as ephemeral streams, and courts have consistently upheld this approach. See, e.g., *Quivira Mining Co. v. EPA*, 765 F.2d 126, 130 (10<sup>th</sup> Cir. 1985) (frequently dry arroyos are "waters of the United States" within the Corps' jurisdiction because when wet they are tributaries to navigable-

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<sup>7</sup> Jurisdictional waters under the Act are "navigable waters," which include not only navigable-in-fact waters, but other "waters of the United States." CWA § 502(7), 33 U.S.C. § 1362(7). See also *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131-34 (1985).

in-fact streams); *U.S. v. TGR Corp.*, 171 F.3d 762, 764-65 (2d Cir. 1999) (“non-navigable tributaries of navigable waters qualify as ‘waters of the United States’”); *Driscoll v. Adams*, 181 F.3d 1285, 1291 (11<sup>th</sup> Cir. 1999) (CWA applies to often dry, small-volume stream), *reh’g and reh’g en banc denied without op.*, 196 F.3d 1263 (11<sup>th</sup> Cir. 1999); *see generally* NRDC Opening Br. at 37-38 and cases cited therein.

The Supreme Court’s decision in *SWANCC* does not diminish the Corps’ jurisdiction over tributary waters. *SWANCC* held only that the Corps lacked jurisdiction over certain isolated waters — a holding that does not apply to streams with a surface connection to navigable-in-fact waters. Indeed, *SWANCC* expressly left untouched precedent holding that “Congress . . . wanted to include all waters adjacent to ‘navigable waters,’ such as nonnavigable tributaries and streams,” 121 S. Ct. at 682, and likewise left intact (and simply declined to extend) the Court’s decision in *Riverside Bayview*, in which the Court upheld a regulation that “extends the Corps’ authority under § 404 to all wetlands adjacent to navigable or interstate waters and their tributaries.” *Id.* at 682-83 (citing *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 129 (1985) (emphases added)). By confirming the validity of this precedent, *SWANCC* fully supports Corps jurisdiction over ephemeral streams tributary to traditionally navigable waters.

Cases decided after *SWANCC* properly have concluded that, consistent with *Riverside Bayview* and other cases, nonnavigable tributaries fall within the scope of the CWA permit requirement. *See, e.g., Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1178-79 (D. Idaho 2001) (“Waters of the United States include waters that are tributary to navigable waters . . . Butler and Walker Springs are sufficiently connected through surface water to Clover Creek to fall within the definition of waters of the United

States”); *U.S. v. Interstate General Co.*, 2001 U.S. Dist. LEXIS 8061 at \*8-\*11 (D. Md. June 12, 2001) (upholding Corps jurisdiction over tributaries to navigable-in-fact waters: “[t]he *SWANCC* case is a narrow holding in that only 33 C.F.R. § 328.3(a)(3), as applied to the Corps’ creation of the Migratory Bird Rule, is invalid pursuant to a lack of Congressional intent. . . . Because the Supreme Court only reviewed 33 C.F.R. § 328.3(a)(3),<sup>8</sup> it would be improper for this Court to extend the *SWANCC* Court’s ruling any farther than they clearly intended”); *see generally* NRDC Opening Br. at 37-38 (citing *Headwaters v. Talent Irrigation District*, 243 F.3d 526, 533 (9<sup>th</sup> Cir. 2001); *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81, 199 (E.D.N.Y. 2001), *adhered to on recon.*, 149 F. Supp. 2d 11 (E.D.N.Y. 2001); *U.S. v. Buday*, 138 F. Supp. 1282, 1286-92 (D. Mont. 2001)).

Plaintiffs mention none of these cases except *Headwaters*. Moreover, their discussion of that case concedes that tributaries only occasionally flowing into other jurisdictional waters fall within the Corps’ § 404 jurisdiction: “*SWANCC* was not implicated” in *Headwaters*, Plaintiffs acknowledge, because the waters at issue there “are connected as tributaries to other ‘waters of the United States.’” NSSGA Reply Br. at 16 (quoting *Headwaters*, 243 F.3d 526 at 533) (emphasis added).

Nevertheless, Plaintiffs assert that “[s]ubsequent interpretations of *SWANCC* are consistent with [Plaintiffs’] . . . argument.” NSSGA Reply Br. at 15. Their only alleged authority for that spurious assertion is a case involving spills and leaks of pollutants that seeped into groundwaters, and were not discharged directly into ephemeral streams that were surface tributaries to navigable waters. *See id.* at 15-16; *Rice v. Harken Exploration*

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<sup>8</sup> The *SWANCC* decision did not address the regulatory subsections (§§ 328.3(a)(1), (a)(5), and (a)(7)), upon which Plaintiffs base their challenge to the Replacement Permits Package.

Co., 250 F.3d 264, 265-67 (5<sup>th</sup> Cir. 2001)). *Rice* concerned allegations that such groundwater contamination affected intermittent or ephemeral streams. Having reviewed the evidence, the court determined that “there is nothing in the record that could convince a reasonable trier of fact that either Big Creek or any of the unnamed other intermittent creeks on the ranch are sufficiently linked to an open body of navigable water.” See 250 F.3d at 270-71.

Thus, even assuming *arguendo* that *Rice* was correctly decided, on its facts it simply does not speak to the Corps’ jurisdiction over ephemeral streams that are linked as surface tributaries to navigable-in-fact waters.

In short, at least some ephemeral streams fall squarely within the Corps’ jurisdiction. See 65 Fed. Reg. 12,833 (“Ephemeral 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”); NSSGA Reply Br. at 16 (“*SWANCC* was not implicated, because [the waters at issue] . . . are connected as tributaries to other ‘waters of the United States.’” (quoting *Headwaters*, 243 F.3d 526 at 533)) (emphasis added). The Replacement Permits Package does not attempt to define which such streams are jurisdictional and which, if any, are not. Rather, from the universe of activities affecting jurisdictional ephemeral streams, the Replacement Permits Package simply defines which ones are subject to general — rather than individual — permits.

**States’ Rights and the Corps’ Authority to Protect Water Quality.** Among Plaintiffs’ cheekiest arguments is the meritless contention that the Corps lacks authority to condition NWP’s upon compliance with measures intended to protect water quality,

because doing so would allegedly intrude upon the exclusive jurisdiction of the states. See NAHB Reply Br. at 27-31; NSSGA Reply Br. at 24-26. Plaintiffs' suggestion that the Corps lacks the authority under the federal Clean Water Act to protect water quality is absurd and meritless. As already shown, the Corps has ample authority to condition permits on permittees' implementation of environmentally-protective measures. See generally NRDC Opening Br. at 22-35. Whether invoking CWA § 401's provisions concerning state water quality standards or the Tenth Amendment, Plaintiffs' argument is refuted by applicable case law as well as by the text, purpose, and past 24 years of implementation of the CWA.<sup>9</sup>

The Corps may clearly decline altogether to issue any nationwide permit for any given category of activities, yet Plaintiffs' argument "would deny it the authority to seek the less drastic alternative of conditioning issuance of a permit" upon compliance with water quality protection requirements. See *U.S. v. Alaska*, 503 U.S. 569, 591 (1992) (emphasis added); see also *U.S. v. Mango*, 199 F.3d 85, 94 (2d Cir. 1999) ("If a condition requiring the defendants to take measures upon dry land reasonably relates to a discharge into the navigable waters, it is valid"). Neither § 401 nor any other provision of the Act restricts that authority. To the contrary, the authority — indeed the duty — to protect water quality is inherent in the Corps' § 404(e) mandate to ensure that NWP's cause "only

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<sup>9</sup> Plaintiffs' Tenth Amendment objection to the NWP conditions is simply an extension of their meritless objection that the Corps exceeded its statutory authority. See NSSGA Reply Br. at 25-26 ("In taking actions beyond the scope contemplated by its authorizing statute, and attempting to regulate areas that are not 'waters of the United States,' the Corps has clearly intruded upon the powers 'reserved to the States respectively, or to the people' in violation of the Tenth Amendment"). Therefore, because Plaintiffs' statutory arguments are meritless, their Tenth Amendment argument must fail as well.

minimal adverse environmental effects,”<sup>10</sup> § 404(e)(1), to “set forth the requirements and standards” applicable to NWP-authorized activities, *id.*, and to ensure that NWPs comply with EPA’s 404(b) guidelines (which include water quality protections). *Id.* (“Any general permit issued under this subsection shall . . . be based on the guidelines described in subsection (b)(1) of this section . . .”). The Corps’ duty to protect water quality is thus set forth quite specifically in § 404(e).

Nothing in § 401 (pursuant to which states certify whether specific discharges would comply with state water quality standards) purports to override the above-quoted § 404(e) mandates that the Corps protect water quality and the environment. Indeed, § 401 expressly provides that “[n]othing in this section shall be construed to limit the authority” of any other governmental agency “to require compliance with any applicable water quality requirements,” such as those of § 404(e). CWA § 401(b), 33 U.S.C. § 1341(b).

Moreover, Plaintiffs’ objections to NWP permit conditions, when viewed together, create a “Catch 22.” On the one hand, Plaintiffs argue that, because of § 401 and the Tenth Amendment, the Corps cannot attach water quality conditions to NWPs. On the other hand, they argue that, under *Mango*, § 404 does not authorize the Corps to issue NWPs with conditions that apply outside of “waters.” Thus, if the Corps could neither require water quality conditions nor upland conditions, it would lack authority to place any environmentally-protective conditions on NWPs. That would be an absurd result that conflicts with the Corps’ express statutory authority under § 404(e) to establish “requirements and standards” for general permits to ensure that NWP-authorized projects

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<sup>10</sup> The environment, of course, includes water. *See, e.g.*, 40 C.F.R. § 1508.8 (Council on Environmental Quality regulations, which govern environmental analysis by the Corps and other

cause no more than minimal adverse environmental effects, as well as with binding precedent such as *Alaska*.

Furthermore, contrary to Plaintiffs' implication, conditions protecting water quality are nothing new to the NWP program. Indeed, of the four conditions of the 1977 "inaugural version of NWP 26" cited by NAHB, at least two directly concerned water quality protection: "fills could not contain toxic pollutants," and "fills must be maintained to control erosion and other point sources of pollution." NAHB Reply Br. at 26 (citing 42 Fed. Reg. 37, 1222 at 37, 146 (July 19, 1977)). As Plaintiffs' own arguments show, since their inception general permits have included water quality-based conditions.

Thus, nothing precludes the Corps from seeking to protect water quality and the environment by conditioning NWPs upon compliance with measures concerning water quality management plans, vegetated buffers along open bodies of water, and discharges in floodplains. *See* NRDC Opening Br. at 22-35. Under *Alaska*, *Mango*, and other applicable case law, this Court must reject Plaintiffs' challenges to those conditions.

#### IV. CONCLUSION

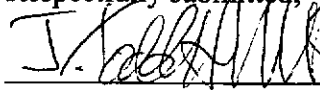
For all the foregoing reasons, Environmental Intervenors' motion for summary judgment should be granted.

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agencies, provide that environmental effects include effects on "water").

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Respectfully submitted,



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