

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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MAYER-ROTTINGEN
CLERK

_____)
NATIONAL ASSOCIATION OF HOME BUILDERS,)
Plaintiff,)
)
)
v.)
)
UNITED STATES ARMY CORPS) Civil Action No. 00-379 (RJL)
OF ENGINEERS, *et al.*,) (and consolidated cases
Defendants,) 00-558 (RJL) and 00-1404 (RJL))
)
NATURAL RESOURCES DEFENSE COUNCIL, *et al.*,)
Intervenor-Defendants.)
_____)

SUPPLEMENTAL 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

July 10, 2002

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

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INTRODUCTION

Intervenor-Defendants Natural Resources Defense Council and Sierra Club (“Environmental Intervenors”) submit this supplemental memorandum opposing Plaintiffs’ motions for summary judgment, and supporting Environmental Intervenors’ cross-motion for summary judgment.

In these consolidated actions, Plaintiffs challenge nationwide permits (“NWP”) issued under § 404(e) of the Clean Water Act (“CWA” or the “Act”) by the U.S. Army Corps of Engineers (the “Corps”) in March 2000 and January 2002. Nationwide permits are general authorizations that allow polluters to discharge dredged or fill material into waters of the United States without having to apply for a standard, project-specific individual permit. Because of the environmental damage caused by such discharges, the Corps changed the NWPs in 2000 by allowing the most widely used permit, NWP 26, to expire automatically, and replacing it with the “2000 Replacement Permits Package,” a series of NWPs that included some environmental protections that NWP 26 had lacked. *See generally* 65 Fed. Reg. 12818 (March 9, 2000).

On January 15, 2002, the Corps published a Final Notice announcing the reissuance of all then-existing NWPs, including those issued in the 2000 Replacement Permits Package, with changes that relaxed some of the NWPs’ environmental protections. 76 Fed. Reg. 2020 (Jan. 15, 2002) (the “2002 Permits Package”). The 2002 reissuance of the NWPs prompted this current round of briefing, in which Plaintiffs state that those recent changes to the NWPs are immaterial to their challenges in these actions, and reiterate arguments already made about the 2000 Replacement Permits Package.

Plaintiffs' new submissions, like their earlier briefs, fail to account for key and fatal flaws in their case:

- Plaintiffs' claims challenge no "final agency action" and are not ripe for review.

Specifically, a would-be discharger whose project does not fall within the scope of an NWP can still apply for a standard individual § 404 permit.

- There is no merit to Plaintiffs' assertion that the NWP promulgations attempt to expand the Corps' jurisdiction. To the contrary, the promulgations simply delineate which activities — if they are within the Corps' jurisdiction — may proceed under general rather than individual permits. They do not require any permit for any activity outside the Corps' jurisdiction.

- Likewise meritless is Plaintiffs' attempt to seek support in the Supreme Court's *SWANCC* decision. The Corps' January 2002 promulgation expressly considers *SWANCC*, and does not sweep into Corps jurisdiction any waters that the Supreme Court held must be excluded.

- Though Plaintiffs criticize the Corps for transgressing the Act's mandate to create a "streamlined" permitting regime, the Act contains no such mandate. Nothing in the Act requires the Corps to issue any general permits. Moreover, if the Corps opts to issue general permits — which it "may," but need not, do — then such permits must encompass only those categories of activities that individually and cumulatively cause no more than minimal adverse environmental effects, and are similar in nature. Plaintiffs' bid to replace these express statutory provisions with a "streamlining" mandate of their own devise must fail.

• Plaintiffs' attempt to weaken the NWP's environmental conditions must likewise fail. 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.

• Finally, Plaintiffs' requests that the Court reinstate NWP 26 must be rejected. That permit has expired and is now null and void. Moreover, only the Corps -- not this Court -- can issue an NWP, and the Corps is not required to do so. To the contrary, the Corps "may" issue an NWP -- but only if it determines that the NWP (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. § 404(e)(1). The Corps made no such findings as to NWP 26, and there is nothing in the record that would support such findings.

ARGUMENT

I. PLAINTIFFS' CLAIMS CHALLENGE NONFINAL AGENCY ACTIONS AND ARE UNRIPE FOR REVIEW.

Plaintiffs' claims must be dismissed because they allege no "final agency action" for which judicial review is available under the Administrative Procedure Act ("APA") and the Regulatory Flexibility Act ("RFA"). 5 U.S.C. §§ 704, 611(a)(1). Specifically, the denial or conditioning of authorization under a § 404(e) general permit does not deny or condition permission for a discharge with finality: the would-be discharger may still apply for an individual permit under § 404(a). Accordingly, 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). Indeed, courts

in a number of cases have dismissed for lack of final agency action complaints that the Corps improperly denied authorization under a NWP. See Environmental Intervenors' 6/14/01 Br. at 6-7 (citing cases).

Similarly, an agency action is inherently unripe for review if it is not final, which the challenged Corps actions here are not. Moreover, even assuming *arguendo* the Corps' actions could be considered final, Plaintiffs' claims are still unripe because they address no agency action from which "rights or obligations have been determined" and from which "legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (internal quotation marks and citations omitted). First, no rights or obligations have been determined, because the individual permit process allows Plaintiffs' members a second bite at the apple for any development project not authorized by a general permit. Second, no adverse legal consequences to Plaintiffs' members will flow from the Corps' issuance of the Replacement Permits Package. To the contrary, the prohibition on discharge is established by the Clean Water Act itself. CWA § 301(a), 33 U.S.C. § 1341(a) ("the discharge of any pollutant by any person shall be unlawful"). Section 404 permits, including NWPs, simply grant permittees an exemption from this baseline prohibition -- and the legal consequences of its violation -- by permitting them to discharge dredged or fill material.

Because Plaintiffs thus challenge nonfinal agency actions, and their challenges are unripe for review, those challenges must be dismissed.

II. PLAINTIFFS' JURISDICTIONAL ARGUMENTS ARE MERITLESS.

Relying primarily on the Supreme Court's *SWANCC* decision, Plaintiffs argue that the NWP promulgations rest on an improperly expansive Corps position concerning

which waters constitute "waters of the United States" subject to CWA jurisdiction. These arguments lack merit.

A. **The Corps' January 2002 NWP Promulgation Expressly Considered SWANCC, And Did Not Assert Jurisdiction Over Waters SWANCC Indicates Are Nonjurisdictional.**

In last year's briefing, NAHB's *SWANCC* argument relied heavily on chronology: specifically, NAHB argued that the March 2000 NWP promulgation was promulgated before the January 2001 *SWANCC* decision and thus had not taken into account *SWANCC*'s view of CWA jurisdiction. NAHB 2/15/01 Br. at 13-17.

NAHB's chronology argument has been undermined by a key development that occurred since the close of last year's briefing: namely, the issuance of the January 2002 NWP promulgation. Unlike its March 2000 predecessor, the January 2002 promulgation was issued after *SWANCC* -- and indeed, contains express discussion of that decision. 67 Fed. Reg. at 2026. Thus, NAHB's chronological argument must be rejected.

NAHB has failed to offer anything of substance to take the place of that obsolete argument. In particular, NAHB has made no showing that the January 2002 promulgation rests on an interpretation of *SWANCC* that sweeps too many waters into CWA jurisdiction. Certainly the mere assertion that "the Corps lacks jurisdiction over isolated waters" (NAHB Supp. Br. at 4) does not constitute such a showing. Nowhere does -- or could -- NAHB show that the January 2002 promulgation interprets the Corps' jurisdiction as encompassing "isolated" waters that are non-jurisdictional under *SWANCC*.

Finally, even if NAHB could surmount these obstacles, its argument would still suffer from the fatal flaws noted in Environmental Intervenors' 2001 briefs. In particular,

NAHB's assertion that "the Corps' decision to revoke and replace NWP 26 was based on factors outside its jurisdiction" (NAHB Supp. Br. at 4) rewrites history. NWP 26 was not "revoke[d]" by the Corps, but rather expired automatically at the end of its term.¹

B. The NWP's Do Not Expand The Scope Of The Corps' Jurisdiction Over Ephemeral Streams.

Plaintiffs NSSGA *et al.* contend that the NWP's assert jurisdiction over ephemeral streams that are outside the scope of CWA jurisdiction. To the contrary, the January 2002 NWP promulgation expressly states: "The NWP's do not establish jurisdiction that does not otherwise exist." 67 Fed. Reg. 2026 (January 15, 2002). *See also* 65 Fed. Reg. at 12822 (March 9, 2000) ("Today's action addresses only NWP's, 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"). Therefore, if there is any ephemeral stream that is not a jurisdictional water under *SWANCC*, nothing in the NWP's purports to assert jurisdiction over such a stream.

NSSGA misstates the import of the Corps' references to OHWMs. The Corps did not claim that an OHWM in and of itself establishes Corps jurisdiction over an ephemeral stream, but rather indicated that streams -- including ephemeral ones -- are jurisdictional waters if they "are tributary to other waters of the United States. . . . Ephemeral streams that are part of an interstate tributary system are waters of the United States, because they

¹ For the same reason, this Court must reject NAHB's spurious argument that the Corps violated § 404(e)(2) by not finding that NWP 26-authorized activities cause adverse environmental impacts, or are more appropriately authorized by individual permits. NAHB Supp. Br. at 14. Those findings are required only for the affirmative revocation of an NWP before its expiration date, not for an NWP's automatic expiration.

are an integral part of that surface tributary system, which supports interstate commerce.” 65 Fed. Reg. at 12823. The Corps' focus on tributary systems was faithful to Supreme Court precedent -- expressly preserved by *SWANCC* -- upholding Corps jurisdiction over "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), discussed in *SWANCC*, 531 U.S. at 170-71.²

In short, (1) the NWP promulgation -- by its express terms -- did not purport to expand the Corps' jurisdiction, and (2) the Corps' discussion of ephemeral streams focused on tributary analysis that is fully consistent with Supreme Court precedent.

III. THE ACT REQUIRES THAT NWPS CAUSE NO MORE THAN MINIMAL ADVERSE ENVIRONMENTAL IMPACTS — NOT THAT THEY “STREAMLINE” THE REGULATORY PROCESS.

Plaintiff NAHB contends that the NWPs “are contrary to law because the Corps ignores Congress’ ‘streamlined permitting’ mandate.” NAHB Supp. Br. at 11. NAHB is doubly wrong. First, the Act authorizes, but does not mandate, issuance of NWPs. § 404(e)(1) (the Secretary “may” issue NWPs). Second, the standard to be applied by the Corps in determining whether to exercise this authority is not one of streamlining. To the contrary, § 404(e)(1) provides that the Corps can issue a NWP only upon determination

² Indeed, far from asserting jurisdiction over nonjurisdictional waters, the Corps has actually done the reverse, suggesting that those ephemeral streams lacking an ordinary high water mark do not constitute waters of the United States. 65 Fed. Reg. 12823 (March 9, 2000). Where ephemeral streams are part of tributary systems, however, they constitute waters of the United States under *Riverside Bayview* and other applicable precedent, and there is no basis for exempting some such waters based on the absence of an OHWM. This issue is not presented here, however, because Plaintiffs claim that the Corps has asserted jurisdiction over too many waters, not too few.

that the "environmental effects" of the authorized activities are no more than "minimal," and that the NWP-authorized activities are "similar in nature." § 404(e)(1).

NAHB's reliance on legislative history discussing the Corps' permitting workload (NAHB Supp. Br. at 12) undermines rather than supports NAHB's argument. Congress was aware of workload issues (as evidenced by the House Report that NAHB cites), but nonetheless enacted a general permit provision that speaks in terms, not of workload or streamlining, but of environmental effect and similarity of activities.

In any event, § 404(e) is clear, and may not be overridden by legislative history, *see, e.g., PanAmSat Corp. v. FCC*, 198 F.3d 890, 895 (D.C. Cir. 1999) -- especially legislative history discussing bill text far different from § 404(e) as enacted.³ *See NWF v. Browner*, 237 F.3d 670, 675 (D.C. Cir. 1991); *Dep't of HUD v. Rucker*, 122 S. Ct. 1230, 1234 n.4 (2002). NAHB's effort to posit an underlying congressional intent to streamline, and to use that alleged intent to override the express terms of § 404(e), must fail. *See, e.g., Sierra Club v. EPA*, 2002 U.S. App. LEXIS 13141 at *12 (D.C. Cir. 2002) ("We reject also the EPA's argument that we must accept its interpretation of the Act in order to give effect to the 'broader congressional intent not to punish downwind areas affected by ozone transport.' The most reliable guide to congressional intent is the legislation the Congress enacted"); *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 374 (1986) ("Invocation of the 'plain purpose' of

³ *See* H.R. Rep. No. 95-139 (1977), reprinted in A LEGISLATIVE HISTORY OF THE CLEAN WATER ACT – Volume 4 at 1217 ("LEGISLATIVE HISTORY") (unlike the environmental effect and similar-in-nature standards prescribed by § 404(e), the House Report cited by NAHB was discussing a bill that would have broadly authorized issuance of such general permits as the Corps found to be in the "public interest").

legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.").

IV. CONDITIONING THE USE OF PERMITS UPON COMPLIANCE WITH ENVIRONMENTAL PROTECTIONS IS WELL WITHIN THE CORPS' AUTHORITY.

A. Requiring Water Quality Protections Does Not Conflict With § 401.

Plaintiffs contend that General Condition 9, which requires water quality planning in certain cases, "would usurp the CWA section 401 powers of the states." NSSGA Supp. Br. at 9; *see also* NAHB Supp. Br. at 12 ("General Condition 9 infringes upon the water quality authority of the States") (internal quotation marks and brackets omitted). That contention is simply wrong. Nothing in § 401 precludes the Corps from acting under the Clean Water Act to protect water quality, as explained thoroughly in last year's briefing. *See* Environmental Intervenors' 6/14/01 Br. at 30-32.

Section 401 requires applicants for certain federal licenses or permits to obtain certification from state authorities that the applicants' activities will not cause violations of state water quality standards. *See* CWA § 401, 33 U.S.C. § 1341. State water quality standards are tailored to the "designated uses" of particular waters, such as fishing, recreational boating, or commercial navigation. CWA § 303(c), 33 U.S.C. § 1313(c). A determination that a given activity will not cause a violation of applicable water quality standards focuses on those topics, and thus does not resolve the broader issue whether the activity will have only minimal adverse individual and cumulative effects on the environment -- including effects on water, which of course forms part of the

environment. To satisfy its § 404(e) obligation to ensure that those environmental effects are minimal, the Corps may properly craft water-quality-based general conditions.

B. The 2002 NWP Promulgation Expressly Links Vegetated Buffers To Water Quality.

Plaintiffs challenge the requirement that certain permittees protect water quality by maintaining vegetated buffers — which filter out sediment and other pollutants — adjacent to open waters. NAHB contends that this requirement bears no rational relationship to the permitted discharge because it applies “regardless of whether a particular project will impact those open waters or streams. 67 Fed. Reg. at 2083, 2086.” NAHB Supp. Br. at 13. To the contrary, the cited portions of the 2002 NWP promulgation clearly explained that vegetated buffers are to be required for “water quality” purposes. 67 Fed. Reg. at 2083 (under NWP 29, “[s]ufficient vegetated buffers must be maintained adjacent to all open water bodies, streams, etc., to preclude water quality degradation due to erosion and sedimentation”) (emphasis added); *id.* at 2086 (under NWP 39, a vegetated buffer “will be determined on a case-by-case basis by the District Engineer for addressing water quality concerns”) (emphasis added). *See also* Environmental Intervenors’ 6/14/01 Br. at 24-26.

C. Plaintiffs’ Attempt To Weaken The NWPs’ Half-Acre Cap Must Be Rejected.

Arguing for a weakening of the half-acre limit applied in various NWPs, NSSGA invokes a 1998 statement by the Corps: “A five acre loss of some relatively low value waters of the United States may constitute a minimal adverse effect in some watersheds while a 1/3 acre loss of high value aquatic resources may be more than minimal in

another geographic area.” NSSGA Supp. Br. at 6 (quoting 1998 Finding of No Significant Impact, AR PRT 9-0144). NSSGA's argument must be rejected.

NSSGA's argument rests on the statutorily untenable assumption that an NWP is arbitrary or unlawful if it excludes any activities with minimal effects. Under § 404(e)(1), however, an NWP cannot issue unless the Corps determines that the adverse environmental effects of the permitted activities are minimal both individually and cumulatively. Assuming *arguendo* that an NWP set at some level higher than a half-acre (for example, at one acre) would encompass a mixture of activities -- some with minimal effects and some with more-than-minimal effects -- then the NWP would fail § 404(e)(1)'s express requirement that the individual and cumulative impacts of authorized activities be minimal. Therefore, NSSGA's argument for weakening the half-acre cap rests on a misreading of the Act's express requirements, and must be rejected.⁴

V. REINSTATEMENT OF NWP 26 IS NOT AN AVAILABLE REMEDY.

Plaintiffs argue that the NWP Package is flawed by alleged arbitrariness and capriciousness, lack of reasoned explanation supported by reference to the record, and other defects, and that the Corps unlawfully failed to define the statutory term “minimal effects.” *See, e.g.,* NAHB Supp. Br. at 9.

Were the Court to accept any of these arguments, the available remedies would be to vacate or remand the NWP Package. *See, e.g., National Mining Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (citation omitted) (affirming

⁴ The question whether the half-acre cap is too high -- *i.e.*, whether it allows activities with more-than-minimal environmental effects -- is not presented here: Plaintiffs challenge the cap as too strict, not too permissive.

vacatur of Corps regulation under § 404); *Allied-Signal v. United States Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (discussing circumstances in which court can remand without vacating).⁵

By contrast, Plaintiffs' primary form of requested relief — either enjoining the expiration, or mandating the reinstatement, of NWP 26 — is beyond this Court's authority to grant. This Court cannot enjoin the expiration of NWP 26 as Plaintiffs have asked, because that permit has long since automatically expired and is now null and void. Environmental Intervenors' 6/14/01 Br. at 9-10. In addition, this Court cannot reinstate NWP 26 because the Act makes clear that only the Corps — not a Court — is authorized to issue a nationwide permit. Environmental Intervenors' 6/14/01 Br. at 11-12. The Act also expressly provides that for the Corps to issue such a permit, it must first 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. § 404(e)(1). The Corps made no such findings as to NWP 26, and there is nothing in the record that would support such findings. Environmental Intervenors' 6/14/01 Br. at 13-16. The lack of such findings, by itself, disposes of Plaintiffs' request that NWP 26 be reinstated. *See, e.g., Gerber v. Norton*, 2002 U.S. App. LEXIS 13144 at *34-*35 (D.C. Cir. 2002) ("When a statute requires an agency to make a finding as a prerequisite to action, it must do so. Merely referencing a requirement is not the same as complying with that requirement. And stating that a factor was considered -- or found -- is not a substitute for considering or finding it. ... Because the Service did not make the

⁵ Because the NWPs' environmentally protective provisions are not severable from those permits' authorizations to discharge, selective vacatur of only those provisions Plaintiffs oppose is not an available remedy. *See* Environmental Intervenors' 6/14/01 Br. at 20-22.

independent finding required by the ESA as a prerequisite to issuance of an incidental take permit, issuance of the permit violated the statute”) (internal quotation marks and citations omitted).

VI. PLAINTIFFS’ OTHER CLAIMS REMAIN MERITLESS.


Plaintiffs make passing reference to other claims that they raised during last year’s briefing, such as that the Corps violated the Regulatory Flexibility Act in issuing the NWP’s, and that the NWP’s violated the nondelegation doctrine. Plaintiffs advance no new arguments in support of these claims, and for the reasons already explained by Environmental Intervenors, *see, e.g.*, Environmental Intervenors’ 6/14/01 Br. at 38-40, those claims are meritless.

CONCLUSION

For all the foregoing reasons, Environmental Intervenors’ motion for summary judgment should be granted, and Plaintiffs’ motions for summary judgment should be denied.

DATED: July 10, 2002

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