

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

**REPLY OF INTERVENOR-DEFENDANTS
NATURAL RESOURCES DEFENSE COUNCIL AND SIERRA CLUB
IN SUPPORT OF SUPPLEMENTAL CROSS-MOTION FOR SUMMARY JUDGMENT,
AND IN OPPOSITION TO PLAINTIFFS' SUPPLEMENTAL
MOTIONS FOR SUMMARY JUDGMENT**

Intervenor-defendants Natural Resources Defense Council and Sierra Club (collectively "NRDC") submit this reply in support of their supplemental cross-motion for summary judgment, and in opposition to plaintiffs' supplemental motions for summary judgment.

Though plaintiffs' memoranda have proliferated into the double digits (six this year plus six last year), none of them seriously engage the fundamental flaws in plaintiffs' position.

- Of key importance, plaintiffs' claims fail to meet finality and ripeness requirements.

First, plaintiffs challenge no final agency action. The Corps' denial of nationwide permit authorization to discharge pollutants into waters of the United States under Clean Water Act § 404(e), 33 U.S.C. § 1344(e), does not represent final denial of permission to undertake any particular discharge, because the would-be discharger can still apply for an individual permit under § 404(a). See NRDC 6/14/01 Mem. at 6-8; NRDC 9/14/01 Mem. at 8-11. Second, plaintiffs' claims are unripe, because (1) they challenge no final agency action, and (2) the

alleged hardships of which they complain flow directly from the baseline statutory prohibition on discharge,¹ not from the Corps' refusal to establish exemptions from that prohibition. See NRDC 6/14/01 Mem. at 8; NRDC 9/14/01 Mem. at 11-12.

- Even if plaintiffs could surmount finality and ripeness obstacles, their desired remedy -- reinstatement of Nationwide Permit 26 -- is beyond this Court's power to grant. Because NWP 26 has expired, plaintiffs' desired remedy necessarily entails issuing NWP 26. This Court's equitable powers, however, do not extend to issuing a general permit -- a power confided by § 404(e) to the Corps. Nor can the Court order the Corps to reissue NWP 26: § 404(e) expressly provides that the Corps "may" -- not "shall" -- issue a general permit. See NRDC 6/14/01 Mem. at 9-12; NRDC 9/14/01 Mem. at 3-5.

Moreover, the Corps' statutory authority to issue a general permit only exists where the Corps "determines" (1) that adverse environmental effects of permitted activities will be "minimal" both individually and cumulatively, and (2) that those activities are "similar in nature." § 404(e)(1). No such determinations have been made with respect to NWP 26, nor could they be made on this record. Accordingly, the Corps lacks authority to issue NWP 26, and the Court cannot order the agency to do so. See NRDC 6/14/01 Mem. at 12-22; NRDC 9/14/01 Mem. at 6-8. See also State of Michigan v. EPA, 268 F.3d 1075, 1081-82 (D.C. Cir. 2001) ("a federal agency ... has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress;" "if there is no statute conferring authority, a federal agency has none;" thus, for example, "in the absence of the conditions set out by" the Clean Air

¹ See Clean Water Act § 301(a), 33 U.S.C. § 1311(a) (with certain enumerated exceptions, "the discharge of any pollutant by any person shall be unlawful") (emphasis added).

Act, the Environmental Protection Agency lacked authority to establish an air pollution permit program).

To these points -- and to others made in NRDC's prior memoranda -- plaintiffs' latest memoranda, like their previous ones, offer nothing of substance.

Finality and ripeness. On the issue of finality and ripeness, National Association of Home Builders (NAHB) seeks support in General Elec. Co. v. EPA, 250 F.3d 377, 380-81 (D.C. Cir 2002), cited in NAHB 8/2/02 Mem. at 4. That case, however, undermines rather than supports plaintiffs' position. There the D.C. Circuit held: "it is clear that the Guidance Document is final agency action because it marks the consummation of the EPA's decisionmaking process and it determines the rights and obligations of both applicants and the Agency." Id. 380 (emphasis added). Here, however, denial of general permit authorization neither represents the consummation of the Corps' decisionmaking process concerning whether any particular discharge can proceed, nor finally determines the rights and obligations of the would-be discharger or the Corps. To the contrary, for any proposed discharge not covered by a general permit, the would-be discharger can still apply for an individual permit.

Moreover, the agency document at issue in General Elec. predetermined substantive outcomes, prescribing how risk analysis was to be conducted in cleanup decisions. See, e.g., id. 384 ("even though the Guidance Document gives applicants the option of calculating risk in either of two ways (assuming both are practical) it still requires them to conform to one or the other, that is, not to submit an application based upon a third way") (emphasis added). By contrast, denial of NWP authorization simply relegates a would-be discharger to the individual permit process, without prejudicing or predetermining the outcome of that process.

For its part, National Stone, Sand and Gravel Association devotes most of its recent memorandum to defending its standing. NSSGA 8/2/02 Mem. at 4-9. However, assuming *arguendo* that NSSGA has standing, it still has not shown, nor could it show, that it is challenging agency action that is final and ripe.

National Federation of Independent Business (NFIB) claims that NRDC's memoranda sweep NFIB's claims under the Regulatory Flexibility Act (RFA) "within Defendants' more general claims that other Plaintiffs' Administrative Procedure Act-based claims are not ripe for judicial review." NFIB 8/2/02 Mem. at 2. To the contrary, NRDC's memoranda also make arguments specific to the RFA, and in particular note that the RFA expressly authorizes judicial review only of "final agency action." 5 U.S.C. § 611(a)(1), cited in NRDC 6/14/01 Mem. at 38-39 and NRDC 7/10/02 Mem. at 3. The denial of NWP authorization to discharge pollutants into waters of the United States is nonfinal, and therefore not reviewable under the RFA. None of the cases cited by NFIB (NFIB 8/2/02 Mem. at 3-5) supports disregarding the RFA's express finality requirement. See 5 U.S.C. § 611(c) (§ 611 of the RFA, the same section that establishes the "final agency action" requirement, further provides: "Compliance or noncompliance by an agency with the provisions of this chapter shall be subject to judicial review only in accordance with this section.") (emphasis added).²

Reasoned decisionmaking. NAHB and NSSGA fault the rationales offered by the Corps for its NWPs. NAHB 8/2/02 Mem. at 2-4; NSSGA 8/2/02 Mem. at 1-2. Because plaintiffs' claims fail as a threshold matter on finality and ripeness grounds, these other issues are not

² NFIB questions the relevance of Bennett v. Spear, 520 U.S. 154 (1997), cited in NRDC 7/10/02 Mem. at 4. But Bennett addresses the test for determining whether agency action is "final," 520 U.S. at 177-78 -- obviously, a highly relevant inquiry under a statute like the RFA that expressly conditions judicial review upon the existence of "final agency action."

properly before the Court. Even if they were, NAHB's and NSSGA's desired remedy for these alleged deficiencies -- reinstatement of the expired NWP 26 -- is unavailable. See p. 2-3, supra.

"Waters of the United States." NSSGA argues that the NWPs sweep ephemeral waters into the Corps' jurisdiction. NSSGA 8/2/02 Mem. at 3. To the contrary, the NWPs expressly disclaim any intent to expand the Corps' jurisdiction. NRDC 7/10/02 Mem. at 6 (quoting NWP preambles).

Moreover, there is no merit to NSSGA's assertion (NSSGA 8/2/02 Mem. at 3) that the NWPs represent the "first time" ephemeral waters have been characterized as "waters of the United States." The very regulation NSSGA itself cites -- the Corps' regulatory definition of "waters of the United States" (cited in NSSGA 8/2/02 Mem. at 3) -- expressly encompasses a broad array of waters, including *inter alia* waters used or usable in interstate or foreign commerce, tidal waters, interstate waters, rivers, lakes, and streams, 33 C.F.R. § 328.3(a)(1) to (4) -- as well as "[t]ributaries" of those waters. 33 C.F.R. § 328.3(a)(5). No exemption is made for ephemeral tributaries, so such tributaries are expressly covered by § 328.3(a)(5),³ which predates the NWPs challenged here. The regulation's inclusion of tributaries is fully proper under court precedent such as Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001). See NRDC 6/14/01 Mem. at 37-38; NRDC 9/14/01 Mem. at 14-17.

NSSGA does not deny that many ephemeral streams are tributaries of larger waterbodies, or that § 404 jurisdiction properly extends to such tributary ephemeral streams. To the contrary,

³ See, e.g., National Public Radio v. FCC, 254 F.3d 226, 229 (D.C. Cir. 2001) (rejecting claim that a statutory provision broadly encompassing licenses issued to educational broadcasters was "silent" as to a specific subset of such licenses: "general rules need not list everything they cover").

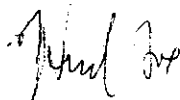
NSSGA apparently objects only to jurisdiction over nontributary ephemeral streams. NSSGA 2/14/01 Mem. at 16 ("Under SWANCC, an ephemeral stream that lacks a surface connection to a navigable water is not itself a 'navigable' water, regardless of the presence of an OHWM [ordinary high water mark].") (emphasis added).

In short, it is undisputed that many ephemeral waters are "waters of the United States" that are properly within the Corps' § 404 jurisdiction. To the extent that some ephemeral waters are not jurisdictional, nothing in the NWP decisions requires a permit for discharges into such waters. Because the NWPs in no way prevent NSSGA's members from protecting their lawful interests, NSSGA's ephemeral waters argument (assuming *arguendo* it surmounts the finality and ripeness obstacles discussed above) must be rejected.

For the reasons stated above and in NRDC's prior memoranda, NRDC's cross-motion and supplemental cross-motion for summary judgment should be granted, and plaintiffs' motions for summary judgment should be denied.

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Respectfully submitted,



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