

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF HOME BUILDERS,)

Plaintiff,)

v.)

UNITED STATES ARMY CORPS OF)
ENGINEERS, et al.,)

Defendants)

No.: CV 00-379 (TPJ)

NATIONAL STONE ASSOCIATION, et al.,)

Plaintiffs,)

v.)

UNITED STATES ARMY CORPS OF)
ENGINEERS, et al.,)

Defendants)

No.: CV 00-558 (TPJ)

NATIONAL FEDERATION OF INDEPENDENT)
BUSINESSES and WAYNE NEWMAN,)

Plaintiffs,)

v.)

UNITED STATES ARMY CORPS OF)
ENGINEERS, et al.,)

Defendants.)

No.: CV 01-404 (TPJ)

PLAINTIFF NATIONAL ASSOCIATION OF HOME BUILDERS' MEMORANDUM
IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN
REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT

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GLOSSARY

APA	Administrative Procedure Act
AR	Administrative Record
CWA	Clean Water Act (Federal Water Pollution Control Act)
IWR	Institute for Water Resources
NAHB	National Association of Home Builders
NWP	Nationwide Permit
PCN	Pre-Construction Notification
RFA	Regulatory Flexibility Act
<i>SWANCC</i>	<i>Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers</i> , 121 S. Ct. 675 (2001).

I. INTRODUCTION

If it were not already clear from the face of the record, the Government's Memorandum in Opposition has made it so: The United States Army Corps of Engineers (the "Corps") has no explanation for the decisions underlying its Replacement Permit Rule.¹ Nowhere does the administrative record provide a reasoned basis for the multitudinous conditions and restrictions the Corps has imposed on the replacement and remaining Nationwide Permits ("NWP"). Not surprisingly, the Defendants' briefs cannot further enlighten this Court.

Unable to point to specific, objective, and rational support in the record for the abandonment of NWP 26 or for the Replacement Permit Rule's conditions and restrictions, the Corps instead grasps at finality and ripeness. Alternatively, the Corps hides behind *Chevron*, and asks this Court simply to excuse the Corps' failure to justify its regulations because they are, even if unexplained and unjustified, nonetheless somehow "reasonable." The Corps cannot so easily avoid judicial scrutiny.

First, the Corps' finality and ripeness arguments are a red herring, which should not long detain this Court. As their name implies, the NWPs are "permits," and the grant, denial, or conditioning of a permit is final, ripe agency action. The Replacement Permit Rule is ready for review now.

Moreover, once exposed to scrutiny, the Rule cannot survive the careful examination that the Administrative Procedure Act ("APA"), the Supreme Court, and this Circuit require. The administrative record is bereft of basic, objective, and scientific support for the restrictions the

¹ This Memorandum will use the "Replacement Permit Rule" to describe, collectively, the Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed. Reg. 12,818 (Mar. 9, 2000), and the Final Notice of Modification of Nationwide Permit 29 for Single Family Housing, 64 Fed. Reg. 47,175 (Aug. 30, 1999).

Corps has imposed. The Corps' continued failure to engage the National Association of Home Builders' ("NAHB's") many examples of the irrational and unsupported nature of the Replacement Permit Rule only perpetuates the Corps' erroneous position throughout the administrative proceedings.

The Corps evidently believes that it has the authority to do virtually whatever it wishes to the NWP's, justified only with a "because we said so." This is repugnant to even minimal standards of administrative law. The Corps must exercise its discretion consistent with the mandates of the Clean Water Act ("CWA") and the APA, within the limits of its jurisdiction, and according to established legal principles. The Corps has done none of these things. The Replacement Permit Rule is arbitrary, capricious, unreasoned, and illegal. It must be vacated, and the *status quo ante* restored.

II. ARGUMENT

A. **The Grant, Denial, and Conditioning of a Permit are Final Agency Actions. These NWP's Have Been Finally Promulgated, and they are Ripe for Review.**

As their name indicates, the NWP's are "permits." This Court unquestionably has jurisdiction to review the Corps' issuance of permits. And, once issued (as the NWP's now are), a permit is final and ripe for review. The Corps' contention that it retains discretion under these permits is merely a smokescreen. NAHB's claims — that the Corps exceeded its statutory authority in crafting these permits, failed to offer a reasoned basis for these permits, and included arbitrary and irrational conditions and restrictions in these permits — are pure questions of law based solely on the four corners of the rulemaking record. These threshold legal issues will not be affected by any future exercises of discretion. They are ready to be decided now.

Indeed, waiting for hypothetical future proceedings will likely ensure that NAHB's claims are never heard at all — a state of affairs that, while perhaps appealing to the Corps,

would be inconsistent with our system's presumption of judicial review, as well as with basic notions of due process, justice, and fair play. NAHB's claims are not amenable to consideration, as the Corps would have it, in hundreds of future reviews of *individual permit* decisions, in which hundreds of disappointed *individual permittees* raise discrete complaints regarding the long-cold administrative record from the *nationwide permit* rulemaking. To relegate NAHB's claims to such piecemeal, remote, and unwieldy proceedings would effectively insulate the Corps' present actions from review. The Corps' attempted evasion must be rejected.

1. **The Grant, Denial, and Conditioning of a Permit is Final, Ripe Agency Action.**

On August 30, 1999, the Corps issued its "*Final Notice of Modification of NWP 29*," and on March 9, 2000, its "*Final Notice of Issuance and Modification of Nationwide Permits*." 64 Fed. Reg. at 47,175; 65 Fed. Reg. at 12,818 (emphases added). Declaring that "these Nationwide Permits *are issued*," 65 Fed. Reg. at 12,885 (emphasis added), the Corps has ultimately (and finally) determined that activities affecting less than 1/10 of an acre may proceed without further federal authorization; activities affecting between 1/10 and 1/2 of an acre must go through the 75-day "pre-construction notification" ("PCN") process, comply with numerous substantive and procedural conditions, and obtain authorization to proceed under a nationwide permit; and activities affecting more than 1/2 of an acre must submit to the lengthy and rigorous individual permit process. If NAHB's members fail to follow the Corps' rules, they will be subject to civil sanction, criminal sanction, and citizen suits. See 33 U.S.C. §§ 1319, 1365.

Thus, as the Intervenor-Defendants recognize, these permits have direct and automatic effects, authorizing certain activities to proceed immediately "without any further action by the Corps." Intervenor-Defendants' Cross-Motion for Summary Judgment at 6 n.5 ("Intervenors' Mot."). See also *Riverside Irrigation Dist. v. Stipo*, 658 F.2d 762, 764 (10th Cir. 1981) ("A

nationwide permit is automatic[,] which means that if one qualifies for such a permit no application is needed nor [in some circumstances] must notice be given before beginning the discharge activity.”); *Shelton v. Marsh*, 902 F.2d 1201, 1204-05 (6th Cir. 1990) (same); *National Wildlife Federation v. Marsh*, 721 F.2d 767, 772-73 & n.7 (11th Cir. 1983) (“Nationwide permits are those *issued by regulations* and requiring no separate permit application.” (emphasis added)); see also *Alaska Center for the Environment v. West*, 31 F. Supp. 2d 714, 718 (D. Alaska 1998) (“Where a general permit applies to a proposed fill, ‘the applicant needs merely to comply with its terms, and no further action by the [Corps] is necessary.’” (quoting 40 C.F.R. § 230.5(b))).

“It is clear . . . that the district courts have jurisdiction under [the] APA to review the Secretary’s decision that a permit may issue.” *Sierra Club v. Pena*, 915 F. Supp. 1381, 1392 (N.D. Ohio 1996) (citations omitted), *aff’d sub nom. Sierra Club v. Slater*, 120 F.3d 623 (6th Cir. 1997).² Included in that jurisdiction is the authority to review a permit’s terms and conditions. The Corps itself acknowledges, in the individual permit context, that courts have the authority to review the grant, denial, or conditioning of § 404 permits. See Memorandum in Support of Defendants’ Cross-Motion for Summary Judgment and in Opposition to Plaintiffs’ Motions for Summary Judgment (“Memorandum in Opposition,” or “Mem. Opp’n”) at 25 (stating that an applicant has a ripe case once it “has its application denied or unacceptably conditioned”). Indeed, the Corps’ finality and ripeness arguments depend on this proposition. In arguing that its

² In *dictum*, *Sierra Club* also states that the decision to deny a permit is not reviewable. See 915 F. Supp. at 1392. And the Intervenor-Defendants embrace that one-sided vision of justiciability, hoping to preserve their right to challenge NWP’s while cutting off the rights of the Plaintiffs. Intervenor’s Mot., at 6 n.5. But that is not the law. The wrongful denial of a permit is also reviewable. See *City of Bedford v. FERC*, 718 F.2d 1164, 1168 (D.C. Cir. 1983) (Scalia, J.). For the opposite proposition, the District Court of Ohio erroneously relied upon three cases involving Corps decisions not to revoke issued permits and not to enforce permit conditions —
(continued . . .)

actions are not final and that this case is not ripe, the Corps simply ignores the fact that the Replacement Permits are themselves “permits,” and that, when they are granted, denied, or conditioned, they are subject to the same right of review. See *Alaska Center for the Environment*, 31 F. Supp. at 720 n.6 (rejecting a ripeness objection to a facial challenge to NWP 29 — one of the permits at issue in this case — on the ground that “[t]his argument overlooks the essence of NWP 29”).

The decision in *Industrial Highway Corp. v. Danielson*, 796 F. Supp. 121 (D.N.J. 1992), *aff'd*, 995 F.2d 217 (3d Cir. 1993), relied on by the Corps, makes this point plainly. The plaintiff in that case challenged the Corps’ decision to require it to apply for an individual permit rather than proceed under an NWP. Industrial Highway Corp. claimed that the decision was a reviewable “final agency action.” *Id.* at 126-27. The court rejected that argument, on the ground that the NWP is not actually “granted” or “denied” by any single Corps determination that a given project is (or is not) eligible to proceed under an NWP. Instead, the NWP was “granted” when it was initially adopted after formal notice and comment:

[D]espite Industrial’s characterization, the Corps did not ‘den[y] plaintiff’s application for a Nationwide Permit.’ *Nationwide Permit 26 was ‘granted’ years ago when promulgated and formally adopted after a public hearing and opportunity for public comment.* Industrial did not ‘apply’ for Nationwide Permit 26, but rather sought authorization to proceed under the already-existing permit.

Id. at 127 (citation omitted and emphasis added). The 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. It may be challenged upon the formal completion of the agency process: here, upon the publication of the Final Notice of Issuance and Modification,

nonenforcement decisions that, like decisions not to prosecute under any criminal law, are generally unreviewable. See *Sierra Club*, 915 F. Supp. at 1392.

which has now occurred. The Replacement Permit Rule is final and ripe for review, and there are no remedies to exhaust.

2. Meaningful Judicial Review of the Corps' Actions Will Only Occur in the Context of this Facial Challenge. The Corps' Convoluted Proposal to Defer Judicial Review will Forever Insulate its Decisions from Scrutiny.

The Corps asserts — without citation — that this action will not be final or ripe until an individual is “allowed or disallowed . . . to proceed with a project.” Mem. Opp’n at 23-24. But if this Court does not hear the Plaintiffs’ claims now, they will likely never be heard at all. *Cf. Ohio Forestry Ass’n, Inc. v. Sierra Club*, 523 U.S. 726, 734 (1998) (in finding a case unripe, noting that the plaintiffs would have “ample opportunity” to raise their claims later). The Corps’ proposal would insulate its illegal actions from judicial review, would fly in the face of the “presumption of judicial review” of agency actions, *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967), and would impose extreme hardship on NAHB’s aggrieved members. It must be rejected.

Indeed, the Corps’ suggestion that *individual permit* reviews are superior fora for airing NAHB’s record-based challenges to the *initial promulgation* of the *nationwide permits* is on its face ludicrous. *See Stipo*, 658 F.2d at 765 (calling it “unusual . . . that the agency insists that proceedings be commenced to seek another type of permit before the nationwide issue can be tested.”). Simply stating the Corps’ suggested procedure exposes the remote and tangential nature of the challenge the Corps would have NAHB bring. What administrative law judge, considering down the road a fact-bound challenge to the denial of an individual permit, will also call for the rulemaking record to consider (for example) whether the Corps properly supported its decision not to define “minimal effects”? The Corps’ proposal defies common sense.

The Corps' suggestion is not only unrealistic, it is disingenuous, for NAHB's record review claims will likely never be heard in individual permitting proceedings. Suppose, for example, that a builder wishes to pursue a project involving one acre of fill in a region in which the Corps requires the submission of water quality plans. As a practical matter, how is he to proceed? It would be silly to file a PCN for an NWP, for the project clearly exceeds the 1/2 acre ceiling for NWP 39. So he must apply for an individual permit — but what then? If the permit is granted, under the Corps' theory the builder is not aggrieved and has no claim, even though he has had to pursue the more onerous individual permit process and as a result may well have had to substantially modify his project. *See* Mem. Opp'n at 36-37. And if the permit is denied, the builder must challenge not only that denial, but also the requirement that he apply for an individual permit rather than an NWP in the first place. *See O'Connor v. Corps of Engineers*, 801 F. Supp. 185, 191-94 (N.D. Ind. 1992) (considering such a claim, and rejecting it on the ground that the Corps has discretionary authority to force applicants out of the NWP process). The prospects for full consideration of the record review claims at issue here are at best remote.

Furthermore, under neither scenario would the builder have an opportunity to challenge the requirement that he submit a water quality plan, or any other NWP condition — a problem the Corps appears to both acknowledge and embrace. *See* Mem. Opp'n at 26 n.16 (noting that applicants who contest the NWP conditions can instead “request another form of [Corps] authorization,” and that if the applicant then receives “an individual or regional general permit containing what it believes are unacceptable conditions, it can challenge *those* conditions administratively and in the courts” (emphasis added)). Thus, Plaintiffs' present challenges to the Replacement Permit Rule's conditions and restrictions would escape judicial review under the Corps' proposal.

Even if NAHB's claims could be heard in the individual permit proceedings, the Corps will have succeeded in transforming a straightforward record review case, involving an agency decision of nationwide application, into hundreds of piecemeal proceedings occurring at some unpredictable time in the future, if at all. This is not the judicial efficiency that the justiciability doctrines seek to further. *See, e.g., NRDC v. EPA*, 859 F.2d 156, 166 (D.C. Cir. 1988).

This exceedingly inefficient mode of proceeding, moreover, would impose hardship even beyond the costs of litigation and delay. It would foreclose complete consideration of the claim that the Replacement Permit Rule is arbitrary and capricious. *See, e.g., National Lime Ass'n v. EPA*, 627 F.2d 416, 431 (D.C. Cir. 1980) (declaring, upon remanding rule to the agency, that the court's "conclusion is a cumulative one, resulting from our assessment of the many points raised by the industry at the administrative level and in this court," and that "no one point made is so cogent that remand would necessarily have followed on that basis alone" — a conclusion that could never be drawn on piecemeal review). And the sheer passage of time could foreclose consideration of NAHB's claims altogether. By the time applicants make their way through the process of having an NWP withheld, applying for an individual permit, having that permit denied, pursuing administrative appeals, and then (finally!) presenting their claims in court, significant time will have passed. Since nationwide permits are valid for at most five years, and since claims against the government must in any event be brought in six, the applicants could well forfeit their claims before they could ever be heard.³

³ This is not idle speculation — in this very case the Corps contends that NAHB's Regulatory Flexibility Act claims are "untimely due to the one-year statute of limitations." Mem. Opp'n at 68 n.41.

This Court should not endorse the Corps' attempt to insulate the Replacement Permit Rule from review. The Corps has finally promulgated the new and modified NWP's, the administrative record is complete, and the Plaintiffs are entitled to have their record review claims heard.

3. The Replacement Permit Rule has Immediate Legal Consequences that Impose Hardship on NAHB's Members, and NAHB Presents Purely Legal Issues that are Fit for Review Now.

Ordinary (and overlapping) principles of finality and ripeness further demonstrate that the NWP's are ready for review. With regard to finality, the Corps' "Final Notices" "mark the 'consummation' of the agency's decisionmaking process." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). The Corps does not contend that its "Final Notices" are "of a merely tentative or interlocutory nature." *Id.* The Notices themselves are complete, and will undergo no further change. Like the regulation at issue in *Abbott Laboratories*, the Replacement Permit Rule was "promulgated in a formal manner after announcement in the Federal Register and consideration of comments by interested parties." *Abbott Laboratories*, 387 U.S. at 151. It is "quite clearly definitive," and "[t]here is no hint that this regulation is informal, or only the ruling of a subordinate official, or tentative." *Id.* (citations omitted).⁴ The Corps has spent years determining which conditions and restrictions would be included in its Replacement Permits, and it has now "rendered the last word on the matter." *Whitman v. American Trucking Ass'ns*, 121 S. Ct. 903, 915 (2001). The Corps' future individual NWP authorizations will not change the edicts of the Replacement Permit Rule.

⁴ It should be noted that whether the Replacement Permit Rule is "final" does not depend on whether the Court considers it to be a "rule" for purposes of the Regulatory Flexibility Act. All sorts of agency actions constitute "final action" for the purposes of the APA, which "is meant to cover comprehensively every manner in which an agency may exercise its power." *Whitman v. American Trucking Ass'ns*, 121 S. Ct. 903, 915 (2001).

The Replacement Permit Rule is also an action from which “rights or obligations have been determined” and from which “legal consequences will flow.” *Bennett*, 520 U.S. at 178 (internal quotation omitted). NAHB’s members are in the business of construction, and they have relied upon NWP 26 to conduct minimal effects projects with a minimum of red tape — often without any notice to the Corps. This they can no longer do. Now they must submit to the PCN process for any project affecting more than 1/10 acre, or face criminal liability if they do not. The Replacement Permit Rule has “alter[ed] the legal regime to which [those members are] subject,” authorizing them to proceed only in a much narrower category of cases, and even then “if (but only if) [they] compl[y] with the prescribed conditions.” *Id.* The Replacement Permit Rule is final agency action, and it is subject to judicial review.

Furthermore, NAHB’s claims are ripe. They are “fit[] . . . for judicial decision,” and it would work “hardship to the parties” to withhold consideration of their claims at this time. *Ohio Forestry Ass’n*, 523 U.S. at 733 (quoting *Abbott Laboratories*, 387 U.S. at 149). As to fitness, this case involves straightforward questions of statutory interpretation and administrative procedure that depend only upon the facts in the administrative record. It is about whether the Corps has the power to promulgate the terms and conditions that it did, whether the Corps followed proper statutory procedures in doing so, and whether the Corps supported its choices with reasoned and non-arbitrary justifications. It is “beyond peradventure” that questions of statutory interpretation are “purely legal.” *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 435 (D.C. Cir. 1986). “An agency’s interpretation of its governing statute, with the expectation that regulated parties will conform to and rely on this interpretation, is final agency action fit for judicial review.” *Id.* at 438 (internal quotation omitted). Whether the Corps has the power to impose the conditions that it did, *NRDC*, 859 F.2d at 168, 182, whether the Corps properly

interpreted the governing statute, *id.* at 196, and whether the Corps had a reasoned basis for its decisions, *id.* at 196, 206, are all purely legal questions.

These issues are “as concrete now as [they] will ever be.” *George E. Warren Corp. v. EPA*, 159 F.3d 616, 621 (D.C. Cir. 1998), *as amended*, 164 F.3d 676 (D.C. Cir. 1999). These questions of statutory interpretation and administrative procedure “would not benefit from further factual development of the issues presented,” *American Trucking Ass’n*s, 121 S. Ct. at 915 (quoting *Ohio Forestry Ass’n*, 523 U.S. at 733), and they will not “benefit from a more concrete setting,” *Clean Air Implementation Project v. EPA*, 150 F.3d 1200, 1204 (D.C. Cir. 1998), *cert. denied sub. nom. Appalachian Power Co. v. EPA*, 527 U.S. 1021 (1999). *See also Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 n.18 (D.C. Cir. 2000) (“*Appalachian Power I*”) (finding “nothing to” the contention that legal questions regarding permit conditions “would be more focused in the context of a challenge to a particular permit”). Here, as in the facial challenge to NWP 29 recently considered in the District of Alaska, “there is no undeveloped fact necessary to disposition of the claims raised.” *Alaska Center for the Environment*, 31 F. Supp. 2d at 720 n.6.

Individual facts will not illuminate the question whether the administrative record is sufficient to support the Corps’ decision to adopt a 1/10 acre trigger for pre-construction notification; individual facts will not aid in answering whether the Corps violated congressional commands by refusing to define “minimal effects”; and individual facts will not help resolve the issue whether the Corps has the authority to override state water quality determinations or to require vegetated buffers. These issues must be decided on the four corners of the administrative

record, and that record is complete now.⁵ Indeed, judicial review of this sort of administrative action is common.⁶

Finally, the Corps' actions are harmful to NAHB, and it would work hardship to withhold review at this time. NAHB's members are constantly engaged in thousands of projects all over the country.⁷ Before the Corps replaced NWP 26, NAHB's members could use an NWP for projects involving up to three acres of impacts to waters of the United States; now, except for "grandfathered" projects, *see* 65 Fed. Reg. at 12,818, NWPs are only available for projects that affect less than 1/2 acre. In addition, any project involving more than 1/10 acre of fill must comply with the notification and review process, which requires a variety of (illegal) plans and disclosures. The Replacement Permits "grant, withhold, or modify [a] legal license, power, [and]

⁵ The Corps' Rule 7.1(h) Statement further demonstrates that this case does not require the development of additional facts. It notes that "statements [of facts] are largely inapplicable" because a court's function in reviewing agency action of this sort "is to determine whether as a matter of law the agency action was arbitrary and capricious based upon the administrative record or was contrary to law." Defendants' Statement Pursuant to Local Rule 7.1(h).

⁶ *See, e.g., Alaska Center for the Environment v. West*, 157 F. 3d 680 (9th Cir. 1998) (facial challenge to five general permits governing construction in Alaska wetlands, issued under identical § 404 "minimal effects" standard applicable in this case); *National Mining Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1406-07 (D.C. Cir. 1998) (facial challenge to Corps regulations defining "discharge of dredged material"); *Alaska Center for the Environment v. West*, 31 F. Supp. 2d 714, 720 n.6 (D. Alaska 1998) (facial challenge to NWP 29, considering and rejecting ripeness objection). *See also National Mining Ass'n v. Department of Interior*, 177 F.3d 1, 3-4 (D.C. Cir. 1999) (reviewing regulations implementing mining permit program); *George E. Warren Corp.*, 159 F.3d at 622 (reviewing regulations implementing reformulated gasoline program); *National Recycling Coalition, Inc. v. Browner*, 984 F.2d 1243, 1249 (D.C. Cir. 1993) (reviewing regulations regarding recycled products purchase program); *NRDC v. EPA*, 966 F. 2d 1292 (9th Cir. 1992) (reviewing stormwater permit regulations).

⁷ Although the Corps contends only "some" of NAHB's members will have "some" projects affected, Mem. Opp'n at 26, the Corps' own study predicted that the Replacement Permit Rule would shift thousands of projects into the notification and review process, and would prevent thousands of others from proceeding under the NWPs at all. *See* U.S. Army Corps of Engineers, Cost Analysis for the 1999 Proposal to Issue and Modify Nationwide Permits ("IWR Study") at 14, AR.PRT1-0898, -0923. These numbers belie any suggestion that NAHB's harm is inconsequential.

authority”; they “subject” NAHB’s members “to . . . civil or criminal liability” for noncompliance with their terms, and they “create . . . legal rights or obligations.” *Ohio Forestry Ass’n*, 523 U.S. at 733. These are immediate and concrete legal consequences, which have forced NAHB’s members to change their conduct.

As the Supreme Court recognized in *Columbia Broadcasting v. United States*, pre-announced conditions for receiving a permit or license — such as the water quality and floodplain conditions at issue here — have “the force of law,” even before the individual permitting or licensing proceeding begins. 316 U.S. 407, 418-19 (1942). “[T]he expected conformity to them causes injury cognizable by a court of equity.” *Id.* See also *Frozen Food Express v. United States*, 351 U.S. 40, 44-45 (1956) (allowing a challenge to the ICC’s failure to include plaintiffs in an exemption to a permitting requirement). In neither of these cases were the plaintiffs forced to apply for a permit and have it further conditioned or denied before challenging the offending restriction in court.

Nor is NAHB required to do so here. These unlawful permit conditions — for example, the requirements to submit “water quality management plans” and to install and maintain vegetated buffers 25-50 feet wide — are effective now. Many who could have proceeded under the “replaced” NWP 26 must apply instead for individual permits and shoulder concomitant additional expense, both in the application process and when complying with what will certainly be even more onerous conditions.⁸ Courts have recognized the very real costs involved in

⁸ The IWR Study estimated that the July 1999 NWP proposal would cost applicants \$48 million in annual direct compliance costs, plus additional unquantified indirect (opportunity) costs, including “development value foregone” and “increased permitting time.” IWR Study at ix, AR.PRT1-0908. The Study also estimated that establishing a uniform 1/2 acre PCN and eliminating the floodplain condition would reduce those costs by about half, *see id.* at x, AR.PRT1-0909, but, of course, the Corps did not adopt that “alternative replacement package.”

applying for and complying with illegally restrictive permits. See *American Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 296-97 (5th Cir. 1998) (stating that "injury . . . in the form of costs of compliance with EPA's new rule, including delays in permitting and the added risk that an application will be denied" imposed an "immediate and significant burden" on the petitioner); *NRDC*, 859 F.2d at 182 (referring to the "hardship" of "harsher permit conditions"); *id.* at 196 ("[D]elay here may cause significant hardship. If industry's contentions are correct, postponing our consideration of the merits could force permittees into continued compliance with unlawfully strict effluent limitations.")⁹ The Corps concedes in the context of individual permit review that

⁹ The Corps (and the *Industrial Highway Corp.* court) cite *FTC v. Standard Oil of California*, 449 U.S. 232 (1980), for the proposition that the burden of pursuing administrative review is not cognizable. But in *Standard Oil*, the agency had already initiated enforcement proceedings against the company. Judicial review in that context would have interfered with the ongoing administrative proceeding. Here, by contrast, no enforcement proceedings have been initiated, and NAHB's members wish to avoid the sort of conduct that would provoke such a proceeding. The law-abiding citizen's need to avoid legal sanction is exactly the sort of hardship that justifies judicial review. See *Abbott Laboratories*, 387 U.S. at 153.

The Corps' further contention that NAHB has lost nothing because NWP's are discretionary proves too much. There may be no "vested right to discharge fill into waters of the United States," Mem. Opp'n at 24, but *Abbott Laboratories* likewise had no "vested right" to distribute drugs without a label. Instead, when the Corps established its narrow view of the NWP program, "it not only granted [NAHB's members] a limited benefit but also denied them a larger benefit." *Joseph v. United States Civil Service Comm'n*, 554 F.2d 1140, 1146 (D.C. Cir. 1977). "By [the Corps'] logic, if it had decided not to [issue NWP's at all] no one would have been able to seek judicial review of that decision since no one would be under any greater restriction than had no [NWP] ever been made." *Id.* (stating "[w]e cannot accept such reasoning."). Congress has authorized the issuance of NWP's, the Corps has issued them pursuant to that authority, and it was required to issue them in accordance with the law. Arbitrary government action imparts injury, and the Corps' failure to act legally has caused cognizable hardship to NAHB's members.

Finally, the Corps' suggestion that NAHB's harm is "speculative" because a district engineer or some other agency might also deny an applicant permission to proceed is itself speculative. Mem. Opp'n at 27-28. Having placed arbitrary and unreasonable barriers before NAHB's members, the Corps cannot avoid review of its own illegality through speculation that some other barriers might later arise.

improperly imposed conditions are final and ripe, and may be challenged. Mem. Opp'n at 25-26 & n.16. The hardship imposed by these illegal conditions is no different.

The Replacement Permit Rule is final and ripe for review, and there are no administrative remedies left to exhaust. The Corps' attempt to forever deflect judicial scrutiny must be rejected. The Plaintiffs are entitled to have their claims heard.

B. The Rule Must Be Remanded for Reconsideration In Light of *SWANCC*.

Because the basic assumptions underlying the Corps' Replacement Permit Rule are wholly tainted by the Corps' fundamental misperception of its jurisdiction, the Rule must be vacated. This argument has four steps, and the Corps has failed to rebut any of them.

First, the primary stated justification for revoking and replacing NWP 26 was the Corps' concern that "the level of cumulative adverse effects under NWP 26 must be reduced and more effectively mitigated." Mem. Opp'n at 11-12 n.11 (quoting 61 Fed. Reg. 65,874, 65,890 (Dec. 13, 1996)). Second, as the very title of NWP 26 indicates, the cumulative effects of concern were occurring in "*Headwaters and Isolated Waters*." 61 Fed. Reg. at 65,916 (emphasis added). Third, the Corps has no jurisdiction over isolated waters. See *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 121 S. Ct. 675 (2001) ("*SWANCC*"). Fourth, the Corps therefore — and, most importantly, improperly — based its decision to revoke NWP 26 and promulgate the myriad conditions and restrictions in the Replacement Permit Rule on effects of activities that were outside its jurisdiction. See 64 Fed. Reg. at 39,274 ("When assessing cumulative adverse effects . . . we can only assess those adverse effects that result from activities authorized by the Corps . . ."). Because the Replacement Permit Rule is premised on extra-jurisdictional effects, and because the Corps is barred from considering effects outside its jurisdiction, this rulemaking must be revisited.

Although the Corps contends that NAHB has “overstate[d]” the holding of *SWANCC*, Mem. Opp’n at 31, the Corps cannot and does not dispute that its jurisdiction over *isolated* waters is untenable under the reasoning and holding of *SWANCC*. Because the Corps unquestionably weighed the effects of activities in *isolated* waters when determining what course to take, it has improperly based its rulemaking on matters outside its jurisdiction. The Corps must try again.

Since the Corps cannot rebut this conclusion, it again seeks refuge in nonjusticiability. This time, it claims that NAHB cannot raise this challenge without first filing a petition to issue or modify the NWP’s under 33 C.F.R. § 330.5(b)(1). Mem. Opp’n at 31-32. The Corps misunderstands the nature and purpose of direct judicial review. This Court has the authority and the duty to “hold unlawful and set aside agency action, findings, and conclusions” that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or “in excess of statutory jurisdiction, authority, or limitations.” 5 U.S.C. §§ 706(2)(A), (C). This Court cannot decline to review a fundamentally flawed and jurisdictionally deficient rule on the ground that the Corps might, in its discretion, decide at some point to grant a petition for review, if one were ever filed.¹⁰ And the Corps cannot subject NAHB to these illegal regulations

¹⁰ A quarter-century ago, the Courts of Appeals for both the D.C. and the Third Circuits held that after-the-fact petition procedures do not substitute for direct review of agency action. See *Joseph*, 554 F.2d at 1146 n.10; *Wagner Electric Corp. v. Volpe*, 466 F.2d 1013, 1020 (3d Cir. 1972). In both *Joseph* and *Wagner Electric Corp.*, the agencies had violated the APA in promulgating certain rules, but argued that the court should allow the rules to take effect and require the plaintiffs to raise their claims in petitions filed under APA § 4(e), which (like 33 C.F.R. § 330.5(b)(1)) gives “interested person[s] the right to petition for the issuance, amendment, or repeal of a rule.” 5 U.S.C. § 553(e). The courts rejected that suggestion, holding that the “right to petition for amendment of a rule . . . is not a substitute for, or alternative to, compliance with” the APA. *Joseph*, 554 F.2d at 1146 n.10; accord *Wagner Electric Corp.*, 466 F.2d at 1020. So, too, the right to petition for a revision to the NWP’s cannot substitute for

(continued . . .)

pending some future discretionary decision whether to reconsider the rule. Indeed, when plaintiffs have attempted to use the APA's petition procedures to raise challenges to rules that could have been raised on direct review, this Circuit has chastised them, decrying "back door procedural challenges by those who had the opportunity to seek direct review of regulations but failed to do so in a timely fashion." *NRDC v. Nuclear Regulatory Comm'n*, 666 F.2d 595, 602 (D.C. Cir. 1981). This issue is now properly before this Court pursuant to the APA, and the APA requires the rule to be vacated.

It makes no difference that this Court has the benefit of the Supreme Court's decision in *SWANCC*, which had not yet been decided when the Corps declared in its Final Notice that "[i]solated wetlands are waters of the United States." 65 Fed. Reg. at 12,824. Compare, for example, the procedure when a district court decides an issue, and an intervening decision changes the law when the case is on appeal. The appellate court would apply the new law or remand the case for further consideration in light of that new law, for it is a basic principle that "a court is to apply the law in effect at the time it renders its decision." *Bradley v. School Board*, 416 U.S. 696, 711 (1974); *see also The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) ("[I]f subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied."). This Court must do the same.

That does not mean that this Court must predict what the Corps would have decided had it had the benefit of *SWANCC* — the Corps correctly notes that it is for the Secretary to decide in the first instance how he will now proceed. But it is for the Secretary to decide *on remand*, not

compliance with — and timely judicial review of — the Corps' duties of jurisdictionally appropriate and reasoned decisionmaking.

in some future discretionary proceeding. The Corps' decision, placed substantially in question by *SWANCC*, must be vacated and remanded for reconsideration in light of that intervening precedent.

Finally, the Corps brazenly contends that *SWANCC* is simply irrelevant — on the ground that the Corps never attempted a “mathematical calculation” of the NWP’s cumulative effects. Mem. Opp’n at 32. This astonishing argument must be rejected for at least two reasons. First, even if the Corps undertook no “mathematical calculation,” the Corps unquestionably cited and re-cited concern with cumulative effects to justify the majority of its decisions throughout this rulemaking. See, e.g., 61 Fed. Reg. at 65,890, 65,891. The Corps’ new-found, *post hoc* rationalization must be rejected as contrary to the published history of the rule.

Second, the Corps cannot excuse its jurisdictional error by invoking its arbitrary failure to develop a rational, objective justification for its actions. The Corps’ two wrongs do not make this rule right; they make it doubly wrong. The Corps’ continued obfuscation of the basis for its decision only drives home the arbitrariness of the Replacement Permit Rule and the need for a remand for further reconsideration.

Indeed, if in 1996 the *nationwide* cumulative effects of the NWPs on isolated waters were irrelevant to the Corps’ decisionmaking, there would be no justification at all for the *nationwide* termination of NWP 26 and the *nationwide* restriction of the NWPs through draconian PCNs, acreage thresholds, and conditions. The Corps may now believe it needs to retreat from its reliance on nationwide cumulative effects to isolated waters to avoid the ramifications of *SWANCC*. But the Corps’ renunciation of nationwide cumulative effects as the driving rationale for its actions leaves it with absolutely no rational justification for the revocation of NWP 26 and the promulgation of the Replacement Permit Rule. It is incumbent upon the Corps to articulate a

non-arbitrary, non-capricious, and properly jurisdictional justification for its rule. *See National Lime Ass'n*, 627 F.2d at 433. On remand, the Corps can make clear the location and the nature of the effects that require it to enact such an elaborate and stringent permitting scheme.

C. Because the Corps Makes No Attempt to Point to Objective Facts in the Record Justifying the Choices Made During its Decisionmaking Process, the Corps' Decisions Cannot be Reasonable and Are Not Entitled to Deference.

Because the Corps utterly failed during its rulemaking to put forth any data in support of its actions, or to articulate any “rational connection between the facts found and the choice[s] made,” *United States Telecom Ass'n v. FCC*, 227 F.3d 450, 461 (D.C. Cir. 2000) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)), it should come as no surprise that the Corps is now unable to point to any reasoned basis in the record for the many conditions and restrictions it has adopted. Instead, the Corps simply asks this Court to approve its decisions as “reasonable.” *See* Mem. Opp'n at 37-42. Without any explanation for the choices underlying each condition and restriction, however, this Court cannot endorse those choices, for there is simply no way to tell whether they meet even minimal standards of rationality. “Merely asserting that [a] choice was ‘reasonable’ is not enough.” *Appalachian Power Co. v. EPA*, 251 F.3d 1026, 1035 (D.C. Cir. 2001) (“*Appalachian Power II*”).

The Corps has stated that it believes its many conditions and restrictions are necessary to ensure that the NWP's authorize only “minimal effects” on the environment. Indeed, “minimal effects” is the sole reason offered in the administrative record. But the Corps steadfastly refuses to explain what “minimal effects” means. It claims that “the determination of what impacts are minimal must be determined on a local basis, so that variations may be taken into account,” Mem. Opp'n at 38 (citing 61 Fed. Reg. at 65,880), and in so claiming neatly sidesteps its obligation to show how each particular condition or restriction relates to “minimal effects.” The Corps cannot shield its decisionmaking from public and judicial scrutiny in this manner, for “the

initial burden of promulgating and explaining a non-arbitrary, non-capricious rule rests with the Agency.” *National Lime Ass’n*, 627 F.3d at 433.

Moreover, the Corps’ approach is not a reasonable interpretation of § 404(e). That section provides for “general permits” to be issued “on a nationwide basis for any category of activities . . . if the Secretary determines that the activities in such category . . . will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.” If the Secretary is to issue *nationwide* permits, this plain statutory language requires him to assess *nationwide* minimal effects.

The Corps’ evasion of this statutory requirement in turn prevents this Court from endorsing the Corps’ various conditions and restrictions as reasonable. The Corps’ justification might rationally explain a system having only regional — not nationwide — permits, and having only regional — not nationwide — conditions. But it is completely irrational, not to mention contrary to explicit congressional direction, when employed to justify a system of permits and conditions that are imposed nationwide. And, despite the Memorandum in Opposition’s *homage* to regionalization, it must be remembered that the NWP’s and their conditions and restrictions are *national* in application and effect.¹¹ What’s more, the Corps has decreed that the “division and district engineers cannot use regional conditioning to make the NWP’s less restrictive,” 65 Fed. Reg. at 12,839.

¹¹ Moreover, the Corps abandons its commitment to regionalization when regionalization does not suit its purposes. For instance, when it was suggested that floodplains and “critical resource waters” could be addressed by district engineers through the PCN process rather than by blanket conditions, the Corps responded: “We do not agree that regional conditions are a better mechanism to address these issues, since the new general conditions address issues of national concern.” 65 Fed. Reg. at 12,872; *see also id.* at 12,873, 12,878. Of course, since the Corps declined to assess effects on a nationwide basis, one is left to guess how the Corps determined that certain issues required national rather than regional treatment.

Simply put, if “minimal effects” cannot be defined on a nationwide basis, then “minimal effects” cannot be used to justify a nationwide 1/2 acre cap on the permits. If “minimal effects” cannot be defined on a nationwide basis, then “minimal effects” cannot be used to justify a nationwide 1/10 acre PCN. And if “minimal effects” cannot be defined on a nationwide basis, then “minimal effects” cannot be used to justify nationwide water quality plan mandates, vegetated buffer requirements, floodplain fill restrictions, or any other nationwide condition or restriction. Since the Corps has failed to provide any other justification for these conditions and restrictions, the Replacement Permit Rule has no reasoned basis and must be vacated.

Indeed, confronted with numerous examples of the lack of a reasoned basis for the Replacement Permit Rule’s conditions and restrictions, the Corps now provides virtually no specific response. For instance, rather than produce any objective, scientific basis underlying NWP 39’s 1/2 acre cap — because there is none — the Corps responds that the average project authorized by NWP 26 was 0.36 acres. Mem. Opp’n at 40. This rationale has nothing to do with the statutory standard for granting or modifying NWPs, and is unreasonable.¹² The Corps’ responses to NAHB’s other examples of unreasoned decisionmaking, collected in the table below, are even less satisfying.

¹² The Corps offers a similar, irrelevant justification for the 1/4 acre ceiling on NWP 29. See Mem. Opp’n at 42. And the Corps offers no explanation how it could first observe that “lower acreage limits [for NWP 29] are not necessary in terms of environmental effects or the workload that would be required to process requests for higher acreage impacts through the individual permit process,” and then, in the same breath, announce that it was “proposing to modify the acreage limit for NWP 29 to 1/4 acre.” 63 Fed. Reg. 36,040, 36,066 (July 1, 1998).

**Arbitrary and Capricious Elements of
Replacement Permit Rule**

NAHB Argument	Reasoned Basis Identified by Corps in Opposition	Argument of Corps in Opposition
No reasoned basis for the 1/2 acre cap for NWP 39. (NAHB Br., 21)	Average project authorized under NWP 26 involved 0.36 acre. (Mem. Opp'n, 40)	Corps' conclusion was "reasonable." (Mem. Opp'n, 39)
No reasoned basis for 1/10 acre PCN for NWP 39. (NAHB Br., 21)	None	Selection of 1/10 acre was "reasonable." (Mem. Opp'n, 41)
No explanation for decision to impose 300-foot streambed limitation. (NAHB Br., 21)	None	None
No explanation for reducing NWP 29 cap from 1/2 acre to 1/4 acre after prior determination 1/2 acre met minimal effects. (NAHB Br., 21)	Average project authorized under NWP 29 involved less than 1/4 acre. (Mem. Opp'n, 42)	Selection of 1/4 acre was "reasonable." (Mem. Opp'n, 42)
No reasoned basis for migration from 10 to 3 to an indexed 3 to 1/2 acre cap. (NAHB Br., 21)	None	None
No reasoned basis for migration from the 1/3 to 1/4 to 1/10 acre PCN. (NAHB Br., 21)	None	None
No reasoned basis for migration from no streambed limitation, to 500 feet, to no limitation, to 300 feet. (NAHB Br., 21)	None	None
No explanation of "strong water quality program." (NAHB Br., 22 n.18)	None	None
No explanation of "minimal degradation" or "minimal adverse effects to water quality." (NAHB Br., 22 n.18)	None	None
No explanation of "project." (NAHB Br., 22 n.18)	None	None
No explanation of what a "water quality plan" would entail. (NAHB Br., 22 n.18)	None	None
Corps arbitrarily justified the Replacement Permit Rule with the IWR's study of a different plan. (NAHB Br., 26-27)	None	IWR Study analyzed a different plan, and workload implications are irrelevant. (Mem. Opp'n, 44 n.21)
No reasoned basis for imposition of floodplain restriction. (NAHB Br., 29)	"The number of applicants who might place permanent, above-grade fills within the floodplains" (Mem. Opp'n, 57)	Final floodplain restriction is "reasonable." (Mem. Opp'n, 55 n.30)
No reasoned basis for division of floodplain restriction into two tiers, below and above the headwaters. (NAHB Br., 30 & n.26)	None	Final floodplain restriction is "reasonable." (Mem. Opp'n, 55 n.30)

NAHB Argument	Reasoned Basis Identified by Corps in Opposition	Argument of Corps in Opposition
No reasoned basis for hinging eligibility for NWP 29 on identity of applicant. (NAHB Br., 31)	Identifies reasoning in regulatory history of NWP 39. (Mem. Opp'n, 66-67)	NWP 29 applies in more areas, so Corps needed to reduce number of parties who qualify. This was within its discretion. (Mem. Opp'n, 66-67)
No reasoned basis for treating public and private transportation crossings differently. (NAHB Br., 32)	"Public interest factors." (Mem. Opp'n, 67-68)	This was a rational justification. (Mem. Opp'n, 67-68)
No explanation for decision to "replace" NWP 26 despite prior determination that it met minimal effects. (NAHB Br., 19-20)	None	None

In the end, the Corps retreats to its own discretion, stressing that the CWA grants it broad discretion, and that the NWPs themselves are discretionary permits. *See* Mem. Opp'n at 37.

"This misses the point." *Nathan Katz Realty v. NLRB*, 251 F.3d 981, 994 (D.C. Cir. 2001).

"[S]imply stating that the [Corps] has broad discretion does not establish that [it] has exercised it properly." *Id.* Regardless of the scope of the Corps' discretion, when the Corps acts, "Congress requires it to act in a reasoned fashion, not arbitrarily and capriciously." *Id.* "If the [Corps] cannot assign a reason for what it has done, then its actions are arbitrary and capricious. That the [Corps] has broad discretion is of no import." *Id.* (citations omitted).

The Corps has declined to justify its conditions and restrictions, stating only that they are required to ensure "minimal effects." And the Corps has declined in turn to give "minimal effects" any meaning. By disabling this Court and the public from scrutinizing the basis for its actions, the Corps has left those actions unreasoned, and hence arbitrary and capricious. The rule must be vacated.¹³

¹³ It now appears unlikely, in light of the Supreme Court's recent decision in *Whitman v. American Trucking Ass'ns*, 121 S. Ct. 903 (2001), that Congress's authorization for the Corps to determine what constitute "minimal effects" violates the nondelegation doctrine — at least if "minimal" is interpreted to mean "minor, but not unnecessarily minor" in light of § 404(e)'s streamlining goals. *See id.* at 913-14 (statute granting discretion to set air quality standards at a level "requisite" — that is, not lower or higher than is necessary — to protect the public health"

(continued . . .)

D. The Corps' Complete Subversion of the Goal of Efficiency Is Contrary to the Clear Intent of Congress, as Expressed in § 404(e), to Create a Streamlined System of "General Permits."

Reading the Corps' Memorandum in Opposition, one might think the Plaintiffs' only complaint was the possibility of being forced into the individual permitting process due to the NWP's reduced acreage caps. Although the restrictive — and, more importantly, unexplained — acreage caps are a significant issue, they are not the only defect in the Replacement Permit program. The many conditions and restrictions that apply to the NWP's — the conditions and restrictions that apply to projects that fall between the PCN threshold of 1/10 acre and the cap of 1/2 acre — have so complicated the NWP's that the program now bears no resemblance to the efficient, streamlined authorization of minimal effects projects that Congress intended to create under § 404(e).

The Corps, however, claims that the only "expressly stated statutory factor on which the Corps' nationwide permits are judged is whether they have only minimal adverse environmental consequences," because "[n]owhere in CWA section 404(e) does Congress set a 'streamlining' standard that the Corps must meet." Mem. Opp'n at 43. Indeed, the Corps declares that "the workload implications of the final NWP's [are] irrelevant." Mem. Opp'n at 44 n.21.¹⁴ The Corps apparently considers itself free to adopt conditions, willy-nilly, and without regard to jurisdictional limitation, until the NWP's resemble nothing more than an alternate individual

did not violate nondelegation doctrine). This only increases the need for the Corps to articulate the bases underlying its decisionmaking, so that it can be judged whether the Corps exercised its discretion within the bounds of the statute.

¹⁴ The Corps admits that the IWR Report, which addressed these workload implications, "did not analyze the proposal ultimately adopted by the Corps." Mem. Opp'n at 44. But the Corps *relied* on the Report to justify the program it ultimately adopted. See 65 Fed. Reg. at 12,820, 12,824. This was arbitrary.

permitting program. The Corps has read the mandate for “general permits” out of the statute, and that interpretation is unreasonable.

“[A]lthough agencies are generally entitled to deference in the interpretation of statutes that they administer, a reviewing ‘court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125-26 (2000) (quoting *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984)). Section 404(e) authorizes the promulgation of “general permits,” 33 U.S.C. § 1344(e)(1), and it is clear from the statute’s legislative history and from its surrounding context that Congress understood “general permits” to be efficient and streamlined.

“The meaning — or ambiguity — of certain words or phrases may only become evident when placed in context,” and “[i]t is a ‘fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.’” *Brown & Williamson Tobacco Corp.*, 529 U.S. at 132-33 (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)). As discussed at pages 41-44 of NAHB’s opening brief, the context in which § 404(e) was enacted makes inescapable the meaning and purpose of “general permits.” As explained in a colloquy between Senator Nunn and Senator Muskie, the lead author of the 1977 legislation, they were “intended to grant permission to conduct activities without . . . separate approval from the Corps or a State each time that activity is to be conducted, or without any more than reasonable notice.” 123 Cong. Rec. 26,770-71 (Aug. 4, 1977) (Sen. Nunn), *reprinted in* 4 Legislative History of the Clean Water Act of 1977, at 1053-54.¹⁵

¹⁵ It is important to note that this streamlined approach was not a sop to industry — or “rubber-stamping,” as the Corps would describe it. Mem. Opp’n at 43. The purpose of these
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Congress's uniform impression of the streamlined nature and purpose of "general permits" was based on the Corps' contemporaneous development of permits of just that description. As the Corps stated when first proposing its NWP, "[t]he general permit concept is intended to eliminate unnecessary review of minor activities, and to focus the attention of the Corps on those activities that require individual review." 42 Fed. Reg. 24,756, 24,756 (May 16, 1977). The inaugural version of NWP 26 required no PCN, and it had all of four self-executing conditions: fills could not destroy endangered species or their habitats; fills could not contain toxic pollutants; fills must be maintained to control erosion and other point sources of pollution; and fills could not occur in the federal or state wild and scenic river systems. 42 Fed. Reg. 37,122, 37,146 (July 19, 1977) (quoting 33 C.F.R. § 323.4-2(b)). The very purpose of these permits was to "reduc[e] unnecessary reviews and delay associated with regulation of minor discharges of dredged or fill material into waters of the United States." *Id.* at 37,132.

The Corps' denial of this unambiguous congressional intent, as expressed in the text of § 404(e) and further supported by the statute's contemporaneous context, is not reasonable. The Corps' arguments in opposition drive home just how unmoored its interpretation has become from the meaning and purpose of § 404(e). The Corps' position that the workload effects of these NWPs is "irrelevant" is contrary to the statute, is in no way reasonable, and cannot be approved. Moreover, its one-sided interpretation of this statute may have led the Corps to adopt

streamlined general permits is to allow the Corps to concentrate its efforts on larger projects having greater environmental effects. *See* 42 Fed. Reg. 24,756, 24,756 (1977). Far from being "irrelevant," the workload implications of closely scrutinizing routine, minor projects — for example, the implications of reviewing thousands of alternative minimization reports, compensatory mitigation plans, water quality plans, vegetated buffer plans, deed restrictions, and floodplain compliance, as the Corps' new conditions require — were a driving force behind Congress's authorization of a general permit program. The Corps' revisionist and ahistorical view of § 404(e) is patently unreasonable.

an unreasonably stringent interpretation of the meaning of the term “minimal” — at least, to the extent any interpretation can be divined from the Corps’ actions.

The Replacement Permit Rule must be vacated and remanded so that the Corps can reconsider the NWP’s with due regard to the undeniably relevant workload effects of its conditions and restrictions, and can establish a streamlined permitting program that comports with Congress’s intent.

E. Section 404(e)’s Reference to “Requirements and Standards” Cannot Allow the Corps to Impose Water Quality Conditions that Conflict with the Act’s Exclusive Grant of Authority to the States.

“[T]he Clean Water Act establishes distinct roles for the Federal and State Governments.” *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 704 (1994). Section 303 of the Act “requires *each State*, subject to federal approval, to institute comprehensive water quality standards establishing water quality goals for all intrastate waters.” *Id.* (emphasis added); see 33 U.S.C. § 1313. These state standards are subject to the approval of EPA, and they are incorporated into federal discharge permits through § 401. 33 U.S.C. § 1341. Section 401 requires all permit applicants (nationwide or otherwise) to obtain certification from the State that the discharge will comply with state water quality standards, including standards issued pursuant to § 303, and it allows States to impose conditions to ensure that compliance. See *PUD No. 1 of Jefferson County*, 511 U.S. at 712-13.

EPA — not the Corps — has the authority to review state water quality standards, and in some instances to adopt effluent limitations of its own. See 33 U.S.C. § 1313(a), (c) (review); *id.* § 1312 (adopt). But the CWA establishes the States as the *primary* developers of water quality standards, and as the *exclusive* issuers of water quality certifications. See *Lake Erie Alliance v. Army Corps of Engineers*, 526 F. Supp. 1063, 1074 (W.D. Pa. 1981) (“[S]tate certification under

the Clean Water Act is set up as the exclusive prerogative of the state and is not to be reviewed by any agency of the federal government.”), *aff'd*, 707 F.2d 1392 (3d Cir.), *cert. denied*, 464 U.S. 915 (1983); *Mobil Oil Corp. v. Kelley*, 426 F. Supp. 230, 234 (S.D. Ala. 1976) (same). For this reason, “courts have consistently agreed . . . that federal courts and agencies are without authority to review the validity of requirements imposed under state law or in a state’s [§ 401] certification.” *Roosevelt Campobello Int’l Park Comm’n v. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982). And for this reason, the Corps’ own regulations mandate that state “[c]ertification of compliance with applicable effluent limitations and water quality standards required under section 401 . . . will be considered conclusive with respect to water quality considerations” 33 C.F.R. § 320.4(d).

Notwithstanding this clear and careful allocation of authority, the Corps has now adopted General Condition 9 (water quality), which purports to empower the Corps to decide whether a State lacks a “strong water quality program” and to require applicants in such States to submit substitute water quality management plans to the Corps.¹⁶ The Corps apparently finds this authority in § 404(e)’s authorization for the Corps to “set forth the requirements and standards” to be included in the NWPs. Mem. Opp’n at 48.

The Corps’ self-aggrandizing reading of the “requirements and standards” clause is not reasonable. It would upset the careful federal/state structure of the Clean Water Act, and it would usurp EPA’s exclusive authority to review and approve state water quality plans. Taken

¹⁶ As noted in footnote 18 of NAHB’s opening brief, the Corps declined to define or explain not only “what constitutes a strong state water quality program,” but also “the terms ‘minimal degradation’ or ‘minimal adverse effects’ to water quality,” “the term ‘project,’” and “the components of a water quality management plan.” 65 Fed. Reg. at 12,862-63. The Corps’ Memorandum in Opposition offers no explanation or defense for its coyness. Even aside from
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to its logical conclusion, the Corps' argument would give the Corps broader authority to restrict minimal-effort projects than it has over larger projects reviewed under its rigorous individual permit standards. This makes no sense.

Where the CWA grants exclusive authority to the States or to another agency, the "requirements and standards" clause must be read to authorize only those terms and conditions that do not trench upon those other authorities. "A court must . . . interpret [a] statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole." *Brown & Williamson Tobacco Corp.*, 529 U.S. at 133 (internal quotations omitted); see also *Weinberger v. Hynson, Westcott, & Dunning, Inc.*, 412 U.S. 609, 631-32 (1973) (When "interpreting separate provisions of a single Act," the court must "give the Act the most harmonious, comprehensive meaning possible in light of the legislative policy and purpose." (internal quotation omitted)). "Statutory construction . . . is a holistic endeavor," and a court must adopt the statutory reading "that is compatible with the rest of the law." *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988).

Moreover, the Corps' claim that it must second-guess and supersede state water quality requirements in order "to ensure that activities authorized by th[e] NWP's do not result in more than minimal adverse effects on water quality," 65 Fed. Reg. at 12,862, only highlights the unreasonableness of the Corps' interpretation of "minimal adverse effects." As the Corps acknowledges, the States may promulgate water quality standards that are "*more stringent* than the level of protection afforded in a federal permit." Mem. Opp'n at 49 (emphasis the Corps'). "State water quality standards provide a supplementary basis so that numerous point sources,

this condition's jurisdictional problems, the Corps' refusal to explain itself renders its action arbitrary and capricious.

despite individual compliance with [federal] effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." *PUD No. 1 of Jefferson County*, 511 U.S. at 704 (internal quotations omitted). Water quality standards must be set at a level sufficient to "protect the public health or welfare, enhance the quality of water[,] and serve the purposes of this chapter." 33 U.S.C. § 1313(c)(2)(A).

It is unreasonable to suggest that state water quality standards would be insufficient to ensure "minimal effects" on the environment consistent with § 404(e). State water quality standards are adopted using a rigorous process. States must first establish "designated uses" for their water bodies. *See id.* They then must adopt "water quality criteria" sufficient to protect those designated uses. *Id.* States must establish numeric criteria and may establish "narrative" criteria for toxic pollutants, *see* 33 U.S.C. § 1313(c)(2)(B), and they must ensure that "[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." 40 C.F.R. § 131.12 (the "antidegradation policy"). "At a minimum, state water quality standards must satisfy these conditions," *PUD No. 1 of Jefferson County*, 511 U.S. at 705, and state standards are subject to the approval of EPA. Furthermore, "[t]he Act also allows States to impose more stringent water quality controls." *Id.* To suggest that projects meeting these detailed, stringent requirements might nonetheless fail § 404(e)'s "minimal effects" requirement betrays the Corps' unreasonable understanding of the term "minimal effects."

The Corps also relies on the "savings clause" in § 401(b), which declares 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). *Mem. Opp'n* at 50. But the "savings clause" can only

“save” authority that the Corps already has. Section 303 of the Act grants the States authority to establish water quality standards, and § 404(e) must be read consistently with § 303. The Corps therefore has no authority under § 404(e) to review or impose water quality standards. With no authority under § 404(e) for § 401(b) to “save,” the clause is simply irrelevant. *Cf. International Paper Co. v. Ouellette*, 479 U.S. 481, 493 (1987) (statement that “nothing in this section” preempts state law does not preclude other sections of the same act from preempting state law).

In addition, courts should not “give broad effect to saving clauses where doing so would upset [a] careful regulatory scheme established by federal law.” *United States v. Locke*, 529 U.S. 89, 106 (2000). In *Locke*, the Supreme Court declined to give a broad reading to a savings clause that purported to preserve state authority over interstate vessels, thinking it “quite unlikely that Congress would use a means so indirect as . . . savings clauses . . . to upset the settled division of authority” between the federal government and the States. *Id.* Similarly, the Corps’ argument that Congress would use a savings clause to upset the CWA’s careful division of authority places more weight on the savings clause than that provision can bear, “either from a textual standpoint or from a consideration of the whole federal regulatory scheme of which [§ 401] is but a part.” *Id.* at 105.

Rather than upset the CWA’s allocation of responsibility to the States, § 401 (and the Act as a whole) must be read in a manner consistent with that allocation. The Act confers authority over water quality plans to the States, and the Corps’ attempted usurpation of that authority is *ultra vires*.¹⁷

¹⁷ The position of the States of New York and New Mexico, as *amici curiae*, that they are willing to have the Corps declare them to “lack strong water quality programs” and are willing to acquiesce in the Corps’ actions is irrelevant. The Corps’ actions are beyond its jurisdiction and illegal. States cannot through acquiescence cure that illegality. If the Attorneys General of New
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F. The Replacement Permit Rule's Requirement of Vegetated Buffers for All Projects Involving Open Waters Exceeds the Authority of the Corps.

The Corps defends its vegetated buffer requirement on two grounds: that the requirement is discretionary, and that it is reasonably related to the permitted activities. Mem. Opp'n at 53-55. Neither ground holds water.

First, although the Corps contends that vegetated buffers are not actually required on a blanket basis, that is not what the Replacement Permit Rule states. NWP 39 (which the Corps does not mention) mandates that vegetated buffers be installed in all cases involving open waters or streams, to the maximum extent practicable:

If there are any open waters or streams within the project area, the permittee *will establish and maintain, to the maximum extent practicable*, wetland or upland vegetated buffers next to those open waters or streams consistent with General Condition 19. Deed restrictions, conservation easements, protective covenants, or other means of land conservation and preservation *are required* to protect and maintain the vegetated buffers established on the project site

65 Fed. Reg. at 12,890 (emphasis added). The fact that vegetated buffers are required only "to the maximum extent practicable" does not make them discretionary. Webster's defines "practicable" as "possible to practice or perform." Webster's Third New International Dictionary 1780 (1993). Asking whether a vegetated buffer is "possible" is far different from considering whether a vegetated buffer would be appropriate — only the latter involves the exercise of discretion.¹⁸ Under NWP 39, if there are open waters on the site, and if the installation of buffers is feasible, then according to the Rule they must be installed.

York and New Mexico are unhappy with their States' water quality programs, their remedy lies with their States' legislatures.

¹⁸ As another dictionary states, "[p]racticable means something that can be put into effect. *Practical* refers to something sensible and worthwhile. Thus, it might be *practicable* to transport children to school by balloon, but it would not be *practical*." Webster's II New

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General Condition 19 operates the same way: It requires vegetated buffers next to open waters “to the maximum extent practicable.” 65 Fed. Reg. at 12,896. The Corps contends that “District Engineers will determine on a case-by-case basis when it is appropriate to require vegetated buffers next to open waters,” Mem. Opp’n at 53, but this explanation is belied by the preamble, which states categorically that “[v]egetated buffers are required if there are open waters on the project site.” 65 Fed. Reg. at 12,836. Despite the Corps’ valiant attempt to soft-pedal the language of the Rule, vegetated buffers are a blanket requirement for sites with open waters.

Second, such a requirement, imposed without regard to whether the discharge on a particular site has impacts that can be redressed by a buffer, is illegal. For the Corps to impose conditions on a permit, “[t]he conditions must be related to the discharge itself,” not to non-jurisdictional activity that may be part of the applicant’s project. *United States v. Mango*, 199 F.3d 85, 93 n.7 (2d Cir. 1999). The vegetated buffer requirement is not so tailored; it requires buffers in upland areas outside the Corps’ jurisdiction, and it is therefore *ultra vires*.¹⁹

G. NAHB Can Raise its Regulatory Flexibility Act and CWA § 404(e)(2) Claims.

The Corps attempts to raise two procedural barriers to NAHB’s claims under the Regulatory Flexibility Act (“RFA”) and § 404(e)(2) of the CWA. Neither is availing.²⁰

College Dictionary 867 (1999). Determining whether the installation of a buffer is as feasible as transporting children to school by balloon is not the same as exercising case-by-case discretion.

¹⁹ NAHB also challenges the Corps floodplain restrictions, and hereby adopts the arguments presented on that issue in the Memorandum in Opposition and Reply of Plaintiffs National Stone, Sand and Gravel Association, *et al.*

²⁰ With regard to the Corps’ substantive arguments regarding the RFA, NAHB hereby adopts the arguments presented in the Memorandum in Opposition and Reply of Plaintiffs National Federation of Independent Businesses, *et al.*

First, the Corps contends NAHB cannot raise a claim under the RFA, because it did not include an RFA claim in its Complaint. Mem. Opp'n at 68 n.41 (citing NAHB's Supplemental Complaint). This is incorrect. Count Four of NAHB's *Amended* Supplemental Complaint contains NAHB's RFA claim. (See Docket Entry 21, filed June 27, 2000.) The Corps is working with the wrong document.

Second, the Corps contends NAHB cannot raise a claim under CWA § 404(e)(2) — requiring the Corps, before revoking or modifying a general permit, to find that the activities authorized by that permit “have an adverse impact on the environment” or “are more appropriately authorized by individual permits” — because NAHB allegedly did not do so during the comment period. Mem. Opp'n at 44-45. This, too, is not so.

NAHB informed the Corps again and again that it had failed to find that the activities authorized by NWP 26 had more than minimal effects on the environment. In the introduction alone to its October 1999 comments, NAHB warned that “[t]hese sweeping changes were made even though the Corps' own statistics showed that the NWP program was achieving no net loss of wetlands on an acreage basis and the Corps found that the existing program met the minimal impacts test,” and that “the Corps has failed to demonstrate the need for additional protections.” Advice & Recommendations of NAHB Regarding Corps Proposal to Issue & Modify NWPs, AR.PRT2-2955, at 5-6 (“NAHB Comments”). “Most disturbing,” commented NAHB, “is the lack of any sound, credible data showing the need to further restrict the use of NWPs. The proposed exclusions add layers of regulation, yet the Corps has failed to demonstrate that . . . the current NWPs were not already protecting and preserving wetlands” *Id.* at 7. NAHB may not have expressly stated that the Corps' failure violated § 404(e)(2), but even without those “magic words,” Mem. Opp'n at 47, NAHB's extensive comments were more than sufficient to

put the Corps on notice of NAHB's claim.²¹ See *Appalachian Power Co. v. EPA*, 135 F.3d 791, 817-18 (D.C. Cir. 1998) ("*Appalachian Power III*"). "So long as [the Corps] has considered the particular challenge raised on judicial review, it is of no import whether that challenge is phrased in exactly the same way in each forum." *Id.* at 818.

In any event, this Court could consider this claim even if NAHB had failed entirely to raise it, since the assumption that NWP 26 was having more than minimal effects is a "key assumption" underlying the entire proceeding, and since the Corps "retains a duty to examine key assumptions as part of its affirmative 'burden of promulgating and explaining a nonarbitrary, non-capricious rule.'" *Id.* (quoting *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 534 (D.C. Cir. 1983)). This Court is free to consider NAHB's claims.

H. This Court has the Authority to Order the Remedy NAHB Seeks.

Although the Corps attempts to restrict this Court's discretion to address its arbitrary and illegal rule, it is well within this Court's equitable authority to restore the *status quo ante* pending remand and reconsideration of the Replacement Permit Rule. As discussed more

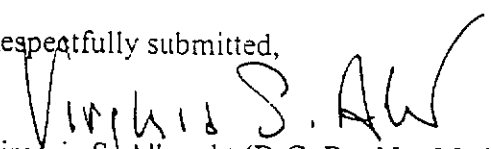
²¹ See, e.g., NAHB Comments, at 33 ("Neither Corps Headquarters nor any of the Districts have provided any information to justify the need for additional conditions."); *id.* ("Absent any documentation that the existing permits and general conditions are not meeting the minimal impacts test, it is difficult to fathom the purpose of the Corps' proposal. NAHB asserts that both Corps Headquarters and every District must provide documentation that explains the need for and expected benefits from each of the conditions imposed."); *id.* at 39 ("The information that is available to the public weighs heavily against today's proposal because it indicates that the adverse environmental effects of the existing permit are minimal."); *id.* at 70 ("[T]he Corps provided no justification to support its belief that a reduction was necessary to ensure minimal impacts."); *id.* at 88 ("[T]he proposal contains no factual or policy basis for modifying the current acreage limitations and includes no indication that the record substantiates the need to reduce those thresholds.") *id.* at 96 ("Specifically regarding the three new General Conditions, the Corps has not provided sufficient data or information to . . . show that the existing permits do not meet the minimal impacts test . . ."); *id.* at 116 ("First, and most important, the Corps has provided no data to show that activities authorized under the NWP program are causing impairment of the Nation's waters.").

completely in the Memorandum in Opposition and Reply of the National Stone, Sand and Gravel Association — which NAHB hereby adopts — the Corps' suggestion that this Court must somehow make "findings" pursuant to § 404(e) is puzzling. This Court's choice of remedy does not depend on any "findings" of the sort that would be required to create, revoke, or modify a permit in the first instance. This Court need only order that NWP 26 remain operative — as it does now for certain grandfathered applications — pending the Corps' reconsideration of the Replacement Permit Rule in a legal, reasoned, and rational manner. This is straightforward equitable relief.

III. CONCLUSION

For the foregoing reasons, NAHB requests that the Court declare that the Replacement Permit Rule is illegal; vacate and remand the Rule to the Corps; and require the Corps to reinstate NWP 26 and NWP 29 until such time as the Corps defines "minimal effects" and issues nationwide permits consistent with the findings of the Court.

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