

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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**NATIONAL ASSOCIATION OF HOME BUILDERS, et al.,** )

Plaintiffs, )

v. )

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

Defendants. )

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No: 1:01CV00274  
(consolidated with  
No. 1:01CV00320)

Judge J. Robertson

**COMBINED RESPONSE AND REPLY OF PLAINTIFF NATIONAL ASSOCIATION  
OF HOME BUILDERS IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT  
AND IN OPPOSITION TO THE UNITED STATES'S AND INTERVENORS' MOTIONS  
FOR SUMMARY JUDGMENT**

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## I. Introduction

The National Association of Home Builders challenges a rule that amends the regulatory definition of “discharge of dredged material” to specifically include “earth-moving.” A discharge of dredged material into navigable waters is illegal under the Clean Water Act unless authorized by a permit. Areas around a home building site (even when apparently dry) are sometimes considered *wetlands* -- and thus navigable waters -- by the Agencies. Because building a home generally requires earth-moving work at or near the site, the “Regards Rule” challenged in this case has immediate and profound implications for home builders.

The statute defines the term “discharge” as an “addition.” Prior to the Regards Rule, the home builder who actually *added* dredged material to a navigable water during earth-moving work was regulated under both the Clean Water Act and the regulations, but earth-moving work that added nothing was not regulated. The Regards Rule expands the regulatory framework. Now, earth-moving is *by definition* regarded as regulated “unless project specific evidence shows that the activity results in only incidental fallback.” The rule defines “incidental fallback” as (1) “small volume” redeposits (2) incidental to “excavation” (3) which fall back to “substantially the same place as the initial removal.” All other earth movements are “discharges.” Period.

Not all earth-moving results in an addition, however. The Agencies agree. 66 Fed. Reg. 4550, 4560 (Jan. 17, 2001); Gov. Br. at 27-30. Yet the Regards Rule categorically subjects earth-movers to regulatory oversight. When the earth-mover whose operations “add” nothing goes to secure financing, sell a property, or engage in other business, he faces the immediate implications of engaging in an activity *regarded by law* as a discharge, including the now obvious question: where is your pass or permit? His only options are: (1) modify or abandon his project; (2) apply for a permit; (3) proceed at the risk of civil or criminal enforcement; or (4) try to convince the Agencies through “project specific evidence” that only incidental fallback

will occur. The last option is available, however, only to (1) excavators (2) with only “small volume” redeposits (3) which fall back to “substantially the same place as the initial removal.” For all others, the “regard” is conclusive, addition or no addition.

The Agencies deride the builders’ dilemma, characterizing it as just a “strategic choice.” Gov. Br. at 25. They also claim that the rule is not ripe for review because the rulemaking merely reflects the Agencies’ “expectation.” But the rule is in effect now; the impact is immediate. Further, it outruns the Agencies’ statutory authority, which is limited to the regulation of “discharges.” The “incidental fallback” definition, coupled with the “regard” provision, means that any large volume or non-excavation soil movement is a discharge that must be permitted to be legal. This, despite the fact that “volume” is not indicative of an addition. Nor is excavation. *Nat’l Mining Ass’n v. Army Corps of Eng’rs*, 145 F.3d 1339, 1404-05 (D.C. Cir. 1998) (incidental fallback occurs during a “wide range” of activities, such as mechanized landclearing, ditching, and excavation, and includes situations in which 1 ton of material falls back in the course of removing 99 tons). By defining incidental fallback impermissibly narrowly and regarding all other earth-moving as a discharge, the rule necessarily sweeps within the definition of “discharge of dredged material” earth-moving activities that add nothing and were previously unregulated. By going beyond the statutory requirement of an addition and categorically regulating earth-moving, the rule exceeds the Agencies’ statutory authority and is contrary to law.

## **II. Argument**

### **A. The Agencies Cannot Evade Review or Salvage the Rule by Amending it Through Argument of Counsel.**

Both the Agencies and the Intervenors try various tacks to avoid substantive review of the rule. The Agencies recast the rule as a statement of “expectation” that earth-moving “will

usually (but not always)” result in regulated discharges which “leaves the question of whether any particular activity is regulated to case-by-case decisionmaking.” Gov. Br. at 12, 15. The Agencies claim that this suit does not present a purely legal issue because this “Court can do no more than ‘theorize about how the rule will be applied.’” *Id.* at 21 (brackets and citation omitted).<sup>1</sup> Conversely, Intervenor claim that, far from a mere “expectation,” the rule establishes a section 301 “effluent limitation or other limitation” reviewable only in the Court of Appeals. Int. Br. at 3-7. Alternatively, Intervenor assert that this action is an improper facial challenge. *Id.* at 9-10. These arguments overlook the fact that this is a simple Administrative Procedure Act review of a final agency rule that governs the public now and that, by its own terms, injures NAHB’s members by going beyond “additions.”<sup>2</sup> The rule is inherently illegal.

#### **1. The Rule is Ripe for Review.**

The purpose of the ripeness doctrine is to keep courts from entangling themselves in unfinished agency decisionmaking, thereby ensuring the separation of powers required by the Constitution.<sup>3</sup> To determine whether a claim is ripe for review, a court will consider “both the fitness of the issue[ ] for judicial decision and the hardship to the parties of withholding court

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<sup>1</sup> The Agencies suggest that any challenge should be deferred to a future determination whether a particular activity will result in a discharge. Gov. Br. at 17-25. But, such a future challenge would be to *that* decision based on the administrative record of *that* decision. Thus, the Agencies would effectively forever insulate *this* rule from review on *its* record. Meanwhile, NAHB’s members would continue to suffer substantial hardship.

<sup>2</sup> See *Amfac Resorts, L.L.C. v. DOI*, 282 F.3d 818, 830 (D.C. Cir. 2002) (regulations putting business plans in “doubt” and forcing change cause immediate injury). The immediate, illegal effect of the Regards Rule was described in the declaration of Duane Desiderio (Memorandum of NAHB in Support of Summary Judgment (NAHB Op. Br.) ex. 1). The facts in that declaration are undisputed and are, therefore, admitted. *Twist v. Meese*, 854 F.2d 1421, 1424 (D.C. Cir. 1988); D.C. District Court LCvR 7.1(h).

<sup>3</sup> See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967); *Allen v. Wright*, 468 U.S. 737, 750 (1984). Because the Regards Rule is a “final agency action,” 5 U.S.C. §§ 704, 706, delaying review of the Rule will not serve the policies advanced by the ripeness doctrine.

consideration.”<sup>4</sup> Where the issue presents a purely legal question, it is fit and therefore presumptively reviewable.<sup>5</sup> Hardship comes into play only if fitness is in question.<sup>6</sup>

**a. NAHB’s Claims are Fit for Judicial Resolution.**

Ripeness is determined based on “the issue tendered.”<sup>7</sup> The issue presented to this Court is not whether a “given project” will result in a discharge, Gov. Br. at 17-22, but whether this final rule -- as written and in effect today -- exceeds the Agencies’ authority. This purely legal question requires no further factual development.

A claim that agency action exceeds its statutory authority presents a purely legal issue.<sup>8</sup> The Agencies assert that the issue is not “suitable for decision in the abstract” because there are “too many imponderables.” Gov. Br. at 18 (citations and quotations omitted). This very argument was recently rejected by the D.C. Circuit where the issue presented was “purely legal.”<sup>9</sup> To determine whether further factual development is required, a reviewing court

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<sup>4</sup> *Nat’l Mining Ass’n v. Fowler*, 2003 U.S. App. LEXIS 7081 at \*8 (D.C. Cir. Apr. 15, 2003) (quoting *Abbott Labs*, 387 U.S. at 149); *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 434 (D.C. Cir. 1986).

<sup>5</sup> *Am. Petroleum Inst. v. EPA*, 906 F.2d 729, 739 (D.C. Cir. 1990).

<sup>6</sup> If a “matter is clearly fit to be heard, [a court] need not consider whether petitioners would suffer any hardship from [] postponing its resolution.” *Consol. Rail Corp. v. United States*, 896 F.2d 574, 577-78 (D.C. Cir. 1990).

<sup>7</sup> *Abbott Labs*, 387 U.S. at 149; *State Farm Mut. Auto. Ins. Co. v. Dole*, 802 F.2d 474, 479 (D.C. Cir. 1986) (the court “examine[s] each issue *raised by petitioner* to determine whether it is ripe for review”) (emphasis added).

<sup>8</sup> *Abbott Labs*, 387 U.S. at 149 (whether rule requiring printing of established drug name every time trade name is used exceeded statutory requirement that established drug name be printed any time trade name is used is a pure question of law); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1039 (D.C. Cir. 2002) (challenge to rule as contrary to statute presented pure question of law).

<sup>9</sup> *Fowler*, 2003 U.S. App. LEXIS 7081, at \*8-14 (rejecting agency’s claim that challenge to regulation as contrary to statute was “too speculative and abstract to warrant review”; “no threshold factual issues”; “disputed issues [were] purely legal”).

considers “whether the agency or court will benefit from deferring review until the agency’s policies have crystallized through the application of the policy to particular facts.” *Am. Petroleum Inst. v. EPA*, 906 F.2d at 739 (internal citations omitted). Whether the Agencies can lawfully “regard” earth-moving as regulated or define incidental fallback to exclude (and thereby sweep within the Regards Rule) soil movements that add nothing is a pure question of law that requires no factual development and is “presumptively reviewable.”<sup>10</sup>

The rule is, by its own terms, a “final rule” that is “final agency action.” 66 Fed. Reg. at 4550.<sup>11</sup> The Agencies, therefore, have no legitimate interest in postponing review.<sup>12</sup> Direct and immediate legal consequences flow from the Regards Rule. As in *Abbott Labs*, this regulation “purport[s] to give an authoritative interpretation of a statutory provision that has a direct effect on the day-to-day business” of NAHB members. 387 U.S. at 152. The Regards Rule “alter[s] the legal regime to which” NAHB members are subject.<sup>13</sup> The rule places earth-movers in the position of either complying with the regulation or risking severe civil and criminal sanctions.

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<sup>10</sup> *Id.* at \*9 (quoting *Am. Petroleum Inst. v. EPA*, 906 F.2d 729, 739 (D.C. Cir. 1990); *Eagle-Picher Indus. Inc. v. EPA*, 759 F.2d 905, 915 (D.C. Cir. 1985) (for a purely legal question the court “assume[s] its threshold suitability for judicial determination”) (citing *Abbott Labs*). Intervenor’s acknowledge that “there are no material facts in this case” because the “entire case on review is a question of law, and only a question of law.” Intervenor’s Statement of Material Facts. Moreover, because this is a challenge to agency action, basic administrative law principles dictate that review of any necessary facts would be limited to the administrative record in existence at the time the rule was issued. *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

<sup>11</sup> *See* Gov. Br. at 18; *Barrick Goldstrike Mines Inc. v. Browner*, 215 F.3d 45, 48 (D.C. Cir. 2000). Intervenor’s recitation of the *Lujan v. Nat’l Wildlife Fed’n* principle that *ongoing* agency actions are not “final” is a statement of the obvious. 497 U.S. 871 (1990); Int. Br. at 8. “[A] substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately . . . is ‘ripe’ for review at once . . .” *Id.* at 891 (citing *Abbott Labs*).

<sup>12</sup> *See Ciba-Geigy*, 801 F.2d at 436 (agency’s interest in postponing review highest when position is tentative; once position publicly articulated agency interest in postponing is gone); *Cont’l Air Lines v. Civil Aeronautics Bd.*, 107, 124-26 (same).

<sup>13</sup> *See Bennett v. Spear*, 520 U.S. 154, 178 (1997) (final agency action that “affected the legal rights of the relevant actors . . . has direct and appreciable legal consequences”).

Like petitioners in *Abbott Labs* and *Ciba-Geigy*, NAHB members' only alternative to compliance is "to run the risk of serious civil and criminal penalties."<sup>14</sup>

The Agencies argue "the Rule cannot be taken in the abstract" because whether a project results in a discharge requires a "case-by-case, fact-specific analysis." Gov. Br. at 19. They say the rule does not automatically require anything, but instead merely represents the Agencies' current thinking on the issue of earth-moving. This is absurd. Because of its practical and legal effects, the rule must be "taken by those entitled to rely upon [it] as what [it] purports to be." *Columbia Broad. Sys.*, 316 U.S. at 422.<sup>15</sup>

The Agencies cite *Clean Air Implementation Project v. EPA*, 150 F.3d 1200 (D.C. Cir. 1998), for the proposition that a specific factual setting is needed to allow the Court to "flesh out" the impact and effect of the rule. Gov. Br. at 19-20. But *Clean Air* is inapposite. There, EPA's air pollution standards provided maximum emission levels *and* a reference test used to analyze pollutants for conformity with a particular standard. *Clean Air*, 150 F.3d at 1202. EPA

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<sup>14</sup> *Ciba-Geigy*, 801 F.2d at 439 (citing *Abbott Labs*). The Agencies assert that the rule does not require any particular action and that a citizen's decision to conform his conduct to the regulation is simply a "strategic choice." Gov. Br. at 22, 25. This cynical argument ignores reality. As a general matter, a rule having the force of law "sets a standard of conduct for all to whom its terms apply." *Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 418 (1942). These standards operate "in advance of the imposition of sanctions . . . . It is common experience that men conform their conduct to regulations by governmental authority so as to avoid the unpleasant legal consequences which failure to conform entails." *Id.* The regulated "are free only in the sense that all those who do not choose to conform to regulations which may be determined to be lawful are free by their choice to accept the legal consequences of their acts." *Id.*

<sup>15</sup> See *Frozen Food Express v. United States*, 351 U.S. 40, 44 (1956) (order specifying commodities deemed "agricultural commodities" ripe because it "sets the standard for shaping the manner in which an important segment of the [regulated's] business will be done."); see also *Barrick Goldstrike Mines*, 215 F.3d at 48 n.3 (rejecting EPA argument that rule was not "binding" because it "merely explained EPA's current view of [ ] the statutory and regulatory requirements"); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020-23 (D.C. Cir. 2000) (agency pronouncements have binding practical effects).

replaced the reference test method with a requirement that emitters present “credible evidence” of conformity. Petitioners argued that the “credible evidence” standard “increase[d] the stringency of the underlying standards.” *Id.* at 1203. The court found that “EPA’s credible evidence rule is final, but *in contending* that the rule alters the standards, *petitioners have raised issues that are not purely legal*, issues that are not suitable for decision in the abstract.” *Id.* at 1205 (emphasis added). Because the record did not show that altering the testing methods had in fact changed the underlying standards, the court concluded that “[a]s matters now stand, there are too many imponderables” and found the *issue* unripe. *Id.*

In sharp contrast to *Clean Air*, this challenge presents the Court with purely legal issues that require no further factual development. Just as the D.C. Circuit recently noted in distinguishing *Clean Air*, “[h]ere, by contrast, no threshold factual issues counsel postponing judgment. All disputed issues are purely legal . . . there are no imponderables.”<sup>16</sup>

**b. Because the Issues are Fit for Review, Hardship Need Not be Evaluated, But NAHB’s Members are Suffering Hardship.**

When the issues presented are fit for review, there is no need to balance the hardships.<sup>17</sup> Even *if* hardship were at issue, NAHB would easily clear the hurdle. The rule is in effect now and imposes immediate and substantial hardship on NAHB and its members.<sup>18</sup>

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<sup>16</sup> *Fowler*, 2003 U.S. App. LEXIS 7081, at \*14. The other cases cited by the Agencies are similarly distinguishable. See *Diamond Shamrock Corp. v. Costle*, 580 F.2d 670, 673 (D.C. Cir. 1978) (as to effect of regulations, petitioners offered only “they ‘know it’s going to come’”); *Nat’l Ass’n of Regulatory Util. Comm’rs v. DOE*, 851 F.2d 1424, 1428 (D.C. Cir 1988) (finding unknowable how new methodology would impact pre-existing statutory obligation).

<sup>17</sup> *Consol. Rail Corp.*, 896 F.2d at 577. If a reviewing court has “doubts about the fitness of the issue for judicial resolution, then [it] balance[s] the institutional interests in postponing review against the hardship to the parties that will result from delay.” *Id.*

<sup>18</sup> The development of land for residential property and the construction of houses almost always involves mechanized earth-moving work. NAHB members engaged in earth-moving can only escape the rule’s categorical “regard” if the Agencies can be convinced by “project-specific  
(continued...)

The Agencies attempt to downplay NAHB's hardship by claiming the final rule shifts no burden of proof and imposes no obligations that "add to Plaintiffs' burden of compliance" with the statutory discharge prohibition. Gov. Br. at 22-25.<sup>19</sup> This reasoning misses the mark on many levels. First, the disclaimer that no burden is shifted *in* an administrative or judicial proceeding is merely a statement of the obvious and irrelevant to the immediate effect of the rule.<sup>20</sup> Second, the Court of Appeals has in similar situations observed that an agency may not "attribute [a petitioner's] dilemma solely to the statute itself and not to [the agency's] interpretation" of the terms of that statute.<sup>21</sup> As demonstrated above, the Regards Rule is causing NAHB members direct and immediate harm.<sup>22</sup> The rule categorically defines earth-moving as

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evidence" that only incidental fallback will occur. Even if an NAHB member could show the project-specific evidence necessary to escape being regarded, that member is still harmed by the cost and delay of making its case to the Corps—a harm incurred where the Corps had no jurisdiction in the first place. *See* Declaration of D. Desiderio at 6-8 (NAHB Op. Br. ex. 1).

<sup>19</sup> Contrary to the Agencies' claim, NAHB did not argue that the rule "puts a burden of proof on persons seeking to conduct earthmoving activities." Gov. Br. at 22. Rather, NAHB made the point that the only way to avoid being regarded, *under the language of the rule*, is to convince the Corps through project specific evidence that a project results in only incidental fallback. But NAHB is not aware of a single member who has ever successfully made this showing, Declaration of D. Desiderio at 5, and the Agencies' briefs do not suggest otherwise.

<sup>20</sup> Without statutory approval in the Clean Water Act (which does not exist), the Agencies cannot legally shift the burden of proof in such proceedings. 5 U.S.C. § 556(d); *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 275-81 (1994).

<sup>21</sup> *Ciba-Giegy*, 801 F.2d at 439 n.11. Such an assertion "depend[s] on acceptance of [the Agencies'] view of the merits" *Id.* But when, as here, "the issue of harm and the issue on the merits are intertwined, [the court] must assume the challenging party's view of the merits in determining ripeness." *Id.* (quoting *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 94 (D.C. Cir. 1986) (internal quotations omitted)).

<sup>22</sup> The Agencies' reliance on *Cronin v. FAA*, 73 F.3d 1126 (D.C. Cir. 1996), is misplaced. Gov. Br. at 18, 25-26. There, a challenge to a regulation that imposed an employment bar on employees testing positive for drugs or alcohol without a hearing was held unripe because the court could not "possibly guess at the precise nature" of a due process claim and the government conceded that "procedural due process protections must be afforded to any employee subject" to the testing. *Id.* at 1128, 1132. *State Farm* is similarly off point. Gov. Br. at 18. There, the harm complained of depended on the unlikely passage of legislation in New York. 802 F.3d at 480

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falling within the definition of “discharge of dredged material,” an act that is illegal unless permitted by the Agencies.<sup>23</sup> It is in effect now and ripe for review.<sup>24</sup>

## 2. Intervenor’s Procedural Claims Lack Merit.

Intervenors’ argument that the Regards Rule is an “effluent limitation or other limitation” reviewable only in the Court of Appeals, while imaginative, is wrong. The courts of appeals have jurisdiction to review an action *by EPA* “approving or promulgating any effluent limitation or other limitation under section [301].” 33 U.S.C. § 1369(b)(1)(E). The Act defines effluent limitation as a “restriction” *by EPA* (or a state) on the “quantities, rates, and concentrations” of pollutants permitted to be “discharged from point sources.” 33 U.S.C. § 1362(11) (emphasis added). The Regards Rule is issued by *both* the Corps and EPA, and does not limit the quantity, rate or concentration of a permitted discharge of a pollutant. It amends the definition of the section 404 term “discharge of dredged material.”<sup>25</sup> Thus, the rule does not establish an “effluent limitation” or any “other limitation.”<sup>26</sup> Not surprisingly, Intervenors find no support in

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(noting that the harm “about which petitioners are vexed will likely never occur”). By contrast, regulation of earth-moving with no addition wrongs earth-movers now.

<sup>23</sup> One look at the definition of “discharge of dredged material” in the Code of Federal Regulations tells the story. While “dredged material” is defined as material “excavated or dredged from waters of the United States,” the definition of “discharge of dredged material” focuses not on the discharge of such material but on when, where and how mechanized earth-moving is regulated. *Id.* at § 323.2(c), (d)(1)(iii), (d)(2)(i)-(ii). The language is mystifying, but the message to earth-movers is clear: they may proceed only by the Corps’s leave.

<sup>24</sup> The Agencies argue that earth-movers can seek guidance from their local Corps office. Gov. Br. at 24-25. But, if anything, the admonition reinforces the breadth and immediacy of the rule. “[A]nyone proposing projects which, for example, involve earth-moving activities . . . [is urged to] contact the Corps *well in advance* . . .” 66 Fed. Reg. at 4568. “[I]t scarcely follows [from the availability of agency guidance] that [petitioners] may not obtain judicial review . . .” *Barrick Goldstrike Mines*, 215 F.3d at 50.

<sup>25</sup> Intervenors admit that the only authority cited in the rule is section 404. Int. Br. at 5.

<sup>26</sup> Intervenors’ argument ignores their own practice of challenging section 404 rules in the district courts. *Natural Res. Def. Council v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975)

(continued...)

the caselaw. The Regards Rule is not an “effluent limitation or other limitation,”<sup>27</sup> and, just like the Tulloch Rule before it, its review is proper in this Court.<sup>28</sup>

Intervenors’ alternate claim, that this suit is an improper facial challenge, also lacks merit. Int. Br. at 9-10. A facial challenge is, traditionally, a “claim that a statute is unconstitutional on its face.” Blacks Law Dictionary 223 (7th ed. 1999). While a “facial challenge” to a statute on constitutional grounds has some parallels to a direct APA review of a final agency rule, the actions involve different principles and operate under different frameworks. The doctrine limiting facial challenges to those where the challenged statute is constitutional in “no set of circumstances” or in more than “some cases,” based on *United States v. Salerno*, 481 U.S. 739 (1987), is inherently grounded in Article III requirements and judicial principles of avoiding constitutional adjudication and deferring to the legislative process.<sup>29</sup> These principles lie in sharp contrast to the presumption of review of agency action and the

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(plaintiffs, including NWF, challenged a section 404 rule); *Nat’l Wildlife Fed’n v. Caldera*, 2002 U.S. Dist. LEXIS 7458 (D.D.C. 2002) (programmatic challenge to 23 section 404 permits). That section 404 rules are challenged in district court is widely recognized. Margaret N. Strand, *Wetlands Deskbook* 61 (Env’t Law Inst. 1997).

<sup>27</sup> “[O]ther limitation” immediately follows the term “effluent limitation” in section 509(b)(1), and both are *EPA* limitations. Thus, there is no more reason to find a section 404 definition an “other limitation” than to find it an “effluent limitation.”

<sup>28</sup> Intervenors’ argument that plaintiffs lack standing because discharges would be regulated with or without the Regards Rule is a non-starter. Int. Br. at 9. Plaintiffs are injured not by the discharge prohibition, but by the Regards Rule because it regulates them beyond statutory additions. This injury could not be more traceable to the Regards Rule nor more redressable than by an order setting it aside.

<sup>29</sup> See, e.g., *New York v. Ferber*, 458 U.S. 747, 767-68, n.20 (1982); *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973); *Younger v. Harris*, 401 U.S. 37, 52 (1971). See also Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 Am. U. L. Rev. 359, 361 (1998).

APA's specific provisions for review of final agency action. 5 U.S.C. § 706.<sup>30</sup>

Intervenors correctly note that *Salerno* has, on occasion, been applied to challenges to agency regulations. *Amfac Resorts, L.L.C. v. DOI*, 282 F.3d 818 (D.C. Cir. 2002) (citing *Reno v. Flores*, 507 U.S. 292 (1993); *INS v. Nat'l Ctr. for Immigrants' Rights*, 502 U.S. 183 (1991) [*NCIR*]). Yet, there has been no clear explanation how (much less why) *Salerno* applies in an APA challenge to an agency rule. *Amfac* discusses the potential applicability of *Salerno*-type tests applied in *Reno* and *NCIR*, but acknowledges that *National Mining* found *Salerno* inapplicable to a review of an agency rule such as this. *Amfac* ultimately comes to no conclusion whether either test applies or, if so, how they would apply.<sup>31</sup>

The logical extension of Intervenors' *Salerno* arguments would be to render the APA and the presumption of reviewability empty vessels. In *National Mining*, the D.C. Circuit acknowledged that the Supreme Court "may take a more *Salerno*-like line on facial challenges to regulations," but noted that in *Babbitt v. Sweet Home Chapter, Communities for a Greater Or.*, "[t]he Court did not sustain the regulation on the basis of a few hypothetical instances of valid application; instead, it [proceeded to the merits and held that the rule] was a reasonable interpretation of the statute in general." *Nat'l Mining*, 145 F.3d at 1408 (citing *Sweet Home*, 515 U.S. 515 U.S. 687, 696-708 (1995)). *National Mining* noted:

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<sup>30</sup> *Abbott Labs*, 387 U.S. at 140 (agency action presumed reviewable unless denied by the statute; APA embodies this basic presumption). Literal application of *Salerno* in the context of challenges to agency rulemakings could run headlong into these bedrock principles. *Amfac*, 282 F.3d at 828 (congressional intent for judicial review of many statutes "may also demand adjustments in the *Reno v. Flores* or *NCIR* tests for reviewing facial attacks on regulations").

<sup>31</sup> "Whether despite *Reno v. Flores*, *National Mining* therefore must stand as circuit law [is] unnecessary for us to answer." *Amfac*, 282 F.3d at 827. *Amfac* simply holds that a claim that *one* unlawful application is "far from enough to make the regulation unlawful under any of the standards [*Reno*, *NCIR*, or First Amendment "substantial overbreadth"] we have mentioned." *Id.* at 828.

it would have been remarkable for the Court to find that the regulation omitted an element made essential by the statute, and then proceed to uphold the regulation against facial attack because that element might happen to be present on the facts of a particular case.

*Id.* (citing *Sweet Home*, 515 U.S. at 731-32 (Scalia, J., dissenting)).<sup>32</sup> Thus, a direct challenge to a rule (like both the Tulloch Rule and the Regards Rule) that “eschews the Act’s ‘addition’ requirement . . . should not fail simply because the Corps might apply it to cases where an addition is present.” 145 F.3d at 1408.<sup>33</sup>

Even if *Salerno* applied as Intervenors suggest, *National Mining* noted that it would “[do] so with a wrinkle:”

as even the Corps concedes, the plaintiffs’ burden under a *Salerno* approach would be to show that the *incremental* regulation represented by the Tulloch Rule is invalid under every set of circumstances; to show, in other words, that the Corps would be acting *ultra vires* every time it required a permit under the 1993 rule that it could not have required under the 1986 rule.

*Id.* at 1407.<sup>34</sup> The Regards Rule easily meets this test. In *National Mining*, the incremental impact of the Tulloch Rule was “that its *faithful* application would carry the agency beyond its

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<sup>32</sup> In *Sweet Home*, Justice Scalia explained:

Suppose a statute that prohibits “premeditated killing of a human being,” and an implementing regulation that prohibits “killing a human being.” A facial challenge to the regulation would not be rejected on the ground that, after all, it *could* be applied to a killing that happening to be premeditated.

515 U.S. at 731-32 (Scalia, J., dissenting).

<sup>33</sup> This is supported by *Salerno* itself. The Court did not hypothesize about possible valid applications. 481 U.S. at 746-55. “The *Salerno* defendants lost . . . because the Court held that the Act on its face satisfied all the applicable due process and Eighth Amendment doctrinal tests.” Isserles, *supra*, at 399.

<sup>34</sup> *National Mining* ultimately found that *Salerno* did not apply because the “Supreme Court has never adopted a ‘no set of circumstances’ test to assess the validity of a regulation challenged as facially incompatible with governing statutory law.” 145 F.3d at 1407. *Amfac* called this conclusion into question in light of *Reno*. 282 F.3d at 826. Nevertheless, *Amfac* did not further discuss (and there is no dispute over) *National Mining*’s explanation of the application of the “no set of circumstances” in this type of challenge.

statutory mandate.” *Id.* at 1408. In other words, activities that *added* dredged material to navigable waters were already regulated, but the *incremental* impact of the Tulloch Rule was that it regulated “any redeposit” without regard to whether the redeposit resulted in “additions.” *Id.* at 1404, 1407-08. Likewise, the incremental impact of the Regards Rule is that it expands the Agencies’ regulation beyond additions and into the regulation of earth-moving. This incremental impact is illegal in and of itself in every circumstance.<sup>35</sup> The Agencies are not authorized to regulate the movement of earth, only the addition of dredged material. Thus, NAHB meets either of the *Salerno* tests. Intervenors’ facial challenge argument is without merit. *Id.*<sup>36</sup>

**B. The Regards Rule Outruns the Agencies’ Statutory Authority and Violates National Mining.**

Rather than defend the rule as written, the Agencies painstakingly avoid its actual terms and recast it as a mere “expectation” that earth-moving will result in a statutory “addition,”<sup>37</sup>

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<sup>35</sup> Given the Regards Rule’s direct and immediate effect on earth-movers, Intervenors fail to explain why NAHB’s members are not similarly situated to the concessioners in *Amfac* who were permitted to challenge the rule “as applied” to their contracts based on the fact that, while the rule had not been used to deny contract renewal, it cast “doubt” on whether the concessioners were forced to bid more generously than they otherwise would have. *Amfac*, 282 F.3d at 830. Indeed, NAHB has demonstrated that the Regards Rule, by its terms, applies to its members now who are engaged in earth-moving. Declaration of Duane Desiderio (Exhibit 1). These facts are un rebutted. Indeed, NAHB’s un rebutted showing demonstrates why the principles underlying the facial challenge doctrine are not served in this case.

<sup>36</sup> Even if Intervenors could force this APA review within the facial challenge rubric, *Amfac* is easily distinguishable. There, petitioners challenged a regulation providing that only express rights of renewal in concessioner contracts would be honored. The petitioners claimed that the rule was facially invalid because of a “*possibility that one*” concessionaire’s contract might have an implied right of renewal that must be honored under the statute. 282 F.3d at 825 (emphasis added). In sharp contrast, NAHB does not challenge the rule based on one possible invalid application. Rather, it challenges the rule’s terms themselves as contrary to law.

<sup>37</sup> The term “regard,” the one operative verb in the first of the rule’s two clauses, is not discussed and, in fact, appears nowhere in the Agencies’ brief except in two block quotes of the rule. Gov. Br. at 12, 27. By contrast, the word “expectation” -- which appears nowhere in the rule -- appears ten times in the Agencies’ brief. *See id.* at 2, 12, 14, 15, 26, 28, 30, 32, 40 and 46. An expectation, which is “something expected or hoped for,” is far different from a regard,

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claiming that this “expectation” is entitled to deference. Gov. Br. at 30. But the public is governed by the actual terms of the rule, not *post hoc* assertions of litigation counsel.<sup>38</sup> By its terms, the rule “regards” earth-moving as “resulting in a discharge . . . unless” it falls within the Agencies’ impermissibly narrow definition of “incidental fallback.” 66 Fed. Reg. at 4574-75.<sup>39</sup>

The earth-mover who caused “any addition” of dredged material “incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation,” was already regulated under regulations that predate the Regards Rule. 33 C.F.R. § 323.2(d)(1)(iii). The Regards Rule expands on the pre-existing regulations by adding two new provisions. First, the “use of mechanized earth-moving equipment to conduct . . . earth-moving” has been added to the definition of “discharge of dredged material.” 66 Fed. Reg. at 4574-75 (adding new paragraph 2(i) to 33 C.F.R. § 323.2(d) (Regards Provision). This, despite the agencies’ acknowledgement that not all earth-moving results in a discharge.<sup>40</sup> Second, earth-movers may avoid being “regarded” as causing a discharge only if their activity satisfies the Agencies’ illegal definition of “incidental fallback,” *i.e.*, it results in (1) “small volume” redeposits (2) incidental to “excavation” activity that (3) fall back to “substantially the same place as the initial removal.”

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which is “to look upon or contemplate mentally in a specified way.” Oxford American Dictionary 336, 841 (1999).

<sup>38</sup> The preamble removes any doubt whether “regard” means what it says: the agencies “view the use of such equipment in waters of the U.S. as resulting in a discharge of dredged material unless there is case specific information to the contrary.” 66 Fed. Reg. at 4552.

<sup>39</sup> A rule that regards earth-movers who discharge nothing as regulated is as untenable as a rule that regards those who remove money from a bank as robbers or foreign-born residents as non-citizens. The wrong that is inflicted is unjustified, regardless of who would shoulder the burden of proof *if* the matter ultimately proceeded to a trial.

<sup>40</sup> *See* Gov. Br. at 27-30 (mechanized earth-moving equipment will typically--but not always--result in regulable redeposits); 66 Fed. Reg. at 4560 (“the activities addressed in today’s rule will not always result in a discharge”).

*Id.* (adding new paragraph 2(ii) to 33 C.F.R. § 323.2(d) (incidental fallback definition)).<sup>41</sup>

**1. Mere Movement is Not a Discharge.**

NAHB demonstrated in its opening brief that, by regarding “earth-moving activity in waters of the United States as resulting in a discharge,” the Regards Rule incorrectly equates movement with addition.<sup>42</sup> In response, the Agencies first make the surprising claim that a discharge can occur “even when no material is ‘added’ to the waters of the United States as that word is commonly understood.” Gov. Br. at 38. This assertion is contrary to both *National Mining*, which found addition to be a straightforward statutory term, and the firmly rooted statutory construction principle that the “plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden” meaning.<sup>43</sup> They then claim, inconsistently, that the “regulation of [earth-moving] is not based on the ‘movement’ of dredged material, but because of the regulable redeposit of dredged material into waters of the United States.” Gov. Br. at 38. But they do not explain how an activity that merely moves material adds material. Finally, they resort to caselaw, but not one of the cited cases holds that earth-moving is *per se* a discharge.

**a. The Cases Cited by the Agencies are Off Point.**

*United States v. Huebner* concluded without analysis that the use of a bulldozer to “move large mounds of dirt and level a 10 to 12 acre area” resulted in a discharge. The court’s only

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<sup>41</sup> The Agencies make the predictable argument that the rule furthers the purpose of the Clean Water Act. Gov. Br. at 32. But “no legislation pursues its purposes at all costs.” *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987).

<sup>42</sup> See NAHB Op. Br. at 18.

<sup>43</sup> *Old Colony R.R. Co. v. Comm’r*, 284 U.S. 552, 560 (1932); *Pioneer Inv. Serv. Co. v. Brunswick Assocs.*, 507 U.S. 380, 388 (1993) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979) (words in enactments carry “the ordinary, contemporary, common meaning”).

explanation is that the “scraping of materials from a wetland constitutes a discharge, because wetlands are defined by the presence of aquatic vegetation.” 752 F.2d 1235, 1243 (7th Cir. 1985). In *Borden Ranch Partnership v. Army Corps of Engineers*, the Ninth Circuit found that pulling four- to seven-foot long metal prongs through a wetland added a pollutant “in the context at issue” by wrenching up “the bottom layer of soil,” moving it around, and redepositing it “somewhere else.” 261 F.3d 810, 815 (9th Cir. 2001). The dissent, however, would have “follow[ed] and extend[ed]” *National Mining* by holding that “the return of soil in place after deep plowing is not a ‘discharge of a pollutant’” because it “does not involve any significant removal or ‘addition’ of material to the site.” *Id.* at 819-20 (Gould, J., dissenting). NAHB does not agree with the majority’s reasoning or conclusion. Nonetheless, the majority did not hold that movement alone is sufficient to constitute an addition. More importantly, to the extent *Borden Ranch* is in conflict with *National Mining*, this Court must follow *National Mining*.

*United States v. M.C.C. of Florida* is no more helpful to the Agencies here than it was in defending the Tulloch Rule. In *M.C.C.*, a construction company used a tugboat to dredge a channel and “redeposit[] spoil dredged up by the tug’s propellers onto the adjacent sea grass beds.” 772 F.2d 1501, 1504, 1506 (11th Cir. 1985). *National Mining* rejected the Agencies’ reliance on *M.C.C.* because redeposit onto adjacent sea grass beds is “analytically more similar to sidecasting than to fallback.” 145 F.3d at 1406. *M.C.C.* does not specifically address whether, nor hold that, mere movement can constitute an addition. And the statement from *National Mining* that plowing “may” produce “actual discharges” is cited out of context. Gov. Br. at 39. The point of the passage is that plowing is included in the section 404(f) exemptions because plowing “may produce fallback, but [it] may also produce actual discharges . . .” 145 F.3d at 1405 (emphasis added). For example, plowing material *from* one wetland and *into* a

nearby but separate wetland might result in a regulated addition if not exempted.<sup>44</sup>

**b. The Cases Ignored by the Agencies Make the Point.**

Unlike the cases cited by Agencies, several decisions specifically analyze the precise issue whether (and when) movement of a pollutant constitutes a statutory “addition.” The Agencies try to minimize the importance of these cases by arguing that discharges under section 404 are “different” from discharges under section 402. Gov. Br. at 38 n.19. But “discharge” is a universal term within the statute. See NAHB Op. Br. at 3-4. Thus, the Court of Appeals in *National Mining* found decisions involving pollutants other than dredged material instructive.<sup>45</sup> Whether the pollutant is dredged material, industrial waste, or another substance, an addition is an addition. Nothing within the statute or caselaw suggests the contrary.

“Dredged material” is material “excavated or dredged *from* waters of the United States.” 33 C.F.R. § 323.2(c) (emphasis added). The statute regulates discharges “*into*” navigable waters. 33 U.S.C. § 1344 (emphasis added). Thus, only material dredged *from* water is “dredged material,” and only when that material is discharged “*into*” navigable waters is Section 404 triggered. *Id.* “Moving” material neither dredges material “*from*” nor discharges material “*into*” navigable water. The concurring opinion in *National Mining* rejected the Agencies’ attempt to get around this statutory framework. There, the Agencies were “asserting that rock and sand are magically transformed into pollutants once dredged, so *all* dredging necessarily results in an

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<sup>44</sup> The other cases cited by the Agencies come no closer to holding that mere movement of material *within* water, as opposed to the discharge of dredged material *into* a water, is an addition. Gov. Br. at 28 (citing *United States v. Deaton*, 209 F.3d 331, 335 (4th Cir. 2000) (placing material excavated from wetland back into wetland at side of excavated area (“sidecasting”) is a discharge) and *United States v. Mango*, 997 F. Supp. 264, 285 (W.D.N.Y. 1998) (placing material excavated from wetland back into trench is a discharge)).

<sup>45</sup> *National Mining* considered *Rybachek* (section 402 -- placer waste); *Avoyelles* (section 404 -- fill material); and *Dubois* (section 402 -- NPDES pollutants). 145 F.3d at 1405-06; see also *Avoyelles*, 715 F.2d at 922-23 (considering section 402 decisions in section 404 challenge).

addition.” 145 F.3d at 1410 (Silberman, J., concurring). But “rock and sand only become pollutants, according to the statute, once they are ‘discharged *into* water’ . . . . The Corps’s approach thus just leads right back to the definition of discharge.” *Id.* (emphasis added).

Earth-moving activities inherently move material, but movement does not inherently add material. The caselaw demonstrates that mere movement of pollutants within a waterbody is not an addition, but movement of pollutants between separate waterbodies can be. The D.C. Circuit held in *National Wildlife Federation v. Gorsuch* that no addition of a pollutant occurs where water behind a dam passes through the dam and continues with “dam induced water quality changes” in the stream below because no pollutant is introduced “into water from the outside world.” 693 F.2d 156, 161-175 (D.C. Cir. 1982). Similarly, in *National Wildlife Federation v. Consumers Power* water in Lake Michigan was passed through a storage reservoir and turbines on the shore for hydropower and back to Lake Michigan with pollutants not present before the diversion. The court held that no addition of pollutants occurred because the facility “merely changes the movement, flow or circulation” of the water, but it “never loses its status as a water of the United States” during the diversion. 862 F.2d 580, 588-89 (6th Cir. 1988).<sup>46</sup>

By contrast, in *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, water was diverted from a reservoir through a tunnel for several miles and then, with suspended solids, turbidity and heat, introduced into a separate waterbody. 273 F.3d 481, 492 (2d Cir. 2001). The court noted that both “*Gorsuch* and *Consumers Power* essentially involved the recirculation of water, without anything added.” *Id.* at 491. It agreed “that for there to be an ‘addition,’ a ‘point

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<sup>46</sup> See also *United States v. Law*, 979 F.2d 977, 979 (4th Cir. 1992) (where pollutants already exist in the water “the mere diversion of flow of the waters [does] not constitute ‘additions’ of pollutants to the water”); *Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 308-09 (9th Cir. 1993).

source must *introduce* the pollutant into navigable water from the outside world ... provided that ‘outside world’ is construed as any place outside the particular waterbody to which pollutants are introduced.” *Id.* The court found that “[w]hen the water and the suspended sediment therein passes from the Tunnel into the Creek, an ‘addition’ of a ‘pollutant’ from a ‘point source’ has [occurred].” *Id.* at 492 (citing *Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1991) (flow of polluted water from pond into separate marsh is a discharge)).

Likewise, in *Miccosukee Tribe of Indians of Florida v. South Florida Water Management District*, the Eleventh Circuit held that pumping of polluted water from a canal into “another distinct body of water into which it would not have otherwise flowed” constituted an “addition.” 280 F.3d 1364, 1368 (11th Cir. 2002), *cert. pending*; *see also Dubois v. Dep’t of Agric.*, 102 F.3d 1273, 1296-99 (1st Cir. 1996) (pumping water from polluted river into *distinct* pond is addition).<sup>47</sup> Citing *Dubois*, the D.C. Circuit noted that “incidental soil movements occurring in normal dredging operations that nonetheless somehow transfer ‘between unrelated water bodies of different water quality’” might constitute an addition. *Nat’l Mining*, 145 F.3d at 1405, 1407.

Collectively these cases demonstrate that mere movement of a pollutant -- be it polluted water or dredged material -- is not by itself an addition unless the pollutant is added *into* a waterbody.<sup>48</sup> Accordingly, mere movement *within* the same waterbody is not an addition, but the *removal* of a pollutant *from* a waterbody and subsequent discharge of the pollutant back *into*

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<sup>47</sup> *But compare North Carolina v. FERC*, 112 F.3d 1175 (D.C. Cir. 1997) (withdrawal of water, which certainly must cause movement, is not a discharge) *with Ala. Rivers Alliance v. FERC*, 2003 WL 1859819 (D.C. Cir. Apr. 11, 2003) (holding that modification to dam resulting in increased release of pollutants is discharge, but without considering the above-cited cases or the distinct waterbody principle).

<sup>48</sup> Indeed, if operating a bulldozer in a wetland causes an addition simply because of movement, then operating a boat on a river must also cause an addition. *See also Nat’l Mining*, 145 F.3d at 1399 n.4 (citing the Agencies’ claim of regulatory authority over bike-riding as evidence of the “unreasonableness of the agencies’ statutory interpretation”).

that same waterbody could be an addition under certain circumstances.<sup>49</sup> The required statutory element is a discharge *into* water. Thus, if one stirs (moves) soup in a pot (be it bouillon or chili), nothing is added. If the soup is poured (moved) into a separate pot of broth, soup is added to that broth. See *Catskill Mountains*, 273 F.3d at 492. (“If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not ‘added’ soup or anything else to the pot (beyond, perhaps, a *de minimis* quantity of airborne dust that fell into the ladle”). The concurring opinion in *National Mining* makes a similar point in slightly different terms:

If the material that would otherwise fall back were moved some distance away and then dropped, it very well might constitute an “addition.” Or if it were held for some time and then dropped back on the same spot, it might also constitute an addition . . . . [T]hat Congress had in mind either a temporal or geographic separation between excavation and disposal is suggested by its requirement that dredged material be discharged at “specific disposal sites,” a term which simply does not fit incidental fallback.

*Nat’l Mining* at 1410 (Silberman, J. concurring).

Mere movement of pollutants within water does not introduce pollutants *into* water. Nor does it meet the requirement of a “temporal or geographical separation” between removal and addition. Because the Regards Rule treats movement as an addition, it exceeds the Agencies’ authority to regulate discharges of pollutants *into* navigable waters.

## 2. Earth-Moving Cannot be a Proxy for a Discharge.

The Agencies’ statement that they “reasonably concluded” that earth-moving “typically” results in a discharge establishes nothing. NAHB does not concede that earth-moving “typically” results in a discharge but, more importantly, that question is simply irrelevant to whether the Agencies can lawfully “regard” earth-moving as resulting in a discharge. It is

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<sup>49</sup> *Nat’l Mining*, 145 F.3d at 1406 (extraction accompanied by incidental fallback not an addition, but redeposit of material taken “from” stream and processed before being dumped back “into” stream can be an addition) (citing *Rybachek v. EPA*, 904 F.2d 1276, 1285 (9th Cir. 1990)).

undisputed that not all earth-moving results in a discharge. The statute and pre-existing regulations already regulate any earth-moving that actually results in a discharge. This kind of administrative action is *ultra vires*.<sup>50</sup> *Az. Cattle Growers' Ass'n v. Fish and Wildlife*, 273 F.3d 1229, 1237 (9th Cir. 2001) (activity cannot be regulated on the basis of take simply because take is likely); *Michigan v. EPA*, 268 F.3d 1075, 1084 (D.C. Cir. 2001) (EPA cannot “treat” areas as “Indian Country” without first determining statutory elements present).<sup>51</sup> The Agencies’ attempt to use earth-moving as a surrogate for discharges is illegal.<sup>52</sup>

### 3. The Incidental Fallback Definition is Illegal.

The Agencies acknowledge that the term “incidental fallback” “arises from the opinions” in *National Mining* and *American Mining*, Gov. Br. at 33, but their definition is utterly at odds with the holdings and reasoning of those cases. In those cases, NAHB challenged the Tulloch Rule, under which the agencies defined “discharge of dredged material” to include “any redeposit” incidental to any activity “including mechanized landclearing, ditching, channelization, or other excavation.” 58 Fed. Reg. 45008, 45037 (Aug. 25, 1993). This Court explained:

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<sup>50</sup> The Agencies argue that the rule “continues the case-by-case approach that was approved in the 2000 *AMC* decision.” Gov. Br. at 31. Deciding whether a permit is required case-by-case in no way means that earth-moving can be categorically regarded as a discharge.

<sup>51</sup> The Agencies attempt to distinguish *Michigan*, arguing that EPA was implementing federal permit programs in areas without making the necessary jurisdictional determination, while under the Regards Rule permits will be required on a case-by-case basis. Gov. Br. at 39-40. This misses the point. The rule now regards as regulated earth-movers who add nothing, and thus outruns the statute, just as the “treats” rule did in *Michigan*. Furthermore, the impact on earth-movers is immediate; it does not depend on future regulatory decisions.

<sup>52</sup> The Agencies emphatically reiterate that they dropped their proposed presumption and that the final rule does not shift any burden of proof. Gov. Br. at 12, 13, 22, 23, 24. They protest too much. NAHB never argued that the rule creates a legal “presumption” in an administrative or judicial proceeding. Rather, the legal flaw in the “regards” clause is that it burdens earth-movers immediately by regarding them as causing regulated discharges.

Until the rule at issue here became effective. . . the agencies did not regulate under § 404 excavation activities that involved the removal of material from waters, such as landclearing, ditching, and channelization, even if those activities might have adversely impacted wetlands or waters. Under the instant rule, the agencies now regulate removal activities because they consider the “incidental fallback” that accompanies dredging to be a “discharge” under § 404.

*Am. Mining*, 951 F.Supp. at 269. NAHB argued that incidental fallback, the “practically inescapable byproduct of all these activities,” is not an addition within the meaning of the Clean Water Act. *Nat'l Mining*, 145 F.2d at 1403. This Court and the Court of Appeals agreed:

[T]he straightforward statutory term “addition” cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back. Because incidental fallback represents a net withdrawal, not an addition, of material, it cannot be a discharge.

*Id.* at 1404. In sum, the courts recognized that landclearing, ditching, channelization and other excavation activities inevitably result in soil movement, but that to call such soil movements “additions” would effectively convert all removal activities into discharges, contrary to Congress's intent. *Id.* But the agencies’ new definition does just that, *and* it claims authority over mere moving as well, not just *removing*. This is bold.

Because the Agencies “regard . . . earth-moving activity . . . as a discharge . . . *unless* . . . the activity results in *only* incidental fallback,” all earth-moving in areas deemed waters of the United States must be a discharge except that which results in only incidental fallback. 66 Fed. Reg. at 4574-75 (emphasis added). But, by limiting incidental fallback to (1) “small volume” redeposits (2) incidental to excavation that (3) fall back to “substantially the same place as the initial removal,” the definition excludes many incidental soil movements that are not additions and thus throws them into the 404 permitting program. This is wrong under *National Mining*.

First, the rule limits incidental fallback to “small volume[]” redeposits. 66 Fed. Reg. at 4574-75. By necessary implication, large volume redeposits are additions. But volume, which is

“space occupied . . . ,” determines only the size of a redeposit -- not whether it is an addition. Oxford American Dictionary 1134 (1999). *National Mining* nowhere suggests that volume is a proper measure of addition. Quite the opposite. *Id.* at 1404. (“Congress could not have contemplated that the attempted removal of 100 tons of [a] substance could constitute an addition simply because only 99 tons of it were actually taken away.”). By using volume as the measure of incidental fallback, the rule omits the statutory requirement of an addition.<sup>53</sup>

Second, the rule limits incidental fallback to redeposits “incidental to *excavation* activity,” 66 Fed. Reg. at 4574-75 (emphasis added), which, the Agencies say, means only those activities that “truly remove[] material from waters,” not those that “merely move[] it around.” Gov. Br. at 35.<sup>54</sup> Until this Rule was adopted, “excavation” had been a catch-all term for earth-moving activities under *National Mining* and the Agencies’ regulations.<sup>55</sup> But now, non-excavation earth-moving activity is excluded from the definition of incidental fallback and is *per*

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<sup>53</sup> The Agencies argue that incidental fallback is the redeposit of “relatively” small volumes of material. Gov. Br. at 34 n.16 and accompanying text. This argument comes out of thin air. The rule does not include the word “relatively,” and the preamble confirms that volume means size, not proportion: “excavation and other earth-moving activities that are undertaken using mechanized earth-moving equipment typically result in the addition of a pollutant to navigable waters *because the nature of such equipment is to move large volumes of material within and around the excavation site.*” *Id.* at 4554 (emphasis added), 4560 (earth-moving equipment typically causes discharges because it is “made to move large amounts of earth”), 4563 (backhoes typically “move more than small volumes of material”).

<sup>54</sup> The Agencies rest their assertion that incidental fallback can occur only during excavation on the claim that *National Mining* concerned only removals of material. Gov. Br. at 35. They do not say whether mechanized land clearing (which was covered by *National Mining* and *American Mining*) is “mere moving” or “removal,” but they argue that material can “fall back” only from a removal. This position is irreconcilable with their argument that mere movement of material can cause a discharge of material that has been *dredged*. If mere movement caused a dredging, then there would be a removal (dredging) for material to fall back from. Thus, the Agencies cannot square one position with the other, much less the law.

<sup>55</sup> See 33 C.F.R. § 323.2(d)(1)(iii) (“discharge of dredged material” includes additions of dredged material incidental to “any activity, including mechanized landclearing, ditching, channelization, or *other excavation*”) (emphasis added).

se subject to regulation. *National Mining* does not support this distinction. There, the Court rejected across the board the Agencies' attempt to require a permit for "all mechanized landclearing, ditching, channelization or excavation." *Nat'l Mining* at 1404. Thus, soil movements incidental to such activities are not additions. Nor, as discussed above, is movement *within* water. Yet, by excluding from the definition of incidental fallback all earth-moving that is not a removal, the "regard" accorded mere movement is conclusive: movement *is* a discharge *per se*.

Third, the definition is contrary to caselaw. In *American Mining*, this Court did not determine that incidental fallback occurs only during excavation. Rather, it stated specifically and repeatedly that incidental fallback is associated with "excavation *and* land clearing ." 951 F.Supp. at 270 and n.3 (emphasis added); *see id.* at 272, 273, 276. *National Mining* recognizes that "[f]allback and other redeposits occur during mechanized landclearing, when bulldozers and loaders scrape or displace wetland soil . . . as well as during ditching and channelization . . . . Indeed, fallback is a practically inescapable product of all these activities." 145 F.3d at 1403.<sup>56</sup> Nor, as explained above, do the cases support the small volume limitation. *Id.* at 1404. Thus, rather than "arise[] from the opinions" in *National Mining* and *American Mining*, as the Agencies claim, the definition conflicts with those decisions.

Under the Tulloch Rule, the Agencies regulated a whole host of earth-moving activities that did not "add" anything to waters by defining the incidental fallback that "unavoidably accompanies" such activities as a "discharge of dredged material." *Am. Mining Cong. v. Army Corps of Eng'rs*, 120 F. Supp. 2d 23, 30 (D.D.C. 2000) (quoting 58 Fed. Reg. at 45013).

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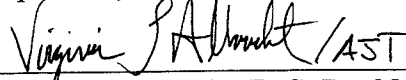
<sup>56</sup> The Agencies' claimed inability to draw a bright line between incidental fallback and discharges, as suggested by the *National Mining* Court, does not justify their regard of an entire category of activities as resulting in discharges. Gov. Br. at 43.

Recognizing that “the Tulloch Rule effectively requires a permit for all mechanized landclearing, ditching, channelization or excavation,” this Court and the Court of Appeals overturned the Agencies’ evasion of the addition requirement. *Nat’l Mining*, 145 F.3d at 1404. In *American Mining II*, this Court “caution[ed the Agencies] against parsing the language of the decisions in *National Mining* and *American Mining* to render a narrow definition of incidental fallback that is inconsistent with an objective and good faith reading of those decisions.”<sup>57</sup> Despite being twice overturned and once warned, the Agencies are at it again.

### III. Conclusion

For the forgoing reasons, this Court should grant the motion of the National Association of Home Builders for summary judgment, deny the Agencies’ and Intervenors’ cross-motions, declare the Regards Rule unlawful, set it aside, and enjoin the Agencies from applying or enforcing it henceforth.

Respectfully submitted,

 /AST

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May 23, 2003

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<sup>57</sup> 120 F. Supp. at 31.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

\_\_\_\_\_  
NATIONAL ASSOCIATION OF HOME BUILDERS, et al., )

Plaintiffs, )

v. )

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

Defendants. )  
\_\_\_\_\_

No: 1:01CV00274  
(consolidated with  
No. 1:01CV00320)

Judge J. Robertson

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that true and correct copies of the Combined Response and Reply of Plaintiff National Association of Home Builders in Support of its Motion for Summary Judgment and in Opposition to the United States's and Intervenors' Motions for Summary Judgment were served this 23rd day of May, 2003, via U.S. mail upon the following counsel of record.

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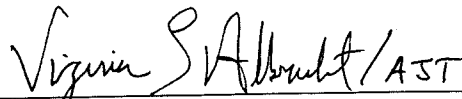
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