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## INTRODUCTION

Plaintiffs, the National Stone, Sand and Gravel Association, the American Road and Transportation Builders Association, and the Nationwide Public Projects Coalition (collectively "NSSGA") respectfully submit this Memorandum in Opposition to the Federal Defendants' and Defendant-Intervenors' Cross-Motions for Summary Judgment and in Reply to Defendants' and Defendant-Intervenors' Opposition to NSSGA's Motion for Summary Judgment. In addition, NSSGA incorporates by reference the Opposition/Reply Memorandum filed by National Association of Home Builders.<sup>1</sup>

In an effort to evade meaningful judicial review, the Corps repeatedly asserts that the NWP's are "discretionary" or "voluntary" and that no party has a "right" to such authorizations. This response misses the essence of Plaintiffs' suit. Plaintiffs do have a right to have the Corps comply with the Clean Water Act ("CWA"), the Administrative Procedure Act ("APA"), and the National Environmental Policy Act ("NEPA") when it issues permits under section 404(e). The Corps has failed to comply with these statutes in this case.

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<sup>1</sup> NSSGA inadvertently failed to file a motion for leave to file an over-length brief when it filed its opening motion for summary judgment. That memorandum exceeded the page limits by four pages in order to accommodate the various interests that jointly filed NSSGA's Complaint and due to the complexity of the issues. This memorandum is significantly shorter than the 45 pages permitted under local rules for memorandums in opposition. Where possible, NSSGA and NAHB have incorporated one another's arguments in order to avoid duplicative briefing.

The effort by the Corps and Defendant-Intervenors to hide behind the “shield” of an unreviewable, “discretionary” action essentially offers the regulated community a “Hobson's Choice”—accept these arbitrary and unworkable nationwide replacement permits, or have no NWP program at all. NSSGA submits that this program must be tested under the crucible of judicial review now—not later—so that the Court can carefully scrutinize the claims we have presented concerning the Replacement Permit Rule's legality. Indeed, upon close scrutiny, this Rule cannot stand up. The Corps has clearly exceeded its authority in major ways. The Rule violates NEPA's mandate of “look before you leap” by materially altering the NWPs prior to completing its Programmatic Environmental Impact Statement, it regulates ephemeral streams in violation of the Supreme Court's recent Solid Waste Agency decision, it imposes ultra vires conditions such as limiting activities in floodplains, and it runs afoul of the clear Congressional direction under section 404 (e) of the CWA to develop an efficient program for permitting “minimal effect” activities with a minimum of red tape and delay.

The remedy that NSSGA seeks—setting aside the Replacement Permit Rule, remanding for reconsideration and temporarily reinstating NWP 26 until the remand process is completed—is consistent with the Court's broad equitable powers. Indeed, it is the only appropriate remedy to address the pervasive and widespread violations of federal law in this case.

## ARGUMENT

### I. PLAINTIFFS' CLAIMS ARE RIPE FOR REVIEW

Defendants and Defendant-Intervenors labor to prevent Plaintiffs' claims from being subject to judicial review. Yet, the Corps's position on the amenability of the parties' dispute to judicial review would make it impossible for any plaintiff ever to challenge the legality of the program. It would encourage ineffective piecemeal litigation<sup>2</sup> as to the legality of the program by precluding review of the Replacement Permit Rule as a whole. And it would substantially injure NSSGA's members by imposing the additional costs and delays of the individual permit process on numerous activities that have no more than "minimal adverse effects" on the environment. For the reasons set forth in NAHB's Memorandum, and those set forth below, NSSGA is clearly entitled to bring a facial challenge to the Replacement Permit Rule so the Court may evaluate the Rule's validity under the CWA, APA and NEPA.

As an initial matter, courts have not hesitated to entertain similar facial challenges raised under section 404. The D.C. Circuit recently upheld this Court's examination of a facial challenge to the "Tulloch Rule," which expanded the definition of "discharge" under section 404 and had the effect of subjecting virtually all excavation and dredging activities performed in

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<sup>2</sup> See, e.g., Bldg. Indus. Ass'n of Superior Cal. v. Babbitt, 161 F.3d 740, 745 (D.C. Cir. 1998) (noting "the historic federal policy against piecemeal appeals" in the context of an administrative challenge to a rule promulgated under the Endangered Species Act).

wetlands to section 404's permitting requirements. See Nat'l Mining Ass'n v. United States Army Corps of Eng'rs, 145 F.3d 1399, 1400 (D.C. Cir. 1998).

Similarly, the Ninth Circuit recently engaged in judicial review of a facial challenge brought by an environmental group seeking review of the Corps's issuance of five general permits for construction in wetlands in Alaska. See Alaska Ctr. for the Env't v. West, 157 F.3d 680 (9th Cir. 1998). Although, as here, there were no specific construction projects under consideration, the Corps apparently did not argue that the general permits it had issued were not final or ripe for review in that case.<sup>3</sup> The court therefore considered the permits' compliance with section 404 on the merits. Id. at 682. From a reviewability standpoint, there is no basis to distinguish the general permits in Alaska Center from the nationwide permits challenged here.

NAHB's Memorandum reveals the fundamental flaws in the Corps's argument on finality and ripeness, and NSSGA agrees with and incorporates by reference NAHB's Memorandum. As NAHB ably demonstrates, the Replacement Permit Rule constitutes a "final agency action" that is ripe for review under applicable legal principles. See Bennett v. Spear, 520 U.S. 154, 177-78 (1997) ("final" action is one that represents the consummation of the agency's decision-making on the issue, and results in legal obligations or consequences to affected parties); Abbott Labs. v. Gardner, 387 U.S. 136, 153

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<sup>3</sup> There was no discussion of finality or ripeness in the Ninth Circuit's opinion.

(1967) (dispute is "ripe" where the issues are appropriate for judicial resolution and there would be immediate harm to plaintiffs if review were postponed).

This case involves purely legal issues that are appropriate for judicial resolution immediately, before the challenged NWP's are applied to particular permit applicants. NSSGA's members have suffered, and will continue to suffer, immediate harm resulting from the illegal restrictions and conditions in the Rule. Most projects for which NSSGA's members formerly would have received authorization under NWP 26 are large-scale public construction and mining activities that could not satisfy the illegal requirements and restrictive conditions in the new NWP's. Thus, it would be futile even to attempt to satisfy the new requirements, and NSSGA's members will be forced into an individual permit process that the Corps admits is extremely costly and time-consuming. See 65 Fed. Reg. at 12,819 (AR PRT1-013/2). Plaintiffs' challenge is therefore ripe for review.

Finally, the Corps's assertion that Plaintiffs have failed to exhaust their administrative remedies lacks all substance. The Corps contends that NSSGA's members are not being denied their day in court, because they can apply for an individual permit and challenge denial of that permit through the administrative appeals process. However, the Corps' regulations provide for administrative review only of an individual permit denial or a declined

individual permit. See 33 C.F.R. § 331.4 There is no opportunity to challenge issuance of or denial of authorization under a nationwide or general permit. Indeed, nationwide permits are not even mentioned in the regulation purporting to afford administrative review of permit determinations. It follows that if Plaintiffs are denied the opportunity to challenge issuance of the Replacement Permit Rule immediately following its issuance, there will never be an opportunity to challenge the Rule's illegal conditions and inappropriate assertions of jurisdiction.

In addition, the Corps's theory that there needs to be an actual project for a challenge to the NWP's to be ripe conflicts with its other theory that Plaintiffs' only complaint is that in some situations applicants will be forced into the individual permit process. See Defs.' Mem. at 4. Under these assumptions, a potential plaintiff would never have Article III standing to challenge the conditions of the NWP's. For example, Plaintiffs contend that the 1/2 acre limitation and the floodplain restrictions are improper. Under the Corps's theory of judicial review, a project proponent whose project would impact 1 acre in a floodway would have to go through the empty (and indeed wasteful) exercise of applying for a NWP with full knowledge that the project

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<sup>4</sup> "Appealable actions" under the regulation are limited to a jurisdictional determination, "permit denial" (defined as "a written denial with prejudice . . . of an individual permit application") or "declined permit" (defined as "a proffered individual permit, . . . [or] an individual permit that the applicant originally accepted, but where such permit was subsequently modified by the district engineer . . ."). 33 C.F.R. § 331.2.

would not be eligible for authorization. If, however, an individual permit were issued (due to the fact that the individual permits have no such blanket restrictions), and the applicant was “authorized to proceed with their desired projects”, id., there would be no Article III injury. Consequently, the courts would not reach the applicants’ fundamental complaint that NWP restrictions are ultra vires. The NWPs may never be subject to judicial scrutiny.

Hence, because the administrative appeal process does not contemplate—and therefore, effectively precludes—review of the initial decision to issue a NWP or denial of authorization under a NWP, Defendants’ interpretation of ripeness may forever insulate the Replacement Permit Rule from judicial review. Neither the CWA nor the APA provide the Corps with such unfettered discretion. NSSGA’s claims are therefore ripe for review, and the Corps’s assertions as to reviewability must fail.

## **II. THE OBLIGATION TO COMPLY WITH NEPA CANNOT BE CIRCUMVENTED BY “VOLUNTEERING” TO CONDUCT NEPA ANALYSIS ON THE AGENCY’S OWN TERMS**

Plaintiffs challenge the Corps’s failure to prepare a Programmatic Environmental Impact Statement (“PEIS”) pursuant to the National Environmental Policy Act of 1969 (“NEPA”), 42 U.S.C. §§ 4321 et seq., prior to phasing out NWP 26. See NSSGA’s Mem. at 44-49. In response, the Corps alleges that so long as it has “consistently taken a position that it is improper to link the decision to perform a PEIS to ongoing decisions relating to the NWP program,” Defs.’ Mem. at 78, “the Court should not interfere with this

reasonable application of the Corps' discretion," id. at 80. In effect, the Corps seeks to conduct its NEPA analysis on its own terms under the theory that by "volunteering" to comply with NEPA, it has unfettered discretion to control the nature of its review.<sup>5</sup> This is without support under NEPA.

Contrary to Defendant's allegation, NSSGA (and many other commenters) has alleged that the Corps must perform a PEIS due to the facts that the replacement of NWP 26 is a "major federal action" and that the agency lacks adequate data to understand the cumulative impacts of its actions. See NSSGA's Mem. at 46-47; Comments of EPA Region 10 (8/17/98) (AR PRT6-3774) (expressing belief that the Corps lacks data to support its assertion that the proposed NWPs would have only minimal impacts); Comments of National Wildlife Federation (10/7/99) (AR PRT2-2636). Given the comments of National Wildlife Federation, Defendant-Intervenor's (who is a similarly-situated environmental group) silence on NSSGA's NEPA count is deafening.

Defendants cite to its "commit[ment] to demonstrating that the NWP program" has only minimal environmental effects. See Defs.' Mem. at 79. However, "[m]erely because the [agency] says it does not make it so." Catron

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<sup>5</sup> Defendants provide no support for its belief that a federal agency may circumvent the substantive and procedural requirements inherent in preparation of a PEIS by "volunteering" to conduct such analysis under its own time frame and after the agency action is complete. Such an interpretation of NEPA would render the goals of the PEIS analysis meaningless.

County Bd. of Comm'rs v. United States Fish and Wildlife Serv., 75 F.3d 1429, 1436 (10th Cir. 1996). The preparation of adequate NEPA analysis prior to commitment of resources will enable all involved to determine what the actual effect will be. See id. As noted by NSSGA and in other comments, proper NEPA analysis is necessary to determine if there are alternatives to phasing out NWP 26 that are superior in terms of efficiency and environmental effects. In effect, the Corps has failed to maintain the baseline of the NWP program while it conducts its PEIS analysis. See 40 C.F.R. § 1506.1 (Council on Environmental Quality regulations pertaining to premature commitment of resources). The sequence proposed by the Corps renders the purpose of NEPA a meaningless gesture. See Comments of Defenders of Wildlife and the Southwest Center for Biological Diversity (06/03/99) (AR PRT9-0107) (stating that issuing NEPA analysis for the NWP Rule prior to the PEIS raises doubts as to the objectivity of the NEPA process). “The NEPA duty is more than a technicality; it is an extremely important statutory requirement to serve the public and the agency before major federal actions occur.” Found. on Econ. Trends v. Heckler, 756 F.2d 143, 157 (D.C. Cir. 1985) (citation omitted) (rejecting agency’s attempt to “minimize the injury that would result if its experiment proceeds without adequate environmental consideration”). Conducting the comprehensive NEPA analysis after the action has already taken place is akin to “closing the barn door after the horse has left”.

### **III. THE RULE IMPROPERLY EXPANDS THE CORPS'S AUTHORITY WITH RESPECT TO TWO KEY JURISDICTIONAL TERMS UNDER THE CWA**

Defendants misconstrue and avoid NSSGA's allegation that the Rule improperly expands the Corps's jurisdiction to include discharges into ephemeral streams and the regulation of excavation. Two provisions of the Rule go beyond the four corners of the NWP process to increase the reach of what is regulated under section 404 by refining the definitions of "waters of the United States" and of "discharge" of dredged materials to include things that are not otherwise in the Corps's regulations. See 33 C.F.R. pt. 328 (definition of "waters of the U.S.") and 33 C.F.R. § 323.2(d) (definition of "discharge"). Defendants' assertion that the NWP replacement permits are not relevant to the issue of CWA jurisdiction ignores a fundamental issue—the Corps's expression of how it will determine its geographic jurisdiction and scope of regulated activities has an immediate impact on the regulated community in determining whether and the extent to which activities will be eligible for a nationwide permit or will require a more detailed individual section 404 permit. Indeed, the Rule sends a clear message to the regulated community that the Corps regards ephemeral streams, such as dry washes and rain filled depressions, as falling within the definition of "waters of the U.S." and that simple "excavation" of these areas will require a section 404 permit.

**A. The Rule Makes a Significant Change to the Definition of “Waters of the U.S.” In a Manner that is Contrary to the Limits of the CWA**

The Corps’s evasive response to NSSGA's allegation that the definition of “ephemeral streams” conflicts with the recent Supreme Court decision in Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 121 S.Ct. 675 (2001) (“SWANCC”), is telling. Defendants ‘dance around’ the merits of NSSGA's argument by rhetorically claiming that Plaintiffs “do not understand” the NWP program. Yet, Defendants miss the central point of NSSGA’s claim—while it is true that a “waterbody does not become a ‘water of the U.S.’ because of a nationwide permit”, Defs.’ Mem. at 33, the simple fact is that the Corps has defined “ephemeral streams” for the first time. The Corps has also provided a test for the determination of whether such “ephemeral streams” are “waters of the U.S.” based on very limited criteria that directly conflict with the “nexus” requirement of SWANCC. Thus, the Corps used the March 2000 Rule as the vehicle to expand the outer limits of its jurisdiction, and to thereby pull into the section 404 program ephemerally wet areas such as rain depressions and dry washes. The Court may review this definition and under SWANCC, this novel expansion of “waters of the U.S.” cannot stand.

- 1) The Rule establishes an improper test for determining whether certain wet areas are jurisdictional

There is little doubt that this calculated expansion of section 404 jurisdiction works a monumental change to the entire Corps regulatory

program. In fact, the Corps has essentially “swept in” all ephemeral streams under the CWA despite the fact that such waters are not presently within the definition of “waters of the United States” in the Corps’s regulations. See 33 C.F.R. pt. 328.<sup>6</sup> The regulations define “waters of the United States” to include streams and “intermittent streams” but not “ephemeral” streams, provided that “the use, degradation or destruction of [such waters] could affect interstate or foreign commerce. . . .” See 33 C.F.R. § 328.3(a)(3). The March 2000 Rule, however, states that, “[a]n ephemeral stream is a water of the United States, provided it has an [ordinary high water mark (“OHWM”)]. An ephemeral stream that does not have an OHWM is not a water of the United States.” 65 Fed. Reg. at 12,823 (AR PRT1-017/2) (emphasis added). The practical impact of this language is simple and straightforward—any person planning to impact a transitionally wet area, ranging from small rain depressions in one’s back yard to dry washes, must first obtain a 404 permit provided that a Corps reviewer finds that an OHWM exists. The Rule states that jurisdiction will be based on a “case-by-case” determination of “whether an OHWM is present” on the basis of the criteria for defining OHWM under 33 C.F.R. § 328.3(a). 65 Fed. Reg. at 12,823 (AR PRT1-017/2). Hence, there is no requirement for the Corps reviewer to apply an “affect on interstate commerce” test or to determine whether the ephemeral area has the required

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<sup>6</sup> Part 328 “prescribes the policy, practice, and procedures to be used in determining the extent of jurisdiction of the Corps of Engineers concerning ‘waters of the United States.’” 33 C.F.R. § 328.1.

hydrological connection to traditionally navigable waters within the meaning of Part 328 of the regulations.

Quite simply, the ephemeral streams definition relies exclusively upon the OHWM test to determine the landward physical limits of 404 jurisdiction. Under the Rule's definition, no further inquiry is required. This impact is particularly significant in arid areas of the west and affects a wide range of Plaintiffs' public and private activities ranging from flood control maintenance and aggregate mining to filling in back yard "wet spots" where rainwater sometimes collects.

2) In light of SWANCC, NSSGA's challenge to the "ephemeral streams" definition is hardly "abstract"

Defendants discount the impact of SWANCC and assert that, because the Corps "does not consider all ephemeral streams to be waters of the United States," Plaintiffs concerns are "abstract." See Defs.' Mem. at 34. However, this assertion conflicts with the plain language of the Rule. The Rule states that "District Engineers use their judgment on a case-by-case basis to determine whether an OHWM is present." 65 Fed. Reg. at 12,823 (AR PRT1-017/2). The fact that the Corps has provided clear guidance to its District Engineers for determining jurisdiction over "ephemeral" streams (i.e. the presence of an OHWM) and the fact that the Rule makes this limited inquiry dispositive of CWA jurisdiction, makes the Supreme Court's decision in SWANCC central to review of the Rule.

SWANCC articulated the principle that CWA jurisdiction is dependent upon a hydrologic nexus to a “navigable water”, not on whether there is a defined “line on the shore” (i.e. an OHWM). The Court held that, “it is the water body’s capability of use by the public for purposes of transportation or commerce which is the determinative factor.” NSSGA’s Mem. at 16 (citing SWANCC, 121 S.Ct. at 680). However, the Rule improperly morphs the presence of an OHWM into the function of being determinative of jurisdiction. Yet, by its own definition, an “ephemeral” water has no connection to such waters.<sup>7</sup> In spite of that, because the presence of an OHWM alone is sufficient to confer jurisdiction, the channel formed by a rain gutter and other impression in the soil caused by precipitation would be converted into “waters of the U.S.” regardless of any hydrologic connection to navigable waters. See id.

Given the clear impact of this definition and of the underlying rationale for the jurisdictional determination regarding ephemeral streams, NSSGA’s facial challenge is entirely appropriate. As stated in Nat’l Mining Ass’n, 145 F.3d at 1407-08, the Circuit has “on several occasions invalidated agency regulations challenged as facially inconsistent with governing statutes despite the presence of easily imaginable valid applications.” Most

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<sup>7</sup> “An ephemeral stream has flowing water only during, and for a short duration after, precipitation events in a typical year. Ephemeral stream beds are located above the water table year-round. Groundwater is not a source of water for the stream. Runoff from rainfall is the primary source for stream flow.” 65 Fed. Reg. at 12,897 (AR PRT1-090/3).

significantly, the NMA court held that, “[t]he problem with the Tulloch Rule is that its faithful application would carry the agency beyond its statutory mandate.” Id. at 1408 (emphasis in original). Hence, the court rejected the argument that the rule “must be upheld if any set of circumstances exists under which the rule would be within the Corps’s statutory authority.” Id. at 1407. That reasoning applies with even greater force here. A “faithful” application of the “ephemeral streams” definition and its underlying rationale for establishing CWA jurisdiction exceeds the CWA’s statutory mandate because they do not incorporate the findings that the Supreme Court found necessary for establishing jurisdiction in SWANCC.<sup>8</sup>

3) Subsequent interpretations of SWANCC are consistent with NSSGA’s argument

Post-SWANCC case law lends support to NSSGA’s argument. In Rice v. Harken Exploration Co., 250 F.3d 264, 270 (5th Cir. 2001), the Fifth Circuit held that oil discharged into an intermittent stream (a small “seasonal creek” that only infrequently contains running water) would not be actionable under the Oil Pollution Act (using the same definition of “waters of the U.S.” as the CWA) because that intermittent stream was not jurisdictional. The court held that under SWANCC, “a body of water is subject to regulation under the CWA if the body of water is actually

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<sup>8</sup> As discussed above, the Court may avoid unnecessary duplicative litigation that would ensue if each prospective permittee were required to go through the determination that an “ephemeral stream” falls within the scope of “waters of the U.S.” on the basis of this improper rationale.

navigable or is adjacent to an open body of navigable water.” Rice, 250 F.3d at 269. Hence, the Rice court found that a groundwater connection between the intermittent stream and the navigable water was insufficient to establish CWA jurisdiction. Under this analysis, ephemeral streams, (by definition, lacking a groundwater connection) where the only source of water is surface collection of precipitation (i.e. areas where rainwater temporarily ponds or runs through so that the rainwater leaves an impression in the soil) would similarly fall outside the scope of the CWA.

The case relied upon by Defendants, Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526 (9th Cir. 2001), is clearly inapposite. In Headwaters, the court found that irrigation canals that exchanged water with “a number of streams and at least one lake” would be considered “tributaries” of those navigable waters and therefore “waters of the U.S.” themselves. 243 F.3d at 533. SWANCC was, thus, not implicated, “because the canals receive water from natural streams and lakes, and divert water to streams and creeks, they are connected as tributaries to other ‘waters of the United States.’” See id. In contrast, under the Rule’s definition the Corps does not require that such rainwater channels be “tributaries” to a navigable water or have any hydrological connection.<sup>9</sup> Again, the “case-by-case”

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<sup>9</sup> The Rule fails to directly respond to requests that the Corps provide the criteria and circumstances for determining the circumstances under which an ephemeral stream could be considered a tributary. See 65 Fed. Reg. at 12,823 (AR PRT1-017/2). The Corps responds to this request that the presence of an OHWM is the key determination. Id.

determination that is to be made by the Corps is “whether an OHWM is present,” based on the criteria for defining OHWM under 33 C.F.R. § 328.3(a), 65 Fed. Reg. at 12,823 (AR PRT1-017/2), rather than a determination that the resource is actually navigable or is connected to or adjacent to an open body of navigable water.<sup>10</sup> Thus, even if there were some plausible means by which a channel sharing the characteristics of an ephemeral stream could become a “waters of the U.S.,” the criteria that the Corps has set forth for making that determination would not be consistent with the jurisdictional inquiry set forth in Headwaters.

**B. The Rule’s Consistent References to “Excavation” Is An Underhanded Means Of Expanding the Definition of “Discharge”**

In response to Plaintiffs’ allegation that the Corps has improperly sought to expand its jurisdiction over “discharge” activities to include “excavation” or removal activities, Defendants fall back on its core response that this issue is not ripe for review and that the words of the Rule in no way affect the Corps’s jurisdiction. See Defs.’ Mem. at 36-37. Despite Defendants’ protestations to the contrary, the plain language of the Rule makes clear that the activities that are regulated under section 404 include “discharges or excavation”. See 65 Fed. Reg. at 12,891-92 (AR PTR1-085) (stormwater

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<sup>10</sup> Citing this “case-by-case” review and the regulations that permit a party to seek a jurisdictional determination, Defendants reiterate their central theory that nothing in this case is ripe until a specific permit action is challenged. See Defs.’ Mem. at 33-34. As noted above, precluding judicial review in this manner is without merit.

management facilities). Given that the Corps's jurisdiction is limited to "discharges" of pollutants, 33 U.S.C. § 1344, the inclusion of the term "or excavation" sends a clear message that such removal activities are considered regulated (i.e. one needs a permit for "discharge" or "excavation", the former being distinguished from the latter).<sup>11</sup> Again, the Corps saw fit to utilize the Rule to provide an expanded definition of its jurisdiction and cannot avoid review of its actions by adopting the litigation position that the words have no meaning.

#### **IV. SEVERAL OF THE CONDITIONS IMPOSED BY THE RULE EXCEED THE CORPS'S AUTHORITY AND CREATE A PERMIT THAT IS VIRTUALLY USELESS**

In effect, the Corps has created a NWP that has restrictive conditions that go so far as to render the NWP of virtually no use to the regulated community. Unfortunately, the Corps's response appears to be that it has unlimited authority under section 404(e) to promulgate whatever conditions it wants and that the regulated community must "take it or leave it." This is not the program that Congress intended. Restrictive conditions related to

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<sup>11</sup> This is no mere coincidence. In fact, several commenters asked the Corps to remove all references to "excavation" in order to avoid the confusion of whether or not an activity is regulated. See 65 Fed. Reg. at 12,822 (AR PTR1-016/3). The Corps's response was that parties could "contact the Corps" to resolve any uncertainty. Id. at 12,823 (AR PTR1-017/01). In its Memorandum, the Corps continues this pattern of refusing to respond to the regulated community's concern that if the Corps truly has no intention of regulating "excavation", then the proper course is to remove this word from the final Rule.

floodplains, vegetated buffers and water quality impose requirements that exceed the Corps's express authority under the CWA.<sup>12</sup>

While the Corps has the discretion to issue, revoke or modify the NWPs, this discretion is not unlimited and does not relieve it of the obligation to exercise its discretion in a manner that is not arbitrary and capricious. The Corps's discretion to implement the NWP program does not include the unbridled latitude to impose restrictions that are not related to its underlying authority to regulate discharges of dredged materials. Moreover, the decisions ultimately made must be rationally consistent with and supported by the record before the agency during the time of the determination. Merely offering broad and unsupported proclamations that such conditions are necessary for "protection of water quality" or to "ensure that the authorized activities will result in minimal adverse effects on the aquatic environment" does not overcome the Corps's burden to adequately explain the authority and rational for its decisions. The court must "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). If judicial review is to have any meaning, the Corps cannot isolate itself from its burdens under this standard. See Nat'l Lime Ass'n v. EPA, 627 F.2d 416, 433

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<sup>12</sup> NSSGA concurs with and adopts NAHB's Memorandum with regard to vegetated buffer and water quality conditions.

(D.C. Cir. 1980).

**A. Defendants Have Failed to Offer A Rational Argument for the Restrictions and Prohibitions of NWP Authorization in Floodplain Areas**

Plaintiffs allege that the Corps arbitrarily and without support created an unworkable regulatory scheme with regard to floodplain conditions. See NSSGA's Mem. at 30-36. This restriction has particularly negative consequences for NSSGA's members engaged in aggregate mining, which, by their very nature, often take place in floodplains. See NSSGA's Am. Compl. at ¶ 14 ("sand and gravel mining is essentially water dependent"). The Corps's response, Defs.' Mem. at 55-59, does not overcome its burden of demonstrating both statutory and record support for the imposition of this nationwide restriction.

1) The Corps has not offered a sufficient rationale for the floodplain restrictions

The Replacement Permit Rule failed to justify the restrictions placed on activities within a floodplain area and the Corps's Memorandum did not respond to Plaintiffs' allegations with any record support. The Corps seeks to justify the imposition of the floodplain restrictions by citing to the section of its regulations that set forth general policies for evaluating permit applications, 33 C.F.R. § 320.4(a), which requires the balancing of certain public interest factors including consideration of safety and flood hazards. Defs.' Mem. at 56. Of course, the Corps does not mention the other "public interest" factors that it is required to balance such as mineral needs, energy

needs, water supply, food and fiber production, property ownership "and, in general, the needs and welfare of the people." See 33 C.F.R. § 320.4(a)(1). Presumably, for the purposes of this litigation, certain factors are more equal than others. Regardless of this slanted view of the balancing of these factors, the simple truth is that these general public interest factors do not excuse the Corps from adequately justifying the national restrictions set forth in the Rule.<sup>13</sup> As noted by NSSGA, the Corps has failed to account for its prior record findings that such restrictions under the NWP program would add little to floodplain protection. See NSSGA's Mem. at 30-31 (citing AR PRT1-0996). In response, the Corps has offered no more than conclusory statements that such restrictions are "reasonable." Defs.' Mem. at 55. Acknowledging the weakness of a proposal in an agency's own analysis and then adopting it as the final rule without articulating a rational reason is the epitome of arbitrary behavior.

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<sup>13</sup> In United States v. Mango, 199 F.3d 85 (2d Cir. 1999), the court rejected the Corps's similarly broad reliance on the public interest factors as authority to condition an individual permit, holding:

We reject the government's broader argument that its public interest regulations allow it to set conditions related to the entire activity involving the discharge. When properly read, the public interest regulations do not indicate an intent to regulate the entire activity rather than the permitted discharge. Although the regulation refers to the "proposed activity," the activity that the Secretary permits pursuant to Section 1344 is the discharge. Therefore, the conditions must be related to the discharge itself.

199 F.3d at 93 n.7.

- 2) The Corps's most recent assertion that the floodplain restrictions "reduce the burden" on the regulated community is unconvincing

The complexity of General Condition 26 burdens the permittees and Corps alike without any resultant benefits. Incredibly, the Corps responds that the reliance on FEMA maps "is intended to reduce the burden" on the regulated community. See Defs.' Mem. at 58. As explained in NSSGA's brief, this is directly contradicted by the record—which demonstrates the Corps's knowledge that many FEMA maps are out of date and that there are no standards to identify what is a "current" map. See NSSGA's Mem. Ex. 2 (AR PRT1-1056); (AR PRT1-0996) (stating that the effort spent hunting for the maps would be better spent on evaluating the effects on the floodplain). Indeed, the Corps's own analysis indicated its belief that "the best way to restrict development in the floodplain is to restrict Corps NWP's to 1/2 acre and for FEMA to change the Federal criteria in 44 CFR 60.3." See id. (AR PRT1-0996). Defendant's revisionist theories, adopted for purposes of litigation, are due little deference.<sup>14</sup> Ethyl Corp. v. EPA, 541 F.2d 1, 34 (D.C.

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<sup>14</sup> A similar approach is taken with regard to the condition restricting mining activities within 100 feet of the OHWM of headwater streams where the annual average flow is greater than 1 cubic foot per second. In response to Plaintiffs' assertion that this restriction is arbitrary due to a lack of support in the record for its necessity, NSSGA's Mem. at 40, the Corps simply falls back on its rationale that such restrictions are necessary to ensure that the NWP's "will result in minimal adverse effects on the aquatic environment." Defs.' Mem. at 63-64. Merely parroting the CWA and falling back on the argument that the NWP program is purely discretionary does not overcome the lack of record support for this decision. This is especially true, given the evidence that this restriction was unnecessary. See Comments of Vulcan Materials (AR PRT2-2314); Comments of NSSGA (AR PRT2-1826).

Cir. 1976).

Defendants' discussion of the impact of FEMA and local floodplain regulations misses the point. See Defs.' Mem. at 58-59. Plaintiffs have alleged that the Corps has engrafted other federal, state and local agencies into the section 404 process in violation of the "clear statement" principle discussed in SWANCC, 121 S.Ct. at 684, by requiring the use of FEMA maps and documentation of compliance with FEMA or FEMA-approved floodplain construction requirements. See NSSGA's Mem. at 40. Whether or not those requirements "must be met independent of the section 404 permit process," Defs.' Mem. at 58, is irrelevant to the question of the Corps's authority to "transmogrify" the section 404 program into a "catchall" mandate to enforce other federal and state statutes. See NRDC v. EPA, 859 F.2d 156, 170 (D.C. Cir. 1988). These other authorities do not expand the range of final decisions the agency is authorized to make under the CWA. "Any action taken by a federal agency must fall within the agency's appropriate province under its organic statutes." See id. at 169. Any changes the Corps wishes to make to its underlying substantive authority must come through Congress. See Nat'l Mining Ass'n, 145 F.3d at 1410 (holding that if the Corps seeks an expansion of its jurisdiction, "the appropriate body to turn to is Congress").

Furthermore, the Corps's response that the restrictions are not so onerous because GC 26 applies "only to the extent that [the activity] results in the discharge of materials, resulting in permanent, above-grade fills,"

Defs.' Mem. at 59, is disingenuous.<sup>15</sup> Obviously, if an activity does not involve a discharge of fill materials, there would be no need for a permit. Further, as previously explained by NSSGA, it is virtually impossible to conduct a sand and gravel operation in a floodplain that would not involve a "permanent, above-grade fill." NSSGA's Mem. at 35. Again, the central issue is the reasonableness of this restriction as implemented and whether the Corps has justified the nationwide restriction. The Corps has failed to provide a rational explanation for its choice and therefore it must be struck. See Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 378 (1989).

#### **V. THE REPLACEMENT PERMIT RULE VIOLATES THE TENTH AMENDMENT**

Our federal government is one of limited and specifically delineated powers; all other powers of government are reserved to the states. See Gregory v. Ashcroft, 501 U.S. 452, 457 (1991); U.S. Const. amend. X. Thus, in enacting federal legislation, Congress is required to respect the limitations on federal power outlined in the Constitution. If Congress "intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" Gregory, 501 U.S. at 460-61 (citations omitted); see also SWANCC, 121 S. Ct. at 683 ("Where an administrative interpretation of a statute invokes the outer limits of Congress's power, we expect a clear

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<sup>15</sup> This essentially parrots the justification set forth in the Rule. See 65 Fed. Reg. at 12,880 (AR PRT1-074).

indication that Congress intended that result.”).

Rather than stating its intention to preempt state authority in the CWA, Congress did just the opposite. It underscored the authority of the states as the primary protectors of land and water resources:

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.

33 U.S.C. § 1251(b); see also 33 U.S.C. § 1370 (providing that “nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States.”); SWANCC, 121 S. Ct. at 684 (states, not the federal government, enjoy “traditional and primary power over land and water use”).

Defendants’ Tenth Amendment analysis misses the point. See Defs.’ Mem. at 51-53. Plaintiffs do not dispute that the Corps has authority to regulate water quality in the manner specifically authorized under the CWA, at least with respect to “waters of the United States”. Whatever authority Congress delegated to the Corps, however, Congress also made clear that the CWA was not intended to encroach upon the states’ primary rights to regulate water quality and land use. As demonstrated in Section III supra, the Replacement Permit Rule goes far beyond the scope of the Corps’s regulatory authority under the CWA. In taking actions beyond the scope

contemplated by its authorizing statute, and attempting to regulate areas that are not "waters of the United States," the Corps has clearly intruded upon the powers "reserved to the States respectively, or to the people" in violation of the Tenth Amendment. See U.S. Const. amend. X. Defendants' Tenth Amendment arguments therefore must fail.<sup>16</sup>

**VI. REMEDYING THESE ILLEGALITIES BY ENJOINING THE EXPIRATION OF NWP 26 AND REINSTATING ITS TERMS IS WITHIN THE COURT'S EQUITABLE AUTHORITY**

The Corps has promulgated a NWP package that is fatally flawed in numerous ways. Plaintiffs seek to have the Court set aside that Rule and to enjoin the expiration of NWP 26 pending compliance with NEPA and the CWA. The NEPA analysis is underway and NWP 26 remains in force. It is thus axiomatic APA and NEPA law, and within the Court's equitable authority, to enjoin the expiration of NWP 26 and reinstate its terms (and therefore restore the status quo ante) pending reconsideration under these

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<sup>16</sup> The Corps also cites dicta in a 62-year-old Supreme Court case for the proposition that private parties lack standing to pursue claims under the Tenth Amendment. See Defs.' Mem. at 51. In fact, standing requirements have eased significantly in the past several decades. There is a split in the circuits as to whether Tenth Amendment actions by private parties are authorized, and it is by no means certain that private party suits are precluded. Compare Gillespie v. City of Indianapolis, 185 F.3d 693, 703-04 (7th Cir. 1999), cert. denied, 528 U.S. 1116 (2000) (concluding that a private plaintiff had standing to raise a Tenth Amendment claim); with Mountain States Legal Found. v. Costle, 630 F.2d 754, 761 (10th Cir. 1980) (concluding that only the states have standing to raise claims under the Tenth Amendment). In any event, the Corps's argument is irrelevant, because Plaintiffs' membership includes numerous public and quasi-public bodies that could be considered state entities for purposes of Tenth Amendment standing.

statutes. Plaintiffs request that the Court set a tight schedule for completion of the PEIS and promulgation of a NWP replacement package that complies with the CWA.

Defendants assert that the Court is deprived of its traditional equitable powers to fashion appropriate relief simply because the Corps has already allowed NWP 26 to expire.<sup>17</sup> See Defs.' Mem. at 82-87. Again stressing its global theme that the permits are "discretionary", the Corps alleges that the Court would be intruding into the discretion of the Corps regarding its section 404(e) findings and would "usurp the Corps' permitting program" if it were to reinstate NWP 26. Defs.' Mem. at 83. However, Defendants' premise that judicial review must result in a "Hobson's choice" (i.e. the choice of taking the thing offered or nothing at all) is unfounded in law or equity. The relief Plaintiffs seek is not so extraordinary under either the APA or NEPA. Indeed, it is the only appropriate remedy, given the extensive and pervasive violations of the CWA and of NEPA that fatally taint the Rule.

#### **A. NWP 26 Remains Alive**

The Corps's allegation that the Court is ill-equipped to make statutory "findings" regarding whether the impacts of NWP 26 are more than "minimal" is a ruse. See Defs.' Mem. at 83. The restoration of the status quo

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<sup>17</sup> As discussed further below, the statement that the permits have "expired" is blatantly misleading, given that the Corps is still actively using NWP 26 under certain circumstances.

that existed prior to the illegal activity is hardly a novel role for the Court. In effect, all the Court would be doing is maintaining a permit in place that already exists. No such "findings" are required in this case for the Court to grant relief.

The Corps's sudden concern with preventing "pollution activities," Defs.' Mem. at 82, is a transparent argument fabricated for the purposes of litigation.<sup>18</sup> This is evidenced by the simple fact that the Corps still treats NWP 26 as an effective nationwide permit. As stated in the March 2000 Federal Register, certain permittees may continue to rely on prior NWP 26 authorizations, until February 2003, provided construction has commenced or is under construction as of February 2002. See 65 Fed. Reg. at 12,818 (AR PRT1-012/3). This decision to extend NWP 26 beyond its June 2000 expiration date amounts to a recognition that the continuation of NWP 26 would not have "more than minimal" adverse impacts and, therefore,

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<sup>18</sup> Defendants cite to the fact that NWP 26 "allowed the filling of thousands of acres of wetlands" as cause for alarm with regard to the relief Plaintiffs seek. See Defs.' Mem. at 83 n.47. The Corps would have the Court believe that it has experienced a sudden epiphany that the past 20 years of the NWP program have been a tragic mistake. This bizarre denouncement of the section 404 program is properly viewed with a skeptical eye. Indeed, one wonders what the position of the Corps would be if it were challenged for creating a program that is too lenient.

achieves the goals of the CWA.<sup>19</sup> This is confirmed by the data in the record.<sup>20</sup> Thus, this Court would not be substituting its judgment for that of the Corps regarding findings under section 404(e) if it reinstated NWP 26 for a limited time because the Corps has already made such findings. The relief Plaintiffs seek is merely restoration of the status quo that existed prior to implementation of the fatally flawed replacement permits for a limited time for reconsideration under a schedule set out by the court.

**B. The Court Possesses Broad Equitable Powers to Fashion Injunctive Remedies**

The federal courts have repeatedly recognized that a reviewing court's equitable discretion is quite broad. "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."

Cobell v. Norton, 240 F.3d 1081, 1108 (D.C. Cir. 2001) (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971)). Indeed, the

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<sup>19</sup> In the July 1999 Proposed Rule, the Corps recognized that if the expiration of NWP 26 were not extended and projects were consequently forced into the individual permit process, "[f]or those activities with minimal effects on the aquatic environment [i.e. those authorized under NWP 26], it would be unfair and unnecessarily burdensome on the regulated public to require and individual permit." 64 Fed. Reg. at 39,260 (AR PRT3—0002).

<sup>20</sup> As of 1996, the Corps had achieved a mitigation ratio of 1.15 to 1 under NWP 26—a net resource gain. See 61 Fed. Reg. at 65,893 (indicating that the Corps authorized impacts of approximately 5,020 acres and received approximately 5,809 acres of mitigation). The 1997 and 1998 data indicated similar gains. See 65 Fed. Reg. at 12,819 (AR PRT1-013/1) (discussion of 1997 data); (AR PRT1-1941) (1998 data indicates 2,974 acres of impacts and 6,304 acres of mitigation).

court's discretion to fashion relief is "displaced only by a 'clear and valid legislative command.'" United States v. Oakland Cannabis Buyers Coop., 121 S.Ct. 1711, 1720 (2001) (citation omitted). As explained by the Supreme Court, "Congress may intervene and guide or control the exercise of the courts' discretion, but we do not lightly assume that Congress has intended to depart from established principles." Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982).

Courts have been particularly amenable to ordering injunctive relief to strictly enforce compliance with NEPA, including maintaining or restoring the status quo. NEPA ensures "that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). It is thus axiomatic that "when a NEPA violation has been found, the court typically shapes the injunction to remedy it." Nicholas C. Yost, NEPA Deskbook 20 (2d ed. 1995).<sup>21</sup> The Corps's decision to terminate NWP 26 prior to the completion of the Programmatic EIS on the entire NWP program violates the basic tenant of NEPA law that the analysis must be performed before the action is taken. See supra Part IV;

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<sup>21</sup> Courts have found "that a NEPA violation in itself constitutes irreparable harm, entitling a plaintiff to a 'blanket injunction.'" Id. (citing to Envtl. Def. Fund v. Froehlke, 477 F.2d 1033, 1037 (8th Cir. 1973)).

Massachusetts v. Watt, 716 F.2d 946, 952-53 (1st Cir. 1983).<sup>22</sup> Here, reinstating NWP 26 for a limited time is appropriate in that the Corps has just announced that its draft Programmatic EIS is available for public comment. See 66 Fed. Reg. 39,499 (July 31, 2001).<sup>23</sup> Thus, the Corps will be able to reconsider the entire NWP program and its alternatives, including NWP 26 and the remanded replacement permits, in an orderly and objective way to ensure that it takes a "hard look" before committing to any one course of action. That is what NEPA requires.

Moreover, it is black letter law that the appropriate relief under the APA, where administrative action has been found to be unlawful, is to require reconsideration by the agency under the applicable statute and regulations. See, e.g., Bowen v. City of N.Y., 476 U.S. 467,487 (1986) (requiring that agency reopen decision at administrative level does not interfere with agency's role in ultimate implementation of relevant statutes and regulations as the court has done no more than what the agency itself

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<sup>22</sup> Indeed, "one beneficial effect of such injunction is to maintain the status quo" and to give the agency the opportunity to effectuate the purpose of the statute at issue. Env'tl. Def. Fund v. Marsh, 651 F.2d 983,1005-06 (5th Cir. 1981) (issuing injunction in part so "that the relevant decision makers and the public may still have the opportunity to choose among alternatives, as required by NEPA").

<sup>23</sup> In fact, the Draft PEIS uses the 1996 NWPs as the baseline, or "no action" alternative against which all alternatives are compared, including the revisions proposed under the Rule. See Corps, Draft Nationwide Permit Programmatic Environmental Impact Statement (July 2001) available at [http://www.iwr.usace.army.mil/iwr/Regulatory/regulintro.htm#DPEIS\\_pdf](http://www.iwr.usace.army.mil/iwr/Regulatory/regulintro.htm#DPEIS_pdf).

would have done had it been alerted that the underlying action was illegal).<sup>24</sup> Furthermore, "the scheme [of the CWA] as a whole contemplates the exercise of discretion and balancing of equities [that] militates against the conclusion that Congress intended to deny courts their traditional equitable discretion in enforcing the statute." Weinberger, 456 U.S. at 316 (allowing naval activities to go forward despite absence of permit). Hence, under the APA and CWA, the court has broad authority to issue injunctive relief and balance the equities to achieve compliance with Congressional directives by restoring the status quo ante.

### CONCLUSION

For the aforementioned reasons, NSSGA respectfully requests that the court grant its Motion for Summary Judgment. Plaintiffs also respectfully request that the Court schedule oral argument as soon as possible.

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<sup>24</sup> The cases cited by Defendants are irrelevant. See Defs.' Mem. at 83-84. Fed. Power Comm. v. Idaho Power, 344 U.S. 17 (1952), addressed a situation where the appellate court sought to directly modify the opinion issued by the agency. Here, Plaintiffs do not seek to have the NWP rule amended, but rather seek restoration of the status quo ante. In PPG Indus., Inc. v. United States, 52 F.3d 363 (D.C. Cir. 1995), the court held that the district court erred in denying an agency's motion for remand after having found that the agency's decision rested on an incorrect legal standard. The central issue was whether the APA, "restricts an agency from reopening proceedings to take new evidence after the grounds upon which it relied are determined by a reviewing court to be invalid." Id. at 366. The court held that if the relevant substantive statute does not provide for direct review in the court of appeals, then the proper role of the district court is to remand the case. The court did not address the question of restoration of the status quo ante.

Respectfully submitted,

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