

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF HOME BUILDERS, <u>et al.</u> , Plaintiffs,)))) No: 1:01CV00274) (consolidated) with) No.1:01CV00320)
v.)
UNITED STATES ARMY CORPS OF ENGINEERS, <u>et al.</u> , Defendants,))) Judge J. Robertson))
and))
NATIONAL WILDLIFE FEDERATION, <u>et al.</u> , Defendant-Intervenors.)))

**PLAINTIFFS', NATIONAL STONE, SAND, AND GRAVEL
ASSOCIATION'S, AMERICAN ROAD AND TRANSPORTATION BUILDERS
ASSOCIATION'S, AND NATIONWIDE PUBLIC PROJECTS COALITION'S
COMBINED REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY
JUDGMENT AND RESPONSE IN OPPOSITION TO DEFENDANTS' AND
DEFENDANT-INTERVENORS' MOTIONS FOR SUMMARY JUDGMENT**

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INTRODUCTION

The Agencies' defense of Tulloch II flows from the fundamentally flawed premise that they can define "discharges" of dredged material in a way that captures, as "additions," virtually all mechanized earth-moving activities in regulated waters, thereby requiring permits for activities that essentially "remove" but that do not "add" material "into" waters of the United States. They argue that because some types of redeposit may be regulable, and soil movement may affect the surrounding waters, they may define the term "discharge" in section 404(a) of the Clean Water Act ("CWA")¹ such that all mechanized earth-moving activities are "regarded" (synonymous for "presumed")² as regulated unless the project proponent can prove otherwise with project-specific evidence. The Agencies then so narrowly define the type of soil movement that would be considered unregulated "incidental fallback" (based on the volume of material and how far it has been incidentally moved), but refuse to provide "bright line" guidance to the regulated community as to how the Agency staff will evaluate the information before them. Instead they claim that "the reality of the situation mandates that a case-by-case approach rather than a bright line test be used," Defs'. Br. at 45, – an approach that conflicts with the clear direction of the Court of Appeals that it would grant deference to a

¹ Federal Clean Water Act, 33 U.S.C. §§ 1251-1387 (2003)

² As discussed below, the Agencies engage in pointless semantics when arguing that there is a difference between "regard[ing]" versus "presum[ing]" that all mechanized earth-moving activities are regulated.

"reasoned attempt" to draw a "bright line between incidental fallback on the one hand and regulable redeposits on the other. . . ."³

The Agencies and Intervenors, National Wildlife Federation *et al.*, ("NWF") next leap from this flawed premise to an equally flawed conclusion – that as long as they acknowledge that "incidental fallback" is not regulated and provide some definition of that term, nothing more is needed to avoid expanding their reach beyond the limited confines of the CWA. Yet, in promulgating a rule that sweeps in so many activities and releases so few, the Agencies have not heeded this Court's warning in its 2000 follow up to NMA – in which the Court cautioned the Agencies "against parsing the language of the decisions in NMA and AMC⁴ to render a narrow definition of incidental fallback that is inconsistent with an objective and good faith reading of those decisions." Am. Mining Cong. v. U.S. Army Corps of Eng'rs, 120 F. Supp. 2d 23, 31 (D.D.C. 2000) ("NAHB Ruling"). Thus, the simple truth is that Tulloch II is but another attempt to circumvent the confines of the CWA. In the words of the NMA court, "if the agencies and NWF believe that the Clean Water Act inadequately protects wetlands and other natural resources by insisting upon the presence of an 'addition' to trigger permit requirements, the appropriate body to turn to is Congress." NMA, 145 F.3d at 1410.

³ Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1405 (D.C. Cir. 1998) ("NMA").

⁴ Am. Mining Cong. v. U.S. Army Corps of Eng'rs, 951 F. Supp. 267 (D.D.C. 1997) ("AMC").

I. PLAINTIFFS CLEARLY HAVE STANDING TO PURSUE THEIR CLAIMS

NWF contests Plaintiffs' standing. See NWF's Br. at 3-9. Tellingly, none of the Government Defendants have joined in this challenge, either in this lawsuit or in the previous Tulloch litigation.

A. Plaintiffs Meet the Traditional Requirements for Standing.

In order to establish standing, plaintiffs must have suffered a concrete or particularized injury that is: 1) actual or imminent; 2) caused by, or fairly traceable to an act they challenge in the instant litigation, and 3) redressable by the court.

See Utility Air Regulatory Group v. EPA, 320 F.3d 272, 277 (D.C. Cir. 2003).

Plaintiffs easily satisfy each of these three requirements.

As the affidavits attached to NSSGA's Motion for Summary Judgment attest (and which the Agencies and NWF do not specifically refute), NSSGA's members have been profoundly impacted by Tulloch II. Among other problems, Tulloch II has forced aggregate companies to proceed through the expensive and lengthy CWA section 404 permit application process for activities that were never intended to be regulated under the CWA. See Carroll Affidavit at ¶ 11, 13 (Ex. A to NSSGA's Motion for Summary Judgment); Spainhour Affidavit at ¶ 8, 11 (Ex. B to NSSGA's Motion for Summary Judgment). By forcing the aggregate industry to obtain permits for virtually every extractive or other earth-moving activity, Tulloch II raises costs, imposes delays, and introduces uncertainty into the long-term planning process – a process that is critical to the aggregate industry. Id. Under similar circumstances, the courts of this Circuit have not hesitated to find that the standing

requirements have been satisfied.⁵ See e.g., Nat'l Lime Ass'n v. EPA, 233 F.3d 625, 636 (D.C. Cir. 2000) (upholding standing of trade association to challenge EPA regulation that imposed significant compliance costs); Idaho Power Co. v. FERC, 312 F.3d 454, 460 (D.C. Cir. 2002) (upholding Idaho Power's standing to challenge a FERC regulation that could have resulted in lost revenue, and noting that "an agency ruling that replaced a certain outcome with one that contains uncertainty causes an injury that is felt immediately and confers standing."). Setting aside the improper regulation and granting a nationwide injunction, as did the AMC Court, will redress this injury.

B. NWF's "Effluent Limitations" Jurisdictional Argument Is Irrelevant to Plaintiffs' Standing.

NWF's assertion that Tulloch II is an "effluent limitation," under CWA section 301 and therefore that review may only be had in the court of appeals pursuant to CWA section 509, see NWF's Br. at 2-7, lacks support. The type of limits EPA may put on the quality or quantity of chemicals discharged under a permit are completely distinguishable from the threshold question of whether there is a discharge in the first place.

Section 301(b) of the CWA requires the achievement of "effluent limitations" for categories and classes of point sources that will require the application of the best practicable control technology available as determined by EPA pursuant to

⁵ In a cryptic argument, Intervenors allege that Plaintiffs cannot trace their injury to Tulloch II because CWA section 301(a), not Tulloch II, prohibits discharges. This argument is wholly without merit as discussed in more detail below. Tulloch II – and its narrow definition of incidental fallback – provides a jurisdictional definition of "discharge" that is used to force Plaintiffs into the section 404 permitting process.

section 304(b)(1). See 33 U.S.C. § 1311(b). The term "effluent limitations" is defined as "any restriction established by a State or [EPA] on quantities, rates, and concentrations of chemical, physical, biological and other constituents which are discharged from point sources. . . into navigable waters. . . ." See 33 U.S.C. § 1362(11) (emphasis added). Pursuant to section 402, the EPA can issue National Pollutant Discharge Elimination System ("NPDES") permits to dischargers (i.e., point sources that discharge effluent directly into navigable waters), who must comply with effluent limitation guidelines. See 33 U.S.C. § 1342(a)(1). Thus, effluent limitations are ultimately restrictions on the types and amounts of pollutants discharged from various industrial, commercial, and public sources of wastewater based on the degree of pollution control that can be achieved using various levels of control technology. See 40 C.F.R. pt. 401 (General Provisions for Effluent Guidelines and Standards).⁶

As noted in the preamble, Tulloch II "addresses the CWA section 404 program's definition of 'discharge of dredged material,' which is important for determining whether a particular discharge is subject to regulation under CWA section 404." 66 Fed. Reg. 4550 (Jan. 17, 2001). Thus, Tulloch II is not a rule that "prohibits or constrains the discharge of dredged material," NWF's Br. at 4 n.1, but rather, determines whether there is a discharge in the first place. Hence, the jurisdictional bar of CWA section 509 is irrelevant.

⁶ The limitations, which are based on the technology available to particular point sources, differ by category of discharger. Compare 40 C.F.R. pt. 409 (sugar processing) with 40 C.F.R. pt. 418 (fertilizer manufacturing).

II. PLAINTIFFS' CHALLENGE TO TULLOCH II IS RIPE FOR JUDICIAL DETERMINATION

Seeking to avoid review of the Rule's merits, the Agencies devote a significant portion of their summary judgment brief to the argument that Plaintiffs' challenge to Tulloch II is not ripe for judicial determination.⁷

In assessing the merits of the Agencies' ripeness challenge, the Court must consider the fitness of the issue for judicial determination. See Consol. Rail Corp. v. United States, 896 F.2d 574, 577 (D.C. Cir. 1990) (citing Abbott Labs. v. Gardner, 387 U.S. 136 (1967)). If the court has doubts as to the fitness of the issue, it then must consider the hardship to the parties of withholding court consideration. Id. Because the Agencies' authority to promulgate Tulloch II is an issue fit for immediate judicial determination, and Plaintiffs would suffer immediate and permanent harm if the Court declined to rule on the merits, the Agencies' ripeness challenge must fail.

A. Plaintiffs' Challenge to Tulloch II Is Fit For Judicial Determination

The ripeness doctrine requires the Court to determine if Plaintiff's challenge to Tulloch II is fit for judicial determination by assessing: 1) whether the issue presented is "purely legal"; 2) whether the agency or court would benefit from

⁷ Intervenor also chime in on the ripeness debate with their cryptic CWA section 301 argument. Again, this argument is misguided. Tulloch II provides a novel definition of "discharge" that was not in place until the day it was enacted. As demonstrated by the affidavits attached to NSSGA's Motion for Summary Judgment, NSSGA's members have since altered their conduct in light of this new regulatory environment. Accordingly, the Intervenor's ripeness arguments should be rejected.

deferring review; and 3) whether the challenged action is final. See Nat'l Mining Ass'n v. Fowler, 324 F.3d 752, 757 (D.C. Cir. 2003).

Although the Agencies do not contest that Tulloch II is final, they do take issue with the first two prongs of the fitness test. Seizing on the decision in Clean Air Implementation Project v. EPA, 150 F.3d 1200 (D.C. Cir. 1998), the Agencies argue that Tulloch II presents "too many imponderables" and that the Court would benefit (as it did in Clean Air) from deferring consideration of the legality of the Rule until such time as the Corps has applied the rule in a "concrete, factual setting." See Defs.' Br. at 18.

The Agencies' reliance on Clean Air is misplaced. In Clean Air, the EPA promulgated a rule stating that the traditional and accepted methods of pollution monitoring were no longer to be construed as exclusive, and that any alternate testing method which presented "credible evidence" of a pollution violation could be used to prove (or disprove) a Clean Air Act violation. The industries subject to the new regulation challenged the rule, arguing that the EPA's decision to allow new types of pollution testing amounted to an increase in the stringency of existing pollution standards, which was impermissible without following the procedural requirements of the APA. See Clean Air, 150 F.3d at 1203.

The merits of the industry's argument in Clean Air were never heard because the court ruled the challenge unripe. The court's decision on ripeness hinged on the EPA's position that its new regulation would not have any impact on existing emissions standards. Indeed, the EPA's new rule stated explicitly that the credible

evidence standard was "not intended to and will not serve to affect the stringency of underlying emission standards by amending the nature of the compliance obligation." Clean Air, 150 F.3d at 1205 (quoting 62 Fed. Reg. 8314, 8315 (Feb. 24, 1997)).

Based on the EPA's representation that the new rule would not have the impact the industry groups claimed, the Clean Air court found it impossible to determine the impact of the new rule in the abstract, and held that an "enforcement action brought on the basis of [the new] credible evidence [Rule] would. . . provide the factual development necessary to determine whether the new rule has affected whatever existing standard is involved." Clean Air, 150 F.3d at 1205 (emphasis added).

In sharp contrast to Clean Air, the instant case does not present the Court with any similar confusion over the significance of the challenged regulatory action. Indeed, there is absolutely no question that Tulloch II is a final rule that amends a definition in the Agencies' CWA section 404 regulations to clarify the Agencies' interpretation of the distinction between regulable redeposit and unregulated incidental fallback. See Defs'. Br. at 14. As noted in the preamble, this "is important for determining whether a particular discharge is subject to regulation under CWA section 404." 66 Fed. Reg. 4550/3; see also Defs.' Br. at 14 ("the Rule provides important clarification").

It is this acknowledged change of policy that Plaintiffs challenge in this action as exceeding the authority exercised by the Agencies pursuant to the CWA.

Specifically, Plaintiffs challenge the Agencies' promulgation of a threshold jurisdictional definition that allows them to assume that they have jurisdiction over all mechanized earth-moving activities without evidence that such activities lead to an "addition" of material. The issue before the Court is whether the CWA authorizes the Agencies to assert jurisdiction in this manner. This challenge presents the Court with a question of statutory interpretation that is purely legal in nature. Furthermore, given that Tulloch II is an acknowledged departure from existing policy, there is no need to wait to see how the Agencies' will apply the Rule, as there was in Clean Air. See Fowler, 324 F.3d at 758 (distinguishing Clean Air and rejecting a ripeness challenge where, as here, "no threshold factual issues counsel postponing judgment.")

B. Plaintiffs Would Suffer Considerable Hardship If The Court Deferred Review Of The Merits Of Tulloch II

To the extent that this Court need consider hardship to the parties,⁸ Plaintiffs have demonstrated that they would be subject to significant and immediate harm if the Court declined to address the merits of their challenge. See Consol. Rail, 896 F.2d at 577 (holding that hardship to the parties need only be considered if the court has doubts as to the fitness of the issue for judicial consideration).

As discussed in NSSGA's Motion for Summary Judgment, see NSSGA's Br. at 10- 14, Tulloch II has already caused disruption and economic harm to Plaintiffs. The uncertainty resulting from Tulloch II has left the regulated community with

⁸ For the reasons argued supra, Plaintiffs would submit that their challenge to Tulloch II is clearly fit for judicial resolution.

two equally unattractive choices. Either proceed through the costly and prolonged CWA section 404 permit program, or proceed without a permit and risk civil and criminal fines and penalties. This "Hobson's choice" has sent a chill throughout the aggregate industry and created considerable regulatory uncertainty that has disrupted long-term planning and increased costs. See Carroll Affidavit at ¶ 11, 13 (Ex. A to NSSGA's Motion for Summary Judgment); Spainhour Affidavit at ¶ 8, 11 (Ex. B to NSSGA's Motion for Summary Judgment). If the Court were to decline to consider the merits of Plaintiffs' challenge and defer its consideration of Tulloch II, the harm to Plaintiffs – which is already significant – would only grow worse.

The Agencies, however, contend that Tulloch II does not require any immediate action by Plaintiffs and therefore does not cause any harm. See Defs.' Br at 23-24. The Agencies further note that that Plaintiffs are free to continue their operations without a permit if they conclude that their "activities will not result in a discharge. . . ." See Defs.' Br. at 24. In making these arguments, the Agencies offer a remarkable misrepresentation of the impact of the Rule.

Tulloch II places NSSGA's members, who are essentially engaged in extractive/removal activities,⁹ in the untenable position of operating in a regulatory environment whereby the agency official assumes that all mechanized earth-moving activities are regulated and then forces the private citizen to demonstrate that such activities do not disturb material beyond the levels the official finds acceptable. Given the wide discretion with which the official is empowered (due to the

⁹ See Affidavit of David W. Carroll, ¶ 4-6 (Ex. A to NSSGA's Motion for Summary Judgment).

vagueness of the definition of "incidental fallback" and the lack of "bright line" guidance), it is nearly impossible for the private party to demonstrate that their activities do not move too much material too far (i.e. that the unintended consequence of the activity is merely "incidental fallback").¹⁰ Considering the stiff civil and criminal penalties that could be imposed for any violation of Tulloch II, the Agencies' suggestion that the Rule does not immediately impact Plaintiffs – or that Plaintiff could happily proceed without fear of prosecution if they simply read the rule and followed its guidance – is absurd.

Thus, Plaintiffs' challenge to Tulloch II is clearly ripe for decision under the law of this Circuit. See Abbott Labs., 387 U.S. at 152-53 (holding that action was ripe before prosecution occurred where appellants faced choice between complying with possibly void regulation and risking "serious" civil penalties). Plaintiffs have shown that the issues raised in their challenge are fit for judicial determination, and have demonstrated the extreme hardship that would result from a delay in consideration of their petition for review. Hence, this Court should reject the Agencies' ripeness arguments and proceed to the merits of Plaintiffs' suit.

III. ~~PLAINTIFFS HAVE SATISFIED THE REQUIREMENTS FOR A FACIAL CHALLENGE, AND IN ANY EVENT, CLEARLY SATISFY THE REQUIREMENTS FOR AN AS APPLIED CHALLENGE~~

In another argument not made nor apparently condoned by the Agencies, NWF asserts that Plaintiffs are not entitled to mount a facial challenge to Tulloch II

¹⁰ Indeed, as best as Plaintiffs can guess, unless the regulated party could track the path of each grain of dirt falling back during the excavation process, there would be no way to know if this material had returned to substantially the same place as it began, and therefore no way to know whether or not they were in compliance with Tulloch II.

because they cannot satisfy the standard set forth in Amfac Resorts v. U.S. Department of the Interior, 282 F.3d 818 (D.C. Cir. 2002), cert. granted, Nat'l Park Hospitality Ass'n v. U.S. Dep't of Interior, 123 S. Ct. 549 (U.S. Nov. 12, 2003). This argument, which was raised and rejected in NMA, is without merit. Moreover, regardless of the merits of the facial challenge argument, NSSGA's attempt to overturn Tulloch II can proceed because the Rule has already caused direct and immediate harm to NSSGA.

A. NSSGA Can Satisfy the Standard For Mounting A Facial Challenge

As the NWF correctly notes, the Amfac court recognized that, in the wake of United States v. Salerno, 481 U.S. 739 (1987), two competing tests have emerged to test the sufficiency of a facial challenge. Under the stricter Salerno test, a facial challenge may proceed only if the challenged regulations "is not invalid in all its applications," while under the more lenient test (applied by the Supreme Court in INS v. National Center for Immigrants' Rights, 502 U.S. 183 (1991) ("NCIR")), a facial challenge may not proceed if the regulation is "invalid in only some of its applications." Regardless of which standard is applied here, Plaintiffs are clearly entitled to bring a facial challenge, as the D.C. Circuit all but said in NMA.

In NMA, the D.C. Circuit considered the exact same facial challenge argument recycled by the Intervenors here. In assessing the argument, the Circuit explained that even if the Salerno test does apply in this case, "it does so with a wrinkle." In the words of the Circuit:

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.

NMA, 145 F.3d at 1407. The Court went on to note that "the problem with the Tulloch Rule is that its faithful application would carry the agency beyond its statutory mandate." Id. at 1408. This is equally true of Tulloch II. By presuming that they have jurisdiction over all mechanized earth-moving activities and providing an unduly narrow exception to that presumption, the Agencies fundamentally misconstrue their statutory authority under the CWA. The incremental impact of this Rule – namely the improper regulation of incidental fallback – is invalid in every imaginable application, and therefore Plaintiffs are clearly entitled to bring a facial challenge.¹¹

B. NSSGA Has Been Directly Harmed By The Tulloch II Rule And Thus Its Challenge Can Proceed

Regardless of the merits of the NWF's facial challenge argument, NSSGA is entitled to proceed with its challenge the Tulloch II rule because the Rule has already caused direct and immediate harm to NSSGA.

As demonstrated in the affidavits attached to NSSGA's Motion for Summary Judgment (which the Defendants have not contested) – and discussed in more detail in the ripeness and standing sections supra – Tulloch II has already had a profound impact on aggregate industry. By forcing aggregate companies to proceed through the CWA section 404 permitting process for activities that Congress never intended to be regulated, Tulloch II has increased the costs of aggregate production and

¹¹ Having satisfied the more difficult Salerno standard, NSSGA obviously meets the less strict NCIR test.

disrupted long-term planning within the industry.¹² See Carroll Affidavit at ¶ 11, 13 (Ex. A to NSSGA's Motion for Summary Judgment); Spainhour Affidavit at ¶ 8, 10-11 (Ex. B to NSSGA's Motion for Summary Judgment). These injuries – which flow directly from Tulloch II and would be redressed by an injunction prohibiting the Corps from enforcing it – provide NSSGA with standing to challenge the Rule on an "as applied" basis. See Idaho Power v. FERC, 312 F.3d at 460; Nat'l Lime v. EPA, 233 F.3d at 636; see also Amfac Resorts, 282 F.3d 818 (declining to address the plaintiff's facial challenge based on Salerno and NCIR, but proceeding to the merits of plaintiff's challenge on an "as applied" basis).

IV. THE AGENCIES' ATTEMPT TO MASK THE TRUE IMPLICATIONS OF TULLOCH II SHOULD BE REJECTED.

The Agencies have failed to rebut Plaintiffs' claim that Tulloch II should be set aside because it allows the Agencies to regulate activities that in no way result in "additions" of pollutants. Earth-moving activities that do not add material into waters of the United States cannot be regulated pursuant to the CWA regardless of

¹² As noted in Amfac Resorts, a plaintiff in an as applied challenge is not limited to the administrative record, and therefore Plaintiffs' affidavits are properly considered by the Court. Amfac Resorts, 282 F.3d 818, 830.

their effects on such waters.¹³

A. The "Regards" Language Gives the Agencies Jurisdiction Over All Mechanized Activities Without Analysis of Whether There is An Addition of Material.

The Agencies' defense of the "regards" language misses the key point of NMA – the fundamental problem with Tulloch I was that it effectively required a 404 permit for almost all dredging and excavation activities performed in waters. See 145 F.3d at 1404. While taking a different approach, this rule has the same result. Clearly, it is up to the regulated community, prior to commencing a project, to controvert the Agencies' presumption that a permit is required for any earth-moving activity.

The Agencies' "experience" and the cases that they cite do not authorize them to promulgate a definition of discharge that exceeds the boundaries of the CWA. Simply because courts have upheld regulation of redeposit does not empower the Agencies to promulgate a rule that considers all mechanized earth-moving activities

¹³ NSSGA submits that the Court may decide this case without reaching its Tenth Amendment claim. However, should the Court decide to reach that claim, we submit that Tulloch II violates Constitutional principles of federalism. See NSSGA's Memo In Support of Motion for Summary Judgment at 36-38. Further, while the agencies cite a 64-year old Supreme Court case Tennessee Electric Power Co. v. TVA, 306 U.S. 118, 144 (1939), for the proposition that private parties lack standing to pursue claims under the Tenth Amendment, see Defs'. Br. at 52, they fail to note that 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, Plaintiff, Nationwide Public Project Coalition's membership includes numerous public and quasi-public bodies that could be considered state entities for purposes of Tenth Amendment standing.

as resulting in additions of pollutants. As explained in NSSGA's opening brief¹⁴ and as noted in AMC, discrete redeposit activities such as sidecasting "have always been subject to section 404." 951 F. Supp. at 270 n.4; see also NMA, 145 F.3d. at 1406 (discussing these same cases).¹⁵ In turn, such examples of regulated activities do not provide authority for the Agencies to assume jurisdiction over all activities and then require the public to demonstrate that such an assertion of jurisdiction is improper. See Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv., 273 F.3d 1229, 1244 (9th Cir. 2001); Nat'l Mining Ass'n v. Babbitt, 172 F.3d 906 (D.C. Cir. 1999) (regulation establishing rebuttable presumption as to cause of structural damage resulting from mining operations is arbitrary under 5 U.S.C. § 556(d) due to over breadth). This type of regulatory process is prohibited "both because it would require [the regulated public] to meet the burden statutorily imposed on the agency, and because it would be requiring it to prove a negative." Id.¹⁶

Despite Defendants' protestations to the contrary, Defs.' Br at 12-14 and 28-30, Tulloch II shifts the burden onto the shoulders of the regulated community to prove that an activity does not require a permit. A substitution of synonyms does

¹⁴ See NSSGA's Br. at 32-33.

¹⁵ The Agencies ignore other instances where the courts have determined that landclearing and excavation activities are not discharges. In United States v. Lambert, 1981 WL 14886, 13 Env'tl. L. Rep. 20045 (M.D. Fla. 1981), aff'd, 695 F.2d 536 (11th Cir.1983), the court held that it "does not consider . . . back-spill [from excavation] to constitute the discharge of a pollutant [under the Act], when the dredged spoil simply falls back into the area from which it has just been taken. Such an event cannot reasonably be considered to be the addition of a pollutant." See AMC, 951 F. Supp. at 275 (citing Lambert).

¹⁶ By the same logic used in Tulloch II, the Agencies may well assume that they may promulgate a rule that "regards" all land in the United States as being regulated wetlands, unless site-specific evidence demonstrates otherwise.

not alter this simple fact.¹⁷ Indeed, whether Defendants "regard," "expect," "believe," "adjudge," "suppose," "reckon," "view," or "surmise"¹⁸ that all mechanized activities lead to discharges, the bottom line is that Tulloch II is founded on an underlying legal premise that every activity is regulated and then requires the public to prove otherwise with "project-specific evidence."¹⁹ Hence, whether or not the Rule or the Agencies state that Tulloch II is not intended to shift the burden in any administrative or judicial proceeding, 33 C.F.R. § 323.2(d)(2)(i), for all practical purposes the burden falls on the project proponent to go to the Corps before undertaking any mechanized earth-moving activity and present "project specific information" to prove that the use of mechanized equipment will not accidentally move so much soil as to be considered, under their notion of the term, a regulable "redeposit."²⁰

Given this framework, it is misleading for Defendants to state that project proponents have no "duty to submit information to the agencies." See Defs.' Br. at 13. Considering the Agencies' unwavering and repeated "expectation" that all activities are likely to lead to regulable redeposits,²¹ it is absurd to imply that the

¹⁷ As noted in other contexts, "[m]erely because the [agency] says it does not make it so." Catron County Bd. of Comm'rs v. U.S. Fish and Wildlife Serv., 75 F.3d 1429, 1436 (10th Cir. 1996).

¹⁸ All such terms are synonyms and functional equivalents of "presume." See Roget's Interactive Thesaurus (2003).

¹⁹ See 33 C.F.R. § 323.3(d)(2)(ii) and 40 C.F.R. § 232.2(2)(i).

²⁰ The hardship of being forced to spend the time and resources to contact the Corps prior to undertaking any activity in a regulated water (which is, in the Agencies' own words, "strongly recommended") is hardly Plaintiffs' own "strategic choice to seek permits routinely." See Defs.' Br. at 25.

²¹ The Agencies "expectation" is belied by the analysis of Corps District offices that there are a wide spectrum of activities that are routinely undertaken in wetlands "where 'incidental fallback' was the only discharge associated with that activity." See Ex. "E" of

Agencies would let a project out of the permit process with no advocacy on behalf of the project proponent. In any event, the fact that the agencies say that potentially regulated parties may provide project-specific evidence to convince the Agencies to release them from their oversight does not cure the Rule's fundamental flaw that it "regards" all mechanized earth-moving activity as "additions" and subject to regulation under the Clean Water Act. See NMA v. Babbitt, 172 F.3d at 912 (noting that "safety valve provisions" can not save a regulatory provision that the court otherwise finds unreasonably broad).

B. Tulloch II's Definition of "Incidental Fallback" Is So Narrow as to Be Illusory.

In effect, the Agencies and NWF alike appear to be under the misimpression that so long as a definition of "incidental fallback" is published, the substance of that definition is unimportant. By explicitly disavowing regulation of incidental fallback (which they must), the Agencies believe that they have met their duties under NMA and AMC. Yet, upon review it becomes evident that the definition offered in Tulloch II is meaningless as it is virtually impossible to separate incidental fallback (as defined by the agencies) from regulated redeposit.²²

NSSGA's Memo in Support of Motion for Summary Judgment. The Agencies' attempt to recharacterize these findings is unconvincing. See Defs.' Br. at 46.

²² Tulloch II is hardly "similar in substance to the 1999 rule" upheld by the NAHB Ruling. See Defs.' Br. at 31. That rule was an interim measure adopted to bring the Agencies into compliance with AMC and NMA by expressly indicating that "incidental fallback" was not regulated. See 64 Fed. Reg. 25,120, 25,121 (May 10, 1999). The 99 rule had no rebuttable presumption and no definition of "incidental fallback."

Incredibly, the response appears to be that the public should simply be quiet and take what it can get.²³

The Agencies' selective quotation from AMC and NMA misses the point. Rather than conceding that the underlying legal implications of Tulloch II is that all mechanized earth-moving activities are regulated, the Agencies repeat their tired refrain that such activities "typically" lead to regulated redeposit (i.e. the soil movement is greater than "incidental fallback") but that the Agencies have an open mind to be convinced to the contrary. See Defs.' Br. at 40-41. This is simply a ruse. The determination of what is regulated is based on three factors: (1) the volume of material that falls back (i.e. "small"), (2) the type of mechanized activity ("excavation" only)²⁴; and (3) the location where the incidentally disturbed material comes to rest (it must land in "substantially the same place"). See id. at 33. No guidance as to how these terms are interpreted or balanced is offered – leaving the decision in the unfettered discretion of Agency field staff.

As they did in the Preamble, the Agencies state that providing "bright line" guidance for compliance purposes is simply not feasible. See Defs.' Br. at 43-44 (citing 66 Fed. Reg. at 4566/1-2). The Agencies' refusal to provide a "hard and fast" cut off is utilized as a justification for a vague and impossibly narrow definition of incidental discharge. See Defs.' Br. at 43-46. Rather than attempting to provide clearer factors to distinguish between what is regulated and what is not, the

²³ For example, NWF points out that the public has "no right" to a better regulation. See NWF's Br. at 19.

²⁴ Given the specificity of this term as opposed to the use of "mechanized earth-moving" in other provisions of the rule, one questions whether other earth-moving activities (e.g. dredging or tree removal) not classified as "excavation" could even qualify for this exclusion.

agencies took the easy (and illegal) way out – instead choosing to presume that everything is regulated and then requiring the public to prove that only a "small volume" of material "falls into substantially the same place" during "excavation."

The Agencies have parsed the language of NMA and AMC to create a presumption that is nearly impossible to rebut. For example, in the preamble, the Agencies state that certain machinery (such as backhoes) "by their nature . . . move more than small volumes" of material, 66 Fed. Reg. at 4563, and therefore would cause more than incidental fallback.²⁵ In turn, Defendants indicate that movement of material "mere inches" from removal would constitute redeposit. See Defs.' Br. at 36. On either basis, a Corps regulator could easily declare that such incidental soil movement provides a "handle" to regulate the entire removal activity – even if 99 percent of the soil was removed. Thus, the practical effect of Tulloch II is that it expressly violates the direct holding of the DC Circuit in NMA "by declaring that incomplete removal constitutes an addition." 148 F. 3d. at 1405.²⁶

As the Agencies themselves once recognized, "[i]f the intent is to remove material from the water and the results support this intent" then it is not a discharge. See AMC, 951 F.Supp. at 274. At its essence, "incidental fallback" is not regulated because it "does not add material or move it from one location to another; some material simply falls back in the same general location from which most of it

²⁵ It is unclear where the Agencies find legal support for the notion that the size of the machinery is dispositive of whether or not an "addition" occurs.

²⁶ In 1986, the Agencies appeared more aware of Congressional intent, stating the following in a prior definition of "discharge": "Section 404 clearly directs the Corps to regulate the discharge of dredged material, not the dredging itself." NMA, 145 F.3d at 1402 (citing 51 Fed. Reg. 41,210 (Nov. 13, 1986)).

was removed." AMC, 951 F.Supp. at 267. Thus, the Agencies' wordplay²⁷ is exactly what this Court had in mind when it cautioned the Agencies "against parsing the language of the decisions in NMA and AMC to render a narrow definition of incidental fallback that is inconsistent with an objective and good faith reading of those decisions." Am. Mining Cong. v. U.S. Army Corps of Eng'rs, 120 F. Supp. 2d 23, 31 (D.D.C. 2000) ("NAHB Ruling").

The Agencies' discussion of the significance of the term "specified disposal site," also ignores AMC and NMA. See Defs.' Br. at 41- 43 (stating that the Agencies "do not agree" with this Court's holdings).²⁸ Indeed, the Agencies try to avoid defending their indefensible interpretation of the term (that it covers "redeposits that occur outside the place of initial removal," 66 Fed. Reg. at 4557/2), by asserting that Tulloch II somehow only relates to CWA section 301(a)'s "basic prohibition" against illegal discharges and is not relevant to section 404(a)'s definition of "discharge." See Defs'. Br. at 41.²⁹ This *post hoc* rationale must be exposed for what it is – an attempt to render a key statutory provision in section

²⁷ The Agencies take the word "substantially the same place" out of context. See Defs.' Br. at 36 (citing NMA, 145 F.3d at 1401). In that sentence the court noted that "when redeposit takes place in substantially the same spot as the initial removal, the parties refer to it as 'fallback.'" Id. (emphasis added). The court did not provide a binding definition.

²⁸ To take the edge off their disagreement with the Court's decision in AMC, the Agencies assert that Tulloch II is consistent with the Court's findings in regard to the significance of the term "specified disposal site" because Tulloch II does not regulate incidental fallback. See Defs.' Br. at 43 n.20. Again, however, they fail to recognize that this term has been defined so narrowly as to be meaningless.

²⁹ Section 301 is not the operative statutory provision. The Corps's regulations explain that Tulloch II relates to the Corps's "policies, practices and procedures" in connection with "permits to authorize the discharge of dredged or fill material into waters of the United States pursuant to section 404 of the Clean Water Act." 33 C.F.R. § 323; see also NMA, 145 F.3d at 1400 (describing section 404 as "the provision at issue in this case").

404(a) meaningless.³⁰ As explained in AMC, this term underscores Congress's understanding that addition is equated with affirmative relocation. See 951 F. Supp. at 273, 278. As Judge Silberman explained, the term "specified disposal site" helps to understand that there is either a geographical or a temporal separation between the act excavation and the act of disposal. See NMA, 145 F.3d at 1410 (Silberman, J. concurring). Thus, the Agencies' interpretation of this term violates "a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view of their place in the overall statutory scheme." Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809 (1989); see also Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000).³¹

V. THE AGENCIES HAVE VIOLATED THE APA'S NOTICE AND COMMENT REQUIREMENTS

In its Summary Judgment motion, NSSGA argued that the Agencies violated the APA's notice and comment requirements by failing to provide the public with an opportunity to review and comment on the Agencies' newly-crafted definition of incidental fallback, which was not part of the published proposed rule. In response, the Agencies claim that NSSGA and the public-at-large should not have been surprised by the Agencies' choice to add the incidental fallback definition to the Rule because the Agencies had left various hints within the proposed rule's

³⁰ In the preamble the Agencies stress that Tulloch II is "important for determining whether a particular discharge is subject to regulation under CWA section 404." 66 Fed. Reg. at 4550/3. Given this statement, it is quite puzzling that the Agencies would now downplay the significance of section 404. See Defs.' Br. at 41-42.

³¹ Interestingly, the Agencies argue elsewhere in their brief that the Court should look to other provisions of the CWA as "additional support" for understanding the Act's purpose. See Defs.' Br. at 32. Perhaps such statutory interpretation is only "relevant" when it suits the Agencies' purposes. Judges Harris and Silberman would appear to believe otherwise.

preamble as to the Agencies' position. The Agencies' *post hoc* justification for their actions is nearly identical to the ill-fated argument made by the EPA in Natural Resources Defense Council v. EPA, 279 F.3d 1180 (9th Cir. 2002), a case with similar facts that Plaintiffs cited extensively in their brief, but that has been ignored by the Agencies.

Just as the Agencies have done in this case, the EPA in NRDC sought to defend its failure to publish its new definition of the regulatory term "zone of deposit" by arguing that references within the published permit should have put the public on notice of its intent. The Ninth Circuit firmly rejected this argument, noting that "nuance and subtlety are not virtues in agency notice practice," and that if the EPA wished to change its approach "it should have done so explicitly." NRDC, 279 F.3d at 1188.

The wisdom of the holding in NRDC is well illustrated by the Agencies' tortured attempt to find language within its published rule that, they argue, should have tipped off the public as to their intent. Without any explicit statement of policy upon which to rely, the Agencies cobble together various sentences from the preamble to the published rule and present them as a unified announcement to the public of their regulatory position. Even a cursory examination of the Agencies' position reveals its obvious faults.

Take, for example, the Agencies' argument that the public was on notice of its intent to narrowly define incidental fallback to encompass only releases of "small volumes" of dredged material. According to the Agencies, the public was on notice

of its intent to utilize the "small volumes" language because the Agencies included a statement within the preamble to the published rule indicating that any release of "dredged material in a manner and amount that is different from, or greater than, incidental fallback" requires a permit. See Defs.' Br. at 48.

The Agencies' argument is entirely circular. Given that incidental fallback was left undefined in the proposed rule, the Agencies' reference to amounts "greater than incidental fallback" is meaningless, and certainly not enough to put the public on notice that only "small volumes" of dredged material would be classified as incidental fallback. Making matters worse, the Agencies cited extensively and with approval to the NMA ruling in its proposed rule, and thereby misled the public into believing that they would follow the NMA court's guidance, which is directly contradicted by the "small volumes" language. See NMA, 45 F.3d at 1404 ("Congress could not have contemplated that the attempted removal of 100 tons of that substance could constitute an addition simply because only 99 tons of its were actually taken away.").

As the D.C. Circuit held in Kooritzky v. Reich, 17 F.3d 1509, 1513 (D.C. Cir. 1994), "something is not a [logical] outgrowth of nothing." Tulloch II failed to provide any definition whatsoever of the term incidental fallback, and gave the regulated community nothing but mixed messages as to the Agencies' understanding of the term. By promulgating a controversial and unduly narrow definition of incidental fallback without even seeking public comment, the Agencies have committed a fundamental violation of the APA's notice and comment

requirements which this Court should not condone. Accordingly, Tulloch II should be remanded to the Agencies with instructions to seek public comment on the incidental fallback definition.

CONCLUSION

The unquestionable impact of Tulloch II is that once again the Agencies have promulgated a regulation that requires a federal permit for virtually all mechanized earth-moving activities in regulated waters. The Agencies have blatantly ignored the NMA and AMC courts' admonishment to refrain from wordsmithing and to seek relief from Congress if they are truly set on regulating activities that do not result in additions of material into waters. As a result, Tulloch II should be set aside and remanded to the Agencies in the hope that "the third time is the charm."

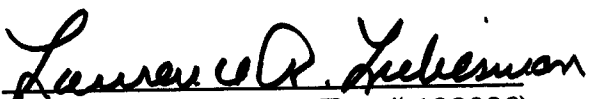
Respectfully submitted,

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DATED:

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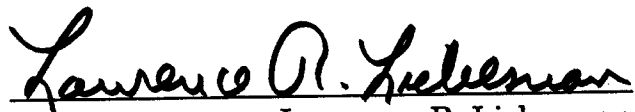
CERTIFICATE OF SERVICE

I, Lawrence R. Liebesman, hereby certify that on this 23rd day of May, 2003, true and correct copies of Plaintiffs', National Stone, Sand & Gravel Association's, American Road and Transportation Builders Association's, and Nationwide Public Project Coalition's Combined Reply to Their Motion for Summary Judgment and Response in Opposition to Defendants' and Defendant-Intervenors' Motions for Summary Judgment have been served via First Class United States Mail, postage prepaid, upon the following:

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