

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

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NATIONAL ASSOCIATION OF HOME BUILDERS, et al.,)	
)	
Plaintiffs,)	No: 1:01CV00274
)	(consolidated with
v.)	No. 1:01CV00320)
)	
UNITED STATES ARMY CORPS OF ENGINEERS, et al.,)	Judge J. Robertson
)	
Defendants.)	
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PLAINTIFFS' JOINT NOTICE OF RECENT DEVELOPMENTS

Plaintiffs file this notice to bring to the Court's attention three developments related to the matters before the Court that occurred subsequent to the filing of Plaintiffs' reply briefs. This notice is being filed and delivered to the parties two weeks prior to the Agencies' and one month prior to the Intervenors' reply deadlines.

First, the Court of Appeals issued a decision addressing ripeness in *CropLife America v. EPA*, 2003 WL 21262716 (D.C. Cir. June 3, 2003) (Attachment 1). At issue was an Environmental Protection Agency (EPA) press release stating that EPA would no longer consider or rely upon "third-party human studies" in evaluating the safety of pesticides. *Id.* at *1. A pesticide trade association and individual manufacturers challenged the release under the Administrative Procedure Act (APA), arguing that it constituted a rule issued without notice and comment and violated statutory requirements that EPA consider all relevant reliable data. EPA argued that it would consider third-party human studies if "legally required" to do so, and, thus, the release was not "binding" and not ripe for review. *Id.* at *4. The Court rejected EPA's argument, noting that a pronouncement is considered binding if it "appears on its face to be

binding.” *Id.* (citations and quotations omitted). The Court held that, “because the EPA directive states unequivocally that the agency will not consider *any* third-party human studies unless a court orders it to do so,”¹ the challenge presented a “purely legal question” ripe for review. *Id.* at *7.² The holding demonstrates that, in a straightforward APA challenge to agency action, the action will be ripe and subject to review where it is binding as to “the issues or rights to which it is addressed.”³

Second, the Supreme Court issued a decision on writ of certiorari in *Amfac Resorts, L.L.C. v. DOI*, 282 F.3d 818 (D.C. Cir. 2002), a case relied on by Intervenors in their opening brief, Int. Br. at 9-10, and therefore discussed in Plaintiffs’ reply briefs, NAHB Reply at 3, 11-13 and NSSGA Reply at 12-14. *Nat’l Park Hospitality Ass’n v. Dept. of the Interior*, 2003 WL 21210427 (U.S. May 27, 2003) (Attachment 2). Because the petitioner “brought a facial challenge to the regulation and [was] not litigating any concrete dispute with NPS,” the Supreme Court asked the parties to “provide supplemental briefing on whether the case [was] ripe for judicial action.” *Id.* at *3. Noting that the Park Service does not administer nor have delegated rulemaking authority under the Contract Disputes Act (CDA) and that the rule did not govern the

¹ Likewise, the Regards Rule categorically defines nonexcavation earth-moving as a “discharge” and that “regard” is dispositive. Excavation earth-moving, on the other hand, may avoid the Agencies’ regard *if* “project specific evidence” demonstrates that the project results in only “small volume” movements in “substantially the same place.” 66 Fed. Reg. 4550 (Jan. 17, 2001). All other excavation and nonexcavation earth-moving is regulated by the plain terms of the rule -- period.

² The court observed that it is “clear that the agency’s characterization of its own action is not controlling if it self-servingly disclaims any intention to create a rule with the ‘force of law,’ but the record indicates otherwise.” *CropLife*, 2003 WL 21262716, at *6.

³ The court vacated the directive based on EPA’s failure to comply with notice and comment rulemaking requirements. The court made no mention of *United States v. Salerno*, 481 U.S. 739 (1987), nor did it suggest that there is any procedural barrier to direct APA review of such final agency action beyond traditional questions of ripeness and standing (both of which it found present).

petitioner's primary conduct (the operation of concessions in national parks), the majority found the challenged rule simply a general statement of policy on the Park Service's view how the CDA would apply to concessioner contract disputes. *Id.* at *4. Thus, the case was not ripe for review. *Id.* at *4-5.⁴ In sharp contrast, the Agencies do administer the Clean Water Act (CWA) and do have delegated rulemaking authority under the Act, and the Regards Rule governs Plaintiffs' primary conduct (earth-moving). Notably, neither the majority, nor the concurring opinion, nor the dissent cited nor even suggested that *Salerno* would bar review.

Third, in response to the Supreme Court's request on the petition for writ of certiorari in *Miccosukee Tribe of Indians of Florida v. S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364 (11th Cir. 2002), the United States filed a brief stating its position that there is no split in the Circuits on the holding in *Miccosukee* -- *i.e.*, that the transfer of polluted water between "two separate bodies of water" results in an "addition." Brief at 12-13 (Attachment 3). The government's brief points out that the courts have consistently held that when a water control facility

directs the flow of water from one part of a single water system to another part of the same water system, the control facility does not result in the 'addition' of a pollutant, even if the facility induces water quality changes, so long as the facility itself does not contribute new contaminants to the water.

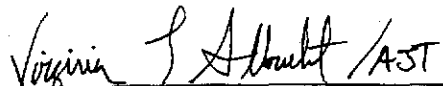
Brief at 10-11. By contrast,


when a water control facility transfers polluted water from one distinct and separate body of water to another less-polluted body of water, the transfer of polluted water results in an 'addition' of pollutants to the more pristine body of water, and an NPDES permit is therefore required.

⁴ The one concurring and two dissenting justices would have found the rule ripe for review, but differed as to whether the petitioners had standing. *Id.* at *6-11 (Stevens, J., concurring, Breyer and O'Connor, JJ., dissenting).

Id. at 11.⁵ The United States's position before the Supreme Court reinforces the position of the National Association of Home Builders that mere movement of a pollutant -- be it polluted water or dredged material -- within a water body is not a discharge. NAHB Reply Br. at 19-20. Thus regarding earth-moving as an addition exceeds the Agencies' statutory authority.

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⁵ The government acknowledges, however, that the courts below may have erred as to the "mixed question of law and fact" whether the canal and water conservation area (WCA) at issue in *Miccousukee* are distinct and separate water bodies. Brief at 13. The United States states that the canal and water conservation area "can appropriately be viewed ... as parts of a single water body" based on their "unique, intimately related, hydrological association" and treatment in law as "part of a single integrated resource." *Id.* Accordingly, the pumping of water at issue would not result in a statutory discharge because it would not cause an "addition" to a separate water body.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the Plaintiffs' Joint Notice of Recent Developments were served this tenth day of June, 2003, via hand delivery and electronic mail upon the following counsel of record.

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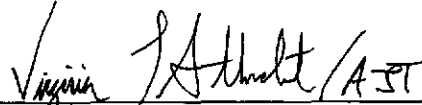
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