

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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NATIONAL ASSOCIATION OF HOME BUILDERS, et al.	)	
	)	Case No. 1:01CV00274
Plaintiff,	)	
	)	(consolidated with
v.	)	1:01CV00320)
	)	
U.S. ARMY CORPS OF ENGINEERS, et al.	)	
	)	Judge James Robertson
Defendants.	)	

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**UNITED STATES'S CROSS-MOTION FOR SUMMARY JUDGMENT**

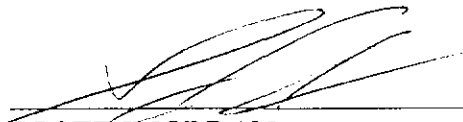
Defendants U.S. ARMY CORPS OF ENGINEERS (the "Corps"), GREGORY DAHLBERG, Acting Secretary of the Army, JOSEPH WESTPHAL, Assistant Secretary of the Army for Civil Works, LT. GEN. ROBERT B. FLOWERS, Chief of Engineers, U.S. Army Corps of Engineers, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ("EPA"), and CHRISTINE T. WHITMAN, Administrator, United States Environmental Protection Agency (collectively, the "United States") move this Court to enter summary judgment for the United States and against Plaintiff NATIONAL ASSOCIATION OF HOME BUILDERS ("NAHB") and Plaintiffs NATIONAL STONE, SAND AND GRAVEL ASSOCIATION, AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION AND NATIONWIDE PUBLIC PROJECTS COALITION (collectively, NSSGA).

This motion should be granted for the reasons stated in the accompanying Combined Memorandum In Support Of Its Cross-Motion For Summary Judgment And In Opposition To Plaintiffs' Motions For Summary Judgment.

A proposed form of order is attached.

Respectfully submitted,

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Date: April 11, 2003

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**UNITED STATES'S COMBINED MEMORANDUM IN SUPPORT  
OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO  
PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT**

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**UNITED STATES'S COMBINED MEMORANDUM IN SUPPORT  
OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO  
PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT**

Defendants United States Army Corps of Engineers ("USACE" or "Corps") and United States Environmental Protection Agency ("EPA") (collectively, the "Agencies" or the "United States") submit this combined memorandum in support of their cross-motion for summary judgment and in opposition to Plaintiffs' motions for summary judgment.

**INTRODUCTION**

This case involves the United States's protection of waters of the United States, including wetlands, by regulating the discharge of dredged material in accordance with the authority granted to the Corps and EPA under the Clean Water Act. Wetlands serve important functions that protect human health, the environment and property. Wetlands filter toxic pollutants, excess nutrients and sediment from water as the water flows through the wetlands to rivers and other water bodies. This filtering protects drinking water and prevents harm to aquatic habitats that support a wide variety of wildlife, including commercially-important fish and shellfish and many endangered species. Indeed, wetlands can decompose or degrade toxic pollutants that are trapped in wetland soil for a sufficient length of time. Wetlands also moderate the flow of rainwater into rivers and streams, serving both to reduce flooding and protect human life and property during periods of heavy rain, and to slowly release water during periods of low rain, thus protecting aquatic environments and helping to provide sufficient water flow for commercial and recreational navigation.

When wetlands are dredged and the material is redeposited into the wetlands, these beneficial functions are disrupted. The dredging and redeposit of wetlands soils can allow toxic pollutants that are trapped in the soils to be released. Even where the wetlands soils do not contain

toxic pollutants, digging or bulldozing and subsequent redeposit can disrupt the wetlands' ability to trap excess nutrients and sedimentation, allowing these pollutants to enter rivers and other water bodies and degrade water quality. The redepositing of dredged material in wetlands can disrupt the the wetlands' ability to hold and moderate water flow, and thereby increase the risk of flooding. Further, the redeposit of material in wetlands can directly kill plants and many small organisms at the base of the food chain as the discharges occur, as well as destroy the habitat for plants and animals.<sup>1/</sup> To protect these many important wetland functions, Congress has prohibited the discharge of dredged or fill material into waters of the United States, including wetlands, in the absence of a permit under CWA § 404.

In this case, Plaintiffs challenge the Agencies' January 2001 Rule (the "Rule" or "Final Rule") modifying certain portions of the regulatory definition of "discharge of dredged material" in 33 C.F.R. § 323.2(d) and 40 C.F.R. § 232.2. Specifically, the Rule modified this definition to state (1) the Agencies' expectation that mechanized earth-moving activities in waters of the United States will typically result in discharges of dredged material that are regulated under the Clean Water Act, and (2) that the scope of the term "incidental fallback" (a form of redeposit that is not regulated under the Clean Water Act) is as broad as – but not broader than – the D.C. Circuit court held in National Mining Association v. U.S. Army Corps of Engineers, 145 F.3d 1399 (D.C. Cir. 1998) ("NMA"), and this Court held in its decisions in American Mining Congress v. United

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<sup>1/</sup> For a further discussion of the beneficial functions of wetlands and the harm caused by excavation and redeposit, see United States v. Deaton, 209 F.3d 331, 336 (4th Cir. 2000).

States Army Corps of Engineers. 951 F. Supp. 267 (D.D.C. 1997) ("1997 AMC), and 120 F. Supp. 2d 23 (D.D.C. 2000) ("2000 AMC").

As discussed below, Plaintiffs' challenges to the Rule are not ripe for review. Moreover, even on the merits, Plaintiffs' challenges fail because the Rule is within the authority of the Clean Water Act, is consistent with the body of relevant case law, and was adopted in compliance with the notice and comment procedures of the Administrative Procedure Act. Summary Judgment should be entered for the United States and against Plaintiffs.

### **STATUTORY BACKGROUND**

#### **A. The Clean Water Act**

Congress enacted the Federal Water Pollution Control Amendments of 1972, also known as the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387, to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act's stated objectives evince a "broad, systemic view of the goal of maintaining and improving water quality." United States v. Riverside Bayview Homes, 474 U.S. 121, 132 (1985).

The cornerstone of the CWA is 33 U.S.C. § 1311(a), which imposes a blanket prohibition on the "discharge of any pollutant by any person," unless in compliance with the Act. The CWA defines the phrase "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The term "pollutant" includes "dredged spoil," "rock," "sand," "cellar dirt," "biological material" and "solid waste," 33 U.S.C. § 1362(6), and has been held to include earthen materials that are removed during excavation, ditching, and other landclearing operations. See Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897,

922 (5th Cir. 1983). A "point source" is "any discernable, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Bulldozers, backhoes, and other earth-moving equipment qualify as "point sources." See United States v. Tull, 615 F. Supp. 610 (E.D. Va. 1983), aff'd, 769 F.2d 182 (4th Cir. 1985), rev'd on other grounds, 481 U.S. 412 (1987). The CWA defines the term "navigable waters" broadly to mean the "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The Agencies have interpreted the term "waters of the United States" to encompass certain wetlands. 33 C.F.R. § 328.3. See Riverside Bayview, 474 U.S. at 133 ("the evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term 'waters' to encompass [adjacent] wetlands"). See also Solid Waste Agency of Northern Cook County v. Corp., 531 U.S. 159, 167 (2001) ("Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands [that are] 'inseparably bound up with the 'waters' of the United States'") (quoting Riverside Bayview, 474 U.S. at 134).

The CWA establishes two permitting programs to authorize otherwise prohibited discharges. The relevant program here is the program under CWA § 404, which authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue a permit "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a).<sup>2</sup> The Agencies' regulations define the term "dredged material" as "material that is

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<sup>2</sup> Discharges of pollutants other than dredged or fill material must be authorized by a permit issued by (continued...)

excavated or dredged from waters of the United States." 33 C.F.R. § 323.2(c); 40 C.F.R.

§ 232.2.

**B. Discharge Of Dredged Material**

The key issue in this case involves the phrase "discharge of dredged material." As noted above, the "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Similarly, the phrase "discharge of dredged material" means the "addition" of dredged material. 33 C.F.R. § 323.2(d); 40 C.F.R. § 232.2. Courts have consistently held that the word "addition" does not require that dredged material be added from off-site. The D.C. Circuit has recognized that redeposits of such material within waters of the United States can be an "addition." NMA, 145 F.3d at 1405-06 (at 1405 n.6, "Even the plaintiffs concede that under a broad reading of the term 'redeposit,' 'a redeposit could be an addition to a new location and thus a discharge.'"). Moreover, courts under a variety of circumstances in enforcement actions have held that the redeposit of material within waters of the United States constitutes the "discharge" or "addition" of pollutants that is regulated by the CWA. See, e.g., United States v. Deaton, 209 F.3d 331, 335 (4th Cir. 2000) (the redeposit of excavated material on the sides of an area being excavated -- a practice commonly referred to as "sidecasting" -- is a discharge of a pollutant); United States v. M.C.C. of Florida, Inc., 772 F.2d 1501, 1506 (11th Cir. 1985) (the use of a boat's propellor to dredge and redeposit vegetation and sediment onto the

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<sup>2</sup>(...continued)

EPA (or a State with an approved program) through the CWA's National Pollutant Discharge Elimination System ("NPDES") under 33 U.S.C. § 1342. See National Wildlife Federation v. Gorsuch, 693 F.2d 156, 164-65 (D.C. Cir. 1982).

adjacent sea grass beds – commonly referred to as “propwashing” or “prop-dredging” – constitutes the discharge of a pollutant); United States v. Huebner, 752 F.2d 1235, 1243 (7th Cir. 1985) (the use of a bulldozer to move dirt within wetlands to level the area constitutes a discharge).

At the same time, not all redeposits constitute discharges. Some redeposits are of such a nature that they constitute mere “incidental fallback” and are not regulated under the CWA. NMA, 145 F.3d at 1405 (recognizing that the CWA regulates some redeposits but holding that it does not regulate “incidental fallback”). The primary issue in this case, as discussed below, is the distinction between regulated redeposits and incidental fallback.

## **REGULATORY BACKGROUND**

### **A. The Agencies’ Original Interpretation of “Discharge of Dredged Material”**

Until 1993, the Agencies did not regulate de minimis discharges from various kinds of equipment during normal dredging and excavation operations. In 1981, a Corps regulatory guidance letter stated, “De minimis discharge occurring during normal dredging operations, such as the drippings from a dragline bucket, is not considered to be a Section 404 discharge.” Corps Regulatory Guidance Letter 81-04, at 1 (NAHB Ex. 2).<sup>3</sup> Similarly, in 1984, a Corps guidance letter noted the contrast between “minimal (‘de minimis’) movement of soil [that is] incidental to removal or planting of vegetation” (which is not regulated under the CWA) and “land leveling operation[s] which alter the topographic features of a ‘water of the U.S.’ through significant

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<sup>3</sup> Where Plaintiffs have already provided the Court with a copy of a document as an exhibit to their briefs, the United States will cite to Plaintiffs’ exhibit.

movement of soil” (which is regulated under the CWA). Corps Regulatory Guidance Letter 84-01, at 1 (NAHB Ex. 3).

Consistent with these guidance letters, in 1986, the Corps regulations were revised to state that the term “discharge of dredged material” did not include “de minimis, incidental soil movement occurring during normal dredging operations.” 51 Fed. Reg. at 41,232/3 (codified at 33 U.S.C. § 323.2(d)). The accompanying preamble discussion explained that “incidental fallback” from normal dredging operations was not regulated under the CWA:

Section 404 clearly directs the Corps to regulate the discharge of dredged material, not the dredging itself. Dredging operations cannot be performed without some fallback. However, if we were to define this fallback as a “discharge of dredged material,” we would, in effect, be adding the regulation of dredging to section 404 which we do not believe was the intent of Congress. We have consistently provided guidance to our field offices since 1977 that incidental fallback is not an activity regulated under section 404.

51 Fed. Reg. 41,206, 41,210/2 (November 13, 1986). The Agencies’ position was further explained in a 1990 guidance letter concerning the use of mechanized equipment, such as backhoes and bulldozers, to clear land. This guidance letter stated that mechanized landclearing generally results in regulated redeposits:

[M]echanized landclearing activities in [wetlands within the jurisdiction of the CWA] result in a redeposition of soil that is subject to regulation under section 404. Some limited exceptions may occur, such as cutting trees above the soil’s surface with a chain saw, but as a general rule, mechanized landclearing is a regulated activity.

Corp Regulatory Guidance Letter 90-05, at 1 (NAHB Ex. 5).

In short, until 1993, the Agencies’ position was that “incidental fallback” associated with normal dredging operations was not regulated under the CWA, but that other redeposits – such as

the land leveling mentioned in the 1984 guidance and the mechanized landclearing mentioned in the 1990 guidance – were regulated.

**B. The Tulloch Rule and the AMC/NMA challenge**

In 1993, the Agencies issued a regulation known as the "Tulloch Rule." 58 Fed. Reg. 45,008 (August 25, 1993).<sup>4</sup> In the Tulloch Rule, the Agencies broadly defined the term "discharge of dredged material" as including "any redeposit" of dredged material. 58 Fed. Reg. at 45,037/3 (discharge of dredged material includes "any addition, including any redeposit, of dredged material, including excavated material, into waters of the U.S. which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation that destroys or degrades waters of the U.S.").

Several industry associations challenged the revised definition of the term "discharge of dredged material." In 1997, this Court ruled that the 1993 regulation exceeded the Agencies' authority under the CWA because it impermissibly regulated "incidental fallback" of dredged material, and the Court enjoined the Agencies from applying or enforcing the regulation. American Mining Congress v. United States Army Corps of Engineers, 951 F. Supp. 267 (D.D.C. 1997) ("AMC") (Judge Stanley Harris). That ruling was affirmed by the D.C. Circuit. National Mining Association v. United States Army Corps of Engineers, 145 F.3d 1339 (D.C. Cir. 1998) ("NMA"). Specifically, the D.C. Circuit stated that "we do not hold that the Corps may not legally regulate some forms of redeposit under its [CWA] § 404 permitting authority. We hold only that

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<sup>4</sup> The Tulloch Rule got its name because it was promulgated following settlement of a case called North Carolina Wildlife Federation v. Tulloch (E.D.N.C. 1992).

by asserting jurisdiction over ‘any redeposit,’ including incidental fallback, the Tulloch Rule outruns the Corps’s statutory authority.” 145 F.3d at 1405.

**C. The 1997 Rulemaking**

In 1999, the Agencies issued a new final rule modifying the definition of "discharge of dredged material" to respond to the D.C. Circuit’s decision in NMA, and to ensure compliance with this Court’s injunction. 64 Fed. Reg. 25,120 (May 10, 1999). Specifically, the 1999 rule modified the definition of “discharge of dredged material” to remove the reference to “any redeposit” and to add language expressly stating that the “discharge of dredged material” does not include “incidental fallback.” 64 Fed. Reg. at 25,123/2 (discharge of dredged material defined as including “redeposit of dredged material other than incidental fallback”).

Following the promulgation of the 1999 rule, Plaintiff National Association of Homebuilders (NAHB) and others filed a motion with this Court (Judge Harris) to compel compliance with the 1997 AMC injunction. The NAHB motion, among other things, asserted that the 1999 rule violated the 1997 injunction by asserting unqualified authority to regulate mechanized landclearing. This Court denied NAHB’s motion, finding that the 1999 rule was consistent with both this Court’s decision and injunction in AMC, and the D.C. Circuit’s affirming opinion in NMA. American Mining Congress v. U.S. Army Corps of Engineers, 120 F. Supp. 2d 23, 29-30 (D.D.C. 2000). Specifically, the 2000 AMC decision held that the 1999 Rule was consistent with the earlier NMA and AMC decisions because the Agencies no longer claimed that “any redeposit” was regulated and, in fact, expressly disclaimed CWA jurisdiction over redeposits that involved only incidental fallback. 120 F. Supp. 2d at 29 (“Inasmuch as this Court in AMC, and the Court of Appeals in

NMA, invalidated the Tulloch Rule because it regulated incidental fallback, the Court's order enjoining the agencies from applying or enforcing the Tulloch Rule must be understood to bar the agencies from regulating incidental fallback."'). Further, the 2000 AMC decision noted that the Agencies had announced their intention to conduct further rulemaking to more clearly delineate the distinction between regulable redeposits and incidental fallback and, in the absence of a clear line distinguishing regulable redeposits from incidental fallback, the Agencies were entitled to make that determination on a case-by-case basis. 120 F. Supp. 2d at 29-30 (citing S.E.C. v. Chenery Corp., 332 U.S. 194, 203 (1947), for the proposition that "agency has discretion to choose between proceeding by general rule or adjudication."').

**D. The August 2000 Proposed Rule and Comments**

In August 2000, the Agencies published a proposed rule that would have created a rebuttable presumption that regulable redeposits would result from mechanized landclearing, ditching, channelization, in-stream mining, or other mechanized excavation activity in waters of the United States, unless the party proved otherwise:

*A discharge of dredged material shall be presumed to result from mechanized landclearing, ditching, channelization, in-stream mining, or other mechanized excavation activity in waters of the United States. This presumption is rebutted if the party proposing such an activity demonstrates that only incidental fallback will result from its activity.*

65 Fed. Reg. 50,108, 50,117 (Aug. 16, 2000) (stating proposed language for 33 C.F.R.

§232.2(d)(2) and 40 C.F.R. § 323.2 (definition of "discharge of dredged material" at (2)).

Further, the proposed rule preamble discussed in detail how the courts had interpreted the phrase "incidental fallback," and in numerous places discussed the factors that distinguish regulable

redeposits from incidental fallback, including volume and location of redeposits and the relationship of incidental fallback to excavation activities. The proposed rule did not include a regulatory definition for incidental fallback.

The response to the 2000 proposed rule was extensive, with the Agencies receiving approximately 9,650 comments. This included approximately 9,500 individual or form letters from the general public expressing overall support for the rule or requesting that it be strengthened. Further, the Agencies received about 150 comments from organizations, state or local agencies, and commercial entities. Of these, 75 provided detailed comments, with approximately 50 expressing opposition to the rule. 66 Fed. Reg. 4550, 4551-52 (Jan. 17, 2001).

Organizations opposing the rule were primarily construction and development interests, mining and commercial interests, as well as local agencies or water districts with agricultural, flood control, or utility interests. These commentators often expressed the view that the proposal was inconsistent with the AMC and NMA opinions and the CWA. Many of these comments also expressed concern that the rebuttable presumption would be difficult or impossible to rebut and inappropriately placed a burden of proof on the regulated entity, and so should not be made part of the final rule. Many commentators (including Plaintiffs in this case)<sup>5/</sup> stated that a definition of incidental fallback was necessary, with many expressing a preference for a “bright line” definition. 66 Fed. Reg. at 4552/1.

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<sup>5/</sup> NAHB October 16, 2000 Comments, at 5-7 (NAHB Ex. 17); NAA-NSA September 7, 2000 Comments, at 5, 9 (NSSGA Ex. F).

Organizations supporting the proposal or advocating it be strengthened included state and local natural resource and environmental protection agencies and environmental organizations as well as many individual citizens. These commentors generally believed that it was appropriate to presume that mechanized landclearing, ditching, channelization, in-stream mining, or other mechanized excavation activity in waters of the U.S. result in more than incidental fallback, and thus involve a regulable discharge of dredged material. Many of these commentors, especially environmental organizations, requested that the rule be strengthened in a number of ways, particularly by identifying certain activities as always requiring a permit. In addition, many of the commentors favoring the proposed rule or requesting that it be strengthened also expressed the view that it should include a regulatory definition of incidental fallback. 66 Fed. Reg. at 4552/1

**E. The Final Rule**

After carefully considering all of the comments, the Agencies determined that the operation of mechanized earth-moving equipment in waters of the United States typically results in regulable redeposits but that there would be instances where the particular equipment used in a project and the way that it is operated would result in no more than incidental fallback. Further, the Agencies modified the Final Rule in response to comments in two ways that are significant in this case.

First, the Final Rule eliminated the proposed rule's use of a rebuttable presumption. Instead, the Final Rule states the Agencies' expectation noted above – that earth-moving machines will usually (but not always) result in regulable redeposits:

The Corps and EPA regard the use of mechanized earth-moving equipment to conduct landclearing, ditching, channelization, in-stream mining or other earth-moving activity in waters of the United States as resulting in a discharge of dredged

material unless project specific evidence shows that the activity results in only incidental fallback.

66 Fed. Reg. at 4575 (promulgating 33 C.F.R. § 323.2(d)(2)(i) and 40 C.F.R. § 232.2 (definition of “discharge of dredged material, in (2)(i))). Further, to address the comments that the rebuttable presumption proposal inappropriately shifted a burden of proof onto the regulated community, the final rule deleted the proposed rule language that stated, “This presumption is rebutted if the party proposing such an activity demonstrates that only incidental fallback will result from its activity”, 65 Fed. Reg. at 50,117, and replaced it with a statement that provided that “project specific evidence [could] show[] that the activity results in only incidental fallback.” 66 Fed. Reg. at 4575. This language change was intended to make clear that the project proponent did not have a duty to submit information to the Agencies. Instead, the Final Rule provides that the Agencies will look at all information to determine whether the project results in incidental fallback. 66 Fed. Reg. at 4552.<sup>9</sup> Also, to make it absolutely clear that the final rule was not creating any burden of proof, the final rule expressly stated that: “This paragraph (i) does not and is not intended to shift any

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<sup>9</sup> The Final Rule Preamble stated:

[T]he rule language has been clarified to make it more evident that we will not look to project proponents alone to provide information that only incidental fallback results. Thus, the rule language now refers to “project-specific evidence show[ing] that the activity results in only incidental fallback.” While this might consist in large part of information from project proponents, we also will look to all available information, such as that in agency project files or information gained from site visits, when determining if a discharge of dredged material results.

66 Fed. Reg. at 4552/2.

burden in any administrative or judicial proceeding under the CWA.” 66 Fed. Reg. at 4575 (33 U.S.C. § 323.2(d)(2)(i) and 40 C.F.R. § 232.2(2)(i)).<sup>7</sup>

Second, in response to the widespread request for a regulatory definition of “incidental fallback,” the Agencies included a definition of “incidental fallback” that focused on volume of the redeposit, the location of the redeposit and relationship of the redeposit to excavation activity:

Incidental fallback is the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal. Examples of incidental fallback include soil that is disturbed when dirt is shoveled and the back-spill that comes off the bucket when such small volume of soil or dirt falls into substantially the same place from which it was initially removed.

66 Fed. Reg. at 4575 (promulgating 33 C.F.R. § 323.2(d)(2)(ii) and 40 C.F.R. § 232.2 (definition of “discharge of dredged material” in (2)(ii))). This definition of incidental fallback was based on the meaning of that phrase as used in the D.C. Circuit’s NMA opinion and this Court’s AMC decisions and the factors that the Agencies and commentors (including the Plaintiffs bringing this challenge) had addressed during the rulemaking.<sup>8</sup>

Although the Rule provides important clarification of the distinction between regulable redeposits and incidental fallback, it does not create a “bright line” test. While the Agencies

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<sup>7</sup> As the Agencies explained in the proposed rule preamble, this rule was intended to express their expectation that the activities in question typically result in regulable discharges, not to create a formal new process or record keeping requirements. 65 Fed. Reg. at 50,113/3.

<sup>8</sup> This point is further discussed below in Argument Section III responding to NSSGA’s notice and comment argument.

considered establishing such a test, they concluded that this was not feasible or defensible.<sup>97</sup> The Agencies concluded that whether a specific activity results in regulable redeposits or only incidental fallback is a project-specific question that cannot be conclusively determined on a generic basis for any category of earth-moving activity.<sup>100</sup> Thus, while the Rule contains a definition of incidental fallback reflecting the relevant caselaw and the Agencies' expectation that mechanized earth-moving activities typically cause regulated redeposits, it leaves the question of whether any particular activity is regulated to case-by-case decision-making by the Agencies and the courts.

### **STANDARD OF REVIEW**

Judicial review in this case is governed by the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-559, 701-706, which establishes a highly deferential standard of review for agency action. Such action is valid unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

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<sup>97</sup> In response to comments suggesting the need for a bright line defining when the volume and/or location of redeposit would trigger regulation, the Agencies stated, "[w]e are not aware of, nor have commenters suggested, a sound technical or legal basis on which to establish brightline quantifiable limits on such factors." 66 Fed. Reg. at 4566/1.

<sup>100</sup> See, e.g., 66 Fed. Reg. at 4553/2-3 ("Because of the fact-specific nature of the assessment of [the relevant] factors, and their interrelated nature, we do not believe it to be feasible or appropriate to establish hard and fast cut-off points for each of these factors. Rather, the totality of the factors will be considered in each case.") and 4562/3 ("It is difficult to give generalized conclusions regarding specific subcategories of activities or practices, particularly where the description lacks detail. Whether a particular activity results in a discharge, or only incidental fallback, necessarily depends upon the particular circumstances of how that activity is conducted, and as a result, today's final rule allows for project specific considerations.").

This standard of review presumes the validity of agency action. Ethyl Corp. v. EPA, 541 F.2d 1, 34 (D.C. Cir. 1976) (en banc). The standard "is a narrow one," under which the court is not "to substitute its judgment for that of the agency." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 417 (1971). If the agency's reasons and policy choices conform to "certain minimal standards of rationality," the action is reasonable and must be upheld. Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 521 (D.C. Cir. 1983).

With regard to questions of statutory interpretation, the court must first consider whether Congress has directly addressed the question at issue. If so, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842-43 (1984). However, if the statute is silent or ambiguous on an issue, the court must accept the agency's interpretation if it is reasonable; the agency's interpretation need not represent the only permissible reading of the statute nor the reading that the Court might originally have given the statute. Id. at 843 & n.11.

In this case, this Court is considering the Agencies' interpretation of the statutory phrase "discharge of dredged material," and thus should apply the deferential standard of review in Chevron. 467 U.S. at 842-43. Because this term is ambiguous, the analysis is a Chevron Step II review and the Agencies' interpretation must be upheld unless it is "manifestly unreasonable." NMA, 145 F.3d at 1406 n.8; Id. at 1410 (Silberman, J., concurring).

## ARGUMENT

### **I. PLAINTIFFS' CHALLENGES TO THE RULE ARE NOT RIPE.**

The ripeness doctrine “prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over policies” as well as “protect[ing] agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way.” Abbott Laboratories v. Gardner, 387 U.S. 136, 148 (1967). There are two factors that determine whether a claim is ripe: the “fitness of the issues for judicial decision” and the “hardship to the parties of withholding court consideration.” Ohio Forestry Ass’n v. Sierra Club, 523 U.S. 726, 733 (1998); Wyoming Outdoor Council v. United States Forest Serv., 165 F.3d 43, 48 (D.C. Cir. 1999). Plaintiffs’ claims fail on both counts.

It is important to bear in mind what the Rule does and does not do. What it does, as the Agencies explained, is to refine the definition of “discharge of dredged material” to “clarify what types of activities [the Agencies] believe are likely to result in regulable discharges.” 66 Fed. Reg. at 4552 (emphasis added). The determination of whether a regulable discharge has occurred will, however, be made individually, based on a “case-by-case consideration” of the “fact-specific” details of a particular project. 66 Fed. Reg. at 4553; see also id. at 4562 (noting that “[w]hether a particular activity results in a discharge, or only incidental fallback, necessarily depends upon the particular circumstances of how that activity is conducted”). Contrary to Plaintiffs’ assertions, the Rule does not automatically subject any earth-moving activity to regulation. Nor does it “establish new requirements or procedures” (66 Fed. Reg. 4563/3); thus, the Rule does not require any additional submittals from, or actions by, the Plaintiffs.

Plaintiffs' claims thus fail both prongs of the ripeness test. First, Plaintiffs' abstract attack on the theoretical reach of the Rule is not yet "fit for judicial decision." Unless and until the Rule is applied in a concrete setting, the Court lacks the information necessary to determine whether the Agencies have overreached. Second, Plaintiffs cannot show that they have suffered the requisite "immediate, direct, and significant" harm. Cronin v. Federal Aviation Admin., 73 F.3d 1126, 1133 (D.C. Cir. 1996).

**A. The Rule Cannot Be Analyzed in the Abstract.**

In determining whether an issue is fit for judicial review, courts examine whether the issue is "purely legal," whether the court's consideration of the issue would benefit from a more concrete setting, and whether agency action is final. Clean Air Implementation Project v. Environmental Protection Agency, 150 F.3d 1200, 1204 (D.C. Cir. 1998). Even though an agency has taken final action, a claim may be unripe if the issues "are not suitable for decision in the abstract." Id. at 1205. Where there are still "too many imponderables," a court will decline review of final action pending further factual development. Id.; see also State Farm Mut. Auto Ins. Co. v. Dole, 802 F.2d 474, 479 (D.C. Cir. 1986) (even when agency action is final and issues presented are purely legal, court may find matter unripe "if postponing review would provide for a more efficient examination and disposition of the issues" or if "the court's deliberations might benefit from letting the question arise in some more concrete and final form") (internal quotations omitted).

Plaintiffs allege that the Rule represents an "illegal . . . attempt to expand the Corps's jurisdiction." Memorandum of Plaintiffs National Association of Home Builders In Support Of Motion For Summary Judgment ("NAHB Br.") at 13; see also Memorandum In Support Of

National Stone, Sand And Gravel Association et al.'s Motion For Summary Judgment (“NSSGA Br.”) at 1 (“[a]t issue before the Court is the Agencies’ attempt to expand the scope of their limited authority . . .”). Plaintiffs thus contend that the Rule, taken in the abstract, necessarily and inevitably reaches even those earth-moving activities that produce only incidental fallback and that therefore are beyond the Corps’s jurisdiction. The critical flaw in this argument (in terms of ripeness) is that the Rule cannot be taken in the abstract – as the Agencies explained, determining whether a given project does or does not result in a regulable discharge will require a case-by-case, fact-specific analysis. Plaintiffs’ claims thus raise the same concerns that led the D.C. Circuit to rule a similar claim unripe in Clean Air. The rule in question in that case allowed the use of “any credible evidence” to demonstrate compliance with Clean Air Act performance standards. Clean Air, 150 F.3d at 1202. Pre-existing regulations required the use of specific test methods. Id. The new rule did not define or otherwise limit the types of evidence that would be considered “credible.” Id. The plaintiffs argued that by altering the means of determining compliance, EPA had effectively made the underlying performance standards more stringent without conducting a rulemaking with respect to each such standard. Id. at 1203.

The D.C. Circuit dismissed the plaintiffs’ claims as unripe, concluding that “[j]udicial resolution of these issues would benefit significantly from having ‘the scope of the controversy . . . reduced to more manageable proportions, and its factual components fleshed out.’” Id. at 1205, citing Lujan v. National Wildlife Fed’n, 497 U.S. 871, 891 (1990). As the court explained, until the “credible evidence” rule was actually applied, it was impossible to determine whether EPA had tacitly imposed more stringent standards:

For all we know, application of EPA’s credible evidence rule in the place of a reference test may potentially affect some standards but not others. Moreover, credible evidence is not a closed set. Given the universe of all possible evidence that might be considered “credible,” it is impossible for us to decide now what impact the rule will have. . . . An enforcement action brought on the basis of credible evidence would, we believe, provide the factual development necessary to determine whether the new rule has affected whatever existing standard is involved. Until then, we have the classic institutional reason to postpone review: we need to wait for a rule to be applied to see what its effect will be.

Id. at 1205 (internal quotations omitted). See also Diamond Shamrock Corp. v. Costle, 580 F.2d 670, 674 (D.C. Cir. 1978) (dismissing pre-enforcement challenge to regulations as unripe, and noting that “[j]udicial review is generally facilitated by waiting until administrative policy is implemented for then a court can be freed, at least in part, from theorizing about how a rule will be applied and what its effect will be”); National Ass’n of Regulatory Utility Commissioners v. Department of Energy, 851 F.2d 1424, 1428 (D.C. Cir. 1988) (declining to review cost allocation method in part because “DOE has not applied its cost allocation method in a way that would allow us to consider, by examining its concrete effects and implications, whether it is consistent with the [Nuclear Waste Policy] Act”).

This case also presents the “classic institutional reason to postpone review.” As in Clean Air, until the Rule is challenged in the context of a specific application, the Court lacks the “factual development” required to determine the Rule’s effect. Previous court decisions have established that the Agencies’ jurisdiction under the Clean Water Act does not extend to “incidental fallback.” See, e.g., NMA, 145 F.3d at 1405. As the Agencies have explained, they do not intend to regulate “incidental fallback” – but they do intend to regulate non-incidental discharges resulting from mechanized earth-moving activities. Determining what constitutes “incidental fallback” and

what constitutes a regulable discharge will require a project-specific, case-by-case analysis that takes into account all relevant evidence:

[T]he determination of whether an activity results in a regulable discharge of dredged material or produces only incidental fallback involves consideration of the location and the amount of the redeposit. Because of the fact-specific nature of the assessment of these factors, and their interrelated nature, we do not believe it to be feasible or appropriate to establish hard and fast cut-off points for each of these factors. Rather, the totality of the factors will be considered in each case.

66 Fed. Reg. at 4553/2-3. Factors to be considered in making the “incidental fallback” determination may include (1) whether material is redistributed beyond the place of excavation; (2) whether dredged material is suspended or disturbed so that it resettles beyond the place of excavation; (3) whether the operation results in the release of previously sequestered pollutants into the environment; (4) whether dredged material is relocated horizontally and/or vertically; and (5) the volume of material that is redeposited. 66 Fed. Reg. 4553; see also 66 Fed. Reg. 4566/1 (factors relevant to determining whether there has been a regulable discharge or merely incidental fallback “are inter-twined with one another, and do not lend themselves to a segregable hard and fast quantification . . .”).

There is no evidence in the administrative record that the Rule is being applied (let alone misapplied) in a concrete, factual setting. Due to the highly fact-specific nature of the “incidental fallback” analysis, it is not possible to review the Rule in the abstract, nor does Plaintiffs’ challenge to the Rule present a purely legal issue. Unless and until the Rule is applied to a specific set of facts, the Court can do no more than “[theorize] about how [the] rule will be applied and what its

effect will be.” See Diamond Shamrock, *supra*. Plaintiffs’ challenge to the Rule is therefore unripe, and should be dismissed.

**B. Plaintiffs Will Suffer No Hardship by Awaiting Review until the Rule Is Applied in a Concrete Setting.**

As demonstrated above, the Court has a strong interest in postponing review of the Rule until it is applied in a specific factual context. When that is the case, review must be postponed unless a plaintiff can demonstrate immediate, direct, and significant hardship. See National Association, 851 F.2d at 1429; Cronin, 73 F.3d at 1133. Plaintiffs cannot meet this burden.

**1. The Rule Does Not Shift the Burden of Proof.**

The Rule adds no new permitting requirements or procedural hurdles. Nor does it require any immediate action by Plaintiffs.<sup>11</sup> NAHB argues that the Rule requires persons to “convince the Corps through project-specific evidence that an earth-moving activity will result in ‘only incidental fallback,’” and thus puts a burden of proof on persons seeking to conduct earth-moving activities. NAHB Br. at 21; *see generally id.* at 21-30. Similarly, NSSGA argues that the Rule requires persons to contact the Corps and EPA “each and every time they wish to disturb soil and prove that regulation is improper.” NSSGA Br. at 10; *see also id.* at 29 (describing Agencies’ position as “all mechanized earthmoving activities are guilty of redeposit unless proven otherwise.”).

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<sup>11</sup>This situation thus contrasts sharply with that faced by the Supreme Court in Abbott Laboratories. In that case, to comply with new regulations, the petitioning drug companies would have been required to change their labels, advertisements, and promotional materials; destroy existing printed stocks; and invest in new printing type and supplies. Abbott Laboratories, 387 U.S. at 152. The only alternative was to risk civil and criminal penalties for distribution of misbranded drugs. *Id.* at 153. Under those circumstances, the Court found that the petitioners had demonstrated hardship sufficient to render the regulations at issue ripe for review even though they had not yet been enforced.

These claims are simply untrue. The Rule eliminates the rebuttable presumption contained in the proposed rule, and expressly states that it shifts no burden of proof.<sup>12</sup> See discussion above in Section E of the Regulatory Background Section. While Plaintiffs must continue to comply with the CWA prohibition against discharges without permits, that obligation is imposed by the statute and this Rule does not add to Plaintiffs' burden of compliance. In short, as the plain language states, this Rule "does not and is not intended to shift any burden in any administrative or judicial proceeding under the CWA." 66 Fed. Reg. at 4575 (33 C.F.R. 323.2(d)(2)(i)); 40 C.F.R. § 232.2 (definition of "discharge of dredged material" at (2)(i)).

The Rule thus does not cause plaintiffs the kind of "hardship" required to render a claim ripe. See Ohio Forestry, 523 U.S. at 733 (finding no hardship to plaintiffs where challenged plan did not "command anyone to do anything or to refrain from doing anything . . . grant, withhold, or modify any formal legal license, power, or authority . . . subject anyone to any civil or criminal liability . . . [or] create . . . legal rights or obligations"). What the Rule does do is clarify the framework the Agencies will use to evaluate mechanized earth-moving activities. Anyone who is considering engaging in earth-moving activity within the waters of the United States will thus need to

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<sup>12</sup>NSSGA at one point misquotes the Agencies as referring to a "rebuttable presumption in . . . today's rule." NSSGA Br. at 25 n.19 (citing to 66 Fed. Reg. at 4556/1). When the ellipses are filled into the sentence that NSSGA is quoting, it becomes apparent that the Agencies were not stating that there is a rebuttable presumption in the final rule, but were referring to the "rebuttable presumption in the proposal" on the one hand and "today's rule" on the other hand: "Both the rebuttable presumption in the proposal and today's rule are more narrow in scope [than the Tulloch Rule] because we are not regulating incidental fallback." 66 Fed. Reg. at 4556/1. The lack of a rebuttable presumption is further made clear in the text that follows. 66 Fed. Reg. at 4556/2 (noting that the final rule "does not use the words 'presumption' or 'presume' to avoid any misunderstanding that we are attempting to shift CWA burdens to the project proponent.").

consider the Rule (along with all other pertinent regulations) in assessing whether or not that activity will require a discharge permit. A party that concludes that its activities will not result in a discharge is still free to proceed without a permit. If the Agencies believe otherwise, and bring an enforcement proceeding against that party, the burden will remain on the Agencies (as it would in any enforcement proceeding) to prove that discharges have occurred.

**2. The Mere Existence of Some Uncertainty Does Not Render Plaintiffs' Claim Ripe.**

Plaintiffs argue that the case-by-case approach adopted in the Rule leaves them with no way to know whether their earth-moving activities are or are not regulated. As discussed below, the Agencies acknowledge that the Rule does not draw a “bright line” between regulated and non-regulated conduct. See infra Section II.E. The uncertainty that Plaintiffs complain of, however, is no more than the reality facing any party potentially subject to a complex regulatory scheme. It is not always possible to draw a bright line between regulated and unregulated activities, and there will always be cases in which a potentially regulated party has to make a judgment call. The mere existence of some uncertainty thus does not create the kind of “significant hardship” that might render Plaintiffs’ claims ripe.

Plaintiffs claim that as a practical matter, they are now forced to seek discharge permits for any and all earth-moving activities in waters of the United States. See NSSGA Br. at 12-13; NAHB Br. at 20-23. This assertion is based in part on the false assumption that the Rule shifts the burden of proof and thus requires a project operator to affirmatively prove that his project will not result in a regulable discharge. Furthermore, seeking a permit is not the only way for Plaintiffs to

resolve their uncertainty; a less-drastic alternative would be to seek guidance from the Corps before undertaking a proposed project. See 66 Fed. Reg. at 4568 (Agencies “strongly recommend” that anyone proposing earth-moving projects contact Corps in advance).<sup>13/</sup> Plaintiffs cannot manufacture a hardship from their own strategic choice to seek permits routinely.

Finally, any landowner or developer will have the opportunity to challenge specific determinations by the Corps, either by appealing a permit decision or by raising a defense in an enforcement action. See Clean Air, 150 F.3d at 1205 (if “credible evidence” rule in fact altered emission standards, petitioners could raise that as defense in an enforcement action); see also Diamond Shamrock, 580 F.2d at 673 (denying review where regulations did not have “immediate and practical” impact; judicial review would be available once regulations were applied in permit proceeding). Plaintiffs would undoubtedly prefer to resolve this matter now, in a single lawsuit, rather than waiting to challenge the Rule as it is applied to specific situations. This desire does not, however, rise to the level of hardship necessary to justify review. Clean Air, 150 F.3d at 1206 (fact that it would be easier and cheaper to bring a single lawsuit rather than defending enforcement actions did not justify review in otherwise unripe case); see also Cronin, 73 F.3d at 1133 (declining

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<sup>13/</sup>Although Plaintiff NSSGA asserts that its members have received “very conflicting interpretations” from different Corps districts “as to what types of activities are regulated,” NSSGA offers no evidence that any Corps office has evaluated a particular proposed earth-moving activity based on project-specific details. See Affidavit of David W. Carroll (Ex. A to NSSGA Br.) ¶¶ 10-11 (emphasis added).

review where only hardship plaintiffs would suffer was burden of having to file another lawsuit).

Plaintiffs' substantive claims should therefore be dismissed as unripe.<sup>14</sup>

## **II. THE RULE CONSTITUTES A REASONABLE INTERPRETATION OF “DISCHARGE OF DREDGED MATERIAL” AND “INCIDENTAL FALLBACK” THAT SHOULD BE UPHELD.**

The Rule contains two changes to the definition of “discharge of dredged material” that are the subject of Plaintiffs’ challenges in this case. First, the Agencies amended their definition of “discharge of dredged material” to state their expectation that earth-moving activities in waters of the United States typically will result in discharges that are regulated under the Clean Water Act, although there can be instances where that is not the case. 33 C.F.R. § 323.2(d)(2)(i); 40 C.F.R. § 232.2(2)(i).

Second, the Agencies defined “incidental fallback” to be redeposits that are (1) of small volume, (2) incidental to excavation activity, and (3) fall back to substantially the same place as where they are removed; and provided two examples of what constitutes incidental fallback:

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<sup>14</sup>Plaintiff NSSGA has also raised a purely procedural challenge, arguing that the Agencies failed to provide notice and seek comment on the definition of “incidental fallback” included in the Rule. NSSGA Complaint ¶¶ 64-67; NSSGA Br. at 33-34. The Agencies acknowledge that this procedural claim presents a closer ripeness question, and could possibly proceed even though the substantive claim is unripe. See, e.g., Wyoming Outdoor Council vs. U.S. Forest Serv., 165 F.3d 43, 51 (D.C. Cir. 1999) (holding that claim that Forest Service had violated its own procedural requirements could proceed even though substantive NEPA claim was not ripe; court concluded that “there no longer exists the possibility that further agency action will alter the claim in any fashion”). However, as a matter of efficiency, Plaintiffs’ entire claim should be reviewed in a single action. See National Ass’n, 851 F.2d at 1430 (finding that procedural claim was not ripe for separate review in part because “judicial economy favors considering all challenges . . . both substantive and procedural, in one proceeding”). NSSGA’s procedural challenge should therefore be dismissed along with Plaintiffs’ substantive challenges to the Rule.

Incidental fallback is the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal. Examples of incidental fallback include soil that is disturbed when dirt is shoveled and the back-spill that comes off the bucket when such small volume of soil or dirt falls into substantially the same place from which it was initially removed.

33 C.F.R. § 323.2(d)(2)(ii); 40 C.F.R. § 232.2(2)(ii).

As discussed below, both parts of the Rule are reasonable interpretations of the Clean Water Act, are fully consistent with the relevant case law and are supported by the administrative record.

**A. The Agencies Reasonably Concluded That Earth-Moving Equipment Working In Water Of The United States Typically Result In Redeposits That Are Regulated Discharges Under The Clean Water Act.**

In this Rule, the Agencies have stated that the operation of earth-moving equipment in waters of the United States will typically, but not universally, result in redeposits that are regulated under the CWA:

The Corps and EPA regard the use of mechanized earth-moving equipment to conduct landclearing, ditching, channelization, in-stream mining or other earth-moving activity in waters of the United States as resulting in a discharge of dredged material unless project specific evidence shows that the activity results in only incidental fallback.

33 C.F.R. § 323.2(d)(2)(i); 40 C.F.R. § 232.2 (definition of “discharge of dredged material” at (2)(i)). This statement does not create a new rule of law. 66 Fed. Reg. at 4563/3 (“[T]oday’s rule does not establish new requirements or procedures . . .”). Instead, this is a reasonable interpretation of the CWA based on decades of experience administering the CWA § 404 program, the relevant case law, and the body of information reviewed as part of this rulemaking,

including how mechanized earth-moving equipment is normally operated in waters of the United States.

**1. Existing Case Law And The Administrative Record Support The Agencies' Expectation That Earth-Moving Equipment Working In Waters Of The United States Typically Result In Regulated Redeposits.**

Courts under a variety of circumstances have repeatedly held that the operation of earth-moving equipment in waters of the United States results in the redeposit of material that is a "discharge of a pollutant" and thus is regulated by the CWA. 65 Fed. Reg. at 50,109-11; 66 Fed. Reg. at 4558-60. See, e.g., Borden Ranch Partnership v. Corps, 261 F.3d 810, 815 (9th Cir. 2001) (use of bulldozers and tractors to pull large metal prongs through soil -- an activity commonly referred to as "deep ripping" -- constitutes a discharge where the soil is "wrenched up, moved around, and redeposited somewhere else."), aff'd without opinion, 123 S.Ct. 599 (2002); United States v. Deaton, 209 F.3d at 335 (4th Cir. 2000) (the redeposit of excavated material on the sides of an area being excavated -- a practice known as "sidecasting" -- is a discharge of a pollutant); United States v. Huebner, 752 F.2d 1235, 1243 (7th Cir. 1985) (the use of a bulldozer to move dirt within wetlands to level the area constitutes a discharge); United States v. Mango, 997 F. Supp. 264, 285 (W.D.N.Y. 1998) (backfilling of trenches excavated in wetland areas falls within the regulatory authority of CWA § 404), reversed on other grounds, 199 F.3d 85 (2d Cir. 1999). In short, courts have repeatedly recognized that the operation of earth-moving equipment in waters of the United States is within the Agencies' regulatory authority under the Clean Water Act. By contrast, Plaintiffs have not pointed to a single court opinion in which the court disagreed with a

United States's claim that a specific earth-moving activity – that is, an earth-moving activity as it was actually conducted in the real world – constituted a “discharge of dredged material” that was regulated by the Clean Water Act.

In addition to this body of case law, the Agencies during the rulemaking considered information concerning earth-moving activities in waters of the United States, and concluded that the use of such equipment in waters of the United States typically results in regulable redeposits rather than mere incidental fallback. In the proposed rule's preamble, the Agencies discussed such activities as site leveling and grading, land clearing (including the removing of trees and brush), and excavation (including ditching, channelization and dredging). 65 Fed. Reg. at 50,111-12. In this discussion, the Agencies recognized that these activities potentially could be accomplished using specialized methods that would not result in regulable redeposits, but concluded that in the real world they usually generated significant redeposit of material within waters of the United States. See, e.g., 65 Fed. Reg. at 50,111-12 (discussing various earth-moving activities and concluding that these activities “typically” or “normally” or “almost always” result in regulable redeposits). Similarly, in the Final Rule's preamble, the Agencies considered the comments and the available information, and again concluded that “as a general matter, excavation and other earth-moving activities that are undertaken using mechanized earth-moving equipment typically result” in regulable redeposits, 66 Fed. Reg. at 4554/2, but that “some excavation activities by using specialized techniques or precautions may be conducted in such a manner that no discharge of dredged material in fact occurs.” 66 Fed. Reg. at 4554/3. See generally 66 Fed. Reg. at 4554/2-3 (discussing cases holding that various forms of mechanized earth-moving are regulated, and

describing examples of activities that would generally not be regulated because they involve only minor disturbances of soil and/or because they do not result in regulable redeposits).

For these reasons, the Agencies' expectation that mechanized earth-moving equipment will typically – but not always – result in regulable redeposits is reasonable and entitled to the deference of this Court.

**2. The Agencies' Interpretation Is Consistent With The 2000 AMC Decision.**

The Agencies' interpretation here is consistent with this Court's 2000 AMC decision, which reviewed the 1999 Rule and found it to be consistent with the 1997 AMC injunction and the D.C. Circuit's decision in NMA, 120 F. Supp. 2d at 29-30. Specifically, the 2000 AMC decision criticized the contention that all mechanized landclearing was regulable, but stated that it was permissible for the Agencies to interpret the CWA as requiring that persons conducting mechanized landclearing have a permit where such activity produced more than incidental fallback:

[T]o the extent [the Agencies'] claim that, under [Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983)], mechanized landclearing always requires a permit, their claim is incorrect because the NMA court indicated that Avoyelles cannot be read to require a permit for mechanized land clearing where it produces only incidental fallback, see NMA, 145 F.3d at 1406; to the extent [the Agencies] cite Avoyelles for the less remarkable proposition that mechanized landclearing may require a permit where it produces an otherwise regulable deposit under [CWA] § 404, their interpretation is permissible under NMA, see id. at 1406-07.

AMC, 120 F. Supp. 2d at 29 n.9. Further, the 2000 AMC opinion expressly considered the Agencies' "case-by-case" approach to distinguishing between regulable redeposits and incidental fallback as stated in the 1999 rule, and found it was "facially consistent with the Court's injunction"

and “consistent with the decisions in AMC [1997] and NMA” because it eliminated any assertion of CWA § 404 jurisdiction over incidental fallback. 120 F. Supp. 2d at 29-30.

The Rule at issue here is similar in substance to the 1999 rule upheld by the 2000 AMC decision. First, the language cited approvingly in the 2000 AMC opinion was not modified in the Rule challenged here. See 33 C.F.R. § 323.2(d)(1)(iii) (quoted at 120 F. Supp. 2d at 26-27).<sup>15/</sup> The regulatory definition of “discharge of dredged material” still expressly excludes incidental fallback. Second, the Rule challenged here continues the case-by-case approach that was approved in the 2000 AMC decision. See 66 Fed. Reg. at 4550/2 (Rule “continues to allow for case-by-case evaluations as to whether a regulable discharge of dredged material results from a particular activity, thus retaining necessary program flexibility to address the various fact-specific situations that are presented.”). Thus, for the same reasons that this Court found that the 1999 rule was “consistent with the decisions in AMC and NMA,” 120 F. Supp. 2d at 30, this Court should reach the same conclusion with respect to the 2001 Rule at issue here.

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<sup>15/</sup> 33 C.F.R. § 323.2(d)(1)(iii) – and the parallel citation in 40 C.F.R. § 232.2 definition of “discharge of dredged material” in (iii) – defines “discharge of dredged material” as:

[A]ny addition of dredged material into, including redeposit of dredged material other than incidental fallback within, waters of the United States. The term includes . . . (iii) Any addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States, which is incidental to any activity, including mechanized landclearing, ditching, channelization, and other excavation.

### **3. The Agencies' Interpretation Furthers The Statutory Purpose Of The CWA.**

The Agencies' interpretation of the phrase "discharge of dredged material" furthers the statutory purpose of the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). See also H. R.Rep. No. 92-911, 76-77 (1972), reprinted in 1 Legislative History of the Water Pollution Control Act Amendments of 1972 (Comm. Print 1973) 753, 763-64 (U.S. Ex. 1) (quoted in M.C.C. of Florida, 772 F.2d at 1506) ("The word 'integrity' as used is intended to convey a concept that refers to a condition in which the natural structure and function of ecosystems is maintained."). Of relevance to this case, earth-moving activities in waters of the United States destroy their physical and biological integrity; such activities clearly do not maintain "the natural structure and function" of the waters of the United States. While the Agencies correctly recognize that their CWA jurisdiction is premised on the existence of a discharge and not on the effects of the activity, 66 Fed. Reg. at 4557/1, the fact that the Agencies' interpretation is consistent with the statutory purpose of the CWA is additional support that the interpretation is reasonable. Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe R.R. Co., 516 U.S. 152, 157 (1996) (statutory terms are to be construed in light of the statute's purpose).

For all of these reasons, the Agencies' expectation that mechanized earth-moving equipment will typically result in regulable redeposits is entitled to deference, is reasonable and should be upheld.

**B. The Agencies' Definition Of "Incidental Fallback" Is A Reasonable Interpretation Of The Scope Of "Discharge Of Dredged Material" And Is Founded On The Relevant Case Law In The D.C. Circuit And This Court.**

The Agencies have defined "incidental fallback" (which is a type of redeposit that is not regulated) consistent with how that term was been described and used by the D.C. Circuit and this Court, but not more broadly. During the rulemaking and in this case, Plaintiffs have advocated for a broader definition of "incidental fallback" and now argue that the Agencies' definition is unlawfully narrow. Plaintiffs' arguments should be rejected.

In this Rule, the Agencies defined "incidental fallback" to be redeposits that are (1) of small volume, (2) incidental to excavation activity, and (3) fall back to substantially the same place as where they are removed; and provided two examples of what constitutes incidental fallback:

Incidental fallback is the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal. Examples of incidental fallback include soil that is disturbed when dirt is shoveled and the back-spill that comes off the bucket when such small volume of soil or dirt falls into substantially the same place from which it was initially removed.

33 C.F.R. § 323.2(d)(2)(ii); 40 C.F.R. § 232.2(2)(ii). This definition of incidental fallback arises from the opinions in National Mining Assoc. v. Corps, 145 F.3d 1399 (D.C. Cir. 1998) ("NMA"), and American Mining Congress v. United States Army Corps of Engineers, 951 F. Supp. 267 (D.D.C. 1997) ("AMC"). 66 Fed. Reg. at 4552-3.

In NMA, the D.C. Circuit identified the key regulatory issue as the distinction between a regulable redeposit (which is subject to CWA regulation) and incidental fallback (which is not regulated under the CWA), but left that line to be drawn by the Agencies:

[W]e do not hold that the Corps may not legally regulate some forms of redeposit under its § 404 permitting authority. We hold only that by asserting jurisdiction over “any redeposit,” including incidental fallback, the Tulloch Rule outruns the Corps’ statutory authority. Since the Act sets out no bright line between incidental fallback on the one hand and regulable redeposits on the other, a reasoned attempt by the agencies to draw such a line would merit considerable deference.

145 F.3d at 1405 (footnote omitted).

Although the D.C. Circuit declined to identify the precise line between those two categories, and did not define the phrase “incidental fallback,” the NMA opinion provides significant guidance as to what the NMA court meant by incidental fallback. 66 Fed. Reg. at 4552-53. The NMA opinion understood “incidental fallback” to have three significant characteristics: (1) it is of small volume; (2) it is incidental to excavation activity; and (3) it falls back to substantially the same place as where the material is removed.

First, the D.C. Circuit in NMA court repeatedly focused on incidental fallback as the redeposit of a relatively small volume of material. For example, the NMA court gave the example of the attempted removal of 100 tons where only 99 tons is actually taken away. 145 F.3d at 1404.<sup>16</sup> Similarly, the NMA court concluded that the statutory term “addition” does not cover the situation where material is removed “and a small portion of it happens to fall back.” 145 F.3d at 1404.<sup>17</sup>

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<sup>16</sup> The Agencies do not understand this 99/100 ratio to suggest that there should be a specific cutoff at 1% or any other specific percentage. The Agencies do believe, however, that the tiny fraction represented by the D.C. Circuit’s 1% example supports its conclusion that incidental fallback is properly understood to be redeposits of relatively small volumes of material.

<sup>17</sup> The legislative history cited by NSSGA provides further support for the Agencies’ inclusion of the  
(continued...)

Second, incidental fallback occurs as a part of excavation activity. For example, the NMA court stated that incidental fallback “represents a net withdrawal” of material, and gave the example of the attempted removal of 100 tons where only 99 tons is actually taken away. 145 F.3d at 1404. This 99/100 example is significant on this point (and not just the small volume point above) because it demonstrates that the D.C. Circuit was thinking of activities that truly removed the material from waters of the United States, rather than merely moved it around with some portion ending up outside of waters of the United States. Similarly, the NMA court described incidental fallback as the product of “imperfect extraction.” 145 F.3d at 1406 (concluding that the discharge at issue in Rybachek v. EPA, 904 F.2d 1276 (9th Cir. 1990), was different from “imperfect extraction, i.e., extraction accompanied by incidental fallback of dirt and gravel.”). Moreover, this Court’s decision in AMC also stated that incidental fallback occurs during excavation. 951 F. Supp. at 270 (“Incidental fallback is the incidental soil movement from excavation . . .”). Finally, some guidance as to what constitutes incidental fallback can be gained from the ordinary meaning of “incidental,” 66 Fed. Reg. at 4558/1, which is defined as “happening or likely to happen in an unplanned or subordinate conjunction with something else.” Random House Dictionary of the English Language (2d Ed. 1987), at 966. In this case, the “something else” that incidental fallback occurs in conjunction with is excavation. In short, the NMA opinion, the AMC opinion and the

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<sup>17</sup>(...continued)

“small volume” component of the definition of incidental fallback. NSSGA Br. at 21-22. Indeed, NSSGA’s citation to this legislative history is somewhat puzzling because the references to “de minimis” activities and “moving a little bit of earth” support the Agencies’ definition of incidental fallback as including only small volumes of material.

plain meaning of “incidental” all support the Agencies’ definition of incidental fallback as being an incidental byproduct of an excavation activity.

Third, fallback occurs when the redeposit occurs “in substantially the same spot as the initial removal.” 145 F.3d at 1401. Notably, and contrary to NSSGA’s contention (NSSGA Br. at 24), the NMA court recognized that dredged material does not have to be moved any significant distance to constitute a regulable redeposit. For example, the NMA court recognized that sidecasting -- that is, the redeposit of excavated material onto wetlands on the side of the excavated ditch -- is a regulated activity. 145 F.3d at 1402 (“The parties agree that the 1986 rule did, however, regulate ‘sidecasting,’ which involves placing removed soil in a wetland but at some distance from the point of removal (e.g., by the side of an excavated ditch).”). Though the redeposit in sidecasting occurs “some distance from the point of removal,” 145 F.3d at 1402, that distance is small – “by the side of an excavated ditch.” Id. Often, no more than a few feet separates the mounds of redeposited soil from the location of the excavation. Similarly, the NMA court recognized that plowing might produce “actual discharges, i.e., additions of pollutants,” 145 F.3d at 1405.<sup>18</sup> Plowing simply turns the soil over, redepositing the material immediately beside the location from which it came. Thus, the discussion of sidecasting and plowing in NMA demonstrates that the D.C. Circuit understood that regulable redeposits could occur within a few feet – or even mere inches – of where the material was removed.

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<sup>18</sup> The Agencies note that the discharge of dredged or fill material from plowing that occurs as part of normal farming operations is not prohibited pursuant to 33 U.S.C. § 1344(f)(1)(A), except as provided in 33 U.S.C. § 1344(f)(2).

In sum, the Agencies' definition of incidental fallback as being of small volume, incidental to excavation activity, and occurring in substantially the same place as where the material is removed are fully consistent with the D.C. Circuit's decision in *NMA*.

Further, the examples provided by the Agencies in the Rule's definition of incidental fallback come directly from this Court's decision in *AMC*. The Rule states that "[e]xamples of incidental fallback include soil that is disturbed when dirt is shoveled and the back-spill that comes off the bucket when such small volume of soil or dirt falls into substantially the same place from which it was initially removed." 66 Fed. Reg. at 4575 (33 C.F.R. § 323.2(d)(2)(ii); 40 C.F.R. § 232.2 (definition of "discharge of dredged material" in (2)(ii))). In *AMC*, this Court stated that "[i]ncidental fallback is the incidental soil movement from excavation, such as the soil that is disturbed when dirt is shoveled, or the back-spill that comes off a bucket and falls back into the same place from which it was removed." 951 F. Supp. at 270.

For all these reasons, the Agencies' definition of incidental fallback should be upheld.

**C. Plaintiffs' Arguments Challenging The Rule Should Be Rejected.**

Plaintiffs NAHB and NSSGA have made a number of arguments challenging the legality and reasonableness of the Rule. The discussion above addresses many of Plaintiffs' arguments. A few remaining points are presented here.

First, Plaintiffs' focus on the word "addition" fails to recognize how that word has been interpreted by the courts in the context of discharges of dredged material. *See, e.g.*, NAHB Br. at 15-19; NSSGA Br. at 17-18. As discussed above in Section B of the Statutory Background section and Argument Section II.A.1, court after court has recognized that a regulable redeposit of

dredged material can occur even when no material is “added” to the waters of the United States as that word is commonly understood.<sup>19</sup>

Second, NAHB’s focus on the word “moving” is misplaced. NAHB Br. at 17-18. The Agencies do not seek to regulate the removal of wetlands material or the movement of it per se. What the CWA regulates is the discharge, including the redeposit, of dredged material that is not just incidental fallback. Moreover, as discussed throughout this brief, the Agencies have concluded that earth-moving activities typically result in redeposits that are not incidental fallback. The regulation of these activities, however, is not based on the “movement” of dredged material, but because of the regulable redeposit of dredged material into waters of the United States.

Third, NAHB suggests that the discharge of dredged material requires that the material actually be removed from waters of the United States and then redeposited, and that no regulable discharge occurs where the material is moved within waters of the United States without being removed first. NAHB Br. at 17 (stating that “dredged material is material that is actually removed from a waterbody, not soil that is merely moved but remains within a waterbody.”). Similarly, NSSGA states that a regulable redeposit cannot occur where the material is “simultaneously excavated and added in a single discrete action.” NSSGA Br. at 21. Plaintiffs’ contentions on this

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<sup>19</sup> For this same reason, Plaintiffs’ citations to cases arising under CWA § 402 rather than CWA § 404 do not support their argument. See NSSGA Br. at 19 n.15 (citing, e.g., National Wildlife Fed. v. Gorsuch, 693 F.3d 156 (D.C. Cir.); NAHB Br. at 19 n.16 (citing, e.g. Catskill Mountains Chapter of Trout Unlimited v. City of New York, 273 F.3d 481 (2d Cir. 2001)). As the Fifth Circuit recognized in Avoyelles, discharges of dredged material regulated under CWA § 404 are different in nature from discharges of pollutants regulated under CWA § 402. 715 F.2d at 924 n.43 (“As discussed infra, ‘dredged’ material is by definition material that comes from the water itself. A requirement that all pollutants must come from outside sources would effectively remove the dredge-and-fill provision from the statute.”).

point is contrary to the case law. Examples of “movement-without-removal” and “simultaneous excavation/redeposit” discharges that are regulated under the CWA include plowing, bulldozing, deep ripping and propwashing. NMA, 145 F.3d at 1405 (plowing may “produce actual discharges, i.e. additions of pollutants”); Huebner, 752 F.2d at 1243 (use of a bulldozer to move dirt within wetlands to level the area constitutes a discharge); Borden Ranch, 261 F.3d at 815 (use of bulldozers and tractors to pull large metal prongs through soil – known as deep ripping – constitutes a discharge.); M.C.C. of Florida, 772 F.2d at 1506 (propwashing – the use of a boat’s propellor to dredge and redeposit materials within a water body – constitutes the discharge of a pollutant). Each of these activities involves a situation where the material is not lifted free and clear of the waters of the United States, but is instead removed and redeposited in a single motion.

Fourth, Plaintiffs’ reliance on Michigan v. EPA, 268 F.3d 1075 (D.C. Cir. 2001) is misplaced. NAHB Br. at 25-26; NSSGA Br. at 30. In Michigan, the court reviewed EPA’s contention that it may administer a federal permit program under certain provisions of the Clean Air Act both in areas that are Indian Country (which was not in dispute) and areas where the Indian Country status was “in question.” 268 F.3d at 1084. The D.C. Circuit in Michigan held that EPA cannot administer a federal permit program in areas where federal jurisdiction was merely “in question”; EPA was required to actually make such a jurisdictional determination before operating a federal program in that geographic area. 268 F.3d at 1084. The situation in Michigan is different from the issue in this case in an important respect. In Michigan, EPA was proposing to implement federal permit programs within specific geographic areas without making a determination as to whether they were “Indian Country,” but on the basis of the areas’ “in question” status. Here, the

Agencies are not suggesting that parties must obtain a permit in any instance based on a lack of certainty. Under the Rule, a given activity will require a permit only if there are regulable redeposits, and that question will be determined on a case-by-case analysis based on project-specific information. To be truly analogous to the situation in Michigan, the Rule would have to require permits whenever the activity was such that regulable redeposits were “in question” and despite an analysis of project-specific information. The Rule does not do that.

Fifth, Plaintiffs at various points resort to misstating the position of the Agencies to argue that the Rule overregulates. For example, NSSGA claims that “the only ‘bright line’ that the agencies drew is that all mechanized earthmoving activities are regulated.” NSSGA Br. at 29. As is clear from the Rule, the Agencies’ position is not that all earth-moving activities are regulated, but that earth-moving activities typically results in regulable redeposits and that project specific information can show otherwise. NSSGA’s use of the word “all” demonstrates that NSSGA’s argument is directed at a regulation that is not what the Agencies promulgated. As a further example, NSSGA states that the Agencies’ preamble “considers and rejects” that certain activities, such as excavation in arid areas, may not always result in regulable redeposit. NSSGA Br. at 29. When one looks at the actual preamble language cited by NSSGA, it is clear that the Agencies have articulated a reasonable basis for their expectation that such activities typically result in regulable redeposits but that specific information might support the conclusion that the activity is not regulated. For example, in discussing in-stream excavation in dry intermittent stream beds in arid areas, the Agencies acknowledged that the presence or absence of water is a fact that must be considered and might support a finding of no regulable redeposit, but also noted some of the

reasons why that fact would not by itself be determinative. 66 Fed. Reg. at 4562/1-2. Finally, NAHB inaccurately describes the Agencies' position concerning whether the activities of backhoes are regulated. NAHB Br. at 22 n.23. The Agencies do not, as NAHB suggests, contend that backhoes are regulated regardless of whether they cause regulated redeposits or incidental fallback. The full preamble text from which NAHB pulls their quote, see 66 Fed. Reg. at 4562-63, states the Agencies' position that while the nature of backhoe operation is that they typically result in redeposits that are more than small volume redeposits in substantially the same place as initial removal, the Rule provides for project-specific evaluation.

In sum, the Rule is reasonable in light of the case law and the administrative record.

**D. Plaintiffs' Arguments Concerning "Specified Disposal Areas" Should Be Rejected.**

Plaintiffs argue that a regulable discharge cannot occur unless the discharge occurs at "a specified disposal site." NAHB Br. at 18; NSSGA Br. at 19-21. Plaintiffs' arguments on this point are incorrect because the discharge to a "specified disposal site" language in the CWA relates only to how discharges may be permitted under CWA § 404, not what constitutes an illegal discharge under CWA in the first place.

The basic prohibition against unpermitted discharges appears in CWA § 301(a) and is broadly stated: except as in compliance with certain sections of the CWA, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). The statutory definition of "discharge of a pollutant" is "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). This definition makes clear that "any" addition "to navigable waters" is regulated, and says nothing about regulated discharges being limited to situations where

the discharge to navigable waters is to a “specified disposal area.” In short, a person is subject to the permitting requirements of the Clean Water Act if he discharges dredged material into waters of the United States without a permit. Thus, whether that unpermitted discharge is to a “specified disposal site” is not an element in determining whether a permit is required.

The phrase “specified disposal site” is relevant only to the Corps’ authority to authorize discharges under CWA § 404. Under 33 U.S.C. §§ 1344(a) and (b), a Section 404 permit must identify a “specified disposal area.” Rather than restricting the scope of activities subject to the CWA’s permitting requirements, the requirement that a CWA § 404 permit include the identification of a “specified disposal site” is to (1) ensure that the permitting authority will consider the propriety of disposing of dredged material at the specific site authorized, see 33 U.S.C. § 1344(b) (providing for EPA and the Corps to develop guidelines for selecting disposal sites), and (2) make clear that CWA § 404 permits are not “carte blanche” licenses to discharge material into waters of the United States wherever a permit holder feels like putting it, regardless of the environmental effects of discharging in that location. See Senate Consideration of the Report of the Conference Committee, October 4, 1972, reprinted in 1 Legislative History of the Water Pollution Control Act Amendments of 1972, at 177-78 (U.S. Exhibit 1). This requirement for a “specified disposal area” for CWA § 404 permits, however, cannot reasonably be read to restrict the statutory definition of “discharge” in 33 U.S.C. §§ 1362(12) and (16), or the broad prohibition against discharges without a permit in CWA § 301(a). As the statute says, a discharge of a pollutant occurs where there is any discharge “to navigable waters.” 33 U.S.C. § 1362(12).

For these reasons, Plaintiffs' argument suggesting that the CWA only regulates discharges at a "specified disposal site" is incorrect.<sup>29</sup>

**E. The Lack Of A Bright Line Standard For Distinguishing Between Regulable Redeposits And Incidental Fallback Is Not A Valid Basis For Invalidating The Rule.**

Plaintiffs make much of the fact that the Rule here does not draw a bright line between regulable redeposits and incidental fallback, see, e.g., NAHB Br. at 24; NSSGA Br. at 27-28, but their criticism on this point should be rejected. While the United States agrees that bright lines are preferable where they can be drawn, the reality here is that the determination of whether a particular activity results in regulable redeposits or only incidental fallback is a project-specific issue that cannot be conclusively determined on a generic basis. Indeed, the Agencies considered bright line tests with cut-off points for volume of redeposit and distance between excavation and redeposit, and concluded that such bright line standards were not feasible:

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<sup>29</sup> Moreover, the Rule is consistent with the portion of the 1997 AMC opinion stating that the "specified disposal sites" language in CWA § 404 "conveys Congress' understanding that 'discharges' would result in the relocation of material from one site to another." 951 F. Supp. at 278. Although the Agencies do not agree with that conclusion (because, as discussed above, the statute prohibits unpermitted discharges "to navigable water" and not only unpermitted discharges that are made to "specified disposal sites"), the Rule at issue here is consistent with this aspect of the court's decision. The 1997 AMC opinion held that, even if the term "addition of a pollutant" were broad enough to cover incidental fallback, the language "specified disposal sites" in CWA § 404(a) would have led the court to the same holding. Because the Rule does not regulate incidental fallback, it is entirely consistent with this aspect of the court's opinion. Moreover, the court's reasoning in AMC was that the Tulloch Rule effectively made all excavation sites into disposal sites, rendering the statutory language "at specified disposal sites" superfluous. The Rule at issue here is fully consistent with the AMC court's reading of the statutory language because the Agencies are only asserting jurisdiction over redeposits that occur outside the place of initial removal. 66 Fed. Reg. at 4557/1.

Some comments suggested drawing a bright line on the basis of measurable criteria such as cubic yards of dredged material, total acres of land disturbed, gallons of water removed, tons of sediment disposed, or similar measures. Although consideration of factors such as the volume and amount of the material and nature and distance of relocation are relevant in determining whether incidental fallback or a regulable discharge occurs, these factors are inter-twined with one another, and do not lend themselves to a segregable hard and fast quantification of each specific factor (or combination of factors) so as to give rise to a hard and fast test. Moreover, we are not aware of, nor have commenters suggested, a sound technical or legal basis on which to establish brightline quantifiable limits on such factors. For example, we do not believe it is technically sound or feasible to simply establish universally applicable cut-off points for amount or distance.

66 Fed. Reg. at 4566/1-2. See also 66 Fed. Reg. at 4562/3 (“It is difficult to give generalized conclusions regarding specific subcategories of activities or practices, particularly where the description lacks detail. Whether a particular activity results in a discharge, or only incidental fallback, necessarily depends upon the particular circumstances of how that activity is conducted, and as a result, today’s final rule allows for project specific considerations.”).

NSSGA criticizes the Agencies for not providing “hard and fast cutoff points” for what is “substantially the same place.” NSSGA Br. at 28. It is not clear what NSSGA would find satisfactory here. Is NSSGA suggesting that regulable redeposits have to be moved at least 10 feet, or 100 feet, or some other precise distance? If so, what would be the legal, scientific or other basis for picking a specific distance? Any such numerical standard larger than just a foot or two would be inconsistent with the case law recognizing that sidecasting is regulated, *NMA*, 145 F.3d at 1405 n.6; *Deaton*, 209 F.3d at 335, and any numerical standard larger than a couple of inches would be inconsistent with case law recognizing that plowing and deep ripping can be regulated in certain circumstances. *NMA*, 145 F.3d at 1405 (plowing); *Borden Ranch*, 261 F.3d at 815 (deep ripping). At the same time, a definition stating that incidental fallback has to fall within

some specified distance might place certain fallback outside the scope of incidental fallback and improperly regulate it. For example, if incidental fallback was defined as fallback that fell within 10 feet of the point of excavation, that definition would lead to the regulation of excavation where the digging machine had a reach of more than 10 feet, such that some of the bits of soil falling from the bucket were being redeposited more than 10 feet from the point of excavation. Neither the Agencies or Plaintiffs contend that such fallback is regulated, but a 10 foot cutoff would make it so. Finally, if one considered farther cut off points (50 feet? 100 feet?), the “substantially the same place” component of incidental fallback would have little meaning. Again, the reality of the situation mandates that a case-by-case approach rather than a bright line test be used.

Faced with this reality, the Agencies reasonably chose a course of action that was intended to put agency staff and the regulated community on notice of what types of activities were likely to result in regulable discharges while avoiding being unnecessarily prescriptive and maintaining the ability for case-by-case consideration. 66 Fed. Reg. at 4553/1. The wisdom of this approach is borne out by the record, which contains evidence both as to the typical nature and use of mechanized earth-moving equipment to relocate substantial volumes of dredge material, as well as information acknowledging that in certain circumstances use of such equipment may nonetheless result in only incidental fallback. For example, during the rulemaking the Agencies collected information from the Corps’ district offices and compiled a list of earth-moving activities that the Corps had seen performed at least once in a manner that resulted in only incidental fallback. The resulting list of activities included activities that typically result in regulable redeposits. See March 24, 1999 email for Corps to EPA, at 3 (page entitled “Activities Impacted By Tulloch Rule

Decision”) (NAHB Ex. 11). When one compares this list with the types of activities that courts have found to be regulated under the CWA, it is clear that a universal statement that any particular type of activity is either always regulated or never regulated cannot be made. Compare, e.g., March 24, 1999 email for Corps to EPA, at 3 (NAHB Ex 11) (including ditching, peat mining, dredging and land clearing as among the activities that the Corps had seen done at least once with only incidental fallback) with Deaton, 209 F.3d at 335 (sidecasting during ditching is regulated); United States v. Bay-Houston Towing, 33 F.Supp. 2d 596 (E.D. Mich. 1999) (regulable redeposits may occur during peat mining); United States v. M.C.C. of Florida, Inc., 772 F.2d at 1506 (the use of a boat’s propellor to dredge and redeposit vegetation and sediment onto the adjacent sea grass beds constitutes the discharge of a pollutant); Avoyelles Sportsmen’s League, Inc. v. Marsh, 715 F.2d 897, 922 (5th Cir. 1983) (land clearing found to be regulated).

In short, the Agencies determined that they could not create the kind of bright line test that everyone would prefer to have. Instead, the Rule represents a reasonable approach by providing a statement of the Agencies’ expectation that mechanized earth-moving activities in waters of the United States typically result in regulable redeposits, while at the same time recognizing that project-specific circumstances can demonstrate that a given activity requires no permit because it results in only incidental fallback.

Finally, NSSGA incorrectly suggests the Rule should be judged under the rule of lenity, which is a rule of interpretation that applies to ambiguous criminal statutes. NSSGA Br. at 31 & n. 25. The Supreme Court has explained that it has applied the rule of lenity where there is “a narrow question concerning the application of a statute that contains criminal sanctions to a specific

factual dispute,” but that the Court has “never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement.” Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 704 n. 18 (1995).

**III. THE AGENCIES PROVIDED NSSGA AND OTHERS WITH SUFFICIENT NOTICE AND OPPORTUNITY TO COMMENT ON THE ISSUES THAT WERE RELEVANT TO THE DEFINITION OF “INCIDENTAL FALLBACK.”**

NSSGA argues the definition of “incidental fallback” in the Rule must be vacated because NSSGA did not have an opportunity to comment on it. NSSGA Br., at 33-36. NSSGA’s argument on this point should be rejected.

As NSSGA concedes, an agency may promulgate a final rule that is different from the proposed rule, if the final rule is a “logical outgrowth” of the proposal. NSSGA Br. at 33. Specifically, the D.C. Circuit has stated that the key question is whether interested parties were sufficiently apprized of the “subjects and issues” of the rulemaking to meet the three goals of (1) allowing the agency’s regulatory approach to be “tested by exposure to diverse public comment,” (2) providing affected parties with “the opportunity to be heard,” and (3) giving interested parties “an opportunity to develop evidence in the record to support their objections,” thus enhancing the quality of judicial review. Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 547 (D.C. Cir. 1983).

In this case, although the Agencies’ proposed rule did not contain a specific proposed definition of incidental fallback, as discussed below the proposed rule’s preamble did discuss the relevant factors that would be considered. Moreover, NSSGA cannot reasonably contend that it

did not know that the scope of incidental fallback was an important issue in this rulemaking.

Indeed, in its discussion of the proposed rule in its brief to this Court, NSSGA states its opinion that the need for a definition of “incidental fallback” was expected by the regulated community and “obvious.” NSSGA Br. at 9. If it was expected and obvious, NSSGA cannot contend that it did not have notice that the scope of incidental fallback was a relevant issue for the rulemaking.

Most importantly, the proposed rule preamble did discuss the scope of incidental fallback and all of the components of the regulatory definition adopted by the Agencies in the final rule. In short, the Agencies’ proposal raised all of the “subjects and issues” relating to the scope of incidental fallback and thus gave NSSGA and all other interested parties the chance to comment.

The key aspects of the final rule defining “incidental fallback” are that this term refers to redeposits that are (1) “small volumes,” (2) “incidental to excavation activity,” and (3) redeposited “in substantially the same place as the initial removal.” Each of these three components was discussed in the preamble to the proposed rule. First, the Agencies noted that regulable redeposits were redeposits in an amount greater in volume than redeposits that would constitute incidental fallback. See, e.g., 65 Fed. Reg. at 50,111/2 (“Activities that would be subject to the rebuttable presumption [in proposed rule] typically use mechanized equipment that redeposits dredged material in a manner and amount that is different from, or greater than, incidental fallback.”) (emphasis added). Second, the proposed rule preamble discussed incidental fallback as being incidental to excavation activity. See, e.g., 65 Fed. Reg. at 50,113/2 (discussing the decision in AMC, 951 F. Supp. at 270, which held that incidental fallback is “the incidental soil movement from excavation, such as the soil that is disturbed when dirt is shoveled, or the back-spill that comes

off a bucket and falls back into the same place from which it was removed.") (emphasis added).

Third, with respect to the location of redeposit, the proposed rule preamble discussed the D.C. Circuit's decision in NMA as referring to incidental fallback as occurring "in substantially the same spot as the initial removal." See, e.g., 65 Fed. Reg. at 50,113/2 (quoting NMA, 145 F.3d at 1403).<sup>21/</sup> In short, although the Agencies did not propose a specific definition of "incidental fallback," the preamble to the proposed rule clearly spelled out the Agencies' position that location of redeposit, volume of redeposit, and the relationship of the redeposits to excavation activity were central to the distinction between regulable redeposits and incidental fallback.

Moreover, NSSGA and other commentors clearly understood that the scope of the term "incidental fallback" and these three issues were central to this rulemaking. Indeed, Plaintiff NSSGA itself submitted comments to the Agencies during the administrative process that requested inclusion of a definition of "incidental fallback" in the Rule and thoroughly addressed the issues of

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<sup>21/</sup> These three examples are representative of the Agencies' repeated references to one or more of these three components of the final rule definition of incidental fallback. Virtually every page of the proposed rule preamble discussed the importance of volume, location and/or relationship to extraction activity in determining whether a given redeposit was a regulable redeposit or incidental fallback. See, e.g., 65 Fed. Reg. at 50,109/1 (noting that NMA court describes incidental fallback as occurring "when redeposit takes place in substantially the same spot as the initial removal"); 50,109/2 (noting that NMA court "recognized that redeposits at various distances from the point of removal" are regulated); 50,110/2 ("substantial redeposits of dredged material into the removal site have been found to constitute regulable redeposits"); 50,111/2-3 (providing examples of when earth-moving activities are regulated or not, based on volume, location of redeposit, and nature of the activity and the specifics of how equipment is operated.); 50,112/1 (discussing how various types of equipment – such as bulldozers, backhoes and "deadlines" used for bucket dredging – typically redeposit significant amounts of material into a different location and thus is regulated); 50,113/2 (noting that AMC court described incidental fallback as "incidental soil movement from excavation" and gave the examples of "soil that is disturbed when dirt is shoveled, or the back-spill that comes off a bucket and falls back into the same place from which it was removed.").

volume of redeposit, location of redeposit and relationship of the discharge to excavation.

See, e.g., October 16, 2000 National Aggregates Association-National Stone Association<sup>22</sup> Comments (NSSGA Ex. F) at 2 (criticizing “[a]ny definition that defines ‘incidental fallback’ so narrowly that it excludes primarily removal activities unless the removed material ‘drops back’ to the precise location of the discharge”); at 3 (quoting NMA regarding importance of “size of discharge”); at 5 (criticizing proposed rule for not containing a definition of incidental fallback); at 7 (criticizing proposed rule’s discussion of incidental fallback being the “incidental soil movement from excavation” and redeposits that occur “in virtually the same spot from which it came” and “in substantially the same spot as the initial removal” and, further, noting NMA Court’s discussion that Congress did not intend to regulate activities where relatively small volume of material is left behind); at 9 (arguing that “a precise definition of ‘incidental fallback’ needs to be developed); and NAA-NSA Legal Analysis (submitted with NAA-NSA comments and included in NSSGA Ex. F), at 4-6 (making legal argument that small volume (‘de minimis’) discharges are not regulated); at 6 (discussing relationship of incidental fallback to excavation activity); at 10-11 (arguing that incidental fallback cannot be limited to material that falls back to “virtually” the same spot of removal); at 12 (distinguishing cases with regulable redeposits from incidental fallback on grounds that those cases involved large volumes of redeposits and minimal distance between excavation and redeposit). As these examples demonstrate, NSSGA expressly requested that the final rule include a definition of incidental fallback, and presented its comments and arguments on the issues of

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<sup>22</sup> The National Aggregates Association - National Stone Association is the previous name for Plaintiff NSSGA.

location of redeposit, volume of redeposit, and the relationship between excavation and incidental fallback. Notably, NSSGA has not identified any relevant “subject or issue” that it was unable to address due to its claimed lack of notice.

In sum, NSSGA understood the “subjects and issues” that were relevant to this rulemaking, and addressed them in its comments during the administrative proceeding. NSSGA cannot reasonably contend that it did not have an adequate opportunity to present its views. Thus, NSSGA’s notice and comment argument should be rejected.

#### **IV. NSSGA’S TENTH AMENDMENT CLAIM SHOULD BE REJECTED.**

NSSGA argues that the Rule violates the Tenth Amendment of the United States Constitution because the Rule intrudes on the regulatory authority of the states. NSSGA Br. at 36-38. The court should either reject this argument or not reach it.

First, for all of the reasons discussed above, the Rule is a reasonable interpretation of the statute in light of the relevant case law, and fully consistent with the authority granted by Congress under the Clean Water Act. Thus, this Rule is not an improper intrusion into state regulatory authority. Moreover, although NSSGA contends that this Rule “upsets the careful balance between state and federal power” (NSSGA Br. at 38), it does not explain how this is so. For example, NSSGA notes (at 38) that many states have wetlands protection laws that are broader than the federal CWA, but NSSGA does not explain how the narrower federal regulation under this Rule intrudes on that sovereignty or why state and federal regulation cannot coexist in this area. In short, NSSGA’s generic contentions of intrusion into state sovereignty and upsetting the balance of

federal and state power fail to demonstrate that this Rule improperly steps beyond the bounds of permissible federal regulation as authorized by the CWA.

Second, NSSGA's basis for their Tenth Amendment argument is the same as their argument under the Clean Water Act. Thus, even if NSSGA's CWA arguments were correct (which the United States disputes), this court would decide this case on the statutory CWA issue and not reach NSSGA's constitutional argument. Jean v. Nelson, 472 U.S. 846, 854 (1985) ("Prior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision."); Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter) (Brandeis, J., concurring); Siler v. Louisville & Nashville R.R. Co., 213 U.S. 175, 193 (1909) ("Where a case in this court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons.").

Third, it is not clear that NSSGA has standing to raise a Tenth Amendment issue. The Supreme Court long ago decided that private parties do not have the authority to assert a state's Tenth Amendment rights. Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 U.S. 118, 144 (1939).<sup>23</sup> With respect to the members within the NSSGA group of Plaintiffs that are local governmental agencies involved in road construction, water supply, wastewater management

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<sup>23</sup> In Tennessee Power, several private power companies sought an injunction against the TVA based, inter alia, on the contention that the TVA's acts amounted to "federal regulation of purely local matters" in violation of the Tenth Amendment. 306 U.S. at 143. The Court rejected this argument, noting that the states themselves had not objected, and therefore "the appellants, absent the states or their officers, have no standing in this suit to raise any question under the [Tenth] amendment." 306 U.S. at 144.

and the like, those agencies appear be regulated entities, not the state or local regulatory agencies that wield the state authority on which NSSGA contends the Agencies' are intruding. Thus, it is not clear how these Plaintiffs have standing to bring NSSGA's Tenth Amendment claim. Mountain States Legal Foundation v. Costle, 630 F.2d 754, 771-72 (10th Cir. 1980) ("The general rule is that, by virtue of constitutional and/or statutory provisions or common-law power, the state attorney general, as chief law officer of the state, is the exclusive legal representative of the state in all litigation with regard to matters of public interest, and he alone has the right to represent the state as to litigation involving a subject matter of statewide interest." (at 771). The court recognized that the Tenth Amendment claim presents issues of "substantial import" but "[t]hese are not matters . . . properly directed to this Court for resolution in view of the fact that the only party with standing to advance them has elected not to do so." (at 772)); Vermont Assembly of Home Health Agencies v. Shalala, 18 F. Supp. 2d 355, 370-71 (D. Vt. 1998) ("The Second Circuit extends Tenth Amendment standing to include municipalities or their arms, to the extent they have been delegated sovereign powers by the State," (at 370), but "[o]nly those arms of state or local government with delegated State sovereign powers have been approved as claimants [to make Tenth Amendment claims]." (at 371)).

### CONCLUSION

For the reasons stated above, summary judgment should be entered for the Agencies and against Plaintiffs.

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CERTIFICATE OF SERVICE

I, Scott J. Jordan, hereby certify that on April 11, 2003, I caused to be served a true and accurate copy of the (1) UNITED STATES'S CROSS-MOTION FOR SUMMARY JUDGMENT AND (2) COMBINED MEMORANDUM IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT by electronic mail and regular mail upon:

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