

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 REPLY MEMORANDUM IN FURTHER SUPPORT  
OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT**

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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 reply memorandum in further support of their cross-motion for summary judgment.

**INTRODUCTION**

In its opening brief, the United States demonstrated that Plaintiffs' claims are not ripe for review and that, in any event, the Rule challenged by Plaintiffs is a reasonable interpretation of the phrases "discharge of dredged material" and "incidental fallback" that should be upheld. In their reply memorandum, Plaintiffs have made arguments that are largely already addressed by the United States' opening brief. For those arguments, the United States relies on its previous brief and will not repeat its arguments here. Instead, this brief will focus on the Plaintiffs' arguments for which a further response is appropriate.

**ARGUMENT**

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

In its opening brief, the United States established that the Rule (1) cannot be reviewed in the abstract and (2) imposes no hardship on plaintiffs. See United States' Combined Memorandum In Support Of Cross-Motion For Summary Judgment And In Opposition To Plaintiffs' Motion For Summary Judgment ("U.S. Br.") at 17-26. Critically, although plaintiffs claim that no further factual development is required, they have failed to identify even a single set of facts – whether actual or hypothetical – in which the application of the Rule either has exceeded, or would exceed, the Agencies' authority under the Clean Water

Act (“CWA”). Plaintiffs rely, instead, upon a misreading of the Rule, and upon the unfounded claim that the Rule. Plaintiffs have failed to show that their abstract challenge to the Rule is ripe, and their claims should therefore be dismissed.

**A. The Rule Cannot Be Reviewed In The Abstract**

The Agencies do not dispute that the Rule is final, or that it clarifies the Agencies’ views regarding the distinction between a regulable redeposit and incidental fallback, or that the general question of the extent of the Agencies’ regulatory authority under the Clean Water Act is one of law. See NAHB Reply at 3-4, 5; NSSGA Reply at 8. This does not mean, however, that the Rule is necessarily ripe for review. See U.S. Br. at 18; see also National Park Hospitality Ass’n v. Department of the Interior, \_\_\_ U.S. \_\_\_, 2003 WL 2121047 (2003) at \*6 (concluding that even though issue was purely legal, and challenged regulation represented final agency action, case was not fit for judicial review because “further factual development would significantly advance our ability to deal with the legal issues presented”) (citation omitted). Plaintiffs acknowledge that redeposits into waters of the United States can be regulated as a discharge of dredged materials. See NAHB Br. at 24 (discussing Agencies’ alleged obligation to draw “bright line” between incidental fallback and regulable redeposits); NSSGA Br. at 27-31 (alleging that Agencies “failed to draw the necessary bright line between redeposit and incidental fallback”). And the Agencies acknowledge that mere “incidental fallback” cannot be regulated as a discharge; indeed, that is an underlying premise of the Rule, which expressly excludes incidental fallback from the definition of “discharge of dredged material.” The Rule, however, does not purport to draw a

bright line between regulable redeposits and incidental fallback.<sup>1/</sup> Rather, it contemplates a fact-specific, case-by-case determination of whether or not an activity produces a regulable discharge. U.S. Br. at 17-18, 20-21. Thus, except when the Rule is actually applied to a particular set of facts, it cannot be shown that it exceeds the Agencies' authority.

Plaintiffs have yet to identify any specific situations in which application of the Rule has exceeded the Agencies' authority.<sup>2/</sup> And for every hypothetical involving overreaching, it would be possible to create a counterexample in which regulation was proper, perhaps by changing only a few facts. See U. S. Br. at 29-30, 40-41, 43-46. Entangling a court in an abstract debate over hypothetical scenarios -- a debate that can have no resolution, precisely because both regulable and unregulated situations can be imagined -- is one of the difficulties that the ripeness doctrine is intended to eliminate. See Ciba-Geigy Corp. v. EPA, 801 F.2d 430, 434 (D.C. Cir. 1986) (ripeness doctrine "prevents judicial involvement in abstract or remote controversies that are likely never to require resolution or likely to evolve substantially before resolution"); Clean Air Implementation Project v. EPA, 150 F.3d 1200, 1204 (D. C. Cir. 1998) (declining review where court "need[ed] to wait for a rule to be applied to see what its effect will be").

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<sup>1/</sup>As discussed below, see infra at 20-21, there is no merit to plaintiffs' claim that the Agencies were required to create a bright-line rule.

<sup>2/</sup>NAHB states that it is unaware of any of its members ever having made the allegedly required "showing" that a proposed project will produce only incidental fallback. NAHB Reply at 8 n.19. As discussed elsewhere, see U.S. Br. at 22-24, no such "showing" is required. Moreover, although NAHB's declarant states that the Agencies "monitor" earth-moving activities "where no permit has been received," NAHB has not identified any case in which any such "monitoring" led to an enforcement action that allegedly exceeded the Agencies' authority under the Act. See Declaration of Duane J. Desiderio (Ex. 1 to NAHB Br.) at 5-6.

Plaintiffs' efforts to distinguish Clean Air are unpersuasive. NSSGA suggests that Clean Air does not apply because in that case there was "confusion over the significance of the regulatory action," and such confusion does not exist here. NSSGA Br. at 8. Initially, NSSGA offers no support for its claim that there was any "confusion" in Clean Air that differs from the situation in this case – there, as here, plaintiffs contended that the challenged action worked an impermissible change in the standards with which plaintiffs were required to comply, and there, as here, EPA denied that the impact of the rule was as wide-ranging as the plaintiffs claimed. See Clean Air, 150 F.3d at 1205. Moreover, NSSGA misses the larger point, which is that both in Clean Air and in this case there was significant uncertainty regarding the real-world impact of a challenged agency action. It was this lack of certainty, rather than any "confusion," that led the court to conclude in Clean Air that there were "too many imponderables" and that the case was not ripe. Clean Air, 150 F.3d at 1205.

NAHB attempts to distinguish Clean Air by arguing that this case presents "purely legal" issues, whereas Clean Air did not.<sup>37</sup> NAHB Reply at 7. NAHB assumes what it seeks to prove, *i.e.*, that there are no issues in this case requiring further factual development. *Id.* As the Agencies have repeatedly explained, contrary to plaintiffs' claims, the Agencies are not asserting regulatory jurisdiction over all earth-moving activities in waters of the United States. See U.S. Br. at 17-18, 22-24. They intend to regulate only regulable activities. The

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<sup>37</sup>NAHB suggests that a ripeness determination is based solely on a plaintiff's definition of the issues. NAHB Reply at 4; see also *id.* at 7 (arguing that in Clean Air, plaintiffs raised non-legal issues and court found those "issues" unripe). To the extent that a ripeness determination is based on the particular issues raised by a plaintiff, that does not free a plaintiff to do what plaintiffs attempt to do here: argue that their claim is ripe based on a misreading of an agency's action, rather than on what the agency actually did.

line between regulable redeposits and incidental fallback cannot, however, be drawn in the abstract, and this case is therefore not fit for judicial review.

**B. Plaintiffs Have Not Identified Any Cognizable Harm**

Plaintiffs argue that they have suffered hardship due to uncertainty regarding the precise impact of the Rule. NSSGA Reply at 9-10. As the Supreme Court recently explained in a case submitted by plaintiffs as a supplemental authority, regulatory uncertainty alone does not constitute a significant hardship:

Petitioner contends that delaying judicial resolution of this issue will result in real harm because the applicability *vel non* of the CDA is one of the factors a concessioner takes into account when preparing its bid for NPS concession contracts. Petitioner's argument appears to be that mere uncertainty as to the validity of a legal rule constitutes a hardship for purposes of the ripeness analysis. We are not persuaded. If we were to follow petitioner's logic, courts would soon be overwhelmed with requests for what essentially would be advisory opinions because most business transactions could be priced more accurately if even a small portion of existing legal uncertainties were resolved. In short, petitioner has failed to demonstrate that deferring judicial review will result in real hardship.

National Park, 2003 WL 2121047 at \*5 (underlining added). Plaintiffs thus cannot establish hardship on that basis.

Nor have plaintiffs sustained their related claim that they are forced into either obtaining a permit or proceeding without a permit and risking fines and penalties every time they engage in earth-moving activities. NAHB Reply at 1, 5-6; NSSGA Reply at 10. This claim turns, once again, on plaintiffs' assertion that the Agencies have asserted regulatory jurisdiction over all such activities, and that a threshold demonstration that an earth-moving activity will not result in a regulable discharge is required before that activity may legally commence. See NAHB Reply at 8-9; NSSGA Reply at 10-11, 16-18. This is simply untrue,

and there is nothing in the Rule that forces plaintiffs to seek permits for all earth-moving activities.<sup>4</sup> Nor are plaintiffs required to proceed blindly, making their best guess as to whether or not their conduct is regulated. As discussed in the United States' opening brief, potentially regulated parties are free – indeed, they are encouraged – to consult with the Agencies regarding the specifics of a particular project in order to determine whether or not they are required to apply for a permit.<sup>5</sup>

Finally, plaintiffs suggest that this is a case similar to Abbott Labs and its progeny, and that therefore judicial review of the Rule is appropriate. NAHB Reply at 5; NSSGA Reply at 11. Courts have allowed pre-enforcement review where plaintiffs are faced with a choice between complying with a straightforward, clear cut agency directive and risking an enforcement proceeding. See, e.g., Abbott Labs (regulations required specific changes to labels, advertising materials, and promotional materials; if changes were not made, drug would be considered misbranded); Barrick Goldstrike Mines Inc. v. Browner, 215 F.3d 45 (D. C. Cir. 2000) (EPA had stated in guidance that chemicals in waste rock were not eligible for de minimis exemption from EPCRA reporting requirements; if miner did not comply with

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<sup>4</sup>Contrary to NAHB's assertion, the Agencies never claimed that "a citizen's decision to conform his conduct to the regulation" is merely a strategic choice. NAHB Reply at 6 n.14; see also id. at 2. Rather, the Agencies stated that a party's choice to apply for a permit every time – rather than, for instance, consulting with the Agencies and making an individualized assessment of whether a permit is required for a particular project – is one of strategy, and not anything that is forced on that party by the Rule. See U.S. Br. at 24-25.

<sup>5</sup>NAHB characterizes the suggestion that potentially regulated parties consult with the Agencies as an "admonition" that highlights the "breadth and immediacy" of the Rule. NAHB Reply p. 9. There is no admonition here; simply the suggestion that if a party is uncertain as to whether its conduct is regulable, the logical first step is to ask the Agencies charged with making that determination.

reporting requirements, it risked sanctions). Where plaintiffs err, however, is in suggesting that any risk that a party may someday violate a regulation in some as-yet-unknown and as-yet-undefined fashion (and consequently become subject to an enforcement proceeding) is sufficient to render that regulation ripe for review. As indicated in Toilet Goods Ass'n v. Gardner, the companion case to Abbott Labs, this is not accurate. In Toilet Goods, the Court concluded that a regulation was not ripe for review where it "serve[d] notice only that the Commissioner [of the FDA] may under certain circumstances order inspection of certain facilities and data, and that further certification of additives may be refused to those who decline to permit a duly authorized inspection until they have complied in that regard" but left the Court with "no idea whether or when such an inspection will be ordered and what reasons the Commissioner will give to justify his order." 387 U.S. at 165. As the Court explained:

This is not a situation in which primary conduct is affected--when contracts must be negotiated, ingredients tested or substituted, or special records compiled. This regulation merely states that the Commissioner may authorize inspectors to examine certain processes or formulae; no advance action is required of cosmetics manufacturers, who since the enactment of the 1938 Act have been under a statutory duty to permit reasonable inspection of a 'factory, warehouse, establishment, or vehicle and all pertinent equipment, finished and unfinished materials; containers, and labeling therein.' § 704(a). Moreover, no irremediable adverse consequences flow from requiring a later challenge to this regulation by a manufacturer who refuses to allow this type of inspection. Unlike the other regulations challenged in this action, in which seizure of goods, heavy fines, adverse publicity for distributing 'adulterated' goods, and possible criminal liability might penalize failure to comply, see Gardner v. Toilet Goods Assn., 387 U.S. 167, 87 S.Ct. 1526, 18 L.Ed.2d 704, a refusal to admit an inspector here would at most lead only to a suspension of certification services to the particular party, a determination that can then be promptly challenged through an administrative procedure, which in turn is reviewable by a court. Such review will provide an adequate forum for testing the regulation in a concrete situation.

Id.

Land owners and developers have long been under a statutory obligation to obtain a permit before discharging dredged material into the waters of the United States. The Rule merely clarifies the Agencies' position regarding the line between a regulable discharge and incidental fallback. And plaintiffs have failed to demonstrate that any "irremediable consequences" would occur if review is deferred until the Rule is applied to a specific case, or that challenging any later enforcement action based on the Rule would not provide them with "an adequate forum for testing the regulation in a concrete situation." Plaintiff's claim should therefore be dismissed as unripe.

**C. Supplemental Authorities Submitted By Plaintiffs Demonstrate That Their Claim Is Unripe**

On June 10, plaintiffs jointly submitted a Notice of Recent Developments attaching recent decisions by the Supreme Court and by the D. C. Circuit that, plaintiffs contend, bear on the ripeness issues in this case. See Plaintiffs' Joint Notice of Recent Developments ("Joint Notice"), attaching Croplife America v. EPA, \_\_\_ F.3d \_\_\_, 2003 WL 21262716 (D. C. Cir. June 3, 2003) and National Park Hospitality Association v. Department of the Interior, \_\_\_ U.S. \_\_\_, 2003 WL 2121047 (May 27, 2003). Neither case supports plaintiffs' arguments; in fact, both cases confirm that this case is not ripe.

In Croplife America, the primary question before the court was whether a "directive" issued in an EPA press release constituted a binding regulation issued without proper notice and comment. Croplife America, 2003 WL 21267216 at \*1; see also id. at \*4 (identifying "principal issue" as whether directive contained in press release constituted binding regulation). Among other things, EPA argued that the petitioners' claim was not ripe. Id. at

\*7. The court rejected this claim, reasoning that EPA had stated “unequivocally” that it would not consider certain studies unless ordered to do so by a court, thus creating a purely legal question “that does not ‘depend upon consideration of . . . particularized facts.’” Id. (citing Mountain States Tel. & Tel. Co. v. FCC, 939 F.2d 1035, 1041 (D. C. Cir. 1991) (emphasis added). In this case, resolving plaintiffs’ challenge to the Rule does depend on consideration of particularized facts. See supra at 2-4; see also U.S. Br. at 18-22, 24-26, 43-47. There is, once again, no merit to plaintiffs’ contention that the Rule “categorically defines nonexcavation earth-moving as a discharge.” See Joint Notice at 2. Croplife America thus does not suggest that this case is ripe.

In addition, in concluding that the press release was a binding directive and therefore appropriate for judicial review, the court noted (among other factors) that if review did not proceed, “petitioners will be afforded no additional opportunity to make the arguments to the agency that they now present in this petition.” Croplife America, 2003 WL at \*5. Here, by contrast, landowners or developers will have the opportunity to challenge specific determinations by the Agencies – and to argue that the Agencies have overreached their statutory authority – in the context of appealing permit decisions or defending against enforcement actions. See U.S. Br. at 25.

In National Park, the Supreme Court concluded that petitioners’ challenge to a rule purporting to render the Contract Disputes Act (“CDA”) applicable to national park concession contracts was not yet ripe. National Park, 2003 WL 21210427 at \*2. Plaintiffs suggest that the Court found the case unripe solely because the Park Service (the author of the rule at issue) did not have authority to administer the CDA, and that therefore the rule could

serve only as a statement of the Park Service's views as to how the CDA would apply to certain contract disputes. Joint Notice at 3. Although the Court found this fact significant, it went on to discuss a more pertinent point, i.e., that the rule at issue did not "affect a concessioner's primary conduct," but rather left the concessioner "free to conduct its business as it sees fit":

All the regulation does is announce the position NPS will take with respect to disputes arising out of concession contracts. While it informs the public of NPS' view that concessioners are not entitled to take advantage of the provisions of the CDA, nothing in the regulation prevents concessioners from following the procedures set forth in the CDA once a dispute over a concession contract actually arises.

National Park, 2003 WL 21210427 at \* 5. Similarly, here, all that the Rule does is to establish the Agencies' views as to the types of activities likely to result in a regulable redeposit and to clarify what constitutes non-regulable incidental fallback. Landowners and developers remain free to seek a permit or not as they see fit after consideration of all relevant regulations and, if they desire, consultation with the Agencies. Moreover, as discussed above, the Court stated clearly in National Park that mere regulatory uncertainty does not rise to the level of "hardship" required to establish that a claim is ripe for review. See supra at 5.

Finally, the Court's decision in National Park also rested on the fact that there, as here, further factual development would enhance the Court's ability to deal with the legal issues presented. National Park, 2003 WL 2121047 at \*6. In National Park, moreover, the petitioners had made fact-specific arguments based on particular types of concession contracts. Id. Even then, because petitioner and respondent relied upon characteristics of different types of contracts, the Court concluded that "judicial resolution of the question

presented here should await a concrete dispute about a particular concession contract.” Id.

Here, by contrast, after two rounds of briefing, plaintiffs have still failed to identify any set of facts under which the Rule reaches beyond the Agencies’s statutory authority. Given the need for further factual development, and the absence of any present hardship to plaintiffs, their claim is not ripe and should be dismissed.

**II. IF THE COURT REACHES THE MERITS, IT SHOULD UPHOLD THE RULE BECAUSE IT IS A REASONABLE INTERPRETATION OF “DISCHARGE OF DREDGED MATERIAL” AND “INCIDENTAL FALLBACK.”**

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In its opening brief, the United States demonstrated that the Rule’s interpretation of “discharge of dredged material” and “incidental fallback” is fully consistent with the existing case law, both in past enforcement cases and in the NMA and AMC cases concerning the 1993 Tulloch Rule. U.S. Br. at 27-31. In adopting the Rule at issue here, the Agencies have done nothing more than recognize the CWA authority that court after court has recognized. With respect to the NMA and AMC decisions, the Agencies properly rejected Plaintiffs’ overly broad reading of those decisions, and instead read these decisions as reaching the limited holding that Judge Harris described in this Court’s 2000 AMC opinion: the NMA and AMC decisions hold that the Agencies may not regulate incidental fallback, and do not hold that other redeposits are unregulable. 120 F. Supp. 2d at 29 & n.9. See also U.S. Br. at 30, 33-34 (discussing NMA and AMC decisions).

In response, Plaintiffs make a number of arguments that are addressed below. Before addressing those arguments, however, the United States notes that there is something conspicuously absent from Plaintiffs’ argument that the Agencies have overreached in promulgating the Rule: Neither NAHB or NSSGA identify any set of facts (either

hypothetical or from an actual enforcement matter) in which the application of the Rule has exceeded or would exceed the Agencies' authority under the CWA. This Rule was promulgated over two years ago (in January 2001), and the predecessor revision to the Agencies' regulations concerning "discharge of dredged material" and "incidental fallback" in light of NMA and AMC was being applied before that, 64 Fed. Reg. 25,120 (May 10, 1999), and yet Plaintiffs do not point to any actual enforcement case in which a court has found that the Agencies have overstepped their CWA authority. Indeed, courts have repeatedly agreed with the Agencies' application of what constitutes the scope of "discharge of dredged material" in actual enforcement cases. See U.S. Br. at 28. The best that Plaintiffs can do on this point is to cite to the dissenting opinion in the Borden Ranch case. NAHB Reply at 16.<sup>9</sup> Moreover, Plaintiffs have not even presented a set of hypothetical facts in which the Rule would overstep the Agencies' authority under the CWA. The absence of any such attempt by Plaintiffs is telling: any discussion of a specific set of facts – whether from an actual case or from an invented hypothetical – would serve to (1) demonstrate that specific facts are needed to judge the Rule and thus that this challenge is not ripe and (2) show that

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<sup>9</sup> As Judge Gould's dissenting opinion in Borden Ranch acknowledges, he would have to "extend" the holding of NMA in order to find that the deep ripping at issue in Borden Ranch was not regulated by the CWA. 261 F.3d at 819. As that dissenting opinion further noted, the holding in NMA was that the discharge of dredged material does not include situations where "material is removed . . . and a small portion of it happens to fall back." 261 F.3d at 819 (quoting NMA, 145 F.2d at 1404). The deep ripping at issue in Borden Ranch does not fall into the range of activities within the NMA court's description of what is excluded from "discharge of dredged material" because 100% (not a "small portion") is redeposited. As the majority opinion in Borden Ranch held, such redeposits are reasonably understood to constitute an "addition" and are regulated under the CWA. 261 F.3d at 814-15.

the Rule is consistent with the applicable caselaw and does not overstep the Agencies' CWA authority.<sup>7</sup>

Similarly, although Plaintiffs do not concede that earth-moving equipment will typically result in a regulable redeposit (see NAHB Reply at 20-21), they do not attempt to demonstrate that this conclusion is incorrect. Instead, as discussed below, they mischaracterize the Rule as attempting to regulate all earthmoving activities and argue that their mischaracterized version of the Rule exceeds the Agencies' CWA authority. By failing to address the actual scope of the Rule, however, they are left without an argument that the Rule as promulgated is improper, and this Court should uphold the Rule.<sup>8</sup>

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<sup>7</sup> For this same reason, this Court does not face the dilemma discussed by the D.C. Circuit in Amfac Resorts v. U.S. Department of Interior, 282 F.3d 818 (D.C. Cir. 2002): whether to apply the more stringent "not invalid in all applications" standard or more lenient "invalid in only some applications" standard. 282 F.3d at 827. In this case, Plaintiffs' failure to identify any set of facts on which the Rule is invalid leaves Plaintiffs far short of meeting either standard.

<sup>8</sup> The only aspect of Plaintiffs' briefing that comes close to addressing the Agencies' conclusion that earthmoving will typically result in regulable redeposits occurs in NSSGA's reply brief, where it refers to what NSSGA inaccurately describes as a list of activities that are "routinely" undertaken without creating regulable redeposits. NSSGA Reply at 17 n. 21. In fact, the list clearly states that the information that a type of activity was performed with only incidental fallback is "on a case-by-case basis" and "case specific," and that a category of activity is listed even if there was only one project in that category that was done with only incidental fallback. NSSGA Ex. E (see unnumbered page entitled "Activities Impacted by Tulloch Rule Decision"). See United States Mem. at 45-46 (discussing how a comparison of this list of types of activities with the caselaw demonstrates that a case-specific approach is appropriate.) The fact that a single instance or a few instances of a given type of activity have been conducted with only incidental fallback does not disprove the Agencies' conclusion, based on their experience, that such activities will typically result in more than incidental fallback.

**A. Plaintiffs Continue To Misstate The Substance Of The Rule In Their Efforts To Argue That The Rule Overregulates.**

As they did in their opening briefs (see U.S. Br. at 40-41), Plaintiffs continue to misstate the substance of the Rule in their attempts to show that the Rule overreaches the Agencies' CWA authority. For example, NAHB says the Rule "categorically defines earth-moving as falling within the definition of 'discharge of dredged material.'" NAHB Reply at 8-9. See also Id. at 21 (claiming that the Agencies use earthmoving as a "surrogate" for discharges). Similarly, NSSGA describes the Rule as "a rule that considers all mechanized earth-moving activities as resulting in additions of pollutants." NSSGA Reply at 15-16. In fact, the Rule clearly states the Agencies' understanding that earth-moving will typically result in regulable redeposits (based on the caselaw and information in the administrative record) but that the final decision in any specific project will depend on the specific circumstances of that project. 66 Fed. Reg. 4562/3. There is no "categorical" definition placing all earth-moving within the scope of what is regulated, no use of any category of activity as a "surrogate" for an actual regulated redeposit, and no conclusion that "all" mechanized earth-moving is regulated.

As a further example, NSSGA inaccurately states that the Rule "would" regulate certain machinery because it moves large volumes of material, and that the movement of material by a few inches "would" constitute regulable redeposit. NSSGA Reply at 20 (citing 66 Fed. Reg. at 4563 and U.S. Br. at 36). In fact, the Agencies' position on these points is not "would" but "could," and this can be seen clearly in the citations that NSSGA inaccurately describe. See 66 Fed Reg. at 4563 (agencies conclude that backhoes and other equipment that move large amounts of material are "likely to result in redeposits that exceed

the definition of incidental fallback” but that the rule provides for a “project specific evaluation” that may show otherwise) (emphasis added); US Br. at 36 (“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.”) (emphasis added).

In short, the Agencies have properly promulgated a rule that declines to reach conclusive generic determinations about broad categories of projects and instead looks at project-specific information to make a final determination as to whether a specific activity is regulated or not. The Agencies have not – as Plaintiffs contend – adopted any final conclusion or any presumption (whether rebuttable or otherwise) that any category of activity necessarily requires a CWA permit.

**B. Plaintiffs’ Use Of The Terms “Movement” And “Addition” Serve To Confuse The Issues In This Case.**

Plaintiffs continue to couch their arguments in terms of “movement” and “addition,” and their use of these terms only serve to confuse the issue. First, it is appropriate to recognize that “movement” is really two things: (1) removing material from one location and (2) depositing the material to another location. The CWA does not regulate the moving of material from waters of the United States, and the Rule does not attempt to do so. If an activity removes material from waters of the United States and moves it to non-waters, that activity is not regulated by the CWA. However, when an activity moves material from one place in waters of the United States and redeposits the material into another place in waters of the United States, that redeposit is regulable (unless the only redeposit is incidental fallback).

It is this regulable redeposit that the Rule covers, and this is consistent with the body of Section 404 caselaw that the United States has cited in its opening brief. U.S. Br. at 5-6, 28-30.<sup>9</sup>

Plaintiffs's use of the term "addition" tends to confuse the issue because a layman's use of the word "addition" – when used out of the context of the CWA – might not include the redeposit of dredged material back into the same body of water from which it came. In the context of the CWA, however, court after court has recognized that such redeposit is an addition. See U.S. Br. at 5-6, 28-30. As the NMA court recognized, "a requirement that all pollutants must come from outside sources would effectively remove the dredge-and-fill provision from the statute." 145 F.3d at 1405 (quoting Avoyelles Sportsmen's League v. Marsh, 715 F.2d 897, 924 n. 43 (5th Cir. 1983)). Thus, the Agencies' assertion that a regulable redeposit of dredged material can occur without an addition as that word is commonly used is not a "surprising claim" (as NAHB contends in NAHB Reply at 15), but simply reflects the existing caselaw on this issue.<sup>10</sup>

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<sup>9</sup> On a related point, NAHB is incorrect in claiming that the United States has not explained "how an activity that merely moves material adds material." NAHB Reply at 15. The United States did so in its opening brief. U.S. Br. at 38.

<sup>10</sup> In response to the United States's explanation of how the Rule is consistent with the existing caselaw concerning what constitutes a "discharge of dredged material" under CWA § 404, NAHB suggests that the CWA § 404 caselaw relied upon by the Agencies is "off-point" and that this Court should instead look at the caselaw arising under a different provision of the CWA – Section 402, 33 U.S.C. § 1342. NAHB Reply at 15-20. NAHB's contention should be rejected.

First, the Rule at issue here is part of the Section 404 regulations defining "discharge of dredged material." Thus, the caselaw addressing the scope of "discharge of dredged material" under Section 404 is the relevant caselaw. The caselaw under Section 402 does not involve the discharge of dredged material.

(continued...)

**C. The Agencies' Definition Of Incidental Fallback Is Consistent With The Controlling Caselaw And Should Be Upheld.**

In its opening brief, the United States explained that whether a given redeposit is a regulable redeposit or incidental fallback is based on three factors that arise from the decisions in NMA and AMC, U.S. Br. at 33-37. Further, one cannot set bright line tests or focus on any one factor in isolation to make the regulated redeposit vs. incidental fallback determination: one has to look at all of the factors together in each specific instance. U.S. Br. at 43-46 (including, at 44, quotation from 66 Fed. Reg. at 4566/1 that the factors are “intertwined”). In response, NAHB misses the importance of the interrelationship of the factors by addressing factors individually.

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<sup>10</sup>(...continued)

Second, with respect to whether the redeposit of pollutants within the same water body constitutes an “addition” under the CWA, the caselaw under Section 404 and the caselaw under Section 402 take different approaches. Courts (including the D.C. Circuit in NMA) have recognized that when material is moved within waters of the United States in the context of Section 404, the redeposit can constitute an “addition.” U.S. Br. at 5-6, 28-30. In the Section 402 context, courts have held that the movement of polluted water from one place in a waterbody to another place in that same waterbody is not an “addition” for purposes of determining whether an NPDES (Section 402) permit is required. See United States’ amicus brief in South Florida Water Management District v. Miccosukee Tribe, No. 02-626, at 10-12 (attached as Tab 3 in Plaintiffs’ Joint Notice Of Recent Developments, filed June 10, 2003). This difference in approach between Section 404 cases and Section 402 cases might be understood through the kind of culinary analogy used by Plaintiffs. Movement of pollutants within a waterbody in the Section 402 context present facts like the mixing of a bowl of soup: moving polluted water around within a given water body does not create a significant change. By contrast, the redeposit of dredged material in the Section 404 context presents facts like the mixing of a piece of seven-layer cake: the natural structure of wetlands soil is moved and intermingled in a way that causes significant change. United States v. Deaton, 209 F.3d 331, 336 (4th Cir. 2000) (discussing harm arising from redeposits). In short, to a customer in a restaurant, a mixed bowl of soup is the same as it was before the stirring, but a piece of seven-layer cake that has had its layers of cake and frosting mixed and intermingled will be returned to the kitchen.

First, NAHB criticizes the use of volume as a factor based on its inaccurate contention that the Agencies “us[e] volume as the measure of incidental fallback.” NAHB Reply at 23. In fact, volume is not “the measure” under the Rule; it is only one factor that must be considered. A ton of redeposit would be a regulable redeposit if the activity consists of sidecasting one ton of material. By contrast, a ton of redeposit may be incidental fallback if that ton is the total cumulative mass of redeposits that occur as small portions of material fall back from each bucketload of material that is excavated from a large project. But whether a ton of redeposit in a large excavation project is regulated is not determined just by the relative volume, but also by other factors such as the location of the redeposits.

Second, NAHB criticizes the Rule’s use of the word “excavation” in the definition of incidental fallback. In part, NAHB’s argument on this point is a variation of Plaintiffs’ argument that movement of material within water of the United States cannot be regulated. NAHB Reply at 23. NAHB’s argument here is incorrect for the reasons discussed above in Section II.B. Similarly, NAHB complains that the Rule’s definition of incidental fallback excludes “earth-moving that is not a removal” and that “mere movement” should not be regulated. NAHB Reply at 23-24. The United States’ discussion of the caselaw demonstrating that “movement-without-removal” can be regulated was presented in the opening brief. U.S. Br. at 38-39.

Third, NAHB argues that the Rule’s definition of “incidental fallback” is too narrow because it uses the word “excavation,” which NAHB suggests excludes “landclearing.” NAHB Reply at 24. The difficulty with the term “landclearing” is that it encompasses a large range of activities: everything from the mere cutting of brush without the disturbance or

movement of soil (which would not constitute the discharge of dredged material) to the bulldozing and leveling of wetland areas (which was held to be regulated in United States v. Huebner, 752 F.2d 1235, 1243 (7th Cir. 1985)). See also U.S. v. Brace, 41 F. 3d 117, 122 (3d Cir.) (clearing, churning, mulching, leveling, grading, and landclearing of a wetlands found to be a discharge of dredged material.) Further, although the word “excavation” is sometimes used to refer to a narrow range of activities that are separate from landclearing, the Agencies in the Rule use the term broadly, such that landclearing could be a type of excavation and incidental fallback from landclearing would not be regulated. This use of “excavation” in the text of the Rule is consistent with the way the Agencies used “excavation” to refer to a broad group of activities including landclearing in both (1) the text of the proposed rule: referring to “mechanized landclearing, ditching, channelization, in-stream mining, or other mechanized excavation activity,” see, e.g., 65 Fed. Reg. 50,117 (in proposed language for 33 C.F.R. § 323.2(d)(2)) (emphasis added); and (2) the preamble to the final Rule.<sup>14</sup> Similarly, Judge Harris in the 1997 AMC opinion referred to “mechanized landclearing, ditching, channelization and other excavation.” 951 F. Supp. at 270. In these instances, the use of phrasing that includes “landclearing” in a list ending with the catch-all “other mechanized excavation activity” or “other excavation” shows that “excavation” is broad enough to include landclearing. Finally, in language just before the quotation recited by NAHB (in NAHB Reply at 24), Judge Harris in the 1997 AMC opinion stated,

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<sup>14</sup> See, e.g., 66 Fed. Reg. 5442/2 (“we believe that the use of mechanized earth moving equipment to conduct landclearing, ditching, channelization, in-stream mining, or other mechanized excavation activity in waters of the U.S. is likely to result in regulable discharges of dredged material”) (emphasis added).;

“[i]ncidental fallback is the incidental soil movement from excavation . . . .” 951 F.Supp. at 270, and so the phrasing of the Rule is consistent with that statement by this Court.

For these reasons, this Court should deny NAHB’s argument that the use of the term “excavation” in the definition of incidental fallback unreasonably excludes incidental fallback that might occur during landclearing activities.<sup>12</sup>

**D. The Agencies Reasonably Declined to Adopt A Bright Line Standard.**

As discussed in the United States’ opening brief, the Agencies considered the D.C. Circuit’s and many interested parties’ call for a “bright line” test to distinguish between incidental fallback and regulable redeposits, and concluded that such a bright line test was not feasible. U.S. Br. at 14-15, 43-47. In their reply, NSSGA cites to the language from the NMA opinion stating that the adoption of a bright line test by the Agencies would be granted “considerable deference” (at 145 F.2d at 1405) and suggests that the failure to promulgate a bright line test “conflicts” with the guidance of the D.C. Circuit. NSSGA Reply at 1-2. The statement in NMA that a reasoned attempt by the Agencies to create a bright line test would merit considerable deference does not mean that a bright line is required or that the absence of such a bright line means the rule is entitled to no deference. The Agencies are entitled to deference even where they interpret the statute on a case-by-case basis in adjudications on specific facts. Christensen v. Harris County, 529 U.S. 576, 587 (interpretations in “formal adjudication or notice and comment rulemaking” are entitled to full deference, while

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<sup>12</sup> NAHB’s argument on this point fails to identify a real or hypothetical set of facts in which the Rule would regulate incidental fallback from any land clearing activity. This further demonstrates that Plaintiffs’ challenge is not ripe or, alternatively, that the Rule does not exceed the Agencies’ CWA authority.

interpretations in opinion letters, enforcement guidelines and the like are not.) In short, NSSGA's suggestion that the Rule "conflicts" with the NMA opinion because it adopts a case-by-case approach rather than a bright line test is without merit. As Judge Harris recognized in the 2000 AMC opinion, the Agencies have discretion to decide whether or not a particular redeposit constitutes incidental fallback 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)).

### **III. THE AGENCIES PROVIDED SUFFICIENT NOTICE TO NSSGA AND OTHER INTERESTED PARTIES.**

In its opening brief, the United States demonstrated that the Agencies' provided NSSGA with sufficient notice and opportunity to comment on the issues that were relevant to the definition of "incidental fallback" and that NSSGA had in fact submitted comments on the relevant issues. U.S. Br. at 48-51.

In its reply, NSSGA again relies on NRDC v. EPA, 279 F.3d 1180 (9<sup>th</sup> Cir. 2002) (cited in NSSGA Reply at 23). NSSGA's reliance on this opinion is misplaced. In NRDC, the Ninth Circuit held that EPA had not given adequate notice of the final action at issue in that case because the final action included a "fundamental change" that interested parties "could not have reasonably anticipated." 279 F.3d at 1187-88. With respect to the term "incidental fallback" in this case, although the Agencies did not propose a regulatory definition in the proposed rule, the proposed rule preamble discussed the scope of incidental fallback and the Rule's definition of incidental fallback is consistent with that discussion. There was no "fundamental change" in how the Agencies view the scope of incidental fallback between the proposed and final rule. Moreover, the Agencies' discussion of incidental fallback in the proposed rule did not create a situation where NSSGA and other

parties “could not have reasonably anticipated” how the Agencies’ would define incidental fallback. Indeed, NSSGA’s comments on the proposed rule demonstrate that it understood exactly what issues were relevant on the scope of incidental fallback and the Agencies’ positions on those issues. See U.S. Br. at 49-51.

Because the Agencies apprized NSSGA and other interested parties of the “subjects and issues” that were pertinent to the definition of incidental fallback, and because NSSGA has not identified any subject or issue relevant to the definition of incidental fallback in the Rule that NSSGA was unable to address due to the claimed lack of notice, NSSGA’s notice argument should be rejected. U.S. Br. at 47-48, 51.

**IV. PLAINTIFFS’ CLAIMS IN THIS CASE ARE NOT WITHIN THE JURISDICTION OF THE COURTS OF APPEAL UNDER CWA § 509(b)**

Intervenors have argued that Plaintiffs’ claims are not properly before this Court because they fall within the exclusive jurisdiction of the courts of appeals under CWA § 509(b)(1), 33 U.S.C. § 1369(b)(1). Intervenors’ Br. at 3-7. The United States disagrees with this argument.

CWA § 509(b)(1) establishes court of appeals jurisdiction to review a limited, specific list of EPA actions. Under the applicable rules of statutory interpretation, the language in Section 509(b) authorizing court of appeals review of certain EPA actions under the Clean Water Act is properly read as excluding direct court of appeals review of other, unspecified EPA actions. Friends of the Earth v. EPA, 2003 WL 21414314, \*3 (D.C. Cir. June 20, 2003) (“the courts of appeals have consistently held that the express listing of specific EPA actions in [Section 509(b)(1)] precludes direct appellate review of those actions not so specified.”); Original Honey Baked Ham Co. of Georgia v. Glickman, 172 F.3d 885,

887 (D.C. Cir. 1999) (“A statute listing the things it does cover exempts, by omission, the things it does not list.”).

Plaintiffs’ claims here challenge an EPA action taken under CWA § 404, 33 U.S.C. § 1344. EPA actions taken under Section 404 are not listed among the actions made reviewable under Section 509(b)(1). Thus, Plaintiffs’ challenge is not within the jurisdiction of the courts of appeals under Section 509(b)(1).

Intervenors argue that the agency action here is properly understood to be within the Section 509(b) list because it should be considered a “limitation under [CWA § 301, 33 U.S.C. §] 1311” under Section 509(b)(1)(E) based on cross references between Section 301 and Section 404. Intervenors Br. at 4-6. This argument, however, should fail. First, the Agencies cited to Section 404 in promulgating the Rule, not Section 301. 66 Fed. Reg. 4550. The D.C. Circuit has recognized that the statutory basis cited by the agency in taking agency action is an important basis for determining whether a given action is “under Section 301” or not. Natural Resources Defense Council v. EPA, 673 F.2d 400, 405 n.15 (D.C. Cir. 1982) (“EPA cited [Section 301] as a statutory basis for the CPR’s, and the CPR’s set out procedures for obtaining permits that comply with [Section 301]. It is thus fair to say that the CPR’s were promulgated under [Section 301]”). Second, if a cross reference between Section 301 and another section were enough to make an action taken under the other section an action “under Section 301” within the meaning of Section 509(b)(1)(E), then actions under the other sections referenced in Section 301(a) – including 33 U.S.C. §§ 1312, 1316, 1317 and 1342 – would also be actions “under Section 301” and reviewable in the courts of appeals on that basis. Actions under these other sections, however, are themselves expressly listed in

Section 509(b)(1). See, e.g., 33 U.S.C. §§ 1369(b)(1)(C) (listing actions under 33 U.S.C. § 1317); and (b)(1)(F) (listing actions under 33 U.S.C. § 1342). Indeed, Section 509(b)(1)(E) itself refers to actions “under [33 U.S.C. §] 1311, 1312, 1316 or 1345.” If Intervenor’s reading of Section 509(b)(1)(E) were correct, then the specific references in Section 509(b)(1)(E) to 33 U.S.C. §§ 1312 and 1316 would be superfluous, as would be the other Section 509(b)(1) provisions expressly listing actions under 33 U.S.C. §§ 1317 and 1342. The better reading is one that gives meaning to all of the words in Section 509(b)(1). Friends of the Earth v. EPA, 2003 WL 21414314, \*4 (D.C. Circuit refuses to give broad meaning to phrase “under Section 301” because that would make other language in Section 509(b)(1) “duplicative and unnecessary”). That better reading recognizes that actions taken under other sections (such as Section 404) are not actions under Section 301. As such, agency actions are reviewable in the courts of appeals only if they are specifically listed in Section 509(b)(1). Because actions under Section 404 are not listed in Section 509(b)(1), challenges to them are not claims within the jurisdiction of the courts of appeals.

### **CONCLUSION**

For the reasons stated above and in the United States’ previous memorandum, summary judgment should be entered for the Agencies and against Plaintiffs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Scott J. Jordan, hereby certify that on June 24, 2003, I caused to be served a true and accurate copy of the UNITED STATES'S REPLY MEMORANDUM IN FURTHER SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT by electronic mail and regular mail upon:

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