ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-5221 (and consolidated cases)

NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*

Appellants,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al*.,

Appellees.

On Appeal from the United States District Court
for the District of Columbia

FINAL BRIEF OF ENVIRONMENTAL APPELLEES AND CONDITIONAL CROSS-APPELLANTS

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DATED: June 20, 2005 (refiled with joint appendix citations July 29, 2005)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF HOME BUILDERS, Appellant, v. UNITED STATES ARMY CORPS OF ENGINEERS, *et al*., Appellees.	No. 04-5221 (and consolidated cases 04-5222, 04-5223, 04-5224)

CERTIFICATE OF PARTIES, RULINGS AND RELATED CASES OF NATIONAL WILDLIFE FEDERATION, NORTH CAROLINA WILDLIFE FEDERATION, AND SIERRA CLUB

Pursuant to D.C. Circuit Rule 28(a)(1), National Wildlife Federation, North Carolina Wildlife Federation, and Sierra Club hereby submit the following certificate as to parties, rulings, and related cases.

(A) Parties and Amici.

(i) Parties, intervenors, and amici who appeared in district court.

Plaintiffs who appeared in district court are National Association of Home Builders; National Stone, Sand and Gravel Association; American Road and Transportation Builders; and Nationwide Public Projects Coalition. Intervenor-defendants were National Wildlife Federation, North Carolina Wildlife Federation, and Sierra Club, and *amicus curiae* was Pacific Legal Foundation.

Defendants who appeared in district court are United States Army Corps of Engineers; Joseph Westphal, Dr., Assistant Secretary of the Army for Civil Works; Robert B. Flowers, Lt. Gen., Chief of Engineers, U.S. Army Corps of Engineers; United States Environmental

Protection Agency; and Christine Todd Whitman, Administrator, U.S. Environmental Protection Agency.

(ii) Parties, intervenors, and amici in this Court.

Appellants and conditional cross-appellees are National Association of Home Builders (No. 04-5221), National Stone, Sand and Gravel Association; American Road and Transportation Builders; and Nationwide Public Projects Coalition (No. 04-5222). Appellees are United States Army Corps of Engineers; John P. Woodley, Jr., Assistant Secretary of the Army (Civil Works); Robert B. Flowers, Lt. Gen., Chief of Engineers, U.S. Army Corps of Engineers; United States Environmental Protection Agency; Stephen L. Johnson, Administrator, U.S. Environmental Protection Agency; National Wildlife Federation; North Carolina Wildlife Federation; and Sierra Club. Conditional cross-appellants are National Wildlife Federation, North Carolina Wildlife Federation, and Sierra Club (Nos. 04-5223 and 04-5224). There are no intervenors. *Amicus curiae* is Pacific Legal Foundation.

National Wildlife Federation makes the following disclosures pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rule 26.1:

The following are parent companies, subsidiaries or affiliates of National Wildlife Federation that have issued shares or debt securities to the public: None.

National Wildlife Federation is a nonprofit corporation organized and existing under the laws of the Commonwealth of Virginia, with more than 1,000,000 members nationwide. National Wildlife Federation's mission is to inspire Americans to protect wildlife for our children's future.

North Carolina Wildlife Federation makes the following disclosures pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rule 26.1:

The following are parent companies, subsidiaries or affiliates of North Carolina Wildlife Federation that have issued shares or debt securities to the public: None.

North Carolina Wildlife Federation, a corporation organized and existing under the laws of the State of North Carolina, is a nonprofit organization dedicated to the wise use, conservation, aesthetic appreciation and restoration of wildlife and other natural resources in the State of North Carolina.

Sierra Club hereby makes the following disclosures pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rule 26.1:

The following are parent companies, subsidiaries or affiliates of Sierra Club that have issued shares or debt securities to the public: None.

Sierra Club, a corporation organized and existing under the laws of the State of California, is a national nonprofit organization dedicated to the protection and enjoyment of the environment.

(B) Rulings Under Review.

National Association of Home Builders v. U.S. Army Corps of Engineers, 311 F.Supp.2d 91 (D.D.C. 2004). (Order and Memorandum Opinion entered by Judge James Robertson).

(C) Related Cases.

On July 21, 2004, D.C. Circuit Nos. 04-5222, 04-5223, and 04-5224 were consolidated with D.C. Circuit No. 04-5221. Counsel is not aware of any other related cases.

An earlier regulation addressing the discharge of dredged material under Clean Water Act § 404(a) was the subject of this Court's decision in *National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998).

DATED: June 20, 2005 (refiled with joint appendix citations July 29, 2005)

Respectfully submitted,

_____

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APA	Administrative Procedure Act
CERCLA	Comprehensive Environmental Response, Compensation and Liability Act
the Corps	United States Army Corps of Engineers
CWA	Clean Water Act
EPA	United States Environmental Protection Agency
NAHB	National Association of Home Builders
NPPC	Nationwide Public Projects Coalition
NSSGA	National Stone, Sand and Gravel Association

JURISDICTIONAL STATEMENT

The district court lacked Article III jurisdiction over Industry Appellants' claims. In this Court, the appeals and cross-appeals were timely filed pursuant to 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

Whether Industry's claims were properly dismissed, either on ripeness or standing grounds.

STATUTES AND REGULATIONS

Pertinent statutory and regulatory provisions appear in an addendum at the end of this brief.

STATEMENT OF THE CASE

I. NATURE OF CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW.

In this case, various trade associations (collectively "Industry") mount a facial challenge to 2001 regulations by the United States Army Corps of Engineers ("the Corps") and United States Environmental Protection Agency ("EPA") (collectively "Agencies") defining the statutory phrase "discharge of dredged material" in §404 of the Clean Water Act ("CWA").

A decade ago Industry challenged a predecessor regulation issued by the Agencies in 1993. While conceding that "substantial" redeposits of dredged material are properly subject to regulation, Industry argued that the 1993 regulation improperly asserted jurisdiction over "*de minimis*, incidental fallback" associated with certain excavation activities. Such incidental fallback, in Industry's view, "itself may have little or no effect on waters," but instead "is simply a means to an end"—*i.e.*, regulation of the activities associated with the discharges, rather than the discharges themselves.

Industry prevailed in its challenge, and the 1993 rule was overturned by the district court and this Court. In a 1999 post-judgment motion, Industry itself argued that those decisions addressed regulation of "small-volume" redeposits.

Yet now Industry has drastically escalated its demands. No longer content with exempting "small-volume" redeposits, Industry now asserts—as its "central claim" in this litigation—that large-volume redeposits should be exempt too.

Such arguments—which represent a 180-degree reversal of positions repeatedly taken by Industry itself in this Court and the district court—threaten serious harm to the Act's core goal of protecting "the chemical, physical, and biological integrity of the Nation's waters." Clean Water Act §101(a), 33 U.S.C. §1251(a). The redeposit of dredged material can release toxic contaminants and cause sedimentation that harms aquatic life. *United States v. Deaton*, 209 F.3d 331, 336 (4th Cir. 2000); 65 Fed. Reg. 50112-13 (August 16, 2000)[JA229-30].

National Wildlife Federation, North Carolina Wildlife Federation, and Sierra Club (collectively "Environmental Appellees") intervened as defendants below to oppose Industry's claims. After summary judgment briefing, the district court dismissed Industry's claims as unripe.[1]

II. STATEMENT OF FACTS.

Instead of replowing the ground covered by the Agencies' statement of facts, Environmental Appellees focus on two areas of key relevance to this appeal:

[1] Because the district court dismissed Industry's complaints pursuant to the Agencies' motion, the court denied Environmental Appellees' summary judgment motion as moot. Environmental Appellees filed a conditional cross-appeal challenging that denial, and submit the present brief in their dual roles as appellees and conditional cross-appellants.

- First, the fundamental role of Clean Water Act §301(a), which prohibits unpermitted discharge of pollutants (relevant to points made in Part I of the Argument section, *infra*); and

- Second, past statements by Industry, the courts, and the Agencies addressing whether size is a relevant factor in distinguishing redeposits that are regulable from those that are not (relevant to points made in Part II of the Argument section, *infra*).

A. Relationship Between Clean Water Act §§ 301 and 404.

(1) Section 301: Statutory Prohibition of Discharge.

The Clean Water Act was a "dramatic response to accelerating environmental degradation of rivers, lakes and streams in this country." *Natural Resources Defense Council v. Costle*, 568 F.2d 1369, 1371 (D.C. Cir. 1977). Its fundamental objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." §101(a), 33 U.S.C. §1251(a).

At the core of the Act since 1972 has been a statutory prohibition: "the discharge of <u>any</u> pollutant by <u>any</u> person shall be unlawful" except as provided in enumerated sections of the Act. §301(a), 33 U.S.C. §1311(a)(emphasis added). As the authors explained:

> This section clearly establishes that the discharge of pollutants is unlawful. Unlike its predecessor program which permitted the discharge of certain amounts of pollutants under the conditions described above, this legislation would clearly establish that <u>no one has the right to pollute</u> -- that pollution continues because of technological limits, not because of any inherent right to use the nation's waterways for the purpose of disposing of wastes.

S. Rep. 414, 92d Cong., 1st Sess. 42 (1971) (emphasis added) ("1971 Senate Report"). *Accord*, H. Rep. 911, 92d Cong., 2d Sess. 100 (1972) ("any discharge of a pollutant not in compliance with" specified CWA sections "is unlawful"); A Legislative History of the Water Pollution Control Act Amendments of 1972 (Jan. 1973) ("1972 Legislative History"), 378 (Cong. Clausen: "we start off with the basic premise that a discharge of pollutants without a permit is unlawful

and that discharges not in compliance with the limitations and conditions for a permit are unlawful").

The Act's definition of "pollutant" expressly includes "dredged spoil" as well as several components found in such spoil, such as "rock," "sand," "cellar dirt," and "biological materials." §502(6), 33 U.S.C. §1362(6). Thus, §301(a) prohibits the discharge of these substances.

(2) Section 404: Authority to Grant Exemptions from Prohibition.

Congress envisioned that discharge of pollutants would eventually be eliminated entirely. §101(a)(1) (establishing "national goal" that "the discharge of pollutants into the navigable waters be eliminated by 1985"). "[R]ecogniz[ing] the impracticality of any effort to halt all pollution immediately," however, the Act "provides an exception if the discharge meets the requirements of" specific Clean Water Act sections. 1971 Senate Report at 43.

Most importantly, discharges can be authorized by permits issued under two key permit programs. For most pollutants, permitting authority resides with the Environmental Protection Agency. §402, 33 U.S.C. §1342. However, for discharges of "dredged or fill material," Congress assigned permitting authority to the Corps. §404, 33 U.S.C. §1344.

Industry has described §301 as the Act's "key regulatory component," and §404 as "establish[ing] a program to permit certain discharges that would otherwise be prohibited." National Association of Home Builders ("NAHB") 3/3/03 Mem. 3[JA100] (emphasis added). *Accord*, National Stone Sand and Gravel Association ("NSSGA") 3/3/03 Mem. 3[JA103].

(3) Proceedings below.

Among the issues addressed in the district court briefing was whether the challenged rule implements §301, or only §404. Environmental Intervenors noted that the Clean Water Act provides for exclusive court of appeals jurisdiction, via petition for review, over "the

Administrator's action ... (E) in approving or promulgating any effluent limitation or other limitation under [§301]." §509(b)(1), 33 U.S.C. §1369(b)(1); *American Paper Inst. v. Train*, 543 F.2d 328, 334 (D.C. Cir. 1976). Thus, Environmental Intervenors argued that, if the challenged rule implements §301, Industry's attempt to challenge the rule via district court complaint must be dismissed. Envir. Int. 5/1/03 Mem. Part I.A[JA105-09].

In response, Industry argued that the challenged rule was issued solely under §404. NAHB 5/23/03 Mem. 9[JA111]; NSSGA 5/23/03 Mem. 5, 21 n.29[JA115-16]. Industry also argued that the rule "does not establish an effluent limitation or any other limitation," NAHB 5/23/03 Mem. 9[JA111] (emphasis added; internal quotations omitted), and indeed "is not a rule that prohibits or constrains the discharge of dredged material." NSSGA 5/23/03 Mem. 5[JA115] (internal quotations omitted).

B. Regulation of Small-Volume Redeposits.

(1) Background: Regulation of Redeposits Under the Act.

The Corps has long regulated, as the "addition" of pollutants triggering permit jurisdiction,[2] activities involving the movement of earth within a waterbody. Such "redeposit" was expressly addressed by Senator Ellender, who introduced the 1972 floor amendment that first proposed assigning dredged material permitting authority to the Corps: "The disposal of dredged material does not involve the introduction of new pollutants; it merely moves the material from one location to another." 117 Cong. Rec. 38853 (Nov. 2, 1971) (emphasis added), *reprinted in* 1972 Legislative History at 1386, *quoted in American Mining Congress v. U.S. Army Corps of Engineers*, 951 F. Supp. 267, 273 (D.D.C. 1997). *Accord. id.* 38854, *reprinted in*

[2] CWA §502(12) (defining "discharge of a pollutant" as *inter alia* "any addition of any pollutant to navigable waters from any point source") (emphasis added).

1972 Legislative History at 1387 (Sen. Ellender: "moving spoil material from one place in the waterway to another, without the interjection of new pollutants") (emphasis added).

Thus, over two decades ago the Fifth Circuit ruled that pollutants need not "come from an external source in order to constitute a discharge," because "'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." *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897, 924 n.43 (5th Cir. 1983) (emphasis added). Consistent with this fundamental observation, *Avoyelles* held that an addition occurred when earthmoving equipment "gouge[d]," "scraped," "disced," "raked," "cut[]," "fluffed," and dug the earth in a wetland and redistributed it within the wetland. *Id.* 923-24.

Since then, a long series of precedents have upheld regulation of redeposits within a waterbody. For example, the Eleventh Circuit held that tugboats discharged dredged material when their propellers stirred up sediments that then settled on adjacent sea grass beds. *United States v. M.C.C. of Florida*, 772 F.2d 1501, 1506 (11th Cir. 1985), *vacated on other grounds*, 481 U.S. 1034 (1987), *"redeposit" analysis reaffirmed on remand*, 848 F.2d 1133 (11th Cir. 1988). *See also United States v. Huebner*, 752 F.2d 1235, 1241-43 (7th Cir. 1985) (§404 permit required for use of earthmoving equipment to move soil around wetlands); *United States v. Brace*, 41 F.3d 117, 127-29 (3d Cir. 1994) (same); *United States v. Deaton*, 209 F.3d 331, 334-37 (4th Cir. 2000) (same); *Borden Ranch Partnership v. United States Army Corps of Engineers*, 261 F.3d 810, 814-15 (9th Cir. 2001), *aff'd*, 537 U.S. 99 (2002) (same).

This Court has likewise found that redeposits associated with earth-moving activities in United States waters can constitute regulable "additions." In *National Mining Assn. v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998), the Court recognized that additions can

occur through the moving of earth within a waterbody—including agricultural plowing, *id.* 1405, as well as the practice of excavating a ditch by "sidecasting" the excavated material alongside the ditch. *Id.* 1402, 1407. However, the Court ruled that the Agencies cannot regulate one specific kind of redeposit: specifically, "incidental fallback," which "returns dredged material virtually to the spot from which it came." *Id.* 1405.

Subsequent to *NMA*, this Court reaffirmed yet again that an "addition" can occur through movement within a waterbody. In *Alabama Rivers Alliance v. FERC*, 325 F.3d 290, 299-300 (D.C. Cir. 2003), the Court held that an addition resulted when low-oxygen water moved within a river, from above a dam to below it.[3]

(2) Industry's "Central" Claim: Is "Volume" a Relevant Factor in Determining Whether There Has Been a Discharge?

The Agencies' rule provides that the "discharge of dredged material" excludes "incidental fallback," 33 C.F.R. §323.2(d)(3)(iii), defined as "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." *Id.* §323.2(d)(2)(ii) (emphasis added).[4] Industry's "central claim" is that the regulation exceeds the Agencies'

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[3] *South Florida Water Management District v. Miccosukee Tribe*, 541 U.S. 95 (2004), *cited in* Ind. Br. 16 n.10, is not to the contrary. There, the only statutory issue resolved by the Court was resolved against the discharger. *Id.* 104-05. Two other statutory issues were presented to, but not resolved by, the Court. One of those additional issues involved a legal theory that had not been raised below, and which the Court therefore declined to address, leaving it open for the district court to address on remand. *Id.* 109, 112. The other issue involved "the application of agreed-upon law to disputed facts," *id.* 104 (emphasis added), and resulted in a remand for the district court to develop those facts. *Id.* 111-12. Thus, absent a Supreme Court holding (or even dicta) to the contrary, this Court remains bound by *Alabama Rivers*.

[4] Virtually identical definitions of "discharge of dredged material" have been promulgated by the Corps of Engineers at 33 C.F.R. §323.2(d) and by the Environmental Protection Agency at 40 C.F.R. §232.2. For simplicity, this brief cites only to the Title 33 version.

statutory authority because "[t]he limitation of incidental fallback to 'small volumes' of soil movement associated with excavation activity means that 'non-small' volumes will be subject to the permitting requirement regardless whether they add anything to waters of the United States." Ind. Br. 35. Thus, Industry seeks review of "[t]he issue whether volume is a proper factor for determining the presence of a CWA 'addition.'" *Id.*

The history of §404 implementation—and of Industry's own prior positions in this Court and the district court—helps place Industry's argument in context. In particular, that history shows that Industry itself repeatedly advocated—and the Agencies, the district court, and this Court repeatedly employed—a volume-based test for distinguishing regulable redeposits from nonregulable ones.

1980's Guidance and 1986 Regulation. In the 1980's, the Corps issued guidance documents and a regulation addressing the redeposit of dredged material in connection with earth-moving activities. In each of these, the Corps described the size of the redeposit as a key factor.

For example, in Regulatory Guidance Letter 81-4, the Corps provided that "[d]e minimis discharge occurring during normal dredging operations, such as the drippings from a dragline bucket, is not considered to be a Section 404 discharge." [JA205] (Emphasis added.) *Accord*, RGL 84-4[JA207] (reissuing RGL 81-4).

Subsequently, the Corps reaffirmed this policy in response to the Fifth Circuit's seminal decision in *Avoyelles*. In a 1985 guidance memorandum, the Corps stated that "[t]he activities in the Avoyelles case did not involve a de minimis discharge because sufficient quantities of fill material were discharged to totally or partially fill in sloughs or level the land." RGL 85-4 ¶ 4 [JA208](emphasis added). Thus, the Corps concluded that *Avoyelles* "does not alter the current

Corps policy stating that permits are not required for de minimis discharges (see RGL 84-1). Each landclearing operation in a water of the United States should be evaluated to determine if more than de minimis discharges would take place; if so, a permit would be required." *Id.* (emphasis added).

The following year the Corps amended its regulations to include a new exemption. Specifically, the Corps provided that "discharge of dredged material" "does not include *de minimis*, incidental soil movement occurring during normal dredging operations." 51 Fed. Reg. 41232 (November 13, 1986)[JA215] (amending 33 C.F.R. §323.2(d)) (emphasis added). In explaining the changes made from the proposal, which had referenced "de minimis or incidental soil movement," *see* 51 Fed. Reg. 9692 (March 20, 1986)[JA212] (emphasis added), the Corps stated: "We have replaced the 'or' between the words 'de minimis' and 'incidental' with a comma to more clearly reflect the fact that the incidental fallback from a "normal dredging operation" is considered to be *de minimis* when compared to the overall quantities removed." 51 Fed. Reg. 41210[JA214] (emphasis added).

1990 Guidance and 1993 Tulloch Rule. The 1986 regulation was followed by a guidance document and rulemaking that provided for regulation of redeposits, without the de minimis exemption provided by earlier rulemaking and guidance.

A 1990 guidance memorandum stated the Corps' position that "mechanized landclearing activities in jurisdictional wetlands result in a redeposition of soil that is subject to regulation under section 404." RGL 90-5 ¶ 2[JA210]. "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." *Id.*

In 1993, the Agencies expanded their regulatory definition of "discharge of dredged material." Describing their past practice, the Agencies indicated that "many channelization, mining, and other excavation activities in U.S. waters have been regulated under Section 404 over the years, because they involved substantial discharges through disposal or stockpiling of the excavated material in waters of the U.S., or 'sloppy' excavation practices, or other substantial discharges." 58 Fed. Reg. 45013 (August 25, 1993)[JA213] (emphasis added). The 1993 rule was designed to go beyond that preexisting coverage, by reaching "a sub-class of excavation-type activities in waters of the U.S.: *i.e.*, those that would take place with relatively small-volume, "incidental" discharges of dredged material that unavoidably accompany such excavation operations." *Id.* (emphasis added). To achieve this, the Agencies amended the definition of "discharge of dredged material" to encompass *inter alia* "[a]ny addition, including any redeposit, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation." *Id.* 45035[JA218] (adding 33 C.F.R. §323.2(d)(1)(iii)) (emphasis added).[5]

Industry Challenge to 1993 Rule: District Court. Industry groups—including three of the four appellants here—challenged the 1993 Rule in the United States District Court for the District of Columbia.[6] Although all of the redeposits regulated by the 2001 Rule were also regulated by the 1993 Rule (via the 1993 Rule's comprehensive reference to "any redeposit"),

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[5] While generally defining "any redeposit" as an addition, the 1993 rule exempted some such redeposits from the §404 permit requirement—in particular, those that "would not destroy or degrade any area of waters of the United States." 58 Fed. Reg. 45036[JA219] (§323.2(d)(3)(i)).

[6] The plaintiffs common to the 1993 and 2001 suits are National Association of Home Builders, National Stone, Sand and Gravel Association (which participated in the 1993 suit under its previous name National Aggregates Association), and American Road and Transportation Builders Association.

Industry did not raise in its 1993 suit the claim it now describes as "central." Specifically, Industry did not challenge the relevance of "volume" to determining whether a redeposit is a regulable addition.

To the contrary, Industry expressly advocated using volume to distinguish between regulable and non-regulable redeposits. On the one hand, Industry argued that *Avoyelles* "concluded that a Section 404 permit was required for certain landclearing activities because the activity resulted in a substantial redeposition of material." Industry 1/25/94 Mem. 16[JA154] (emphasis added). On the other hand, Industry argued that "Congress has never intended to subject *de minimis*, incidental fallback associated with certain activities to Section 404 permitting requirements." *Id.* 21-22[JA155-56] (emphasis added). Such incidental fallback, in Industry's view, "itself may have little or no effect on waters," *Id.* 26[JA158], but instead "is simply a means to an end"—*i.e.*, regulation of the activities associated with the discharges, rather than the discharges themselves. *Id.* 25-26[JA157-58]. Industry went so far as to argue that its preferred approach (which, as noted above, distinguished between redeposits based on volume) had been ratified by Congress in the 1987 Amendments to the Act. *Id.* 21[JA155].

The district court's ruling adopted this size-based approach. The court noted that caselaw supported regulation of "substantial redeposits," including those in "immediately adjacent areas" as well as in the "same general area." 951 F. Supp. 272 nn. 8 and 9 (emphasis added). *See also* Industry 6/9/97 Opp. to Intervenors 4-5[JA160-61] (Industry confirms that under district court's decision, "substantial redeposits" are regulable even if the dredged material is not relocated from the point of excavation before being redeposited). By contrast, the court indicated that the 1993 Rule "redefined the term 'discharge of dredged material' to include small-volume incidental fallback," 951 F. Supp. at 270 (emphasis added), and that such fallback "is not sufficient to

trigger §404." *Id.* 276 n.22. The court expressed concern that under the 1993 rule, "incidental fallback that may have little or no effect on waters becomes a means through which the agencies may invoke §404 jurisdiction over otherwise unregulated activities." *Id.* 275-76 n.18.

Industry Challenge to 1993 Rule: Court of Appeals. In its 1997 brief to this Court Industry argued that, "by defining as a 'discharge' incidental fallback that itself may have little or no effect on waters, the agencies capture activities over which they have no regulatory authority." Industry 11/19/97 Br. 5[JA164]. By contrast, "the district court found that the agencies could regulate activities involving substantial redeposits of material, the movement of material from one place to another or anything else that could reasonably be said to involve an addition of material." *Id.* 8[JA165]. According to Industry, the district court "drew a sensible boundary" that "marks the point at which Section 404 regulation stops." *Id.* 9-10[JA166-67]. *See also id.* 32-33[JA168-69] (Industry "look[s] to the purpose and effect of the activity, the location of the disposal site, and the volume of material involved as criteria for whether an addition of dredged material has occurred") (emphasis added).

In its *NMA* decision, this Court noted that, "whereas the 1986 rule exempted de minimis soil movement, the Tulloch Rule covers all discharges, however minuscule." 145 F.3d at 1403 (emphasis added). The Court indicated that "'addition' cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back." *Id.* 1404 (emphasis added). The Court emphasized that "we 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's statutory authority." *Id.* 1405 (emphasis added).

1999 Remand Rule. In May 1999 the Agencies issued a rule designed to implement the *AMC* and *NMA* decisions. 64 Fed. Reg. 25120 (May 10, 1999)[JA221]. The rule amended the definition of "discharge of dredged material," deleting the word "any" from "any redeposit," and expressly excluding "incidental fallback." *Id.* 25123[JA224]. In discussing these changes, the Agencies reviewed caselaw endorsing regulation of various redeposits, including *AMC*'s observation that "sloppy disposal practices involving significant discharges into waters[] have always been subject to section 404." *Id.* 25121[JA222] (quoting *AMC*, 951 F. Supp. at 270) (emphasis added). The Agencies cautioned: "Entities that are engaging, or intend to engage, in activities in waters of the U.S. that may result in a 'discharge of dredged material' as that term is defined in today's final rule are hereby given notice that the agencies intend to regulate those activities that we find, based on the particular circumstances, would result in an addition of pollutants to waters of the U.S." *Id.*

NAHB's Motion to Compel Compliance with *AMC* Injunction. In 1999 NAHB and Nationwide Public Projects Coalition ("NPPC") challenged the May 1999 rule, by filing a post-judgment motion in the *AMC* district court case.[7] According to NAHB, "both this Court and the appellate court took care to clarify the kinds of soil movements that were captured by the Tulloch Rule and were no longer regulable once the Rule was invalidated. This Court described it as 'small-volume incidental discharge that accompanies excavation and landclearing activities.'" NAHB 8/13/99 Mem. 6[JA171] (emphasis added; citation omitted).

In particular, NAHB asked the district court to bar the Agencies from regulating such small-volume redeposits. First, NAHB argued that such small-volume redeposits constitute

[7] The motion was filed by NAHB, and subsequently endorsed by NPPC. *See* NPPC 11/5/99 Mem. 1-2[JA176-77].

incidental fallback: "the courts and the parties used the term 'incidental fallback' to refer generally to the small-volume soil movements inherent in mechanized landclearing and other excavation activities." NAHB 10/29/99 Mem. 9-10[JA174-75] (emphasis added). Second, NAHB argued that, even if those small-volume redeposits did not constitute incidental fallback, they would still be outside the Agencies' jurisdiction:

> Defendants read *NMA* to have invalidated only the regulation of "incidental fallback," implying that "incidental fallback" is a narrow subset of all redeposits. But this myopic interpretation ignores, *inter alia*, that, whatever it is called, the issue before the *NMA* court was the Tulloch Rule's regulation of "relatively small-volume, 'incidental' discharges of dredged material that unavoidably accompany [mechanized landclearing, ditching, channelization, and other excavation activities]."

NAHB 8/13/99 Mem. 22 [JA172](emphasis added; citations omitted).

District Court's Denial of Motion to Compel. The district court denied NAHB's motion to compel. *American Mining Congress v. US Army Corps of Engineers*, 120 F. Supp. 2d 23 (D.D.C. 2000). The court declined to extend the scope of its injunction beyond incidental fallback, noting—with copious citations to the *AMC* and *NMA* decisions—that the "[t]he [District] Court's analysis clearly focused on the impermissibility of regulating incidental fallback," and "[t]he Court of Appeals agreed that the agencies had exceeded their statutory authority by regulating incidental fallback." *Id.* (emphasis added; citations omitted).

Thus, "to the extent plaintiff argues that the May 10th Rule violates the Court's injunction because NMA invalidated the regulation of all small-volume soil movements incidental to mechanized landclearing, and not only incidental fallback, its argument more appropriately bears on the scope of 'incidental fallback.'" *Id.* 30 (emphasis added). On that issue, the district court noted plaintiff's argument "that the definition of incidental fallback should include all small-volume soil movements incidental to" mechanized landclearing, ditching, channelization, and

other excavation activities. *Id.* (emphasis added). However, the court "declin[ed] to 'clarify' its injunction in the manner requested by plaintiffs." *Id.* Though the court offered some dicta concerning the scope of incidental fallback, *see id.* ("the Court comments briefly on the scope of incidental fallback"), those comments neither stated nor suggested that volume is irrelevant to distinguishing regulable from non-regulable redeposits, or that large-volume redeposits are exempt. To the contrary, the court expressly reiterated its prior finding that "sloppy disposal practices involving significant discharges" are regulable under §404. *Id.* 25 n.3 (emphasis added).

SUMMARY OF ARGUMENT

Role of Section 301. Industry objects to being prohibited from redepositing dredged material without a permit, but that prohibition stems from Clean Water Act §301. Industry itself insists that the challenged rule implements only §404, not §301. If that is so, the regulation causes Industry no hardship sufficient to meet ripeness and standing requirements.

Volume of Redeposits. It is preposterous for Industry to claim that the Rule causes it hardship by making volume a factor in distinguishing regulable redeposits from nonregulable ones. Industry itself has repeatedly urged on this Court and the district court a volume-based test, under which small-volume redeposits are exempt while substantial ones are regulable. Corps guidance documents and regulations over a period of two decades, as well as decisions of the district court and this Court, have recognized the relevance of volume.

"Regards" Clause. Industry also claims hardship from the Rule's provision that the Agencies "regard" certain mechanized earth-moving equipment as resulting in discharges. However, the same sentence of the Rule expressly provides that this "regard" does not apply where "project-specific evidence shows that the activity results in only incidental fallback."

Industry's claim that this proviso is "mere surplusage" violates Industry's own insistence that the Rule be read such that "no clause, sentence, or word shall be superfluous, void, or insignificant."

Industry's claim also conflicts with its position in the 1997 *NMA* litigation. Having there presented to this Court a single substantive issue—specifically, whether "incidental fallback" is a discharge—Industry should not now be heard to dismiss as surplusage a proviso that exempts such fallback.

Presumption Concerning Judicial Review. Industry argues that the Rule is presumptively reviewable because it is a final rule. To the contrary, the Supreme Court and this Court have recognized that a regulation is presumptively not subject to immediate facial review—and Industry has failed to overcome that presumption here. This outcome does not foreclose judicial review: if the regulation is applied in a manner that causes injury, Industry can challenge it then, either as applied or facially. As the Supreme Court has observed, "[t]he case-by-case approach ... is the traditional, and remains the normal, mode of operation of the courts." Indeed, issues of Clean Water Act jurisdiction have overwhelmingly been developed in the courts through a case-by-case approach, not through the kind of nationwide facial challenge Industry has filed here.

ARGUMENT

I. BECAUSE THE BAN ON UNPERMITTED DISCHARGE STEMS FROM §301, THE DISTRICT COURT PROPERLY DISMISSED INDUSTRY'S CHALLENGE TO THE JANUARY 2001 RULE.

A. If the 2001 Rule Implements Only §404, Not §301, Industry's Challenge Must Be Dismissed on Ripeness and Standing Grounds.

Under precedent of the Supreme Court and this Court, a regulation is presumptively unripe for immediate facial review. The Supreme Court has held that "a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the

[Administrative Procedure Act] until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891 (1990) (emphasis added). *Accord*, *Natl. Park Hospitality Assn. v. Dept. of the Interior*, 538 U.S. 803, 808 (2003); *Atlantic States Legal Fdn. v. EPA*, 325 F.3d 281, 284 (D.C. Cir. 2003).

Industry has failed to overcome this presumption. In particular, industry has failed to show that the 2001 Rule "as a practical matter requires [Industry] to adjust [its] conduct immediately," *see Lujan*, 497 U.S. at 891, and indeed has failed to show that the Rule causes it any hardship at all. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 148-149 (1967). *See also Wyoming Outdoor Council v. USFS*, 165 F.3d 43, 48 (D.C. Cir. 1999) ("Just as the constitutional standing requirement for Article III jurisdiction bars disputes not involving injury-in-fact, the ripeness requirement excludes cases not involving present injury."). Likewise, absent injury traceable to the 2001 Rule and redressable by a decision vacating that Rule, Industry has failed to show Article III standing. *Utility Air Regulatory Group v. EPA*, 320 F.3d 272, 277 (D.C. Cir. 2003) (to establish Article III standing plaintiffs must show that they "have suffered a concrete and particularized injury" that is "(1) actual or imminent, (2) caused by, or fairly traceable to an act that [they] challenge[] in the instant litigation, and (3) redressable by the court") (internal quotations omitted).

Simply stated, Industry is taking aim at the wrong target. The injury of which Industry complains in this case—specifically, the prohibition on unpermitted discharge—stems from §301(a), not from §404. Far from imposing such a prohibition, §404 authorizes an exemption from that prohibition.

Industry itself openly acknowledges that its alleged injury rests on §301:

> The government has made it plain that it believes that engaging in earth-moving activities without a permit violates a well-defined legal prohibition (*i.e.*, section 301 of the CWA). Though the government's enforcement plans are not known, anyone contemplating such an activity proceeds at his peril. It was precisely because of this threat that Appellants decided—quite reasonably—to seek judicial review of the disputed regulation.

Ind. Br. 34 (emphasis added; footnote omitted). Likewise, all of the statutory enforcement provisions cited by Industry (*see* Ind. Br. 33) rest in relevant part on §301, not on §404.[8]

In this very case, Industry itself—as well as the Agencies—have taken the position that the 2001 Rule was issued only under §404.[9] If that is so, then the rule imposes no hardship on Industry, because it does not implement §301(a)'s ban on unpermitted discharge.

Indeed, if the challenged rule implements solely §404, narrowing the rule's scope (as Industry is attempting to do here) would actually increase Industry's regulatory exposure. The §301(a) prohibition would remain unchanged, while the circumstances in which Industry could obtain an exemption from that prohibition would be narrowed.

In short, accepting *arguendo* Industry's own insistence that the challenged rule implements only §404, Industry's claims must be dismissed on ripeness and standing grounds.

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[8] *See* 33 U.S.C. §§1319(c)(1), (c)(2), and (d); 1365(a)(1) (as defined in §1365(f)). The only §404 violation addressed by those provisions is the violation of a requirement imposed in a §404 permit. Here, Industry's alleged harm stems not from being obliged to obey requirements of permits, but rather from being required to obtain a permit in the first place. That latter requirement appears in §301(a), not in §404.

[9] NAHB 5/23/03 Mem. 9 n.25[JA111] ("the only authority cited in the rule is section 404") (emphasis added); NSSGA 5/23/03 Mem. 5[JA115] (the January 2001 rule "addresses the CWA section 404 program's definition of 'discharge of dredged material'") (emphasis added; citation omitted); *id.* 21 n.29[JA116] ("Section 301 is not the operative statutory provision.") (emphasis added); Agencies' 6/24/03 Mem. 23-24[JA118-19].

B. If the 2001 Rule Is a §301 Rule, Then the District Court Lacks Jurisdiction.

If the Court were to conclude that the challenged rule implements §301(a),[10] Industry's claims must still be dismissed. Under that scenario, Industry's claims would be reviewable only in a court of appeals by petition for review under the Clean Water Act's judicial review provision—not in a district court suit under the Administrative Procedure Act.

Section 509(b)(1) of the Act assigns to the jurisdiction of the courts of appeals certain specified actions, including "the Administrator's action ... (E) in approving or promulgating any effluent limitation or other limitation under section 1311"—i.e., under CWA §301. 33 U.S.C. §1369(b)(1). That jurisdiction is "exclusive." *American Paper Inst. v. Train*, 543 F.2d 328, 334 (D.C. Cir. 1976).

To the extent the 2001 Rule directly determines whether a discharge is prohibited or not, it constitutes an "effluent limitation,"[11] or at a minimum fits comfortably within §509(b)(1)(E)'s broad reference to "any ... other limitation." *See*, *e.g.*, *Natural Resources Defense Council v. USEPA*, 673 F.2d 400, 404 n.11 (D.C. Cir. 1982). Moreover, to the extent the rule defines the

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[10] Like the 2001 Rule, the 1993 rule defined the term "discharge of dredged ... material" in §404(a), and cited only §404 in its authority section. 58 Fed. Reg. 45035-37 (Aug. 25, 1993) [JA218-20]. Nonetheless, the agencies in defending the rule, and the district court in overturning the rule, invoked §301. *See AMC*, 951 F. Supp. at 272 ("The agencies contend that the authority to regulate incidental fallback is included in their §301(a) authority to regulate all discharges of pollutants.") (emphasis added), *id.* ("The Court concludes that neither §301 nor §404 covers incidental fallback.") (emphasis added). Also, §301(a) expressly cross-references §404, and §404(p) expressly cross-references §301.

[11] A rule that prohibits or constrains the discharge of dredged material constitutes an effluent limitation under the Act and implementing regulations. *See* CWA §502(11), 33 U.S.C. §1362(11) (defining effluent limitation as "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance") (emphasis added); 40 C.F.R. §232.2 (defining "effluent" to include "dredged material").

availability of an exemption from the discharge prohibition, it would likewise be an effluent limitation or other limitation. *See*, *e.g.*, *Natural Resources Defense Council v. USEPA*, 656 F.2d 768, 775 (D.C. Cir. 1981).

Thus, assuming *arguendo* that the 2001 rule implements §301, it constitutes an "effluent limitation or other limitation under section [301]," and "the Administrator's action ... in approving or promulgating" the rule is reviewable only in the courts of appeals, under §509(b)(1)(E). On that basis, Industry's challenge to the EPA-promulgated portion of the 2001 Rule must be dismissed for lack of jurisdiction.

In addition, because the court of appeals would have ancillary jurisdiction over a challenge to the Corps-promulgated provisions of the rule,[12] Industry's claims addressing those provisions should likewise be dismissed. In the alternative, even if the Corps-promulgated provisions could not have been reviewed under §509(b)(1)(E), Industry's challenge to those provisions must still be dismissed for lack of standing. If the EPA-promulgated portions of the regulation are within the court of appeals' exclusive §509 jurisdiction (and thus not subject to district court APA challenge), a claim solely against the Corps-promulgated portions will not redress Industry's injury. Even if Industry were to succeed in overturning the Corps regulation, the virtually identically worded EPA provisions -- and the prohibition they impose on Industry's members -- would remain.[13]

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[12] *See American Iron & Steel Inst. v. EPA*, 115 F.3d 979, 986 (D.C. Cir. 1997) (asserting jurisdiction over non-509(b)(1) claims that were "ancillary" to §509(b)(1) claims). *Cf. National Wildlife Federation v. Hanson*, 859 F.2d 313, 315-16 (4th Cir. 1988) (under CWA §505(a)(2), 33 U.S.C. §1365(a)(2), which -- like §509(b)(1) -- provides for suits against "the Administrator," Corps was properly joined as an additional defendant).

[13] At this point, Industry could not achieve redress by pursuing concurrent challenges in different courts (*i.e.*, by challenging the EPA provisions in the court of appeals, and the Corps

(... footnote continued next page)

II. THE 2001 RULE'S PROVISION LIMITING INCIDENTAL FALLBACK TO "SMALL VOLUMES" OF DREDGED MATERIAL CAUSES INDUSTRY NO HARDSHIP.

In what Industry describes as its "central claim," it argues that "[t]he limitation of incidental fallback to 'small volumes' of soil movement associated with excavation activity means that 'non-small' volumes will be subject to the permitting requirement regardless whether they add anything to waters of the United States." Ind. Br. 35. Thus, Industry seeks review of "[t]he issue whether volume is a proper factor for determining the presence of a CWA 'addition.'" *Id.*

The 2001 rule's reference to "small volumes" of dredged material does not impose hardship on Industry, and certainly not sufficient hardship to overcome the presumption against facial review of regulations. *See* p. 17, *supra* (to overcome presumption, plaintiff must show that the regulation as a practical matter requires plaintiff to adjust its conduct immediately). Industry itself has repeatedly urged the district court and this Court to distinguish between regulated and non-regulated redeposits on the basis of volume. *See* Part B(2) of Statement of Facts, *supra*. Moreover, that volume-based distinction has been reflected in 1980's guidance, a 1986 regulation, the district court's 1997 and 2000 *AMC* decisions, this Court's *NMA* decision, and the 1999 remand rule. *See id*. Indeed, Industry has gone so far as to argue that this approach has been ratified by Congress. *See* p. 11, *supra*.

Under these circumstances, it is preposterous for Industry to argue that the 2001 rule "present[s] [Industry] with the immediate *dilemma to choose between complying with newly*

(... footnote continued from previous page)
provisions in district court). The 120-day §509(b)(1) statute of limitations has expired with respect to the 2001 Rule.

imposed, disadvantageous restrictions and risking serious penalties for violation." *See* Ind. Br. 26 (citation omitted; underlined emphasis added). Far from being "newly imposed," the Agencies' reliance on volume to distinguish between regulable and nonregulable redeposits is a longstanding approach stretching back at least two decades.

Evidently, Industry is no longer satisfied with the position it has repeatedly urged on this Court and the district court. In a dramatic escalation of its demands, Industry now seeks exemption not only of small-volume redeposits, but also of large-volume redeposits that threaten serious environmental harm, and that Industry itself previously conceded are properly regulable. While these arguments demonstrate an impressive ability to execute a 180-degree turn, they fall far short of showing hardship sufficient to overcome the presumption against immediate facial review of regulations.

III. INDUSTRY'S ARGUMENTS CONCERNING THE 2001 RULE'S "REGARDS" PROVISION ARE INTERNALLY INCONSISTENT, AND CONTRAVENE INDUSTRY'S OWN POSITION IN THE *NMA* CASE.

Industry also claims hardship from the 2001 rule's provision that "[t]he 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). But Industry's arguments suffer from a fatal inconsistency.

Industry starts by conceding that the regulation should be read "as a whole," such that "no clause, sentence, or word shall be superfluous, void, or insignificant." Ind. Br. 20 (citation and internal quotations omitted). This should be the end of Industry's facial challenge, because as Industry itself recognizes, the 2001 rule "has a savings clause providing that earth-moving activities are 'regarded' as regulated 'unless' project-specific evidence shows that they result in

only incidental fallback." Ind. Br. 21 (emphasis added). But instead of obeying the principle of regulatory interpretation it has just finished enunciating, Industry proceeds to blatantly violate that principle. Specifically, Industry argues that the "unless" clause is "mere surplusage," "does not add anything new," and "has no significant legal implication." Ind. Br. 21-22.

Reading the "unless" clause as "surplusage" not only violates fundamental canons of interpretation, but also disregards Industry's own past arguments to this Court. The "unless" clause grants an exception for earth-moving that produces only incidental fallback. To say that the difference between regulating incidental fallback and not regulating it "has no significant legal implication" (Ind. Br. 21) is to say that Industry's own legal theory in *NMA* had no significant legal implication either. In its 1997 *NMA* brief, Industry presented a single substantive issue: "Whether the incidental fallback that accompanies excavation and landclearing activities constitutes the 'discharge' of dredged material under Section 404 of the Clean Water Act." Industry 11/19/97 Br. 1[JA163] (emphasis added). Industry should not be heard to dismiss as "mere surplusage" a provision exempting the very thing Industry told this Court should be exempted.

IV. INDUSTRY IMPROPERLY SEEKS TO INVERT THE PRESUMPTION AGAINST IMMEDIATE FACIAL REVIEW OF REGULATIONS.

Industry argues that the 2001 Rule is presumptively ripe for immediate facial review because it is a "rule" within the meaning of the APA. Ind. Br. 13. To the contrary, the Supreme Court and this Court have held that a regulation is presumptively unripe for immediate facial review. *See* pp. 16-17, *supra*. Industry's effort to invert this presumption, and substitute a reverse presumption, must be rejected.

Purely legal issues, and final agency action. Industry argues that the 2001 rule is presumptively ripe for facial review because it raises purely legal issues, and constitutes final

agency action. Ind. Br. 15-17. But these features are common to all suits to review agency action.[14] Thus, under Industry's argument, all such cases are *per se* fit for review. Such an approach would render meaningless *Lujan*'s presumption against ripeness of immediate facial challenges of regulations—as well as the fitness prong of the ripeness test.

General presumption favoring reviewability of agency action. Industry also suggests that the district court's dismissal runs counter to the general presumption that agency action is reviewable. Ind. Br. 12-14. To the contrary, the APA presumption is that review be available, not that it take the form of immediate facial review. *Lujan* makes clear that immediate facial review of regulations is presumptively unavailable.

Far from closing the door to judicial review, *Lujan* simply requires that such review be conducted not in the abstract, but in the context of a particular application of the regulation. In that context, a reviewing court can adjudicate the validity of the 2001 Rule if the Rule then "matters," *i.e.*, if it "plays a causal role" in causing harm to the litigant. *See Ohio Forestry Assn. v. Sierra Club*, 523 U.S. 726, 734 (1998). Such case-by-case review can include adjudication of the facial validity of regulations. *See*, *e.g.*, *United States v. Picciotto*, 875 F.2d 345 (D.C. Cir. 1989) (in prosecution for violation of agency rule, Court held rule facially invalid for lack of notice and comment); *United States v. Wilson*, 133 F.3d 251, 255-57 (4th Cir. 1997) (in prosecution for violation of agency rule, court held rule facially invalid as inconsistent with Clean Water Act).

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[14] *See*, *e.g.*, *Marshall County Health Care Authority v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993) ("Appellants ... overlook the character of the questions before the district court when an agency action is challenged. The entire case on review is a question of law, and only a question of law."); *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 124 S. Ct. 2373, 2378 (2004) (in APA judicial review suit, "the 'agency action' complained of must be 'final agency action'") (quoting 5 U.S.C. §704) (emphasis added by Supreme Court).

Postponing review until a regulation has been applied has important advantages. For example, Industry and the Agencies disagree on the meaning of the 2001 Rule.[15] Depending on how the Agencies implement the Rule, problems predicted by Industry may not arise, and the courts may not need to adjudicate them. *See*, *e.g.*, *Natl. Treasury Employees Union v. United States*, 101 F.3d 1423, 1431 (D.C. Cir. 1996) (the "usually unspoken element of the rationale underlying the ripeness doctrine" is: "If we do not decide it now, we may never need to.").

Even if the Agencies' implementation leads to disputes with Industry, postponing review will allow those disputes to be measured against specific fact patterns that can help illuminate the legal issues presented. *See*, *e.g.*, *Ohio Forestry*, 523 U.S. at 735 ("The ripeness doctrine reflects a judgment that the disadvantages of a premature review that may prove too abstract or unnecessary ordinarily outweigh the additional costs of—even repetitive—post-implementation litigation."); *Sabri v. United States*, 541 U.S. 600, 124 S. Ct. 1941, 1948 (2004) ("facial challenges are best when infrequent," and "laws should not be invalidated by reference to hypothetical cases;" "Although passing on the validity of a law wholesale may be efficient in the abstract, any gain is often offset by losing the lessons taught by the particular, to which common law method normally looks.") (citation and internal quotations omitted).

Indeed, as Industry well knows, issues of Clean Water Act jurisdiction have overwhelmingly been addressed via disputes about specific fact patterns, rather than nationwide facial challenges. In addition to the numerous cases on what constitutes a "discharge" (many of which have been cited by the parties in the present appeal), another large body of precedent has

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[15] *See*, *e.g.*, Agencies' Br. 34 (disputing Industry's assertion that the Rule's "unless" clause is superfluous), 39 (arguing that Industry's position is based on a "false assumption" concerning the Rule's meaning).

addressed which waters are covered by the Act. For example, the two leading Supreme Court cases on the Act's geographic jurisdiction addressed disputes concerning a specific abandoned sand and gravel pit in Cook County, Illinois, and specific marshland in Macomb County, Michigan. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985). Industry has advanced no good reason to deviate from this well-established approach.

"Common" facial review. Industry argues that judicial review of facial challenges is "common." Ind. Br. 14. Beyond *NMA*, which is distinguishable,[16] and cases reviewing challenges to Clean Water Act permits,[17] Industry's brief is peppered with numerous citations to cases involving statutory provisions like Clean Water Act §509(b)(1) that provide for immediate facial review of specified agency actions.[18] Such statutory provisions do indeed justify an exception

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[16] The *NMA* Court proceeded directly to the merits, without ruling on the ripeness of Industry's challenge to the 1993 Rule. In any event, that Rule was worded more broadly than the 2001 Rule—specifically, the 1993 Rule comprehensively regulated "any redeposit."

[17] *See* Ind. Br. 14-15 (citing cases reviewing discharge permits under Clean Water Act §404(e)).

[18] *See, e.g.*, *EPA v. Natl. Crushed Stone Assn.*, 449 U.S. 64 (1980) (Clean Water Act; §509(b)(1) requires filing within 120 days); *NRDC v. EPA*, 966 F.2d 1292 (9th Cir. 1992) (same); *Waterkeeper Alliance v. EPA*, 399 F.3d 486 (2d Cir. 2005) (same); *Chemical Mfrs. Assn. v. NRDC*, 470 U.S. 116 (1985) (same); *American Forest and Paper Assn. v. USEPA*, 137 F.3d 291 (5th Cir. 1998) (same); *National Mining Assn. v. Dept. of Interior*, 177 F.3d 1 (D.C. Cir. 1999) (Surface Mining Control and Reclamation Act; 30 U.S.C. §1276(a)(1) requires filing within 60 days); *George E. Warren Corp. v. EPA*, 159 F.3d 616 (D.C. Cir. 1998) (Clean Air Act; 42 U.S.C. §7607(b)(1) requires filing within 60 days); *Whitman v. American Trucking Assns.*, 531 U.S. 457 (2001) (same); *Puerto Rican Cement Co. v. USEPA*, 889 F.2d 292 (1st Cir. 1989) (same); *Natl. Recycling Coalition v. Browner*, 984 F.2d 1243 (D.C. Cir. 1993) (Resource Conservation and Recovery Act; 42 U.S.C. §6976 requires filing within 90 days); *American Petroleum Institute v. EPA*, 906 F.2d 729 (D.C. Cir. 1990) (same); *CropLife America v. EPA*, 329 F.3d 876 (D.C. Cir. 2003) (Federal Food, Drug and Cosmetic Act; 21 U.S.C. §346a(h)(1) requires filing within 60 days); *Eagle-Picher Industries v. USEPA*, 759 F.2d 905 (D.C. Cir. 1985) (Comprehensive Environmental Response, Compensation and Liability Act; 42 U.S.C. §9613(a) requires filing within 90 days); *General Elec. Co. v. EPA*, 290 F.3d 377 (D.C. Cir.

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from *Lujan*'s presumption against immediate facial review of regulations. *See Lujan*, 497 U.S. at 891 ("Some statutes permit broad regulations to serve as the 'agency action,' and thus to be the object of judicial review directly, even before the concrete effects normally required for APA review are felt."); *Eagle-Picher Industries v. USEPA*, 759 F.2d 905, 916 (D.C. Cir. 1985) (construing another environmental statute's counterpart to §509(b)(1), this Court noted that the provision "constitutes compelling evidence that Congress has, in effect, decided that the interest of the EPA in effectuating CERCLA's purposes will generally be furthered by review during the statutory period and, by implication, hindered by postponing review") (emphasis added).

Here, however, Industry and the Agencies insist that this case is not governed by §509(b)(1). *See* p. 18, *supra*. If they are correct, then the statutory exception to the *Lujan* presumption does not apply. Thus, Industry's citation to cases that do fit within that exception, because they arise under the judicial review provisions of the Clean Water Act and other statutes, does not support immediate facial review here. As was true in *Ohio Forestry*, the rule challenged by Industry here "is consequently unlike agency rules that Congress has specifically instructed the courts to review 'pre-enforcement.'" 523 U.S. at 737. Absent such Congressional instructions, "[t]he case-by-case approach ... is the traditional, and remains the normal, mode of operation of the courts." *Id.* 735 (citation and internal quotations omitted).

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2002) (Toxic Substances Control Act; 15 U.S.C. §2618(a)(1)(A) requires filing within 60 days); *Fox Television Stations v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002) (Telecommunications Act; 28 U.S.C. §§2342(1) & 2344 require filing within 60 days); *Electric Power Supply Assn. v. FERC*, 391 F.3d 1255 (D.C. Cir. 2004) (Federal Energy Regulatory Commission: 16 U.S.C. §825l(b) requires filing within 60 days).

CONCLUSION

Industry's claims do not meet ripeness or standing requirements. Accordingly, the Court should either (1) affirm the dismissal of Industry's claims which was entered pursuant to the Agencies' motion, or (2) grant Environmental Appellees' conditional cross-appeal, and order Industry's claims dismissed on ripeness and/or standing grounds.

DATED: June 20, 2005 (refiled with joint appendix citations July 29, 2005).

Respectfully submitted,

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CERTIFICATE REGARDING WORD LIMITATION

Counsel hereby certifies that, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), the foregoing **Final Brief of Environmental Appellees and Conditional Cross-Appellants** contains 8,379 words, as counted by counsel's word processing system.

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Addendum of Statutes and Regulations

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