

ORAL ARGUMENT NOT YET SCHEDULED

Case No. 04-5221
(Consolidated with Case Nos. 04-5222, 04-5223, and 04-5224)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

National Association of Home Builders, *et al.*,
Appellants,

v.

United States Army Corps of Engineers, *et al.*,
Appellees.

On Appeal of the Memorandum Opinion and Order of the
United States District Court for the District of Columbia

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Other Materials

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GLOSSARY

Agencies	United States Environmental Protection Agency and United States Army Corps of Engineers
APA	Administrative Procedure Act
Corps	United States Army Corps of Engineers
CWA	Clean Water Act
EPA	United States Environmental Protection Agency
NAHB	National Association of Home Builders
NSSGA	National Stone, Sand and Gravel Association

INTRODUCTION

The claims at issue are eminently fit for judicial review. All parties agree that the challenged regulation is final, that the regulation establishes a new standard for discerning a regulated “discharge of dredged material,” and that the challenges raised are purely legal. The Agencies have no plans to change or refine this Rule, and their suggestion in their brief that they “retain discretion” as to whether to apply the Rule is misleading. The Rule is binding on the Agencies and the public alike. Thus, judicial review now will not intrude on any ongoing administrative process. Nor will further facts aid the Court in analyzing the legality of this regulatory standard.

The Agencies cannot fundamentally change the law under the guise of interpreting it, while immunizing their unauthorized lawmaking from judicial review. Where, as here, there is no institutional interest or judicial benefit to be gained from delaying review, there is no need to consider hardship. Nevertheless, deferring adjudication would cause significant hardship to Appellants' members who need to know, before a dispute arises, whether their activities are properly regulated under the Clean Water Act (“CWA” or “Act”).

SUMMARY OF ARGUMENT

The Rule establishes a binding standard for distinguishing regulable activities from non-regulable activities. The legal questions whether that standard is consistent with the CWA and whether it was adopted with proper APA procedures are ripe for review now. Further factual development would not add to the Court’s understanding of those questions.

The Agencies’ claim that they “retain discretion” to apply the Rule, or not, is disingenuous. They do not. The standard is binding and must be applied by the Agencies and adhered to by Appellants' members. Because the Rule defines the scope of CWA regulatory authority, it has an immediate effect, and denying review would work a hardship on Appellants.

ARGUMENT

I. APPELLANTS' FACIAL CHALLENGE RAISING PURELY LEGAL ISSUES IS FIT FOR REVIEW AND REQUIRES NO FURTHER FACTUAL DEVELOPMENT.

A. Tulloch II Is Binding and Must Be Applied by the Agencies and Adhered to by Earth-Movers.

In claiming that Tulloch II is not fit for review, the Agencies assert that “it is important to bear in mind what the Rule does....” Gov’t Br. at 27. Appellants agree. Tulloch II subjects all mechanized earth-moving activities to regulation by “regarding” them as resulting in “discharges” (thereby requiring a permit) “unless there is case-specific information to the contrary.” 66 Fed. Reg. at 4552 (JA). All such activities, even those that the Agencies concede “may be conducted in such a manner that no discharge of dredged material in fact occurs,” are considered regulated in the first instance. *Id.* at 4554 (JA). This “expectation” can only be overcome if “project specific evidence shows that the activity results in only incidental fallback.”¹ *Id.* at 4552 (JA).

According to the Agencies, Tulloch II “provide[s] a *standard* against which to judge regulable versus non-regulable redeposits.” *Id.* at 4561 (JA) (emphasis added). As a standard, it is binding on both the Agencies and public alike. Thus, if one is engaged in land-clearing or excavation, one must either (1) seek a permit; (2) provide project-specific evidence to demonstrate that the activity results in no more than incidental fallback (the definition of which,

¹ The Agencies stress that they are not shifting any burdens. 66 Fed. Reg. at 4552 (JA). Toward that end, they say, they eliminated a “rebuttable presumption” from the proposed rule and replaced it with the pronouncement that the Agencies merely “regard ... earth-moving activity as resulting in a discharge ... unless project-specific evidence” shows otherwise. *Id.* at 4560-61 (JA). The Preamble explains that this language was intended to convey the Agencies’ “expectation” that such earth-moving is likely to be regulable, “absent information to the contrary.” 66 Fed. Reg. at 4553 (JA). However characterized, the Rule’s “regard” pushes parties into a classic comply-or-defy dilemma. Calling it an “expectation” as opposed to a “presumption” does not soften the impact.

we argue, is illegal on its face); or (3) undertake the project and deal with the Agencies in a defensive posture. Under the latter two choices, the Agencies will adjudge their jurisdiction based on the legally binding standard. 66 Fed. Reg. at 4554 (JA). Thus, Tulloch II has sufficiently “crystallized” for ripeness purposes because it is binding and will not be altered by future agency action. *See Gen. Elec. Co. v. EPA*, 290 F.3d 377, 380 (D.C.Cir. 2002) (holding that agency action is ripe when it “marks the consummation of the ... decisionmaking process and it determines the rights and obligations of both applicants and the Agency”); *Air Tour Ass’n v. FAA*, 298 F.3d 997, 1013 (D.C.Cir. 2002) (FAA rule imposing cap on number of commercial air tours that could be run in national park “fully-crystallized” because it resulted in “legal consequences”).

The Agencies claim that the Rule is not reviewable because it “leaves the question of whether any particular activity is regulated to case-by-case decision-making by the Agencies and the courts.” Gov’t Br. at 16. Whether any particular project is ultimately considered regulated under the standard is irrelevant to the ripeness question at bar. Any factual development related to implementation would not assist the Court in determining whether the standard is legal under the CWA and APA. In issuing the Rule pursuant to an APA rulemaking, the Agencies are bound to apply it – which, of course, is one of the central reasons why Appellants are challenging the Rule *itself* as unlawful and unreasonable. Given that Tulloch II will not be further refined, there is no reason for the courts to delay review. *See Better Gov’t Ass’n v. Dep’t of State*, 780 F.2d 86, 95-96 (D.C.Cir. 1986) (challenge was ripe for review because the regulation “governs and will continue to govern [agency] decisions,” and challenged standard will be used in its “present form” without further procedural and substantive evolution); *Mountain States Tel. and Tel. Co. v. FCC*, 939 F.2d 1021, 1028 (D.C.Cir. 1991) (orders of FCC directing telecommunication service

companies to alter certain accounting practices ripe for review, where administrative record was comprehensive, positions of parties were polarized, and core issue was wholly legal question).

The Agencies cannot have it both ways. They cannot reap the benefits of permanently codifying the standard as a final rule, Gov't Br. at 26, while simultaneously pushing judicial review of its legality to some indefinite future point.²

B. Facts Developed in Case-by-Case Applications of the Rule Will Not Aid the Court in Deciding Whether the Rule Itself Violates the CWA.

The assertion that judicial review must await application of Tulloch II “in a particular case” because the Agencies purport to “retain the discretion to apply the rule on a case-by-case basis,” Gov't Br. at 28, is mere sophistry. The Agencies confuse the issue of whether the Rule will be further refined (it will not) with how it will be applied to a particular project in the future (which is irrelevant to the question of whether the Rule, as adopted, is ripe). As the Agencies acknowledge, Appellants are pursuing purely legal challenges to a final agency rule, *see* Gov't Br. at 26. The Rule itself is not discretionary – it provides the “standard” under which the Agencies assert jurisdiction. 66 Fed. Reg. at 4561 (JA). That “standard” is binding and unalterable. Whether Tulloch II violates the plain language and clear intent of the CWA; whether the Agencies adequately explained their rationale for issuing it; and whether the Agencies gave adequate notice, and considered and responded to the public comments they solicited, are quintessential legal issues that this Court is fully capable of resolving. Indeed,

² Intervenor's assertion that the Rule is an “effluent limitation” under CWA section 301, and therefore that review may only be had in the court of appeals pursuant to CWA section 509, *see* NWF's Br. at 16-20, lacks support. Section 301 requires the achievement of “effluent limitations” in permits issued under section 402, National Pollutant Discharge Elimination System. *See* 33 U.S.C. §1342(a)(1); §1311(b). The Rule interprets section 404, not section 301 or 402. Hence, the jurisdictional bar of CWA section 509 is irrelevant.

these are the kinds of questions that are routinely adjudicated without the need for case-specific application.³

Ignoring the substantial precedent under which this Court has entertained legal, facial challenges to myriad agency rules, the Agencies label Appellants' Complaints as "abstract." Gov't Br. at 27-28, and accuse Appellants of attempting to "deconstruct" the Rule. *Id.* at 33. However, it is the Agencies that selectively deconstruct the Rule. They treat the "project specific evidence" language of the Rule as dispositive of its reviewability, but effectively ignore the "regards" expectation and incidental fallback definition, which set the standard of conduct that Appellants must adhere to.⁴ The Complaints make clear that Appellants have brought a

³ See *CropLife Am. v. EPA*, 329 F.3d 876, 884 (D.C.Cir. 2003) (facial challenge ripe where agency action is an unequivocal statement of intent); *Eagle-Pitcher Indus. v. EPA*, 759 F.2d 905, 916 (D.C.Cir. 1985) ("the issue presented for review – whether the [regulation] is arbitrary, capricious, or in excess of statutory authority – is a purely legal question and thus was 'fit' in that respect for judicial resolution"); *George E. Warren Corp. v. EPA*, 159 F.3d 616, 621 (D.C.Cir. 1998) ("[w]hether the remedial provision is consistent with the statute is purely an issue of law" and ripe); *Great Lakes Gas Transmission v. FERC*, 984 F.2d 426, 431 (D.C.Cir. 1993) ("the issue in this case is fit for judicial resolution because it is a purely legal one (whether the agency's order reflects reasoned decision-making), not requiring a developed factual record"); *Chamber of Commerce v. FCC*, 69 F.3d 600, 603-04 (D.C.Cir. 1995) (question of validity of rule defining "members" under election act would not be elucidated by enforcement).

⁴ Further, their argument that the "unless" clause bars review but also "is an integral, and inseparable, part of the Rule since it identifies the circumstances when such activities are not subject to regulation," Gov't Br. at 34, only demonstrates the tautological nature of the "unless" clause. The Rule says "earth-moving results in a discharge" (clause 1) "unless project-specific evidence shows it does not" (clause 2). But every law and regulation has an implicit "unless" clause, e.g., a car must stop at a red light unless project-specific evidence shows that the light is green. *Tulloch II* just makes the "unless" explicit, but the unless does not change the operation of the Rule. Nor should it defeat review.

In *Shays v. Federal Election Commission*, No. 04-5352, 2005 WL 1653053 (D.C. Cir. July 15, 2005), this Court held that certain FEC regulations were in excess of statutory authority. The regulations stated: "Communications made within 120 days of a general election or primary and 'directed' at the relevant electorate may qualify as 'coordinated' if they refer to a political party or 'clearly identified candidate for Federal office.'" *Id.* at *4 (quoting 11 C.F.R. § 109.21(c)(4)). Would the Court have denied review if the regulations had contained an "unless" clause, e.g., "unless project-specific evidence shows that such communications do not refer to a political party or clearly identified candidate"? Likewise, in *American Petroleum*

straightforward legal challenge to that standard. In any event, in determining whether the case was properly dismissed on ripeness grounds, it is necessary to “construe the complaint liberally, granting plaintiff the benefit of all inferences that can be derived from the facts alleged.”

Venetian Casino Resort LLC v. EEOC, 409 F.3d 359, 364 (D.C.Cir. 2005) (citation omitted).

In an attempt to demonstrate that Tulloch II does not “crystallize” the Agencies’ decision-making process, the Agencies cite a number of “factors” they claim they will consider in making a case-by-case determination of whether specific projects are regulated. Gov’t Br. at 32-35. The project-specific factors that are utilized in applying the underlying standard are irrelevant to the ripeness of the standard already adopted. See *EPA v. Nat’l Crushed Stone Ass’n*, 449 U.S. 64, 72 (1980) (challenge to variance clause was ripe for judicial review prior to application of the regulation); App. Br. at 22-23. The administrative record underlying the Rule provides the basis to review the Agencies’ assertion of authority. The question whether the standard adopted in the Rule is appropriate in the first place can be resolved now without further factual development. See *Atlantic Richfield Co. v. Dep’t of Energy*, 769 F.2d 771, 783 (D.C. Cir. 1985) (noting that “questions of statutory authority are the day-to-day business of the courts,” and therefore there is no need for a “particularized factual record to assist” the court in deciding the challenge). As explained in *Better Government Association*, “what is decisive [to the ripeness analysis] is the substance of what the agency has done,” 780 F.2d at 93. What they have

Institute v. EPA, 198 F.3d 275, 278 (D.C.Cir. 2000), an EPA regulation regarding mandated use of reformulated gasoline was struck as invalid because it exceeded authority under the Clean Air Act. The challenged language stated: Any “area currently or previously designated as a nonattainment area for ozone ... or any time later, may be included on petition of the governor.” 40 C.F.R. § 80.70(k). The incorporation of an unless proviso, e.g., “unless project-specific evidence shows that an area has not been designated as nonattainment for ozone,” would not change the operation of the regulation, and therefore would not be a basis for denying review. The key question is the expectation of the Rule. If it has immediate legal consequences, and the challenge is legal then the case can be heard now, with or without an “unless” clause.

“done” here is promulgate a standard that has an immediate effect on all earth-moving activities. The exact nature of those activities (*e.g.* excavation *v.* clearing) is irrelevant to whether or not the underlying rule is proper. *Id.*

As in this Court’s recent decision in *Venetian Casino*, this case “is fit for review because it presents a clear-cut legal question, *i.e.*, whether the [agency’s] ... policy is inconsistent with the [authorizing statute] ... or the APA. Resolution of this question turns on an analysis of the pertinent statutes and their construction by relevant case law.” 409 F.3d at 364-65. The *Venetian Casino* Court rejected the government’s claim that the challenger must “show how the agency has used or imminently will use the policy and so illuminate the consequences of the alleged dispute and ‘crystallize’ the legal issues.” 409 F.3d at 365. Citing *Better Government Association*, the Court found the agency’s assertion “without merit,” given that “the government has said nothing to suggest that a procedural or substantive evolution of its [challenged] policy is pending or expected.” *Id.* at 365 (rejecting the claim that the policy must be implemented in a concrete factual setting).

Here, the standard will not change. Nor is there danger of interference with the deliberative process. The agency position is “settled” and final. *Appalachian Power Co. v EPA*, 208 F.3d 1015, 1023 n.18 (D.C.Cir. 2000) (rejecting the argument that the court’s review would be more focused in the context of a challenge to a particular permit). Furthermore, whether there was proper notice and comment on the definition of “incidental fallback” (because, as alleged by NSSGA, the final Rule was not the logical outgrowth of the proposed rule)⁵ is a straightforward legal question that is not dependent on how the Rule is applied. Such procedural claims can

⁵ Rules that are issued without adequate notice and comment procedures are invalid and may not be enforced. *See United States v. Picciotto*, 875 F.2d 345, 346 (D.C.Cir. 1989); *Community Nutrition Inst. v. Young*, 818 F.2d 943, 945 (D.C.Cir. 1987).

never be riper than on the day the Rule is published. *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 737 (1998) (discussing procedural challenge under NEPA).

The Agencies rely on several cases that, upon inspection, support Appellants. See Gov't Br. at 28-32 (citing *Clean Air Implementation Project v. EPA*, 150 F.3d 1200 (D.C.Cir. 1998) and *Sprint Corp. v. FCC*, 331 F.3d 952 (D.C.Cir. 2003)). Foremost, neither of these cases involved the adoption of a binding standard that took immediate effect. Instead, they involved situations in which the agencies restored to themselves certain authority that could be utilized at a later date or not at all.

In *Clean Air*, EPA promulgated a rule expanding the type of information used to determine compliance or noncompliance with emission standards. Prior to the rule's enactment, only the 130 or so reference tests set forth in EPA's regulations could be used in enforcement proceedings. The new rule, however, allowed for all "credible evidence" to be utilized in those proceedings. 150 F.3d at 1202. Thus, the agency removed a pre-existing constraint on its authority. Review was precluded because the Court held that the range of "credible evidence" was not a "closed set." *Id.* at 1205 Therefore, it would be impossible to determine what impact "the universe of all possible evidence that might be considered 'credible,'" would have on compliance with the underlying standard. *Id.* (noting that the credible evidence rule might affect some standards but not others).

The factors that made *Clean Air* unripe are not present here. The Agencies have affirmatively defined their jurisdiction in a manner that has the force of law. Unlike *Clean Air*, the jurisdictional standard *has* been changed. 66 Fed. Reg. at 4561 (JA). That binding action had an immediate impact. Hence, there is no concern that the Court will be forced to hypothesize as to the Rule's likely effects. *Clean Air*, 150 F.3d. at 1205. This challenge is as

concrete as it ever will be, and further factual development is not necessary to avoid the institutional concerns expressed in *Clean Air*. See *George E. Warren Corp.*, 159 F.3d at 621 (distinguishing *Clean Air* on this basis); see also *Gen. Elec. Co.*, 290 F.3d at 381 (further factual development through implementation of challenged policy is not required where policy purports to bind both agency and public).

The Agencies also mistakenly rely on *Sprint Corp. v. FCC*, 331 F.3d 952 (D.C.Cir. 2003), for the proposition that their “discretion” mandates that the Court withhold review. Gov’t Br. at 28. *Sprint* is distinguishable because it too involved the lifting of a pre-existing limitation on agency discretion, not the adoption of a legally binding standard. *Sprint* challenged an FCC decision to lift a self-imposed ban on specialized overlay area codes and to consider state applications for specialized overlays on a case-by-case basis when and if they were filed. The Commission did not authorize any overlay codes,⁶ and the decision to lift the ban had no immediate impact. 331 F.3d at 953. The Court found that more facts would be necessary to understand the nature of the harm to *Sprint* because the FCC had “reserved judgment” on whether to approve any overlays. *Id.* at 957-58 (future decision whether to approve, disapprove or approve with conditions an overlay zone might be made in a manner that will never harm *Sprint*). Thus, the FCC restored its authority to take certain action under certain circumstances, but had yet to act and might never do so in a way that impacted *Sprint*’s particular circumstances. *Id.* at 957-58. Indeed, *Sprint* conceded that it might never be injured. *Id.* at 957.

Here, in contrast, there are no such unknown contingencies. Far from “reserv[ing] judgment,” the Agencies have adopted a binding “standard against which to judge regulable vs.

⁶ An “overlay” area code is a new area code number that is geographically coextensive with an existing area code. *Id.* at 955. Until the challenged order was issued, the FCC had banned specialized overlays (*e.g.*, codes assigned only to wireless phones). *Id.*

nonregulable redeposits.” 66 Fed. Reg. 4561. No future factual developments will add to the Court’s understanding of the legality of the Rule.

Finally, this case is distinguishable from *Ohio Forestry*, Gov’t Br. at 36, and *Office of Communication of the United Church of Christ v. Federal Communications Commission*, 826 F.2d 101 (D.C.Cir. 1987), Gov’t Br. at 29-31, where the challenged agency actions were discretionary, making it unclear if, when, or how the agency would employ them. *Ohio Forestry* did not involve review of a substantive rule that the agency would have to apply in all future proceedings. To the contrary, it involved an amorphous forest “plan” which merely set “logging goals” and “probable methods of timber harvest” for one national forest. 523 U.S. at 729. No cutting of trees was authorized under the plan. *Id.* Moreover, because the plan could be refined during implementation, judicial review at an earlier stage could hinder implementation. *Id.* at 734.

Office of Communication involved a challenge to a nonbinding policy statement. 826 F.2d at 102. On its face, the statement provided that it “is not intended to foreclose the Commission, in a particular proceeding, from adopting a different approach if warranted in specific circumstances.” *Id.* at 103.⁷ Here, by contrast, the Agencies themselves say that Tulloch II defines the “standard” that the Agencies must apply to distinguish regulable from nonregulable activities. 66 Fed. Reg. at 4561 (JA). Because the policy statement in *Office of Communication* did not require the FCC “to do anything in any particular proceeding,” the challenge was not ripe. *Id.* at 105-06; see also *Sprint*, 331 F.3d at 957 (noting the crux of the *Office of Communication* decision was that the agency retained “substantial discretion” to

⁷ The Agencies’ discussion of *Office of Communication*, Gov’t Br at 29-30, fails to note that this Court has recognized a clear distinction between policy statements, which do not become binding, and therefore ripe, until applied, and substantive rules, which are likely to be ripe upon promulgation. *Hudson v. FAA*, 192 F.3d 1031, 1035 n.3 (D.C.Cir. 1999) .

implement its decision). The binding, immediately effective standards of *Tulloch II* do not pose the same institutional concerns of either of these policy decisions.

II. WITHHOLDING REVIEW WOULD CAUSE HARDSHIP TO APPELLANTS.

“Under the law of this circuit, once we have determined that an issue is clearly fit for review, there is no need to consider ‘the hardship to the parties of withholding court consideration,’ because there would be no advantage to be had from delaying review.” *Action for Children’s Television v. FCC*, 59 F.3d 1249, 1258 (D.C.Cir. 1995). Indeed,

[t]he ‘hardship’ prong of the *Abbott Laboratories* test is not an independent requirement divorced from the consideration of the institutional interests of the court and agency. Thus, where there are no institutional interests favoring postponement of review, a petitioner need not satisfy the hardship prong.

AT&T Corp. v. FCC, 349 F.3d 692, 700 (D.C.Cir. 2003) (citation omitted); *Gen. Elec.*, 290 F.3d at 381 (same). Where, as here, there is no institutional interest or judicial benefit to be gained from delaying review of purely legal claims, there is no need to consider hardship. Project-specific contexts will not aid the Court in determining, for example, whether the incidental fallback definition is consistent with the CWA and this Court’s decisions.

Assuming, *arguendo*, that hardship is at issue, Appellants’ claims easily pass muster. This case is not, in the words of the Agencies, about the reality of a “complex regulatory scheme.” Gov’t Br. at 38. It is about whether a binding standard adopted by the Agencies is in excess of statutory authority. The Rule pulls a wide spectrum of activities into the Agencies’ “jurisdictional net.” 66 Fed. Reg. 4556 (JA). Under the heading “Potentially Regulated Entities,” the preamble lists “land developers and landowners,” among others, as “likely to be regulated by this Action.” 66 Fed. Reg. 4550 (JA). The development of land for residential

construction almost always involves mechanized earth-moving work.⁸ So too mining, the very purpose of which is to extract earthen materials.⁹ Thus, it is clear that Appellants' members are affected by the Rule. Under the Rule's plain language, if Appellants' members are moving earth with mechanized equipment they are regarded as discharging – thus compelling them into the regulatory process, regardless of whether the activity will result in the CWA requisite “addition” of pollutants – and forcing them to comply with the (illegal) “incidental fallback” definition.¹⁰

Though the Agencies may provide earth-movers with case-by-case guidance on their particular activities, “it scarcely follows that [petitioners] may not obtain judicial review of the [Agencies'] interpretation of the statute” merely because the agency offers to assist companies in complying with the standards they adopt. *Barrick Goldstrike Mines, Inc. v. Browner*, 215 F.3d 45, 50 (D.C.Cir. 2000) (noting that the ability to seek agency guidance does not speak to, nor preclude, reviewability). The same can be said of the Agencies' invitation to challenge specific determinations or defend enforcement actions.

The Agencies assert that Appellants have not satisfied the hardship prong because: (1) the Rule does not require immediate action; (2) the planning uncertainty associated with a case-by-case determination does not constitute sufficient hardship; and (3) Appellants have the opportunity to consult with the Corps to determine if their planned activities will require a permit. Gov't Br. at 20. Yet, Appellants are faced with “an onerous legal uncertainty,” and there

⁸ Even if an earth-mover can show the project-specific evidence necessary to escape being “regarded,” that person is still harmed by the cost and delay of making its case to the Agency. See Declaration of D. Desiderio, at ¶¶ 6-8 (JA). Of course, those that lack the wit or the wallet necessary to meet the improper definition of “incidental fallback” are harmed by the improper expansion of the CWA.

⁹ Declaration of D. Carroll at ¶ 5 (JA); Declaration of C. Spainhour at ¶¶ 5, 6 (JA).

¹⁰ “[W]e fail to see how there can be an addition of *dredged material* when there is no addition of *material*.” *Nat'l Mining Ass'n v. Army Corps of Eng'rs*, 145 F.3d 1399, 1404 (D.C.Cir. 1998).

is no “principled justification for refusing” review. *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 439 (D.C.Cir. 1986). If the Court reaches this prong of the ripeness analysis, the standards created by the Rule create immediate injury, and, therefore, Appellants’ challenges are ripe for review.

A. Tulloch II Requires Immediate Compliance.

The Agencies claim that “[t]he Rule does not require any immediate action by appellants and thus does not cause appellants the kind of ‘hardship’ required to render a claim ripe,” citing *Ohio Forestry*. Gov’t Br. at 36. This is simply not true. Unlike the cases cited by the Agencies, Tulloch II imposes immediate changes to the regulatory standard, thereby creating significant hardship for the regulated community.

First, contrary to the representations of the Agencies, Appellants’ members (and indeed all earth-movers) suffer injury because they must either comply with the standard of the Rule or “run the risk of serious civil and criminal penalties....”¹¹ *Ciba-Geigy*, 801 F.2d at 439 (citing *Abbott Labs*). The Agencies try to distinguish this challenge from ones “where courts have allowed pre-enforcement review because plaintiffs are faced with a choice between complying with a straightforward, clear cut agency directive and risking an enforcement proceeding.” Gov’t Br. at 37. This is not a valid distinction. The Rule establishes a jurisdictional standard

¹¹ As one district court has noted in a criminal case involving CWA wetlands which did not have the appearance of what most lay people think of as a “wetland”:

This case presents the disturbing implications of the expansive jurisdiction which has been assumed by the United States Army Corps of Engineers under the Clean Water Act. In a reversal of terms that is worthy of *Alice in Wonderland*, the regulatory hydra which emerged from the Clean Water Act mandates in this case that a landowner who places clean fill dirt on a plot of subdivided dry land may be imprisoned for the statutory felony of ‘discharging pollutants into navigable waters of the United States.’

United States v. Mills, 817 F.Supp. 1546, 1547 (N.D. Fla. 1993) (defendants sentenced to twenty-one months of incarceration followed by one year of supervised release, a \$5,000 fine, and compliance with a site restoration plan), *aff’d*, 36 F.3d 1052 (11th Cir. 1994).

that must be complied with. Moreover, the CWA is not a mild-mannered statute. Violations of the Act can carry significant monetary penalties, as well as criminal sentences.¹² The Agencies cannot fundamentally change the law under the guise of interpreting it,¹³ while immunizing their unauthorized lawmaking from judicial review.

The Agencies' discussion of *Ohio Forestry* ignores a salient point of that case. Gov't Br. at 36. The Court there found no hardship where the challenged forest management plan did not "grant, withhold, or modify any formal legal license, power, or authority," "subject anyone to any civil or criminal liability," or create "legal rights or obligations." *Ohio Forestry*, 523 U.S. at 733. This was so because the "plan" itself did not authorize any harvesting; it was only the first of many administrative reviews that had to be taken before trees could actually be cut. *Id.* at 730. *Tulloch II* defines the scope of the Agencies' jurisdiction, which, by its very nature, has direct and immediate legal consequences. Hence, *Tulloch II* does "create legal obligations." It also "alter[s] the legal regime to which" Appellants are subject. *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (action that "affected the legal rights of the relevant actors ... has direct and

¹² See, e.g., *United States v. Perez*, 366 F.3d 1178, 1180 (11th Cir. 2004) (concurrent terms of thirty-six months imprisonment and three years supervised release); *United States v. Rapanos*, 339 F.3d 447, 449 (6th Cir. 2003) (three years of probation and \$185,000 fine); *United States v. Interstate Gen. Co.*, No. 01-4513, 2002 U.S. App. LEXIS 13232, at *6 (4th Cir. July 2, 2002) (following jury trial, which convicted defendant of four felony counts and sentenced defendant and corporate entities to significant prison terms and monetary fines, convictions reversed and case remanded for a new trial, at which point case settled for a guilty plea, \$1.5 million fine, \$400,000 civil penalty, and a wetland remediation plan); *United States v. Pozsgai*, 999 F.2d 719, 723 (3d Cir. 1993) (three years imprisonment, five years probation, and a \$200,000 fine); *United States v. Ellen*, 961 F.2d 462, 464 (4th Cir. 1992) (eighteen months probation, \$1 million criminal fine, and \$1 million for restoration; second defendant sentenced to six months imprisonment and one year supervised release).

¹³ The Agencies' assertion that the "prohibition against discharges without permits ... is imposed by the statute and this Rule does not add to Appellants' burden of compliance," Gov't Br. at 37, is a diversion. The regards language and incidental fallback definition are significant changes to the scope of the Agencies' jurisdiction. In any event, it is not the CWA's prohibition on discharges that is challenged, but the manner in which that term is defined.

appreciable legal consequences”). Moreover, as in *Abbott Labs v. Gardner*, this regulation “purport[s] to give an authoritative interpretation of a statutory provision that has a direct effect on the day-to-day business.” 387 U.S. 136, 152 (1967).

The Agencies cite *Diamond Shamrock Corp. v. Costle*, 580 F.2d 670, 674 (D.C.Cir. 1978), Gov’t Br. at 40, for their theory that Appellants should be forced to wait for permit denial or an enforcement action before the legality of the Rule can be reviewed. The permitting standards at issue in *Diamond Shamrock* did not have “an immediate and practical impact” as the petitioners could continue to operate under their existing permits. 580 F.2d at 673. Petitioners, therefore, would not be affected until they applied for new permits (whereupon they could challenge the new effluent limitation measurement). *Id.* Indeed, petitioners, even when “repeatedly pressed” at oral argument for a statement as to “what effect the regulations now have” on them, could only offer that “they ‘know it’s going to come.’” *Id.* In contrast, Tulloch II’s standards are immediately effective. The legal regime has been altered, and Appellants’ members face “concrete immediate business costs”¹⁴ that produce the “dilemma of either expending considerable sums of money to comply” or facing “serious penalties for noncompliance accompanied by the stigma of transgressing the law which could affect their goodwill.” 580 F.2d at 673 (noting that this dilemma exists “even though no enforcement proceeding was alleged to be imminent”).

B. The Planning Uncertainty Causes Injury.

The Rule “regards” all earth-moving as “discharges” despite the fact that many removal activities (e.g., excavation) clearly do not result in the requisite “addition” of material. See “Activities Impacted by Tulloch Rule Decision” (listing activities (such as drainage projects,

¹⁴ The average cost of an individual permit is \$271,000, and it takes an average of 788 days from preparation to issuance of a permit. Declaration of D. Desiderio at ¶¶ 7-8, (JA).

sand and gravel mining, and channel maintenance) where “incidental fallback” was the only discharge associated with that activity) (JA). Before Tulloch II, such activities were generally not regulable. Now they are subject to the Agencies’ “regard.” The Agencies attempt to hide this reality from the Court by insisting that Tulloch II merely “clarifies the framework the Agencies will use to evaluate mechanized earth-moving activities,” Gov’t Br. at 36, thus not affecting the current regulatory state. This leads the Agencies to suggest that, because the Rule requires no immediate action, compliance is somehow a strategic choice. *Id.* (“A party that concludes that its activities will not result in a discharge is still free to proceed without a permit.”).¹⁵ This is cold comfort.

A rule having the force of law is usually not self-executing. Rather, it “sets a standard of conduct for all to whom its terms apply.” *CBS v. United States*, 316 U.S. 407, 418 (1942). Such a standard operates “in advance of the imposition of sanctions.... It is common experience that men conform their conduct to regulations by governmental authority so as to avoid the unpleasant legal consequences which failure to conform entails.” *Id.* Earth-movers are no different. “It is no answer to say,” *id.* at 419, as the Government does so blithely in its brief, that an earth-mover who “concludes that its activities will not result in a discharge is still free to proceed without a permit.” Gov’t Br. at 38. As the Supreme Court observed in *CBS*, such a person is “free” “only in the sense that all those who do not choose to conform to regulations which may be determined to be lawful are free by their choice to accept the legal consequences

¹⁵ “In light of this uncertainty that has existed since before the first Tulloch Rule in 1993, which makes it virtually impossible to determine which activities are regulated, LNA is in a difficult position. LNA may either seek permits for every mechanized land clearing and extraction activity undertaken (which would result in huge expense and delay) or risk an [enforcement] action and citizen suit over every mining project by proceeding without a permit based on the assumption that the activity is not regulated.” Declaration of D. Carroll at ¶ 12 (JA).

of their acts.” *CBS*, 316 U.S. at 419. Consequently, earth-movers who the Government considers “free” to “proceed without a permit” are only “free” to the extent that they are willing to assume the risks such freedom may bring.

The Agencies also cite *National Park Hospitality Ass’n v. Department of Interior*, 538 U.S. 803, 808 (2003), for the proposition that “regulatory uncertainty alone does not constitute a significant hardship.” Gov’t Br. at 38. *National Park Hospitality* is inapposite. It turned on a determination that the NPS had no “delegated rulemaking authority” with respect to the Act it construed, 538 U.S. at 808, and consequently the underlying policy was “nothing more than a general statement of policy” that did not create “adverse effects of a strictly legal kind” on the concessionaires. *Id.* at 808-09. Here, the Agencies do have delegated authority to interpret the CWA, and their pronouncement has profound practical and legal effects. *Tulloch II* must be “taken by those entitled to rely upon [it] as what [it] purports to be,” *CBS*, 316 U.S. at 422, the regulatory definition of a key jurisdictional term, which controls what is subject to section 404’s permitting requirements. To imply that the Rule does not automatically require anything, but is merely the Agencies’ current thinking on this issue, is disingenuous. *Id.* at 422; *see also Frozen Food Express v. United States*, 351 U.S. 40, 44 (1956) (determination that a commodity is not exempt from the Act’s requirements subjects the regulated to liability and determines rights and obligations that “touches the vital interests of [the regulated] and sets the standard for shaping the manner in which an important segment of the [regulated community’s] business will be done.”).¹⁶

¹⁶ *See also Gen. Elec. Co.*, 290 F.3d at 380 (final action “on its face purports to bind both applicants and the Agency with the force of law”); *Barrick Goldstrike Mines*, 215 F.3d at 48 n.3 (rejecting EPA arguments that rule was not ripe because it “merely explained EPA’s current view of how the statutory and regulatory requirements ... apply to the metal mining industry and *do[es] not impose any binding new requirements*”) (emphasis added).

C. The Possibility of Case-by-Case Guidance on Whether a Particular Activity Meets the Agencies' Illegal Definition of Incidental Fallback Does Not Vitiolate Appellants' Harm.

As a final attempt to discredit Appellants' hardship, the Agencies lamely assert that earth-movers can seek guidance from their local Corps office: "Appellants have the opportunity to consult with the Corps of Engineers regarding whether their planned activities will require a permit, and they may challenge the Corps' determinations by appealing any final permit decision or raising a defense in an enforcement action." Gov't Br. at 20. The advice to seek counsel reinforces the breadth and immediacy of the rule. "[A]nyone proposing projects which, for example, involve earth-moving activities ... [is urged to] contact the Corps well in advance...." 66 Fed. Reg. 4568. This "opportunity" cannot right the Agencies' illegal assertions of authority and in no way minimizes the genuine harm caused by this Rule.

D. Where No Institutional Interests Counsel Deferral, Lack of Hardship Cannot Tip the Balance Against Judicial Review.

Tulloch II must be reviewed now because it provides legal standards that, if not complied with, subject earth-movers to civil or criminal liability. See *Ohio Forestry*, 523 U.S. at 733. The *Ohio Forestry* Court distinguished between the amorphous plan before it and "agency regulations ... [that] force immediate compliance through fear of future sanctions." *Id.* (citing *Abbott Labs* and *CBS*) (noting that both cases were ripe because the challenged rules required compliance, at substantial economic costs, through risk of severe civil or criminal sanctions). Even if the Court finds that delay in review causes little hardship, when there are no "significant agency or judicial interests militating in favor of delay, [lack of] hardship cannot tip the balance against judicial review." *Consol. Rail Corp. v. United States*, 896 F.2d 574, 577 (D.C.Cir. 1990). This principle flows from the presumption of reviewability that pervades the ripeness inquiry and reinforces a primary function of the ripeness doctrine to prevent courts from

entangling themselves in agency policy and decision-making. See *Cont'l Air Lines v. Civil Aeronautics Bd.*, 522 F.2d 107, 128 (D.C.Cir. 1974).

Agencies may affect persons only to the extent authorized by the Constitution and acts of Congress. This is especially true where agencies purport to act upon the rights and obligations of citizens. Those rights are only protected through judicial review. Once the agency has finished its decision-making, as is the case here, its interest in postponed review is at an end. And, by necessary implication, the Court's interest in remaining free of entanglement is also at an end. Hence, "only upon a showing of [] clear and convincing evidence[] of a contrary legislative intent should courts restrict access to judicial review," *Dart v. United States*, 848 F.2d 217, 221 (D.C.Cir. 1988).¹⁷ The Supreme Court noted:

An agency is not an island entire of itself. It is one of the many rooms in the magnificent mansion of the law. The very subordination of the agency to judicial jurisdiction is intended to proclaim the premise that each agency is to be brought into harmony with the totality of the law, the law as it is found in the statute at hand, the statute book at large, the principles and conceptions of the 'common law,' and the ultimate guarantees associated with the Constitution.

Bowen, 476 U.S. 672 at n.3 (quoting Louis Jaffe, *Judicial Control of Administrative Action* (1965)).

This is a simple APA review of a final agency rule that governs the public now and that, by its own terms, injures Appellants by going beyond "additions." The issues tendered are fit for judicial review, and the balance of hardships in postponing review clearly weighs in Appellants'

¹⁷ The Supreme Court explained in *Bowen v. Michigan Academy of Family Services*, 476 U.S. 667, 672 n.3 (1986), the "strong presumption [in favor of judicial review of administrative action] finds support in a wealth of scholarly literature." (citing 2 K. Davis, *Administrative Law* § 9:6, p. 240 (1979) (praising "the case law since 1974" for being "strongly on the side of reviewability").

favor. The Agencies have failed to demonstrate why their Rule should be subject to a different standard of review.

CONCLUSION

The judgment should be reversed, and the matter should be remanded to the district court for further proceedings on the merits of Appellants' claims.

Respectfully submitted,



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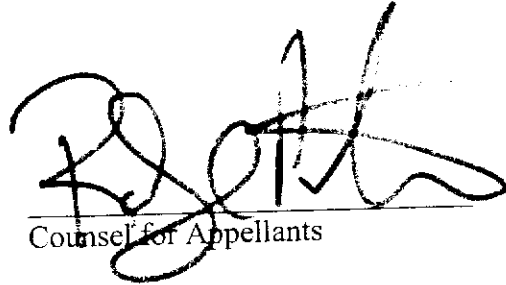


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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a)(7)(C) and Circuit Rule 32(a), the undersigned certifies that this Reply Brief of Appellants contains 6,868 words. It was prepared using 12 point Times New Roman Font.



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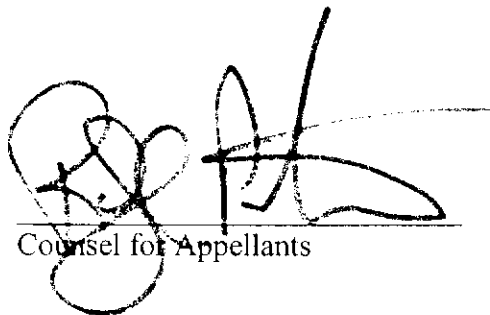
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