

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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DISTRICT OF COLUMBIA
2003 JUL 10 PM 7:00

NATIONAL ASSOCIATION OF HOME BUILDERS,)

Plaintiff,)

v.)

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

Defendants.)

NANCY M.
MAYER-WHITTINGTON
CLERK

Civil No. 01-274 JR
(and consolidated case
Civil No. 01-320 JR)

**REPLY MEMORANDUM OF INTERVENOR-DEFENDANTS
NATIONAL WILDLIFE FEDERATION, ET AL.,
IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT**

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**REPLY MEMORANDUM OF INTERVENOR-DEFENDANTS
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Intervenor-defendants National Wildlife Federation, North Carolina Wildlife Federation, and Sierra Club (collectively "NWF") submit this reply memorandum in support of their cross-motion for summary judgment. Plaintiffs' own characterization of their claims confirms that those claims fail to overcome the presumption against ripeness of facial challenges to regulations, and that plaintiffs lack Article III standing. If the Court reaches the merits, it should rule against plaintiffs, who have failed to make the showing necessary for a successful facial challenge. Moreover, plaintiffs' interpretation of the Clean Water Act to allow the unregulated damage and destruction of wetlands and streams around the nation by massive earthmoving activities is refuted by the Clean Water Act's language and history as well as by binding precedent of the D.C. Circuit, corroborated by decisions of other courts.

I. PLAINTIFFS' CLAIMS ARE NOT PROPERLY BEFORE THE COURT.

Plaintiffs' attempts to justify why their claims are properly before the Court utterly ignore the most basic feature of the Clean Water Act. Specifically, the Act broadly prohibits (in § 301(a), 33 U.S.C. § 1311(a)) "the discharge of any pollutant by any person," but allows (in §§ 402 and 404, 33 U.S.C. §§ 1342 and 1344) exemptions from that prohibition. As one of those exemption provisions, § 404(a) provides that the Secretary of the Army "may issue permits ... for the discharge of dredged or fill material."

Plaintiffs insist that the rule under review is only a § 404 rule. National Association of Home Builders ("NAHB") Reply at 9; National Stone, Sand and Gravel Association ("NSSGA") Reply at 5. If accepted, this characterization necessarily leads to the conclusion that, whatever happens in this case to a rule interpreting § 404's exemption from the § 301 discharge

prohibition, the § 301 prohibition itself will stand. As a consequence, plaintiffs' claims must fail under the threshold doctrines of ripeness and standing.

A. A Rule That Has No Impact on the Applicability of the Act's Discharge Ban Does Not Require Plaintiffs to Adjust Their Conduct Immediately, and Is Therefore Unripe.

Plaintiffs fundamentally misstate the applicable test concerning ripeness. They begin with the correct observations that the challenged rule is final agency action, and that a challenge to such a rule is a record review case that inherently raises only legal issues. NAHB Reply at 4-5 & n.10; NSSGA Reply at 9. However, from these premises they make the unwarranted leap to the conclusion that, because the issues are allegedly fit for review, that the hardship prong of the ripeness test need not be considered at all. NAHB Reply at 4, 7; NSSGA Reply at 6, 9.

This approach turns on its head the true ripeness test for facial challenges to regulations. As the Supreme Court recently held,

a regulation is not ordinarily considered the type of agency action "ripe" for judicial review under the Administrative Procedure Act (APA) 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.

Natl. Park Hospitality Assn. v. Dept. of the Interior, 123 S. Ct. 2026, 2030 (2003) (emphasis added; citation, internal quotation, and brackets omitted).

Facial challenges to regulations by their nature address agency actions that are final, and that are reviewed on an administrative record. By arguing that those inherent characteristics of facial challenges require a finding of ripeness, without need to consider hardship, plaintiffs essentially remove the "not" from the above quotation, and transform the presumptive non-ripeness of facial challenges into presumptive ripeness. The Court should decline plaintiffs' invitation to invert Supreme Court precedent.

Instead, the Court should follow *Natl. Park Hospitality*, which set forth two exceptions to the presumptive non-ripeness of facial regulatory challenges. Neither of those exceptions applies here.

First, *Natl. Park Hospitality* indicated that a facial challenge to a regulation may be ripe where "a statutory provision provid[es] for immediate judicial review." 123 S. Ct. at 2030. However, plaintiffs vigorously insist that the challenged rule is not within the scope of the Clean Water Act provision (§ 509(b)(1), 33 U.S.C. § 1369(b)(1)) that provides for prompt review of specified agency actions. Specifically, although § 509(b)(1) provides for court of appeals review of EPA's action in approving or promulgating "any effluent limitation or other limitation under section 1311," plaintiffs insist that the challenged rule does not meet that description. Specifically, they argue that the rule (1) is neither an "effluent limitation" nor an "other limitation," and (2) was not promulgated "under section 1311 [i.e., 301]," but rather under § 404 alone. NAHB Reply at 9-10; NSSGA Reply at 4-5. Accordingly, by plaintiffs' own characterization, the first *Natl. Park Hospitality* exception does not apply.

Second, *Natl. Park Hospitality* held that a facial challenge to a regulation may be ripe if the regulation is "a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately." 123 S. Ct. at 2030. Initially, plaintiffs have not explained how the challenged rule, which interprets a statutory phrase, can be considered a "substantive" rule. *See* NWF 5/1/03 Mem. at 8.

Even if the rule is substantive, however, it still does not require plaintiffs to adjust their conduct immediately. Certainly, the § 301(a) discharge ban requires the regulated community to adjust its conduct, by providing that "the discharge of any pollutant by any person shall be unlawful." (Emphasis added.) However, by plaintiffs' own characterization, that ban is not at

issue here, because the challenged rule implements only § 404. Plaintiffs have not and could not explain how § 404 -- and the challenged rule implementing § 404 -- require the regulated community to adjust its conduct beyond the adjustment already required by the § 301 prohibition.

To the contrary, far from showing that the rule requires any such adjustment, plaintiffs argue that the rule "does not establish an effluent limitation or any other limitation," NAHB Reply at 9 (emphasis added; internal quotations omitted), and indeed "is not a rule that prohibits or constrains the discharge of dredged material." NSSGA Reply at 5 (internal quotations omitted). A rule that establishes no limitation, and no constraint on discharge, cannot require the adjustment in conduct necessary to support a finding of ripeness under the *Natl. Park Hospitality* test.¹

B. A Rule That Has No Impact on the Applicability of the Act's Discharge Ban Does Not Cause Injury that Is Traceable to the Rule, and Redressable By Setting Aside the Rule.

As indicated above, plaintiffs insist that the challenged rule implements only § 404, not § 301. Thus, to the extent plaintiffs are prohibited from redepositing dredged material in U.S. waters, that prohibition -- and any injury it causes -- are traceable to § 301(a), not to the challenged rule. Moreover, a judgment overturning the challenged rule would not redress

¹ Elsewhere in their replies, plaintiffs claim that the Rule "regulates [plaintiffs] beyond statutory additions," NAHB Reply at 10 n.28, and "provides a jurisdictional definition of 'discharge' that is used to force Plaintiffs into the section 404 permitting process." NSSGA Reply at 4 n.5. These claims fundamentally conflict with plaintiffs' own positions quoted in the text *supra*. Moreover, if the Rule did have regulatory effects of the kind plaintiffs claim, those effects would necessarily flow from § 301(a), which is the provision of the Act that bars discharge without a permit -- not from § 404, which establishes an exemption from the § 301(a) discharge ban. Thus, if the Rule did have such regulatory effects, it would necessarily constitute an "effluent limitation or other limitation under section 1311 [301]" within the meaning of the Act's judicial review provision, § 509(b)(1) (emphasis added), and this Court would lack jurisdiction. NWF 5/1/03 Mem. at 3-7.

plaintiffs' alleged injury. Specifically, because the rule implements only § 404, a judgment vacating it would leave undisturbed the § 301(a) ban on discharge. Accordingly, under their own characterization of the rule, plaintiffs lack standing to challenge it. *See* NWF 5/1/03 Mem. at 9 (citing caselaw holding that traceability and redressability are required components of Article III standing).

II. UNDER PRECEDENT GOVERNING FACIAL CHALLENGES, PLAINTIFFS' CLAIMS MUST FAIL ON THE MERITS.

Even if plaintiffs' claims surmount the threshold requirements of ripeness and standing, those claims should still be rejected on the merits, under the standards governing facial challenges. Specifically, plaintiffs fail to satisfy either of the two facial challenge standards set forth by the D.C. Circuit in *Amfac Resorts v. U.S. Dept. of the Interior*, 282 F.3d 818, 827 (D.C. Cir. 2002) (emphasis added), *vacated in part on other grounds sub nom. Natl. Park Hospitality Assn. v. Dept. of the Interior*, 123 S. Ct. 2026 (2003).

Under the stricter "*Salerno*" standard, a facial challenge must fail if the rule "is not invalid in all its applications." *Id.* (emphasis added). Under the more lenient "*NCIR*" standard, a facial challenge must fail if the rule "is invalid in only some of its applications." *Id.* (emphasis added).

NWF's opening memorandum noted that plaintiffs had met neither the *Salerno* nor the *NCIR* standard, because plaintiffs' opening memoranda had not pointed to a single fact pattern in which the 2001 Rule would require a permit, but the Act would not. NWF 5/1/03 Mem. at 10. In their memoranda replying to NWF, plaintiffs still have failed to point to a single such fact pattern. Accordingly, their facial challenge must fail.

Plaintiffs' arguments seeking to avoid this result must be rejected.

A. The Court Should Reject NAHB's Invitation to Ignore Applicable Precedent Governing Facial Challenges.

NSSGA concedes that the facial challenge tests set forth in *Amfac* govern here. NSSGA Reply at 12 ("[a]s NWF correctly notes," *Amfac* recognized that "two competing tests have emerged to test the sufficiency of a facial challenge"). However, NAHB argues that those tests should not apply. NAHB Reply at 10-12. NAHB's arguments rest on a fundamental mischaracterization of *Amfac* and other precedent, and must be rejected.

First, NAHB argues that the facial challenge tests apply only to constitutional facial challenges, not statutory ones. NAHB Reply at 10. To the contrary, *Amfac* expressly considered and rejected this precise argument. In particular, *Amfac* recognized that plaintiffs' facial attack "is not ... on the basis that the regulation is unconstitutional," but rather that it "conflicts with § 415 of the 1998 Act." *Amfac*, 282 F.3d at 826 (emphasis added). Nonetheless, the D.C. Circuit noted that Supreme Court precedent had found facial challenge principles applicable to both constitutional and statutory claims. *Id.* (quoting *Reno v. Flores*, 507 U.S. 292, 301 (1993), in which the Supreme Court had held facial challenge principles applicable "to both the constitutional challenges and the statutory challenge") (emphasis added; citations omitted).

Second, NAHB attempts to invoke the D.C. Circuit's decision in *National Mining Assn. v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998), as a basis for avoiding facial challenge principles. NAHB Reply at 11-12. But *Amfac* -- which was decided after *National Mining* -- carefully considered *National Mining* and nonetheless decided that facial challenge principles do apply to statutory challenges. 282 F.3d at 828-30, 833. That holding is binding precedent here.

Third, noting that *Amfac* discussed both the *Salerno* and *NCIR* tests, NAHB suggests that the *Amfac* Court "ultimately comes to no conclusion whether either test applies or, if so, how

they would apply." NAHB Reply at 11 (emphasis added). To the contrary, while *Amfac* reserved the question whether the stricter *Salerno* test applies, it clearly held that -- at a minimum -- a facial challenge must fail if it does not meet the more lenient *NCIR* test. In particular, *Amfac* noted that it was "unnecessary for us to answer" whether *National Mining* was still good law, because *National Mining* "dealt only with the no-set-of-circumstances formulation of *Salerno*," and "did not mention *NCIR*." 282 F.3d at 827 (emphasis added). Consistent with this analysis, *Amfac* proceeded to use the *NCIR* test to reject not just one, but two of plaintiffs' facial challenges.

As to one of those challenges, plaintiffs pointed to circumstances they claimed rendered the regulation unlawful as to "some" situations. *Id.* 828. The D.C. Circuit rejected this argument, holding that "far more is demanded before a regulation may be declared facially invalid." *Id.* (emphasis added). Initially, the Court noted that, under the stricter *Salerno* test, the challenged regulatory provision "must of course be sustained on its face because there are circumstances in which applying the regulation would not be inconsistent with § 415 of the 1998 Act." *Id.* The Court went on to hold that, "[e]ven under the more relaxed standard of *NCIR*, it is not enough that some contracts" might be treated unlawfully by the regulation. *Id.* (internal quotations omitted; emphasis in original). *Accord, id.* 829 ("the possibility that one or some concessioners" might be treated unlawfully by the regulation "is not a sufficient basis for holding [the challenged regulatory provision] invalid on its face") (emphasis added).

As to another facial challenge, the Court noted that "the parties quarrel about hypothetical projects," and concluded that "on the face of the regulations, the most we can imagine is that in some applications -- depending on how the Park Service administers the LSI regulations -- there

may be a conflict with the statute." *Id.* 832-833 (emphasis added). However, "[t]hat is not a sufficient basis for holding the regulations unlawful on their face." *Id.* 833 (emphasis added).²

Given that the *Amfac* Court did not simply endorse facial challenge principles in the abstract, but actually used those principles to adjudicate the facial challenges before it, there is no merit to NAHB's attempt to cast doubt on whether or how those principles apply. To the contrary, because neither NAHB nor NSSGA has identified any fact patterns in which faithful application of the 2001 Rule would exceed the agencies' statutory authority, their challenge is weaker than that of the *Amfac* plaintiffs, who had at least pointed to "some" allegedly unlawful applications of the regulations challenged there.

Fourth, NAHB argues that facial challenge principles should be rejected as contrary to "the presumption of review of agency action and the APA's specific provisions for review of final agency action." NAHB Reply at 10-11. *Accord, id.* 11 (application of facial challenge principles would "render the APA and the presumption of reviewability empty vessels"). NAHB overlooks Supreme Court precedent holding that the presumption is not for facial reviewability of regulations, but against such reviewability. *See* p. 2, *supra*. In any event, facial challenge principles do not represent a denial of judicial review, but rather prescribe how such review is to be conducted. Given the broad-ranging nature of the relief sought in a facial challenge (*i.e.*, the striking down of an entire regulation), the cautious approach reflected in *Amfac* is warranted.

In any event, whether or not NAHB finds that approach too burdensome, those burdens were expressly recognized by *Amfac*, 282 F.3d at 827 (either the *Salerno* or *NCIR* tests "may

² As the quotations in the text make clear, NAHB is simply wrong in asserting that *Amfac* only addressed a claim about "one unlawful application." NAHB Reply at 11 n.31 (emphasis in original). To the contrary, *Amfac* held that even "some" unlawful applications are insufficient to warrant facially invalidating a rule, 282 F.3d at 828-29, 833, and that "far more" is required for a successful facial challenge. *Id.* 828.

pose potential problems for judicial review of agency regulations"), which nonetheless held that statutory facial challenges must at a minimum meet the *NCIR* test. *Id.* 828, 833. In so doing, *Amfac* recognized that an unsuccessful facial challenger is not without other remedies: specifically, such a challenger can mount an as-applied challenge. *Id.* 827 (consequence of facial challenge principles "may be that petitioners would have to make their challenge in another circuit and in another setting, in defense of an enforcement action for instance"). While NAHB may disagree with *Amfac*'s approach, that decision represents binding precedent in this Circuit.

B. Plaintiffs' Facial Challenge Fails Even the More Lenient *NCIR* Test.

As was the case in *Amfac*, this Court need not decide whether *Salerno* or *NCIR* governs, because -- even under the more lenient *NCIR* test -- plaintiffs' facial challenge must fail. Notwithstanding repeated opportunities to do so, plaintiffs have failed to identify a single fact pattern in which the 2001 Rule regulates redeposits that are beyond the agencies' statutory authority.

Plaintiffs' arguments that they satisfy facial challenge principles must be rejected.

First, plaintiffs invoke *National Mining*'s observation that "*faithful* application [of the 1993 Rule] would carry the agency beyond its statutory mandate." 145 F.3d at 1408 (emphasis in original), *quoted in* NAHB Reply at 12-13, NSSGA Reply at 13. This argument ignores key differences between the 1993 and 2001 Rules. While the 1993 Rule broadly regulated "any" redeposit of dredged material, and contained no exemption for incidental fallback,³ the 2001 rule preserves 1999 language that deleted the word "any" before "redeposit" and added an express exemption for incidental fallback. 64 Fed. Reg. 25123 (May 10, 1999). Thus, the broad *per se*

³ See p. 13 & n.9, *infra* (quoting 1993 Rule).

categorical applicability of the 1993 Rule reviewed in *National Mining* is absent from the rule challenged here.

Second, NAHB and NSSGA note that the *National Mining* Court performed an "incremental" analysis designed to identify the additional activities regulated by the 1993 Rule that were not regulated by that rule's predecessor. NAHB Reply at 12-13; NSSGA Reply at 12-13. They argue that a similar incremental analysis performed here would lead to the conclusion that the incremental effect of the 2001 Rule is unlawful. *Id.* The argument must be rejected. Neither NAHB nor NSSGA has identified any fact pattern that would be regulated under the 2001 Rule, that could not have been regulated under its predecessor, the 1999 initial remand rule.⁴

Other than incidental fallback, the 1999 Rule did not categorically exempt any forms of redeposit -- whether associated with "earthmoving" or any other activity -- from regulation.⁵ Instead, the 1999 Rule -- like the 2001 Rule -- left to case-by-case determination which redeposits are included and which excluded. 64 Fed. Reg. 25121 (May 10, 1999). In short, because plaintiffs have identified no incremental fact pattern regulated by the 2001 Rule that was not subject to regulation under the 1999 Rule, *a fortiori* they have identified no unlawful incremental fact pattern.

⁴ The 1999 Rule was upheld by this Court against NAHB's challenge in *American Mining Congress v. US Army Corps of Engineers*, 120 F. Supp. 2d 23 (D.D.C. 2000), and is not subject to challenge here.

⁵ *Cf.* NAHB Reply at 13 (erroneously claiming that the 2001 Rule expanded regulation of "earth-moving"); NSSGA Reply at 13 (same).

Finally, NSSGA's claim that the 2001 Rule establishes a "presumption" (NSSGA Reply at 13) ignores the language of the Rule indicating that no such presumption was intended,⁶ and even if true would not be a basis for facially invalidating the Rule. As the D.C. Circuit recently held in rejecting a facial challenge to a rule:

The FCC's rule adopting a presumption for duct space is not facially invalid. The rule merely establishes a rebuttable presumption. The possibility that a utility can present information showing that an attached wire or cable occupies more than half of the duct space makes it clear that the rule is not facially unreasonable.

Southern Co. Services v. FCC, 313 F.3d 574, 584-85 (D.C. Cir. 2002). *Accord, id.* 581 ("The FCC's decision to use rebuttable presumptions is neither inherently unlawful nor facially unreasonable.").

C. Plaintiffs' Extra-Record Declarations Are Not Properly Before the Court for Purposes of Adjudicating the Merits of Plaintiffs' Facial Challenge.

Plaintiffs continue to rely on extra-record declarations to support the merits of their facial challenge. For example, responding to NWF's argument that plaintiffs have failed to meet the standards governing facial challenges, NAHB cites an extra-record declaration, claiming that "[t]he facts in that declaration are undisputed and are, therefore, admitted." NAHB Reply at 3 n.2. Those declarations on their face identify no fact pattern in which the 2001 Rule would regulate beyond the agencies' statutory authority. As a threshold matter, however, they are not properly before the Court in adjudicating the merits of this facial challenge. *See* NWF 5/1/03 Mem. at 10 n.6 (quoting *Amfac*, which ruled extra-record affidavits inadmissible in a facial challenge). Indeed, elsewhere in its reply NAHB itself insists that this case presents "a pure question of law that requires no factual development," and that "review of any necessary facts would be limited to the administrative record." NAHB Reply at 5 & n.10 (emphasis added).

⁶ *See* NWF 5/1/03 Mem. at 19 (noting that the 2001 Rule establishes no presumption).

D. Plaintiffs Have Stated No As-Applied Challenge, and In Any Event Such a Challenge Could Not Justify the Broad Facial Relief Plaintiffs Have Requested.

Perhaps recognizing the weakness of their facial challenge to the 2001 Rule, plaintiffs suggest that they wish to pursue an as-applied challenge.⁷ Plaintiffs have stated no such challenge, however. Their summary judgment motions (like their complaints) challenge no specific agency decision applying the rule, but rather take aim at the rule itself. Indeed, until plaintiffs point to a specific agency implementing decision they claim is unlawful, an as-applied claim (even assuming *arguendo* that plaintiffs have stated one) would be unripe. *See, e.g., Southern Co.*, 313 F.3d at 582 (dismissing as-applied challenge to regulation on ripeness grounds: "Absent a live controversy regarding a particular application of the presumptions, petitioners' challenges to the presumptions as applied are unfit for review.") (emphasis added). *Accord, id.* 585.

Even if the Court were to find that plaintiffs had stated an as-applied challenge and that such a challenge were ripe, the relief requested by plaintiffs would be improper. Plaintiffs have not asked the Court to overturn a particular agency decision applying the 2001 Rule, but have asked the Court to set aside the 2001 Rule itself.⁸ That is facial-challenge relief that cannot be granted in an as-applied challenge.

⁷ NSSGA Reply at 14 (claiming that its members have suffered injuries that "provide NSSGA with standing to challenge the Rule on an 'as applied' basis"), 11 (claiming that plaintiffs "clearly satisfy the requirements for an as applied challenge") (capitalization omitted); NAHB Reply at 13 n.35 (claiming that NAHB's members are "similarly situated to the concessioners in *Amfac* who were permitted to challenge the rule 'as applied' to their contracts").

⁸ NAHB's proposed order accompanying its motion for summary judgment asks this Court to order that the 2001 Rule "is in excess of statutory authority and is therefore set aside, and the Agencies are hereby enjoined from applying or enforcing it henceforth." For its part, NSSGA joins in NAHB's motion, NSSGA 3/3/03 Mem. at 3 n.4, and advocates "setting aside the rule." *Id.* 3.

III. PLAINTIFFS' BROAD ATTACK ON REGULATION OF "EARTHMOVING" REPRESENTS AN IMPROPER ATTEMPT TO GAIN A THIRD BITE AT THE APPLE AFTER OVER A DECADE OF LITIGATION AND RULEMAKING.

Plaintiffs broadly complain that the 2001 Rule regulates "earthmoving." *See, e.g.*, NAHB Reply at 1, 13-25; NSSGA Reply at 1, 14-22. But the predecessors to the 2001 Rule -- the 1993 "Tulloch" Rule and the 1999 initial post-*National-Mining* remand rule -- both regulated earthmoving as well. Consideration of those rules illustrates why plaintiffs' current claims represent an improper attempt to obtain a third bite at the apple.

1993 Rule. The 1993 Rule broadly encompassed "any addition of dredged material into, including any redeposit of dredged material within, the waters of the United States." 58 Fed. Reg. 45035 (Aug. 25, 1993) (33 C.F.R. § 323.2(d)(1)) (emphasis added).⁹ Thus, by its terms, the 1993 Rule regulated "any" redeposit of dredged material -- which necessarily included the earthmoving-related redeposits which plaintiffs seek to exempt here. *Dept. of HUD v. Rucker*, 535 U.S. 125, 131 (2002) ("the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind'" (citation and internal quotations omitted)).

Nonetheless, in the D.C. Circuit proceeding addressing the 1993 Rule, plaintiffs focused their substantive arguments entirely on incidental fallback, and thus did not argue for exemption of any earthmoving deposits other than incidental fallback. *See* NWF 5/1/03 Mem. at 11-12. Tracking the plaintiffs' own formulation of their challenge to the 1993 Rule, the D.C. Circuit in *National Mining* held only that the agencies had exceeded their authority in regulating incidental fallback, and did not invalidate regulation of any other kind of earthmoving-associated

⁹ *Accord, id.* (33 C.F.R. § 323.(d)(1)(iii): "any 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") (emphasis added).

redeposits. 145 F.3d at 1405 ("We hold only that by asserting jurisdiction over 'any redeposit,' including incidental fallback, the *Tulloch* Rule outruns the Corps's statutory authority.") (emphasis in original).

1999 Rule. For its part, the 1999 Rule -- issued in response to the D.C. Circuit's judgment in *National Mining* -- amended the 1993 Rule to delete the word "any" before redeposit, and to exempt incidental fallback. 64 Fed. Reg. 25123 (May 10, 1999). While no longer requiring regulation of "any" redeposit, however, the 1999 Rule granted no categorical exemption to any form of earthmoving-associated redeposits other than incidental fallback. Under the 1999 Rule, therefore, the Corps and EPA had authority to regulate non-incidental-fallback redeposits -- including those associated with earthmoving -- on a case-by-case basis. Dissatisfied, plaintiffs challenged the 1999 Rule in this Court, seeking a broad exemption for earthmoving. The Court rejected their arguments, and upheld the 1999 Rule. *See* NWF 5/1/03 Mem. at 12-13.

In short, plaintiffs have had two previous bites at the apple to raise their earthmoving arguments. As to the 1993 Rule, they bypassed an opportunity to raise those arguments, while as to the 1999 Rule, they raised them and lost. After over a decade of litigation, this Court should not allow plaintiffs a third opportunity to raise these arguments.

IV. PLAINTIFFS' NARROW READING OF THE STATUTORY TERM "ADDITION" MUST BE REJECTED AS CONTRARY TO THE ACT AND JUDICIAL PRECEDENT.

Plaintiffs' arguments concerning earthmoving, assuming *arguendo* they are properly before the Court, should be rejected on the merits. Most of plaintiffs' arguments have previously been refuted in NWF's opening memorandum, and in the Agencies' memoranda (on which NWF generally relies, though not necessarily agreeing with every aspect). The following discussion briefly emphasizes a few points.

In particular, plaintiffs' proposed test for ascertaining whether there has been an "addition" is absurdly narrow and fundamentally in conflict with the Act and judicial precedent. For example, NAHB invites the Court to establish a blanket rule that "movement of pollutants within a waterbody is not an addition." NAHB Reply at 18. Instead, NAHB contends that an addition occurs only where there is "movement of pollutants between separate waterbodies" or "the removal of a pollutant from a waterbody and subsequent discharge of the pollutant back into that same waterbody." *Id.* 18-20 (emphasis in original).

NAHB cites no statutory basis for imposing this absurdly narrow interpretation of "addition" on the Agencies -- and there is none. To the contrary, the discharge of "dredged ... material," § 404(a) -- *i.e.*, material that by its very nature is drawn from U.S. waters -- inherently involves redeposit of that material to U.S. waters. NWF 5/1/03 Mem. at 13. There is no statutory basis for concluding that such redeposits are regulable only under the narrow circumstances proposed by NAHB.

Indeed, under NAHB's approach, the agencies would not even be able to regulate the fact pattern cited by the sponsor of the floor amendment that became § 404 -- *i.e.*, "moving spoil material from one place in the waterway to another, without the interjection of new pollutants." NWF 5/1/03 Mem. at 14 (emphasis added) (quoting Sen. Ellender). NAHB's test would disqualify this fact pattern, which involves neither movement to a different waterbody nor taking dredged material out of the water and dropping it back in. Moreover, NAHB's test would conflict with 1977 Amendments in which Congress confirmed its intent to regulate various earthmoving activities that involve displacing earth within a single waterbody, rather than moving it to a different waterbody or lifting it up and dropping it back. NWF 5/1/03 Mem. at 15-17.

NAHB's proposed test likewise conflicts with court precedent. A recent D.C. Circuit decision found that the movement of pollutants from the water above a dam to the water below it constitutes an "addition" and therefore a discharge. *Alabama Rivers Alliance v. FERC*, 325 F.3d 290, 293, 299-300 (D.C. Cir. 2003). While NAHB disagrees with the D.C. Circuit's analysis, NAHB Reply at 19 n.47, that is no basis for ignoring binding precedent. *See also* NWF 5/1/03 Mem. at 14 n.9 (discussing *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 174-75 (D.C. Cir. 1982), which held that the Act can permissibly be read to regulate releases from dams as discharges).¹⁰

Likewise, NAHB's theory fails to account for *National Mining* itself, which found that plowing and ditch maintenance can produce "actual discharges, i.e., additions of pollutants." 145 F.3d at 1405. NAHB's wildly implausible response is to claim that the D.C. Circuit meant "plowing material *from* one wetland and *into* a nearby but separate wetland." NAHB Reply at 16-17 (emphasis in original). This flight of fancy is uncorroborated by any language from *National Mining*, contradicts the common understanding of what plowing does (*i.e.*, pushes soil short distances), and in any event fails to address the D.C. Circuit's separate reference to ditch maintenance. Likewise, NAHB's proposed "distinct waterbody principle" (NAHB Reply at 19 n.47) is further refuted by *National Mining's* recognition that sidecasting, which involves moving excavated earth a short distance within a wetland (specifically, from a ditch to the side of the ditch) constitutes a regulable addition. 145 F.3d at 1402, 1407.

¹⁰ NAHB mischaracterizes *NWF v. Gorsuch* as holding that "no addition of a pollutant occurs" where water passes through a dam. NAHB Reply at 18. In reality, the D.C. Circuit noted the competing interpretations advanced by the parties, and held that "the language of the statute permits either construction." 693 F.2d at 175 (emphasis added).

Beyond the D.C. Circuit, NAHB's proposed test conflicts with a broad body of precedent from other courts. For example, the Eleventh Circuit held that tugboats had discharged pollutants when their propellers stirred up sediments that then settled on adjacent seagrass 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), *modified in part on other grounds*, 863 F.2d 802 (11th Cir. 1989). Under NAHB's theory, those redeposits would have been exempt, because they occurred in a single waterbody, and the sediments never left the water before being redeposited. Likewise, other appellate decisions extending back two decades have found the addition requirement triggered by activities that move earth short distances within a wetland. *See, e.g., Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897, 920-21, 923-24 (5th Cir. 1983) (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); *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000) (redistribution of excavated earth from inside a ditch to alongside the ditch constituted an addition); Corps/EPA 6/24/03 Mem. at 19 (citing additional caselaw from the Seventh and Third Circuits).

While the Act, its history and two decades of judicial precedent refute plaintiffs' narrow reading of "addition," it also bears emphasis that plaintiffs' reading cannot be reconciled with the Clean Water Act's fundamental purpose "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101(a), 33 U.S.C. § 1251(a). As the Supreme Court has recognized:

This objective incorporated a broad, systemic view of the goal of maintaining and improving water quality: as the House Report on the legislation put it, "the word 'integrity' ... refers to a condition in which the natural structure and function of ecosystems [are] maintained." H. R. Rep. No. 92-911, p. 76 (1972). Protection of

aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for "[water] moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." S. Rep. No. 92-414, p. 77 (1972).

United States v. Riverside Bayview Homes, 474 U. S. 121, 132-33 (1985).

The activities at issue in this case profoundly degrade -- and destroy -- the integrity of wetlands, streams, and other waters around the nation. As vividly described in the rulemaking, those activities involve use of heavy earthmoving equipment -- including bulldozers, bucket dredges, graders, and rippers -- to move massive quantities of dredged material around in wetlands and streams. 65 Fed. Reg. 50107, 50111-12 (Aug. 16, 2000). The Fourth Circuit has recognized that the impacts associated with this intensive activity -- which include massive deterioration or destruction of the waterbody's hydrology as well as release of toxic pollutants previously immobilized in soil -- are just as prevalent when dredged material is redeposited in the same waterbody where it was excavated, as when such material is redeposited in a different waterbody:

In deciding to classify dredged spoil as a pollutant, Congress determined that plain dirt, once excavated from waters of the United States, could not be redeposited into those waters without causing harm to the environment. Indeed, several seemingly benign substances like rock, sand, cellar dirt, and biological materials are specifically designated as pollutants under the Clean Water Act. *See* 33 U.S.C. § 1362(6). Congress had good reason to be concerned about the reintroduction of these materials into the waters of the United States, including the wetlands that are a part of those waters.

Wetlands perform a vital role in maintaining water quality by trapping sediment and toxic and nontoxic pollutants before they reach streams, rivers, or other open bodies of water. *See* Office of Technology Assessment, U.S. Congress, *Wetlands: Their Use and Regulation* 48-50 (1984). Given sufficient time, many (but not all) of these pollutants will decompose, degrade, or be absorbed by wetland vegetation. *See id.* at 48-49. When a wetland is dredged, however, and the dredged spoil is redeposited in the water or wetland, pollutants that had been trapped may be suddenly released. *See id.* at 49 ("Natural or man-made alterations of the wetland caused by lowering the water table, dredging, and the like, could mobilize large quantities of toxic materials."); *id.* at 124 ("A long-term effect of

the disposal of contaminated dredged spoil in or near wetlands is the potential bioavailability of toxic chemicals such as oil and grease, pesticides, arsenic, and heavy metals, when the sediments are resuspended periodically."]; [*United States v. Wilson*, 133 F.3d [251,] 273-74 [(4th Cir. 1997)] (op. of Payne, J.) (describing how sidecasting dredged material threatens to release pollutants contained in sub-surface soil). At the same time, the increased drainage brought about by the dredging may render the surrounding wetland unable to reabsorb and filter those pollutants and sediment (the very purpose of dredging is to destroy wetland characteristics). See 40 C.F.R. § 230.41(b) (explaining how discharge of dredged or fill material in wetlands "can degrade water quality by obstructing circulation patterns that flush large expanses of wetland systems, by interfering with the filtration function of wetlands, or by changing the aquifer recharge capability of a wetland"). Even in a pristine wetland or body of water, the discharge of dredged spoil, rock, sand, and biological materials threatens to increase the amount of suspended sediment, harming aquatic life. See *id.*; Office of Technology Assessment, *supra*, at 48; see also *Wilson*, 133 F.3d at 274 (op. of Payne, J.).

These effects are no less harmful when the dredged spoil is redeposited in the same wetland from which it was excavated. The effects on hydrology and the environment are the same. Surely Congress would not have used the word "addition" (in "addition of any pollutant") to prohibit the discharge of dredged spoil in a wetland, while intending to prohibit such pollution only when the dredged material comes from outside the wetland.

Deaton, 209 F.3d at 336 (emphasis added).

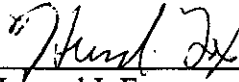
Plaintiffs' attempt to dismiss the Act's purposes as irrelevant (NAHB Reply at 15 n.41) must be rejected. "[T]he court must avoid an interpretation that undermines congressional purpose considered as a whole when alternative interpretations consistent with the legislative purpose are available." *United States v. Braxtenbrown-Smith*, 278 F.3d 1348, 1352 (D.C. Cir. 2002). Here such an alternate interpretation is not only available, but is required by the Act's language and history and applicable judicial precedent.

CONCLUSION

For reasons stated above and in NWF's opening memorandum, NWF respectfully requests that the Court grant NWF's cross-motion for summary judgment, and dismiss plaintiffs' complaints in their entirety.

DATED: July 10, 2003.

Respectfully submitted,



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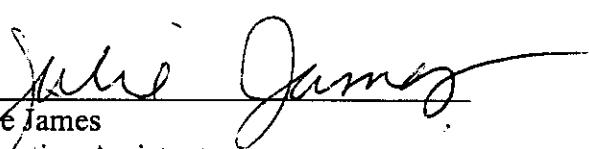
CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply Memorandum of Intervenor-Defendants National Wildlife Federation, *et al.*, in Support of Cross-Motion for Summary Judgment has been served by United States first-class mail this 10th day of July, 2003, upon the following:

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