ADVOCACY GROUP
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Office of Wastewater Management (4203M)
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

RE: Docket ID No. EPA-HQ-OW-2006-0141
National Pollutant Discharge Elimination System (NPDES) Water Transfers

Dear Mr. Arling,

On behalf of the National Association of Home Builders' (NAHB), I am pleased to submit the following comments on the U.S. Environmental Protection Agency's (EPA) proposed rule governing National Pollutant Discharge Elimination System (NPDES) Water Transfers that was published in the Federal Register on Wednesday, June 7, 2006 (today's proposal). NAHB represents more than 225,000 member firms involved in home building, remodeling, multifamily construction, property management, housing finance, building product manufacturing and other aspects of residential and light commercial construction. Because the proposal further refines what is considered a "discharge" and develops other concepts under the Clean Water Act, and because the Clean Water Act regulates many land development activities that home builders oftentimes are engaged in, our members have an interest in the outcome of this rulemaking.

The Clean Water Act (CWA or Act) regulates discharges into "the waters of the U.S." The very language and framework of the Act are designed to prohibit the input of pollutants except in certain circumstances. Those circumstances allow discharges to occur if conducted in compliance with a permit issued under section 402 or 404. Importantly, the Act emphasizes the need to satisfy two fundamental tenets – the activity must result in a *discharge* (i.e., an addition) of pollutants, and that discharge must be *into* a water of the United States. Activities that do not result in an addition of pollutants into a covered water, do not need permits.

The EPA is proposing to amend its regulations to specifically exclude water transfers from the Section 402 National Pollutant Discharge Elimination System (NPDES) permitting program. NAHB fully supports this proposal. Moreover, we believe that the agency should employ the same logic used in defense of today's proposal to similarly exclude the mere movement of soil in wetlands from the Section 404 permitting requirements when that recirculation does not result in the addition of material. EPA is also urged to define the term "meaningfully distinct."

I. The CWA Is Limited to Regulating *Discharges Into* Waters (i.e., additions)

Congress carefully laid out the tenets of the CWA in 1972 by declaring it unlawful to discharge pollutants into "the waters of the U.S." except if and when in compliance with a permit issued pursuant to section 402 or 404. A discharge occurs only when a pollutant is "added" "into" waters. Other activities that occur within or that impact waters, but which add no pollutants, are beyond the CWA's jurisdiction. Because today's proposal seeks to specifically exclude activities which do not add materials from the permitting requirements, NAHB finds the proposal sound and supportable.

a. The Clean Water Act's Pollution Control Framework Supports this Limit

The very structure of the CWA, as evidenced by its history and its implementation over the past thirty-plus years, supports its deliberate design as a pollution control statute. It authorizes the agencies to regulate discharges in a very specific way. First, it prohibits discharges. It then specifically allows the agencies to permit discharges under certain circumstances. The authority to permit otherwise prohibited discharges is the source of, and limit on, the agencies' regulatory authority under the CWA.

i. CWA History

Congress passed the CWA in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" by controlling discharges of untreated industrial and municipal wastes into the Nation's waterways. The Act uses a mix of federal financial assistance, incentives, and regulation to pursue its pollution abatement goals while, at the same time, emphasizing "the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan the development and use . . . of land and water resources . . . ."[1]

The regulatory permitting program is one of the Act's primary water pollution control components. Section 301 prohibits the "discharge" of any pollutant unless specifically permitted under the Act. The Act defines the term "discharge" as an "addition" of a pollutant to navigable waters "from" any "point source," and defines "point source" in terms of conveyance: "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." Finally, the definition of pollutant includes a variety of municipal, agricultural, chemical and biological spoils, wastes, and residues, garbage, rock, sand, and cellar dirt when "*discharged into* water" (emphasis added).[2]

Section 402 provides one exception to the discharge prohibition. It authorizes EPA and delegated States to issue permits for discharges of pollutants such as industrial and municipal waste. Section 404 is the other exception to the discharge prohibition. It authorizes the Corps of Engineers to issue permits for the "*discharge* of dredged or fill material *into* the navigable waters at specified *disposal* sites" (emphasis added).

[1] 33 U.S.C. §§ 1251(a)–(b).
[2] Id. § 1362(6).

The CWA does not regulate all activities in or impacting navigable waters, as that is not what it was designed to do. Rather, Congress selected in the Act a specific mechanism to address water pollution – namely, regulating the addition of pollutants. The statute nowhere regulates the movement of polluted water or the recirculation of materials that are already in the water.

ii. The Refuse Act Origins

The 1899 Refuse Act makes it unlawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind . . . into any navigable water of the United States.[3] The focus of the prohibition is on the dumping ("throw, discharge or deposit") of waste ("refuse") "from" a ship or shore "into" navigable water.

The CWA prohibition on the "discharge" of a pollutant "into" water can be traced to the 1899 Refuse Act. In the Report of the Senate Committee on Public Works, the committee explained that it had "extracted from the Refuse Act the basic formula . . . so that before any material can be added to the navigable waters authorization must first be granted by [EPA] under Section 402."[4] Indeed, the 1972 Conference Committee Report states, and the Act provides, that permits issued or applied for under the Refuse Act of 1899 are to be considered permits issued or applied for under section 402 of the CWA upon enactment.[5]

iii. The Regulatory Design: Control the Dumping of Wastes Into Navigable Waters.

Like its Refuse Act predecessor, the CWA defines "pollutant" in terms plainly directed to wastes, byproducts and other unwanted materials dumped into water. The CWA states: "the term "pollutant" means dredged *spoil*, solid *waste*, incinerator *residue*, *sewage*, *garbage*, sewage *sludge*, munitions, chemical *wastes*, biological materials, radioactive materials, *heat*, *wrecked* or *discarded* equipment, rock, sand, cellar dirt and industrial, municipal and agricultural *waste* discharged into water" (emphasis added). The definition nowhere suggests that discharge includes the recirculation of waterborne constituents inherent in the movement of water or soil movements caused by landclearing or excavation activities.

Congress clearly targeted the industrial and municipal entities that were dumping chemicals, sewage and other pollutants into the nation's waterways when it passed the CWA in 1972. The discharge prohibition and permitting program is specifically designed to control pollution by regulating and requiring the treatment of polluted effluent. In fact, section 301 is titled "Effluent limitations" and, after setting out the Act's general discharge prohibition, requires the development of effluent limitations for the treatment of pollutants discharged from point sources. Congress's intent to regulate the "disposal" of pollutants into water is reinforced

[3] 33 U.S.C. § 407 is one section of the Rivers and Harbors Act of 1899, 33 U.S.C. § 401 *et seq*.
[4] S. Rep. No. 92-414, at 76 (1971), *reprinted in* 2 Legis. Hist. at 1494.
[5] Conference Comm. Rep. No. 92-1236, at 139 (1972), *reprinted in* 1 Legis. Hist. of the Water Pollution Control Act Amendments of 1972, at 322 (1973); 33 U.S.C. § 1342(a)(4) and (5).

by the terms of section 404, which direct that permits for discharges of dredged and fill material specify the "disposal" site.[6]

The plain language selected by Congress in framing the discharge prohibition, permit exceptions and definitions of key terms within those provisions, clearly demonstrates its intent: to prohibit the discharge "into" navigable water of waste unless the source of the waste treats and is authorized to discharge the waste under a permit. It did not create a new scheme whereby a permit is required for the mere movement of water, whether polluted or not. Indeed, if Congress intended such a sweeping permitting requirement, one would expect explicit language to that effect in the statute and its legislative history. Prohibiting or requiring a permit for the mere movement of water and accompanying incidental changes in waterborne constituents goes far beyond the language or purpose of the Act. As the agency recognizes in discussing the scope of the proposed rule, "[I]f no pollutants are added, a permit would not be required."[7] We concur.

b. Today's Proposal is Consistent with Recent Court Decisions

The existence of a "discharge" of a pollutant is the critical, deciding factor in determining whether an activity can be regulated under the CWA. Thus, what constitutes a "discharge of a pollutant" is of paramount import. According to the CWA, the term "discharge of a pollutant," means ". . . any addition of any pollutant to navigable waters from any point source . . . ."[8] While commonsense may lead one to assert that to meet this definition, an activity must put material into a water, like much of the rest of the CWA, this definition has often been sent to the courts for interpretation. As of late, the highest court has ruled on this matter twice, confirming that, indeed, a discharge must result in the addition of materials for the activity to be regulable under the CWA. Based on these determinations, today's proposal is appropriate and correct.

i. The Supreme Court's *S.D. Warren* Decision Confirms that to Be a "Discharge of Pollutants," an Activity Must "Add" Pollutants.

The U.S. Supreme Court recently issued a decision clarifying the difference between "discharge" under section 401 of the CWA, and "discharge of pollutants" for purposes of sections 301, 402, and 404 of the Act.[9] The Supreme Court held that a "discharge" under section 401 is distinct from, and broader in meaning than, a "discharge of a pollutant" under sections 402 and 404: "the two sections are not interchangeable, as they serve different purposes and use different language to reach them."[10] The Court explained that it is "the understanding that something must be added in order to implicate § 402," which differentiates the provisions. Thus,

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[6] Congress's use of the term "specified disposal sites" is consistent with the common dredging practice of excavating material *from* one place and dumping it *into* another area—*viz.*, the "specified disposal site." *See* Sen. Debate on S. 2770 (1971), *reprinted in* 2 1972 Legis. Hist. at 1386-90 (colloquy among Senators Ellender, Muskie, and Stennis) (disposal of dredged material in open water is "essential since the Secretary of the Army is responsible for maintaining and improving the navigable waters of the United States") and 1 1972 Leg. Hist. at 177 (Senate Consideration of Conference Report on S. 2770) (EPA "should have the veto over the selection of the site for dredged spoil disposal and over any specific spoil to be disposed of in any selected site.").

[7] 71 Fed. Reg. 32,892 (June 7, 2006).

[8] 33 U.S.C. § 1362(12).

[9] *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 126 S. Ct. 1843 (2006).

[10] 126 S. Ct. at 1850.

for the CWA's permitting sections, 402 and 404, the Court determined, "[t]he triggering statutory term … is not the word 'discharge' alone, but 'discharge of a pollutant,' a phrase made narrower by its specific definition requiring an 'addition' of a pollutant to the water." *S.D. Warren* confirms that the permitting requirements of the CWA are only triggered by the "discharge of pollutants" that causes an "addition." Because, as the agency recognizes, "it is reasonable to interpret "addition" as not generally including the mere transfer of waters from one water of the U.S. to another,"[11] water transfers should not be subject to the NPDES permitting requirements.

ii. The Supreme Court's Logic in *Miccosukee* Indicates that Movement of Pollutants Within a Single Waterbody Is Not a Discharge.

Movement of pollutants -- dredged or fill material or anything else -- within a single waterbody, does not constitute a discharge of pollutants. This is because mere movement of earth -- including removing of earth -- does not add material. As the D.C. Circuit observed in the *National Mining* case:

> "the straightforward statutory term "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…. Congress could not have contemplated that the attempted removal of 100 tons of [material] could constitute an addition simply because only 99 tons of it were actually taken away."[12]

The Supreme Court's decision in *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians,* ("*Miccosukee*"), reinforces the holding of *National Mining*.[13] In *Miccosukee*, the Court considered whether water pumped from a canal to a water conservation area sixty feet away constituted an "addition" in the context of section 402 of the CWA. Observing that a "discharge of a pollutant" occurs when the water body receiving the water is "meaningfully distinct" from the water body that was the source of the water, the Court indicated that removing water and then returning it to the same water body does not constitute an "addition" of a pollutant under section 402. If the canal and the water conservation area are not "meaningfully distinct" water bodies, the pumping of water from one location to another would not "add" anything to the receiving water, and there is no discharge. Like pumping water in the same waterbody, movement of water and soil in the same waterbody does not trigger the CWA's permitting requirements -- simply because no pollutant is added in either situation.

Most recently, the Court's decision in S.D. War*ren* drove home its view that moving water within a single waterbody does not constitute an addition. Noting that in *Miccosukee*, "[it had] accepted the shared view of the parties that if two identified volumes of water are 'simply two parts of the same water body, pumping water from one into the other cannot constitute an 'addition' of pollutants,'" the Court explained that the effect of its decision in *Miccosukee* is that one can no longer argue that moving water within a waterbody constitutes an "addition."

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[11] 71 Fed. Reg. 32,981 (June 7, 2006).
[12] *National Mining*, 145 F.3d at 1404.
[13] 541 U.S. 95 (2004).

iii. Other Courts Have Similarly Ruled

Several of the U.S. Circuit Courts of Appeals have recognized that Section 402 permits are not required where there is no addition of a pollutant. For example, in both *National Wildlife Federation v. Gorsuch,*[14] and *National Wildlife Federation v. Consumers Power Co.*,[15] the D.C. and Sixth Circuits, respectively, concluded that in order to find the required "addition" that defines a "discharge," something must be introduced into navigable water from the outside world.

Similarly, the U.S. Court of Appeals for the Second Circuit in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*[16] concluded that the conveyance of water containing pollutants from one water body to another distinct, hydrologically unconnected water body constitutes an addition, and thus requires a permit. Yet, the court emphasized that mere recirculation, on the other hand, is not an addition:

> If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not "added" soup or anything else to the pot (beyond, perhaps, a *de minimis* quantity of airborne dust that fell into the ladle).[17]

Importantly, the *Catskill Mountains* court found that a permit was required where an addition was made, consistent with the comprehensive regulatory provisions of the CWA, but where water is simply recirculated and nothing is added, there is no discharge.

Merely taking water or soil out of a water body, and redepositing that same water or soil into the same water body, cannot constitute an "addition." CWA Section 301(a) is triggered by discharges. The test enunciated by the *Miccosukee* Court requires an "addition" of new constituents between "meaningfully distinct" water bodies. Collectively, these cases and today's proposed rule demonstrate that mere movement of a pollutant within a single waterbody is not by itself an addition. Because moving material within a single waterbody is not a discharge, a faithful application of Section 404 would similarly find that mere earth-moving activities within a single waterbody do not result in a discharge. NAHB urges EPA to finalize the proposal to exempt both water transfers and soil movement from the permitting requirements.

c. The CWA's Regulatory Reach is Limited to Actual Discharges

Like the requirement that there be an "addition" to a waterbody for an activity to fall under the mandates of the CWA, that addition must be actual, in fact, and not simply potential or presumed. As the *National Mining*, *S.D. Warren,* and *Miccosukee* Courts found, the mere movement of earth or material within a single waterbody does not add material. Today's proposal to exempt water transfer from the permitting requirements because water transfers do not result in discernable "additions" is true to the courts' interpretations and, thus, is fully supported. To remain wholly true to the court's assertions, however, NAHB submits that the

[14] 693 F.2d 156 (D.C. Cir. 1982).
[15] 862 F.2d 580 (6th Cir. 1988).
[16] 273 F.3d 481 (2d Cir. 2001).
[17] *Catskill Mountains*, 273 F.3d at 492.

Agency must refrain from its current policy of regulating virtually all earth-moving activities in waterbodies through the so-called "Tulloch II Rule,"[18] because all earth-moving activities do not result in actual discharges. NAHB, therefore urges EPA to rescind its Tulloch II rule.

Tulloch II declares that the Agencies (the Corps and EPA) "regard" all mechanized earth-moving activity in areas deemed to be waters of the United States as "resulting in a discharge of dredged material." Despite their efforts to characterize this language as a mere "expectation," the Rule establishes a presumption that effectively makes all mechanized earth-moving activities in such areas subject to the Agencies' regulatory control, whether or not they actually constitute an "addition." This result is unacceptable, as it allows the Agencies to regulate potential discharges, which is beyond their CWA authority. In practice, Tulloch II forces all earth-movers into the regulatory progress -- they must either obtain a permit or make a showing that only incidental fallback will occur, regardless of whether or not their activities result in an addition of pollutants.

The Agencies' Tulloch II scheme is remarkably similar to EPA's failed attempt to require all concentrated animal feeding operations ("CAFOs") to obtain a permit under section 402 of the CWA. EPA assumed that all CAFOs would result in a discharge and therefore required all CAFOs to be permitted under the CWA regardless whether there was actually a discharge. The Second Circuit struck EPA's rule because the "Clean Water Act gives the EPA jurisdiction to regulate and control only *actual* discharges - not potential discharges" (emphasis in original).[19] The Second Circuit's holding was plain, and must guide EPA whenever it enacts CWA permit regulations:

> In the absence of an *actual addition* of any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, … and no statutory obligation of point sources to seek or obtain [a CWA] permit in the first instance.[20]

Like CAFOs, because all earth-moving activities do not cause a discharge, EPA and the Corps are strongly urged to remove earth-moving activities that do not cause an "actual discharge" from the Section 404 permitting requirements.

d. The CWA Specifically Recognizes State Primacy

The CWA states, "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan the development and use . . . of land and water resources. . . .," and further specifies that "Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce, and eliminate pollution in concert with programs for managing water resources." [21] Thus, Congress decided that it was improper for the federal government to maintain jurisdiction over every wet puddle or trickle of water, or over every activity that may

[18] 66 Fed. Reg. 4550 (Jan. 17, 2001).
[19] *Waterkeeper Alliance, Inc. v. U.S. Envtl. Prot. Agency*, 399 F.3d 486, 505 (2d Cir. 2005).
[20] *Id.*
[21] 33 U.S.C. § 1251(b),(g).

affect a water or wetland. Instead, the Act mandates a cooperative approach to addressing pollution through water management programs, not the coercive control of the permitting program.

As the Supreme Court recognized in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, the Government's expansive interpretation of what may be regulated "would result in a significant impingement of the States' traditional and primary power over land and water use."[22] A plurality of the Court further admonished EPA in its recent *Rapanos* opinion, in declaring: "[T]he extensive federal jurisdiction urged by the Government would authorize the Corps to function as a de facto regulator of immense stretches of intrastate land – an authority the agency has shown its willingness to exercise with the scope of discretion that would befit a local zoning board. We ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority."[23]

If the agency has reservations over whether or not states take such delegation authority seriously, it only needs to look at the numerous water pollution control, wetlands, and resource protection statutes enacted by the states. For example, Connecticut regulates "any operation within or use of a wetland or watercourse involving removal or deposition of material, or any obstruction, construction, alteration, or pollution, of such wetlands or watercourses."[24] Similarly, the Washington law regulates "[T]he construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, gravel, or minerals; bulkheading; driving of piling; placing of obstructions; or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to this chapter at any state of water level."[25]

II. The Court(s) Have Suggested That Waters Must Be Meaningfully Distinct

In *Miccosukee*, the Supreme Court ruled that a "discharge of a pollutant" occurs only when the water body receiving the discharge (receiving water) is "meaningfully distinct" from the water body that conveyed the release (donor water). Given the import of this new term, NAHB suggests that the agency develop and adopt a "meaningfully distinct water body" test to determine the existence of a "discharge" for purposes of both Section 402 and Section 404.

While *Miccosukee* remanded the case back to the lower courts for further fact-finding to determine if the canal and basin at issue there were "meaningfully distinct water bodies," it did not declaratively state what facts would be helpful or necessary to flesh out that standard. Yet, *Miccosukee* does provide some indication of the kinds of facts that would be pertinent to determine the separateness of hydrographic features. This rulemaking provides EPA with an ideal opportunity to develop an administrative record as to how land owners and regulatory officials can discern the crucial difference between "meaningfully distinct water bodies." NAHB suggests that, to address this inquiry, relevant factors suggested in *Miccosukee* provide important guidance. EPA is encouraged to consider whether:

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[22] 531 U.S., at 174.
[23] Rapanos v. United States, 126 S.Ct. 2208, 224 (2006).
[24] Inland Wetlands and Watercourses Act, Connecticut General Statutes §§22a-36-22a-45.
[25] Washington State Water Pollution Control Acct, RCW §90.48.

- The soils underlying or surrounding the two water bodies are "extremely porous," enabling water to "flow[ ] easily between ground and surface waters. So much so that 'ground and surface waters are essentially the same thing.'" Conversely, it would be pertinent to know if water bodies are separated by impermeable berms, channels, or levees;

- The water bodies "share a common underlying aquifer."

- The boundaries between the water bodies are "indistinct."

- "[T]here is some significant mingling of the two waters."

- There is "flooding" between the two water bodies.

The jurisdictional *sine qua non* of the CWA is the addition of pollutants to a water of the United States. The distinction made by the Supreme Court that only those additions to meaningfully distinct waterbodies may be regulated is of great import, thus it is imperative that the agency distinguish meaningfully distinct waterbodies from those that are inseparably bound up from one another. As it develops an administrative record, surely EPA can develop and consider other factors that may be appropriate in determining whether waterbodies are "meaningfully distinct" in any given case. The point is that, given both the jurisdictional importance and ambiguity of the "meaningfully distinct waterbodies" concept, EPA should provide both its field officials and the regulated community with direction on how it interprets that term. If it does not, litigation will be unavoidable. The agency can save itself and land owners millions of dollars in time and money if it addresses the issue head-on, and provides its interpretation of "meaningfully distinct waterbodies" in the course of this rulemaking.

III. A Similar Exemption Should Be Provided For Certain Earth-Moving Activities Under Section 404

Given that numerous courts have determined that there must be an actual addition of materials in order for an activity to be regulated under the CWA, and that statutory construction of the Act does not allow it to maintain oversight over every activity that may impact a water or wetland, NAHB submits that, consistent with today's proposal, certain earthmoving activities should likewise be exempt.

a. Earthmoving Activities Do Not Always Result In A Discharge

The CWA Section 404's regulatory reach is limited to discharges of dredged or fill material. The activities typically regulated as resulting in a point source discharge include the use of dump trucks or other equipment to place soil, rocks, or other materials (i.e., "fill") into waters. While not explicitly included in the CWA's mandates, the agencies' policies regarding the regulation of dredging and excavation activities have and continue to evolve through judicial opinions.

For example, the U.S. Court of Appeals for the Fifth Circuit in *Avoyelles Sportsmen's League, Inc. v. Marsh*, found that "[t]he word 'addition,' as used in the definition of the term, 'discharge,' may reasonably be understood to include 'redeposit.'"[26] That a redeposit *can* be an addition, however, does not mean a redeposit is *always* an addition. In *Avoyelles*, the Fifth Circuit held that a large-scale mechanized landclearing project in Louisiana, where stumps and ashes from forested trees were placed in sloughs and depressions to level the land, constituted a discharge of fill material. In contrast, the U.S. Court of Appeals for the District of Columbia Circuit rejected an agency rule that would have treated all redeposits as "discharges."[27] The challenged rule would have regulated "*any* redeposit," but the court distinguished *Avoyelles* and held that the Agencies' rule "outruns [their] statutory authority, because "[T]here can be [no] addition of [a pollutant] when there is no addition of material."[28] In fact, not all redeposits are discharges because the CWA defines the term "discharge" as an "addition," and the straightforward statutory term "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. Because incidental fallback represents a net withdrawal, not an addition of material, it cannot be a discharge. . . . In fact the removal of material *from* the waters of the United States, as opposed to the discharge of material *into* those waters, is governed by a completely independent statutory scheme.[29]

Because of more recent court decisions, it is appropriate for the agency to declare that regulation of any "redeposit," such as those which do not result in "additions," is inappropriate, given the Supreme Court's holding in *Miccosukee*. *Miccosukee* instructs that a "discharge" occurs when there is an "addition" to a "meaningfully distinct" water body. "Redeposit" does not move water, or material, to a meaningfully distinct water body.[30] It simply returns the water or material to the same water body from which it originated. Therefore, redeposit cannot be an "addition" under *Miccosukee*.

Furthermore, the courts have recognized that other types of discharges do not result in an addition and therefore, are similarly nonregulable. For example, in *American Mining Congress* v. *United States Army Corps of Engineers,* the U.S. District Court for the District of Columbia ruled that the agencies' regulation of "incidental fallback" exceeded their authority under the CWA.[31] The court went on to note that ''incidental fallback'' occurs when a bucket used to excavate material from the bottom of a river, stream, or wetland is raised and soils or sediments fall from the bucket back into the water; the court further noted that ''fallback and other redeposits'' occur during mechanized landclearing, when bulldozers and loaders scrape or displace wetland soil as well as during ditching and channelization when draglines or backhoes are dragged through soils and sediments. In the preamble to the Tulloch Rule, the Corps noted that "it is virtually impossible to conduct mechanized landclearing, ditching, channelization, or

[26] 868 A.2d at 215 (quoting *Avoyelles*, 715 F.2d at 923).
[27] *Nat'l Mining Ass'n*, 145 F.3d 1399 (D.C. Cir. 1998).
[28] *Id.* at 1404, 1405.
[29] *Id.* (emphasis added) (citations omitted).
[30] *See, e.g., Nat'l MiningAss'n*, 145 F.3d at 1404 (holding that there can be no "addition" of a pollutant without an addition of material).
[31] American Mining Congress v. United States Army Corps of Engineers, 951 F.Supp. 267 (D.D.C. 1997) (''AMC''); aff'd sub nom, National Mining Association v. United States Army Corps of Engineers, 145 F.3d 1339 (D.C.Cir. 1998) (''NMA'').

excavation in waters of the United States without causing incidental redeposition (however small or temporary) in the process."[32] Likewise, when announcing their presumptive Tulloch II rule, the Agencies admitted that "the activities addressed in today's rule will not always result in a discharge."[33]

To further flesh-out the types of landclearing and earth-moving activities that do not need a permit, and, thus may be appropriately excluded from the Section 404 permitting requirements, passages from various Federal Register notices are instructive. In the preamble to the original 1993 Tulloch Rule the following mechanized activities as described as causing only incidental fallback:

- "[S]hearing blades … can move large amounts of debris, soil and roots if they are moved along the surface of the ground. Rippers and deep plows are pulled along below the soil surface to break up hard pans or other stiff subsoil. The arm which is attached to the bulldozer or loader drags through the soil surface, moving soil aside…."

- "As material is excavated from the waters of the United States, the addition or redeposit of dredged material occurs through soil or sediment spills, drippings, and moving or displacing of soils and sediments as the dredging equipment moves through the soil or sediments."

- "Because of the physical processes of soil movement inherent to the act of dredging, the use of bulldozers, draglines, dippers and backhoes, or other equipment of this kind will, except in limited situations, result in some addition or redeposit of dredged material. The addition or redeposit of dredged material occurs as soils and sediments are picked up and moved during the excavation process."

- "[W]hen a dragline or backhoe is dragged through soils or sediments, such soils and sediments are displaced and redeposited to various distances from the initial excavation point as the implement used in the excavation process gathers the dredged material. This same type of displacement and redeposition occurs as a bulldozer pushes sediments during a stream channelization project."

- "As the cutterhead [dredge] moves through the bottom, it pushes the sediment around. The addition or redeposit of dredged material occurs as the whirling of the cutter slings some of the dredged material away from the suction of the pump either as discrete clumps or in suspension and adds or redeposits it at various points from where the cutterhead moved through the bottom."

[32] 58 Fed. Reg. at 45,017.
[33] 66 Fed. Reg. at 4560.

- "Brushrakes … have tines which scrape below the ground level to gather and stockpile slash and loose rock; chunkrakes have bowl shaped blades … which cut into the ground and fluff the soil.[34]

Accordingly, at a minimum, EPA should declare that those activities listed above do not result in regulated "discharges" that require a permit. NAHB would welcome the opportunity to discuss with EPA other kinds of activities, typical in the land development process, which also fail to result in "actual discharges" and thus are not covered by the CWA's permitting requirements.

The common thread from *Miccosukee* and numerous decisions from the federal courts of appeals analyzing the jurisdictional purview of Sections 401, 402, and 404 of the CWA is that the CWA term "discharge" necessarily includes "addition." Mere movement within a single water body is not an "addition" and does not require a permit or water quality certification. Therefore, NAHB fully supports today's proposal and urges the agency to extend the same logic to exclude those earth moving activities that do not add materials from the section 404 permitting requirements.

Thank you for considering our views on this important proposal. If you have any questions, please contact me at 202-266-8538 or sasmus@,nahb.com.

Best Regards,

Susan Asmus

[34] 58 Fed. Reg. at 45,018-19.