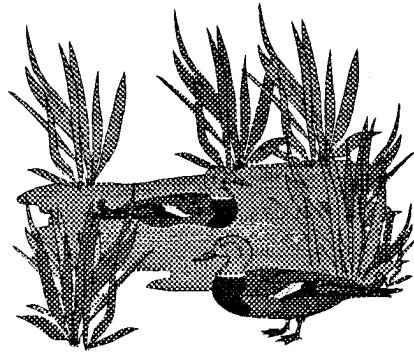


Dredging Up the Tulloch Rule

Much controversy surrounds the Army Corps of Engineers' authority to regulate "discharges" in the nation's wetlands. The Clean Water Act authorizes the Corps to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. §1344 (C.W.A. §404). The Act defines a "discharge" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §1362 (12). The controversy has arisen over what constitutes an "addition," especially given the realities of some dredging activities.

In 1993, the Corps adopted the "Tulloch Rule" which added to the definition of discharge "[a]ny addition, including redeposit, of dredged material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation." 33 C.F.R. §323.2(d)(1)(iii) (1993). The rule thus covered "incidental fallback" during dredging activities¹.

In 1998, in *National Mining Association v. U.S. Army Corps of Engineers*, the D.C. Circuit held that the Corps had overstepped its authority in the Tulloch Rule by defining "addition" to include incidental fallback. 145 F.3d 1399, 1404 (D.C. Cir. 1998). In striking down the Tulloch Rule, the court held that the "straightforward statutory term 'addition' [could not] reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back." *Id.* at 1404. The court noted that this definition simply did not fit



within Congress' framework of the Clean Water Act and that Congress was the proper body to increase protection of the wetlands. *Id.* at 1410.

In response to this court ruling, the Environmental Protection Agency and the Corps deleted the word "any" from the phrase "any redeposit" as well as expressly excluded "incidental fallback" from the definition of "discharge of dredged material." See 64 Fed. Reg. 25119-25123 (May 10, 1999) (codified at 33 C.F.R. §323.2(d)(1)(iii)). Additionally, in January 2001, the EPA and the Corps issued a final rule which would define "incidental fallback" in the regulation. See 66 Fed. Reg. 4549-4575 (January 17, 2001). However, this rule was one of President Clinton's administration's last acts and was therefore subject to President Bush's temporary hold on all such rules. Pending agency review, this rule was to become effective on February 16, 2001. See *id.*

The new rule would define incidental fallback as "the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United

States when such material falls back to substantially the same place as the initial removal." *Id.* Furthermore, although the agencies state that the new rule is not intended to shift the burden of proof to the regulated community regarding what constitutes a discharge subject to the Act, the rule states that "use of mechanized earth-moving equipment to conduct landclearing, ditching, channelization, in-stream mining or other earth-moving activity in waters of the United States [results] in a discharge of dredged material *unless project-specific evidence shows that the activity results in only incidental fallback.*" *Id.* (emphasis added).

Like the original Tulloch rule, this new rule will be subject to judicial interpretations. As the court in *National Mining* enunciated, the key issue will be whether or not the agencies have overstepped their authority under the Clean Air Act.

¹ It is important to note the distinction between "incidental fallback" and "sidecasting." "Sidecasting" is "the deposit of dredged or excavated material from a wetland back into that same wetland." *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000). Furthermore, unlike incidental fallback, sidecasting does not result in the dredged material being redeposited in substantially the same place as it was dredged. In *Deaton*, the Fourth Circuit held that "sidecasting is the discharge of a pollutant that violates the Act." *Id.* at 334.

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