

Army Corps Adopts Rule Limiting "Incidental Fallback" Exemption

The U.S. Army Corps of Engineers (COE) has issued a regulation to implement its interpretation that activities involving the re-deposit of soils and similar materials into a wetland must be presumed to require a wetlands dredge and fill permit unless it can be demonstrated that the project will comply with COE's definition of "incidental fallback."

The Federal Clean Water Act, Section 404, generally prohibits the discharge of dredged or fill material into waters of the United States without a permit from the COE or an approved State. The definition of "waters of the United States" is very broad and includes many wetland areas and streams.

Earlier this year the COE promulgated a rule intended to address a long-standing regulatory and judicial debate over the extent to which certain activities (mechanized land clearing, ditching, channelization, in-stream mining and other mechanized excavation activity) resulting in the fallback of materials into waters of the United States were subject to COE permitting requirements. The COE had promulgated a rule (known as the "Tulloch Rule") in 1993 which purported to interpret the Section 404 prohibition to include any addition, including any re-depositing of dredged material, (e.g., excavated material), that destroyed or degraded U.S. waters. Thus, almost any activity that could allow material to "fall back" into U. S. waters would be required to be permitted by the COE in advance. Even the crossing of a wetland by a bulldozer was viewed as giving rise to such fallback as earth adhered to the bulldozer's treads and fell back.

The Tulloch rule was the subject of litigation by the American Mining Congress, the National Mining Association and others who challenged the rule on the basis that it exceeded the COE's authority under Section 404 because it impermissibly regulated "incidental fallback" of material. This argument prevailed in court and the COE was enjoined from applying or enforcing the Tulloch Rule. The COE responded in 1999 by issuing a new rule modifying its definition of discharge of dredged material to exclude regulation of "incidental fallback" (the "1999 Rule").

The COE explained that the 1999 rule, which required a "case-by-case" assessment of proposed activities to determine whether they would give rise only to "incidental fallback" (and which, therefore, essentially required persons undertaking such activities to always submit to prior COE review or risk the

COE's hindsight determination that the activities were unlawful), was consistent with the courts' determination. COE viewed the courts as determining that "incidental fallback" was only that limited re-deposition of material which returned the material "virtually to the spot from which it came" or "substantially the same spot as the initial removal." As the COE also noted, one of the reviewing courts had stated that "incidental fallback" occurs when a bucket is used to excavate material and the material falls from the bucket back into the water, while observing, in contrast, that "fallback" occurs when bulldozers or loaders scrape or displace soil or when draglines are dragged through soils.

Although the National Association of Homebuilders and others challenged the 1999 Rule and asked that the COE be ordered to comply with the earlier injunction, the reviewing court did not do so and viewed the 1999 Rule as being in keeping with the earlier determinations.

In the meantime, in August, 2000, the COE proposed a rule to establish a rebuttable presumption that the activities first identified above would result in regulated discharges of material. As the COE then said "[a]bsent a demonstration to the contrary, the (identified activities) typically will result in more than incidental fallback and thus result in regulatable re-deposits of dredged material." This rule was hurried into effect on January 17, 2001, in the waning days of the Clinton administration. Although its implementation was delayed for 60 days by the Bush administration, it was allowed to become final and effective April 17, 2001.

Henceforth, the use of mechanized earth-moving equipment to conduct land clearing as well as the other activities identified in the 1999 Rule will be viewed as giving rise to regulated re-depositing, or fallback, of materials and subject to the requirement for a prior COE (or authorized State) permit before being undertaken unless project-specific evidence shows that the project will result in only incidental fallback of such materials into virtually the same location from which they were displaced.

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