

District Court Strikes Down Clean Water Act Tulloch II Dredging Rule

February 2, 2007

On January 30th, the United States District Court for the District of Columbia found that two federal environmental agencies had exceeded their statutory authority and invalidated the “Tulloch II” rule. The rule presumed that the use of “mechanized earth-moving equipment” would result in the discharge of dredged or fill material into waters of the United States and thus would require a permit pursuant to section 404(a) of the Clean Water Act (CWA). *National Ass’n of Home Builders v. U.S. Army Corps of Engineers*, No. 01-0274 (D.D.C. 2007). The district court also enjoined the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) from enforcing and applying the Tulloch II rule. The ruling makes clear that not all uses of mechanized earth-moving equipment may be regulated under the CWA.

Background

Section 404(a) of the CWA authorizes the Corps to issue permits for the discharge of “dredged or fill material” into the waters of the United States. Between 1986 and 1993, the Corps expressly excluded “*de minimus*, incidental soil movement occurring during normal dredging operations” from its definition of the discharge of dredged material.

In 1993, the Corps issued the “Tulloch I” rule eliminating the *de minimus* exception, thereby including in the definition of discharge incidental material – sometimes called “fallback material”- pushed or dropped into “waters of the United States” by mechanical excavating devices. In 1998, the U.S. Court of Appeals for the D.C. Circuit invalidated the Tulloch I rule, explaining that the Corps had exceeded its statutory authority by asserting jurisdiction over incidental fallback. *National Mining Assoc. v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998). The D.C. Circuit ruled that incidental fallback could not be regulated under the CWA, because it represents a net withdrawal, not an addition, of material, and as such is not a “discharge.” The court noted that it was not prohibiting the regulation of any redeposit, and suggested that the agencies modify the rule to draw a “bright line” between incidental fallback, which cannot be regulated under the CWA, and other redeposits, which can.

The Corps and EPA subsequently issued the Tulloch II rule in 2001. Under the Tulloch II rule, the agencies determined that the use of mechanized earth-moving equipment to conduct various excavation activities in the waters of the United States would result in a discharge of dredged material, unless project-specific evidence showed that the activity resulted in only incidental fallback. The Tulloch II rule defined incidental fallback as “the redeposit of small volumes of dredged material that is incidental to excavation activity in the waters of the United States when such material falls back to substantially the same place as the initial removal.”

The parties initially challenged the Tulloch II rule in 2001. The district court, however, initially dismissed the case in 2004 on the basis that it was not ripe for review. The D.C. Circuit subsequently overturned the dismissal order in 2006, sending the case back to the district court.

The Decision

The plaintiffs claimed that the Corps and EPA exceeded their authority under the CWA, specifically challenging two aspects of the Tulloch II rule: (1) the definition of “incidental fallback”; and (2) the statement of the Corp and EPA that the agencies “regard” that the use of mechanized earth-moving equipment to conduct various excavation activities will result in a discharge of dredged material *unless* project-specific evidence shows otherwise.

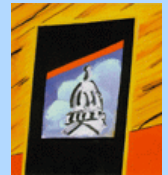
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Although the district court's decision was a short one, the implications of the decision are significant. In granting the plaintiff's motion for summary judgment, the district court held that the definition of "incidental fallback" improperly included a volume requirement. The court explained that the determination of whether a discharge is incidental fallback or redeposit, and thus subject to the CWA, should not be contingent on the quantity of material that is being disturbed. Rather, incidental fallback and redeposit should be distinguished by: (1) the time the material is held before being dropped to earth; and (2) the distance between the place where material is collected and the place where it is dropped.

The Court also ruled that the agencies should reconsider the statement that they regard the use of mechanized earth-moving equipment as resulting in a discharge of dredged material unless project-specific evidence shows otherwise, noting that the agencies cannot require project-specific evidence from projects over which they have no regulatory authority.

For Additional Information

For additional information on this case, please contact Steve Richardson, Sam Kalen, or any member of the firm's Environmental practice group at (202) 298-1800.

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