

Final conforming rulemaking addressing the definition of “discharge of dredged material” under the Clean Water Act

Summary: The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) (together, the "Agencies") are promulgating a final rule to amend a Clean Water Act (CWA) section 404 regulation that defines the term "discharge of dredged material." This action conforms the Agencies regulations to a court order invalidating the January 17, 2001, amendments to the regulatory definition (referred to as the "Tulloch II" rule). The rule responds to the court decision by deleting language from the regulation that was invalidated, which reverts the regulations to their previous state. The previous state of the regulations is found in the version that was promulgated in May 1999, which excluded but did not define "incidental fallback." This conforming rule acknowledges the status of the regulation following the 2007 decision and court order and therefore does not require soliciting public comment.

NAHB v. Corps (2007) Decision: The *NAHB v. Corps (NAHB)* decision and associated court order that the rulemaking addresses said that the Tulloch II rule violates the Clean Water Act because of the way the rule used volume to determine “incidental fallback.” *NAHB*, No. 01-0274 at 7, 10 (D.D.C. Jan. 30, 2007). The court stated in the 2007 decision that “[t]he difference between incidental fallback and redeposit is better understood in terms of two other factors:

- (1) the time the material is held before being dropped to earth and
- (2) the distance between the place where the material is collected and the place where it is dropped.” *Id.* at 7-8.

The court also criticized the rule for failing to specify exactly when mechanized land clearing would require a permit, since the Court of Appeals has made clear “that not all uses of mechanized earth-moving equipment may be regulated.” *Id.* at 9. The district court declared the Tulloch II rule to be “invalid” and enjoined the Agencies from enforcing the rule. *NAHB*, No. 01-0274 Order at 1 (D.D.C. Jan. 30, 2007).

The effect of the Rulemaking: Before the Tulloch II rule was promulgated in 2001, the regulations governing discharges of dredged material were last amended on May 10, 1999. The regulations in force following the 1999 amendments, therefore, have been reinstated by the court’s decision on the Tulloch II rule.

To accomplish this the rule removes virtually all changes to the definition of “discharge of dredged material” that were made by the Tulloch II rule and restores 33 CFR 323.2(d)(2) and 40 CFR 232.2 to the text as it existed immediately following the 1999 Rule amendments. This means that the definition of “incidental fallback” has been deleted from the regulation, as has the language indicating that the agencies “regard” the use of mechanized earth-moving equipment as resulting in a regulable discharge.

There is just one facet of the Tulloch II rule that is not being reversed by today’s rule. The Tulloch II rule *removed* a “grandfather” provision from the regulations that had exempted from 404 permit requirements a limited class of discharges. In issuing its decision in *NAHB*, the district court did not consider the merits of this provision because it was not at issue in the litigation. There is, therefore, no reason to believe that the court intended for the Agencies to *reinsert* this provision into the Agencies’ regulations when the court declared the Tulloch II rule “invalid.”