Revisions to the Clean Water Act Regulatory Definition of "Discharge of Dredged Material" Final conforming rule

Questions and Answers

What is the purpose of this rule?

This final rule responds to a court order issued as part of the *National Association of Homebuilders v. Corps* decision (D.D.C. 2007) invalidating the January 17, 2001, amendments to the Clean Water Act Section 404 regulatory definition of "discharge of dredged material" (referred to as the "Tulloch II" rule). The U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) are promulgating a joint final rule to amend this definition by conforming the Corps' and EPA's regulations to the language of the court's opinion by deleting language from the regulation that was invalidated.

What did the court's opinion specifically say about the Tulloch II Rule?

The ruling and associated court order came as the result of the case in the D.C. District Court, entitled *National Association of Homebuilders v. Corps*, (hereafter known as *NAHB*) (No. 01-0274 at 7, 10 (D.D.C. Jan. 30, 2007)). The resulting decision, issued on January 30, 2007, said that the Tulloch II rule violates the Clean Water Act because of the way the rule used volume to determine "incidental fallback." Incidental fallback was defined in the Tulloch II rule 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. Examples of incidental fallback include soil that is disturbed when dirt is shoveled and the back-spill that comes off a bucket when such small volume of soil or dirt falls into substantially the same place from which it was initially removed. (66 FR 4575) (amending 33 CFR 323.2(d)(2)(ii), and 40 CFR 232.2(2)(ii))."

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 D. C. Circuit Court of Appeals made clear in an earlier decision "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).

Since the court ruled the Tulloch II definition invalid, what definition of "redeposit of dredged material" is currently in effect?

The definition below excerpted from the May 1999 Rule addressing the definition of "redeposit of dredged material" is in effect since the court order declared the subsequent Tulloch II Rule invalid.

The changes made in this rulemaking remove those invalidated elements of the existing rule so as to revert the Corps' and EPA's regulations to the last unchallenged version, which was the 1999 Rule. Once the rule has been published the federal register, the relevant portion of EPA's regulations defining "redeposit of dredged material" will reflect the current state of practice, and will read as follows:

> (1) Except as provided below in paragraph (2), the term *discharge of dredged material* means any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States. The term includes, but is not limited to, the following:
> (i) The addition of dredged material to a specified discharge site located in waters of the United States;
> (ii) The runoff or overflow, associated with a dredging operation, from a contained land or water disposal area; and
> (iii) Any addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation.
> (2) The term *discharge of dredged material* does not include the following:
> (i) Discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill). These discharges are subject to section 402 of the Clean Water Act even though the extraction and deposit of such material may require a permit from the Corps or applicable State.
> (ii) Activities that involve only the cutting or removing of vegetation above the ground (e.g., mowing, rotary cutting, and chainsawing) where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material.
> (iii) Incidental fallback.
> 40 C.F.R. § 232.2 (Jul. 1, 1999) (Corresponding changes were also made to Corps regulations at 33 C.F.R. § 323.2(d)(1), (2) (Jul. 1, 1999).

If this rule is just reinstating an older rule, what changes are actually being made to the regulations?

Before the Tulloch II rule was promulgated in 2001, the regulations governing discharges of dredged material were last amended on May 10, 1999. Since the 2001 rule was invalidated by the D.C. District Court's ruling, the regulations in effect following the 1999 amendments have been reinstated by the court's decision invalidating 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 this final rule. The Tulloch II rule *removed* a "grandfather" provision from the regulations that had exempted from 404 permit requirements a limited class of discharges. See 33 CFR 323.2(d)(3)(iii) (1999) and 40 CFR 232.2(3)(iii) (1999). 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." Moreover, this "grandfather" provision expired – by its own express terms – in 1996, and it is the Agencies' view that this provision would not be meaningful if included in the regulations. Indeed, EPA received no comments on this provision when the Agency proposed to remove it from the CFR on August 16, 2000 (65 FR 50111, 50117), and it has been absent from the regulations since 2001.

How will regulators determine when a regulable redeposit has occurred?

Consistent with our CWA authorities and governing case law, the determination whether a particular redeposit of dredged material in waters of the United States requires a section 404 permit will continue to be done on a case-by-case basis, consistent with the May 1999 definition of "discharge of dredged materials."

Why is there no notice and comment period for this rule?

Under the Administrative Procedure Act (APA), 5 U.S.C. 553, agencies generally are required to publish a notice of proposed rulemaking and provide an opportunity for the public to comment on any substantive rulemaking action. Notice is not required, however,

> When the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. 5 U.S.C. 553(b)(3)(B).

This rule merely conforms the language in our section 404 regulations to the current status of those regulations after the *NAHB* case. The district court judgment invalidated the changes made to the regulatory definition of "discharge of dredged material" promulgated on January 17, 2001. By removing the invalidated definition of "incidental fallback" and the language indicating that the agencies "regard" the use of mechanized earth-moving equipment as resulting in a regulable discharge, these revisions conform the regulations to reflect the legal status quo in light of the district court's January 30, 2007, order in the *NAHB* case invalidating the Tulloch II rule. Therefore, pursuant to 5 U.S.C. 553(b)(3)(B), we find that solicitation of public comment is unnecessary.