

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF)
HOME BUILDERS, et al.,)
)
Plaintiffs,)
)
v.) Civ. Nos. 01-0274(JR)
) 01-0320(JR)
UNITED STATES ARMY CORPS)
OF ENGINEERS, et al.,)
)
Defendants,)
)
and)
)
NATIONAL WILDLIFE)
FEDERATION, et al.,)
)
Defendant-Intervenors.)
_____)

**AMICUS CURIAE BRIEF OF
PACIFIC LEGAL FOUNDATION
IN SUPPORT OF PLAINTIFFS**

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) have adopted a new rule defining the “discharge of dredged materials” under section 404 of the Clean Water Act (CWA). 66 Fed. Reg. 4550 (Jan. 17, 2001). This definition goes way beyond the statutory language and clear intent of Congress as interpreted by this Court and the D.C. Circuit. In effect, this new rule authorizes these Agencies to regulate any earth-moving activity in United States Waters, including wetlands. It is, therefore, invalid on its face and should be vacated.

ARGUMENT

I

THE NEW RULE DEFINING “DISCHARGE OF DREDGED MATERIAL” IS INVALID BECAUSE IT IMPERMISSIBLY SHIFTS THE JURISDICTIONAL BURDEN OF PROOF ONTO THE PUBLIC

The EPA and the Corps have the statutory duty to regulate the discharge of “dredged and fill material” into United States Waters under section 404 of the CWA. 33 U.S.C. § 1344. They are required, therefore, to determine when a discharge is subject to regulation. This is a jurisdictional determination that the Agencies cannot foist on the public. *See Arizona Cattle Growers Ass’n v. U.S. Fish and Wildlife Service*, 273 F.3d 1229 (9th Cir. 2001) (It would be improper to force ACGA to prove that the species does not exist on the permitted area, as the Fish and Wildlife Service urges, both because it would require ACGA to meet the burden statutorily imposed on the agency, and because it would be requiring it to prove a negative.). The Agencies tacitly acknowledge this responsibility (*see* 66 Fed. Reg.

4550 (Jan. 17, 2001)), but they have attempted to shift the jurisdictional burden of proof to landowners by adopting a presumption that the use of certain equipment is subject to federal regulation, unless it is proven otherwise:

The Corps and EPA regard the 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 as resulting in a discharge of dredged material *unless project specific evidence shows that the activity results in only incidental fallback*.

33 C.F.R. § 323.2(d)(2)(i); 40 C.F.R. § 232.2(2)(i) (emphasis added).

The Agencies claim that this paradigmatic example of a rebuttable presumption really doesn't shift the burden of proof to landowners because: "The Rule adds no new permitting requirements or procedural hurdles. Nor does it require any immediate action by Plaintiffs." *United States Combined Memorandum in Support of its Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motions for Summary Judgment* (Government's Memorandum) at 22. This is patently false. If the landowner does not prove to the satisfaction of government officials that the earth-moving equipment *does not* result in a regulable discharge, government officials will invariably conclude that the activity *is* subject to federal regulation.

In his article, *The Revised Definition of "Discharge of Dredged Material: Its Legality, Practicality, and Impact on Wetland Protection*, 9 *Env'tl. Law*. 187 (2002), William S. Pufko arrives at the obvious conclusion that despite the Agencies' denials, the final discharge rule is a rebuttable presumption that shifts the jurisdictional burden of proof to the landowner. *Pufko* at 237. Pufko notes the lengths to which the Agencies went to explain that they had done away with the rebuttable presumption that appeared in the proposed rule. *Id.* But, he observes: "Their shift from using the word "presumption" in

the proposed rule to “regard” in the final revised rule, however, should provide little assurance to the regulated community.” *Id.*

In contrast, the regulated community can have complete assurance that unless it provides rebuttal evidence, the Agencies will simply rely on their own information to determine jurisdiction consistent with their presumption that mechanized landclearing, ditching, channelization, and in-stream mining is subject to section 404 regulation. *Id.* According to Pufko, “[t]he trigger is the use of certain earth-moving equipment.” *Id.* Why? Because the Agencies have already determined that the use of certain earth-moving equipment will result in more than incidental fallback and is, therefore, subject to permitting. *Id.*

Pufko concludes, as he must, that “[d]espite the textual language, the final revised rule serves as a presumption in an ordinary and meaningful sense.” *Id.* “Thus, the diligent project proponent would be forced to rebut, presenting evidence showing that its activities result only in incidental fallback.” *Id.* But given the Agencies’ generic determination that earth-moving equipment does involve more than incidental fallback, Pufko is doubtful that any rebuttal evidence submitted by landowners will overcome the government’s presumption. *Id.* The use of backhoes is an example. Although commentators on the new rule provided evidence to the Agencies of the common-sense observation that a single-motion scoop, like a backhoe, typically only results in incidental fallback, the Agencies refused to except the use of such equipment from their presumption that such equipment would cause a regulable discharge. 66 Fed. Reg. at 4563.

Pufko’s conclusion—that the new rule is a presumption in disguise and shifts the burden of proof to the public—stands in stark contrast to the self-serving assertion by the Agencies that “The Rule adds no

new permitting requirements or procedural hurdles. Nor does it require any immediate action by Plaintiffs.”
Government Memorandum at 22.

Because the new discharge rule impermissibly shifts the responsibility for establishing federal jurisdiction to the regulated community, the rule is invalid and should be set aside.

II

THE AGENCIES’ SEDIMENT AND POLLUTANT RELEASE THEORY NULLIFIES THE DECISIONS OF THIS COURT AND THE D.C. CIRCUIT INTERPRETING THE CWA

The EPA and the Corps recognize three types of activity associated with the use of mechanized earth-moving equipment in United States Waters: (1) the dredging itself, or the actual removal of soil and debris from the water; (2) incidental fallback, such as the spilling of soil back into the water as the dredged material is being removed; and, (3) the incidental suspension and relocation of soil disturbed by the dredging operation. *See* 66 Fed. Reg. 4550. Under the CWA, these Agencies have no authority to regulate these types of activities. But in their new rule defining “discharge of dredged material” these Agencies assert authority over resuspension and relocation of soil. This allows the Agencies to effectively regulate all soil movement in United States Waters in open contravention of the decisions of this Court and the D.C. Circuit, and the clear text of the CWA.

In *American Mining Congress v. U.S. Army Corps of Engineers*, 951 F. Supp. 267 (D.D.C. 1997), this Court held that Congress did not authorize the Agencies to regulate dredging operations under section 404 of the CWA. *American Mining*, 951 F.Supp.at 273. Instead, this Court held that Congress authorized the regulation of dredging operations, in certain waters, only under section 10 of the Rivers and

Harbors Act of 1899. *Id.* This Court also held that Congress never intended section 404 of the CWA to cover incidental fallback. *Id.* That decision was affirmed by the D.C. Circuit in *National Mining Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998). That court agreed with this Court that the Agencies could not regulate incidental fallback from landclearing, ditching, channelization, and in-stream mining activities under the CWA as those activities do not “add” anything to United States Waters. The court held: “Because incidental fallback represents a net withdrawal, not an addition, it cannot be a discharge.” *National Mining*, 145 F.3d at 1404. Likewise, the court stated: “we fail to see how there can be an addition of *dredged material* when there is no addition of *material*.” *Id.* (emphasis in original).

But in their new rule, the Agencies parse the words of these opinions and ignore the courts’ express rationale. They claim they still have authority to regulate any redeposit that is not incidental fallback. *See* 66 Fed. Reg. at 4555. In particular, they claim they can regulate earth-moving activities that result in the relocation of sediments or the resuspension of sequestered pollutants previously bound up in the excavated sediments. This claim is wrong for a number of reasons.

First, if the sediment is merely disturbed by the excavation, it never becomes “dredged material” and cannot be regulated. *See* 33 C.F.R. § 323.2(c). As this Court stated in *American Mining*, “[t]he purpose of dredging is to remove material from the water, not to discharge material into the water. . . . If the intent is to remove material from the water and the results support this intent, then the activity involved must be considered “a normal dredging operation” that is not subject to section 404.” *American Mining*, 951 F. Supp. at 274 (citing the Corps’ own language). Second, this court has defined “incidental fallback” from mechanized earth-moving operations, like landclearing, ditching, channelization, and other excavation

activities, to include the disturbance of soil that may result in resuspension and relocation: “Incidental fallback is the incidental soil movement from excavation, *such as the soil that is disturbed when dirt is shoveled*, or the back-spill that comes off a bucket and falls back into the same place from which it was removed.” *Id.* at 270 (emphasis added). Third, the incidental stirring up of sediments and sequestered pollutants still involves a “net withdrawal” and not an “addition of material” as discussed above and understood by this Court in *American Mining* and the D.C. Circuit in *National Mining*. And fourth, as a practical matter, it would be nearly impossible to use any earth-moving equipment (with the possible exception of a pristine suction dredging operation) without disturbing sediments or sequestered pollutants.

Thus, the clear intent of the new rule is to nullify the decisions in *American Mining* and *National Mining* interpreting the CWA and create a “per se” permit rule for the use of mechanized earth-moving equipment for landclearing, ditching, channelization, and in-stream mining in United States Waters. This raises a pure question of law that can and should be addressed by this Court in this case.

III

THE AGENCIES’ PUTATIVE RELIANCE ON A CASE-BY-CASE JURISDICTIONAL DETERMINATION IS A PLOY TO EVADE JUDICIAL REVIEW OF THE NEW DISCHARGE RULE

The EPA and the Corps have established a pattern of evading judicial review of their jurisdictional interpretations under the CWA. This pattern involves the Agencies’ refusal, as in this case, to adopt a formal bright-line rule defining their statutory jurisdiction and, instead, relying on so-called case-by-case decisions. So long as the Agencies fail to establish clear jurisdictional lines through the rule making process, they can argue, as they have in this case, that any facial challenge to their permit regulations is not ripe for

review because no one knows how the Agencies will apply these regulations. This is nonsense, because the Agencies do employ consistent bright-line jurisdictional rules in actual cases. But the case-by-case tactic has proven a very effective ploy. For example, this tactic has allowed the Agencies to continue to regulate water bodies clearly beyond the scope of the CWA, as interpreted by the United States Supreme Court more than two years ago, without a facial challenge to the jurisdictional rule they consistently apply but have not formally adopted.

In January, 2001, the Supreme Court issued its landmark ruling in *Solid Waste Agency of Northern Cook County (SWANCC) v. Army Corps of Engineers*, 531 U.S. 159 (2001), wherein the court held that Congress intended the CWA only to reach traditional navigable waters and such wetlands as abut and are “inseparably bound up” with traditional navigable waters. *SWANCC*, 531 U.S. at 167. This ruling expressly invalidated some of the Agencies’ jurisdictional regulations and drew into question many others. But to this date, the Agencies have yet to revise their jurisdictional regulations or issue a formal rule defining jurisdictional waters in accordance with the Supreme Court’s decision. Instead, these Agencies ignore the court’s rationale limiting federal jurisdiction over United States Waters while continuing to regulate, on a case-by-case basis, any wetland with a hydrological surface connection to a navigable water, no matter how remote or tenuous the connection. Since most project applicants do not have the wherewithal to fight the federal government, these Agencies run little risk of having their illegal actions challenged in court. Even if their actions are challenged and invalidated in court, for a particular case, these Agencies simply exercise the same illegal authority in the next case. *See* 68 Fed. Reg. 1991, 1996 (identifying various cases challenging Corps’ jurisdiction post *SWANCC*).

The Agencies' blithe assertion in this case that the Plaintiffs can challenge individual discharge determinations, on a case-by-case basis, "either by appealing a permit decision or by raising a defense in an enforcement action," *Government Memorandum* at 25, is disingenuous. The EPA and the Corps have become adept at stringing land owners along so that they must either accede to the Agencies' regulatory demands or they never receive a final agency decision.

To illustrate, in *Moore v. United States*, 943 F. Supp. 603 (E.D. Va. 1996), taxpayers sought a refund of taxes paid to the Internal Revenue Service, arguing that they could claim as a loss the involuntary conversion of some of their investment property (called "the Boy Scout Tract") as a result of the land being reclassified as wetlands. *Moore*, 943 F.Supp. at 607. Though the Moores had not tried to obtain a section 404 permit, they argued that the denial of a permit should not be a prerequisite to their claim, because seeking a permit would have been futile. As reported by the Court, several experienced individuals, including Bernard Goode, an environmental consultant that had been a Corps employee for 34 years testified on the Moores' behalf:

When asked for his opinion concerning the likelihood that a § 404 permit would be issued for the Boy Scout Tract, Goode testified: "It is my opinion that there was a very low likelihood that this project would have been approved." When asked about the likelihood that a § 404 permit for the Boy Scout Tract would have been formally denied, Goode testified:

"It has been my experience in studying this very issue nationwide that there was a very low likelihood that the Corps would have denied the application. Because the Corps can't reach that point until they have gone through the full analysis, which includes the mitigation sequencing.

"And it is a much more likely outcome that more and more information is requested until eventually the applicant loses staying power and either withdraws the application himself, or the Corps says because of the lack of information to continue the valuation, the Corps

withdraws the application.

“And that is the outcome of well over half of the 404 applications.”

“Here in the Norfolk district I looked at some statistics and there is [sic] over 3/4 of the cases [that] end up being withdrawn for section 404 permit applications. Only one percent end up being denied.”

Goode’s testimony on this latter point was corroborated by the Moores’ other two expert witnesses. Robert Kerr, an environmental consultant with experience in over sixty § 404 permit applications, testified:

“We advised the [Moores] that there was no chance of getting a permit.”

“We also told Mr. Moore [the Corps] would never reject the permit.”

“Because rejecting a permit could set a precedent also. And as the government’s attorney stated, you have to have a permit denial to go for a taking.”

“Well, the Corps knows that and will not issue a denial, an open denial. They will just request additional information, and more additional information, and the more you give them the more they ask for They basically bleed a client to death financially until you have spent so much money on the alternatives analysis you've drained the profitability out of the project.”

Doug Davis, an environmental consultant who at one time worked in the Corps’ wetlands program, testified that the likelihood of a permit being issued for the Boy Scout Tract was “as close to zero as it can get,” and that a permit would not have been finally denied because projects like that contemplated for the Boy Scout Tract “just sort of wither on the vine and no final agency action is taken.” In addition, both Kerr and Davis testified that completing the § 404 permit process in this case would have been a very lengthy and expensive proposition, costing hundreds of thousands of dollars.

Id. at 612 (citations omitted).

This excerpt demonstrates the remarkable leverage the EPA and the Corps have over section 404 permit applicants. With very little risk of a court challenge, they can scuttle a project with dilatory practices or condition approval on extraordinary demands. If a land owner is able to ripen a case and successfully

challenge agency jurisdiction, it's only one case. In the absence of a formally adopted rule of general applicability, it will not affect other similar cases of government overreaching. For this reason, this court should address the legal questions raised by Plaintiffs and invalidate the new rule.

IV

IT IS CLEAR HOW THE AGENCIES WILL RULE ON THE USE OF MECHANIZED EARTH-MOVING EQUIPMENT ON A CASE-BY-CASE BASIS

Despite the Agencies' claims that this court cannot know how they will apply their new discharge rule, except in the context of a particular case, we know with a reasonable certainty that the Agencies will invariably conclude that the use of certain earth-moving equipment is subject to section 404 permitting.

For example, in a recent case called *Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 261 F.3d 810 (9th Cir. 2001)(affirmed per curium by an equally divided Supreme Court, 13 S. Ct. 599 (2002)), the EPA and the Corps cited a west coast landowner for discharging "dredged material" into navigable waters without a permit. But the so-called discharge involved nothing more than "deep plowing" through various swales, or sloped depressions, for the purpose of planting vineyards. *Borden Ranch*, 261 F.3d at 813-815. "Deep plowing" consists of pulling a vertical shank through the dirt with a tractor to break the hardpan and, like the incidental fallback prohibited by the illegal "Tulloch Rule," it results only in the incidental movement of the soil in situ. Although the de minimis movement of soil by means of "deep plowing" does not result in any "addition of a pollutant" as defined by the D.C. Circuit in *National Mining*, 145 F.3d 1399, these Agencies are currently regulating such activity as a "discharge"

under section 404 of the CWA.

It is certain, therefore, that the Agencies will require a 404 permit for the “use of mechanized earth-moving equipment to conduct landclearing, ditching, channelization, in-stream mining or other earth-moving activity. . . .” This is not only clear from the Agencies’ current application of section 404 to such benign “earth-moving” activities as “deep plowing,” but also from the fact that ordinary earth-moving equipment will always result in what the Agencies deem as more than incidental fallback.

In the preamble to the new discharge rule, the EPA and the Corps stated that the mere stirring up of the soil in water can cause siltation or the release of chemical pollutants trapped in the dirt which, in their view, constitutes a regulable discharge. *See* 66 Fed. Reg. at 4557. The only general class of activities which the Agencies haven’t prejudged as discharge producing “include discing, harrowing, and harvesting where soil is stirred, cut or turned over to prepare for planting of crops.” *Id.* at 4554. Because these “practices involve only minor redistribution of soil, rock, sand, or other surface materials,” the Agencies say they are not regulable. *Id.* But since these activities are indistinguishable from the “minor redistribution of soil” caused by “deep plowing” which the Agencies maintain *is* regulable, it would appear that the Agencies are using a stricter bright-line rule than they admit.

The only other exception mentioned by the Agencies is so narrow and antiseptic that it implies no other earth-moving activities could reasonably pass the Agencies’ test for producing *only* incidental fallback. According to the Agencies, “some suction dredging operations can be conducted in such a manner that if the excavated material is pumped to an upland location or other container outside waters of the United States and the mechanized removal activity takes place without resuspending and relocating

sediment downstream, then such operations generally would not be regulated.” *Id.* at 4554.

This hypothetical of a pristine dredging operation, which does not resuspend or relocate sediment, is the Agencies’ defacto standard for judging all other earth-moving activities. But it is a standard that cannot be met by any ordinary method of landclearing, ditching, channelization, or in-stream mining. Indeed the Agencies received several comments demonstrating this in relation to in-stream mining, dry stream excavation, and the use of a backhoe, “the classic example of how digging could be done with no more than incidental fallback.” *Id.* at 4562. But the Agencies refused to modify their presumption that such activities would be subject to 404 permitting.

In the case of the backhoe, the Agencies concluded that one-motion excavation is subject to regulation because such excavation involves large volumes of soil. This conclusion is in direct conflict with the D.C. Circuit’s statement in *National Mining* that the regulation of even a ton of fallback was not intended by Congress:

the straightforward statutory term “addition” cannot 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 . . . Congress could not have contemplated that the attempted removal of 100 tons of [material] could constitute an addition simply because only 99 tons of it were actually taken away.

National Mining, 145 F.3d at 1404.

This Court need not wait for a case that applies the new rule to determine the validity of the new rule. It is clear that the Agencies will regulate virtually any activity that results in any soil disturbance involved in landclearing, ditching, channelization, and in-stream mining. Moreover, the Agencies have been clear about the legal bases on which they rely for applying their new rule so broadly. They claim that

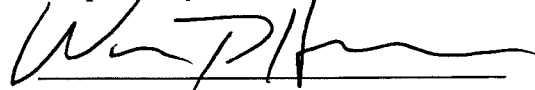
neither the Act nor the decisions of *National Mining* and *American Mining* bar them from regulating any soil movement they can characterize as more than incidental fallback, even if there is no “addition” of material to United States Waters. This assertion of authority exceeds Congressional intent and should not be allowed. Therefore, this Court should invalidate the new rule.

CONCLUSION

Unfortunately, even after clear decisions limiting federal jurisdiction under the CWA, such as *SWANCC*, *National Mining*, and *American Mining*, the EPA and the Corps are still looking for ways to expand their authority. For them, an adverse court decision is just a temporary setback; there are other courts. Rather than embrace their responsibility to enforce the law as written, they would rewrite the law on a case-by-case basis to suit their own ends. But the regulated community has a right to know what the law requires. Therefore, this Court should address the merits of Plaintiffs’ arguments in this case and determine the scope of federal authority for regulating the discharge of dredged material under the Clean Water Act.

DATED: May 23, 2003.

Respectfully submitted,



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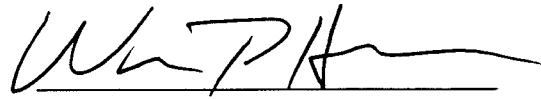
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