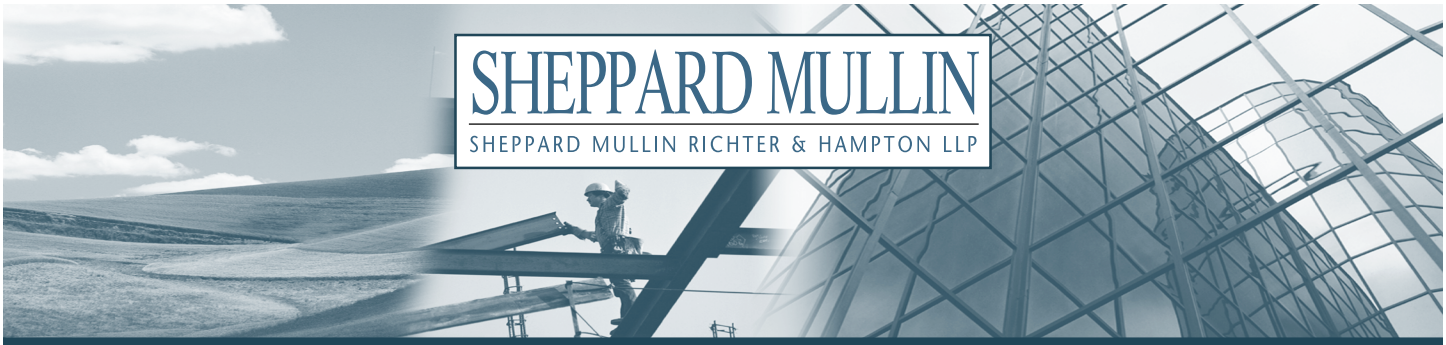

Land Use & Natural Resources Update

March 2001

U.S. Army Corps of Engineers Narrows the Impact of Recent Court Decisions That Attempt to Limit Clean Water Act Jurisdiction

ABOUT THIS UPDATE

Implementation of the SWANCC Decision and the Revised "Tulloch Rule".

A. Implementation of the SWANCC Decision

In our January update entitled "Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers," we addressed the U.S. Supreme Court's decision to exclude non-navigable, isolated, intrastate waters from the scope of Clean Water Act jurisdiction. Solid Waste Agency of Northern Cook County v U.S. Army Corps of Engineers, 531 U.S. _____(January 9, 2001) ("SWANCC"). The Supreme Court ruled that the "Migratory Bird Rule" was an invalid exercise of agency jurisdiction under 33 CFR § 328.3 and called into question jurisdiction over all isolated waters of the U.S., including vernal pools, prairie potholes and other waters that traditionally have been covered under 33 CFR § 328.3(a)(3).

On January 22, 2001, the U.S. Army Corps of Engineers ("Corps") and the Environmental Protection Agency ("EPA") issued a joint policy memorandum to their field offices regarding the scope of agency jurisdiction under the Clean Water Act in light of the SWANCC decision. The joint policy memorandum limits the potential impact of SWANCC through its narrow interpretations of the Court's ruling. The memorandum is generally consistent with the views expressed in the January update. Following are some of the major points stated in the joint policy memorandum:

1. Field staff should no longer rely on the use of waters or wetlands by migratory birds as the sole basis for assertion of regulatory jurisdiction under the Clean Water Act. The document does not clarify how this change will be implemented to revise jurisdictional delineations that were certified prior to the SWANCC decision.

2. The memorandum clarifies that the Court's decision affects the scope of regulatory jurisdiction under all Clean Water Act provisions that rely on the definition "waters of the U.S.," including, but not limited to, the Section 311 oil spill program, the Section 402 NPDES program and any regulations of a state or tribal entity that implement the Section 402 program.

3. The Court's ruling is strictly limited to only waters that are "nonnavigable, isolated, and intrastate." All other waters should continue to be regulated. By this, the agencies qualified the impact of the Court's decision by requiring

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that a water body have all three characteristics for it to escape agency jurisdiction.

4. The memorandum states that 33 CFR 328.3(a)(3) can and should be used to regulate isolated waters if there is a subsequent nexus to interstate commerce other than the presence of migratory birds. The memorandum encourages agency staff to consult agency legal counsel on an ad-hoc basis to determine whether a sufficient connection to interstate commerce can be established.

5. For example, the memorandum suggests that a sufficient nexus could be established if the use, degradation, or destruction of an isolated, intrastate, and non-navigable water could affect other "waters of the U.S." This broad definition expands agency jurisdiction to include otherwise non-jurisdictional areas once a connection with other clearly jurisdictional areas is established. The memorandum also states that impoundments of, tributaries of, and wetlands adjacent to other waters listed in 33 CFR § 328.3(a)(3) are jurisdictional if the waters they impound are tributaries to or are adjacent to, waters of the U.S.

6. The term "adjacent" is defined as "bordering, contiguous, or neighboring. Wetlands separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes, and the like are 'adjacent wetlands.'" 33 CFR § 328.3(d). This definition includes wetlands and waters which may not have a clear surface connection to navigable waters.

In conclusion, the agencies' narrow interpretation of SWANCC excludes from Corps and EPA jurisdiction those waters that are isolated, non-navigable, intrastate and that do not impact others waters of the U.S. The memorandum does not clarify how waters will be removed from certified jurisdictional delineations for projects that are currently in the permitting process. We recommend that all delineations be reviewed to identify potentially isolated waters and to evaluate potential interstate commerce connections.

B. Practical Reinstatement of the "Tulloch Rule"

In 1993, the Corps issued a regulation that defined the term "discharge of dredged material" as including "any . . . redeposit of dredged material, including excavated material into waters of the U.S. which is incidental to any activity. . . . " 65 FR 50109 (August 16, 2000). This rule, commonly known as the "Tulloch Rule," states that incidental fallback from an activity could and should be considered a discharge, and therefore should be regulated under Section 404 of the Clean Water Act.

Over the past decade, the Corps has faced a barrage of litigation regarding the validity of this rule. American Mining Congress v. Corps, 951 F.Supp. 267 (D.D.C 1997); aff'd sub nom, National Mining Association v. Corps, 145 F.3d. 1339 (D.C. Cir. 1998). In these cases, the courts have stated that the Corps does not have the authority to regulate incidental fallback material as a discharge under Section 404 of the Clean Water Act. The D.C. Appellate Court specifically requested that the Corps further define the parameters of its jurisdiction in this area.

On January 17, 2001, the Corps issued a final rule that defined the phrases "discharge of dredged material" and "incidental fallback" in an attempt to clarify the Corps' jurisdictional limit under Section 404. 66 FR 4550. The main points stated in the final rule are discussed below.

1. The rule states that the Corps does not have the authority to regulate "incidental fallback" under Section 404 of the Clean Water Act.

2. The rule defines incidental fallback as the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the U.S. when such material falls back to substantially the same location from which it was initially removed. This narrow definition excludes any fallback that takes place in either large volume, or in a location that differs from the original excavation location.

3. As Sheppard, Mullin, Richter & Hampton LLP suggested in comments filed on behalf of a client, the Corps eliminated a proposed rebuttable presumption that specified activities are subject to regulation and instead stated that the "use of mechanized earth moving equipment to conduct landclearing, ditching, channelization, in-stream mining, or other mechanized excavation activity in waters of the U.S. is *likely* to result in regulable discharges of dredged material." 66 FR 4552. As a result of this qualification, the Corps has effectively maintained the same policy embodied in the previous assumption, but has removed the project applicant's burden to formally rebut the presumption.

4. The rule states that if there is project-specific evidence which suggests that a particular earth moving project causes only incidental fallback, the Corps will consider this evidence and exclude certain projects as appropriate.

The Corps narrowly interpreted the incidental fallback exclusion in an effort to maintain its jurisdiction over as many activities as possible. In the final rule, the Corps reasserts its jurisdiction over most activities covered by the original Tulloch Rule with minor technical exceptions. This rule will affect in-stream mining activities that may have been excluded from the Corps' jurisdiction after the Tulloch Rule was invalidated in 1997-8. Project applicants should now assume that all earth moving activities are jurisdictional under Section 404 unless the discharge meets the limited definition of incidental fallback or unless specific evidence exists to verify minimal movement or material discharge.

On January 24, 2001, the Bush Administration adopted an Executive Order pursuant to which all department or agency heads appointed by the new President shall have the authority to review all rules adopted at the close of the Clinton Administration and approve all regulatory action. 66 Fed. Reg. 7702 (January 24, 2001). Regulatory review applies automatically to all proposed or final regulations that have not yet been published in the Federal Register. With regard to all regulations that have already been published in the Federal Register but have not taken effect, the effective date of these regulations will be postponed for 60 days pending executive review.

On February 15, 2001, the Executive Order was applied to the Corps' final rule regarding the definition of discharge material. 66 Fed. Reg. 10367. The agencies postponed the implementation of the revised "Tulloch Rule" from February 16, 2001, to April 17, 2001, in order to allow for the appropriate executive review of the regulation. Consequently, the final rule addressed in this update may be subject to further revision pending review by the Bush Administration.

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