

Clean Water Act Jurisdiction Over Excavation Activities: The “Tulloch Rule” Revised

by Radcliffe Dann IV

A Clean Water Act § 404 permit is required for activities that result in the discharge of dredged material into waters of the United States. Prior to 1993, the U.S. Army Corps of Engineers and the Environmental Protection Agency generally did not require a § 404 permit for excavation activities in waters of the United States, because excavation activities typically do not result in a discharge of material. In 1993, the agencies reversed course by way of the “Tulloch Rule.” The Tulloch Rule and “Tulloch II” were invalidated by the courts. In December 2008, the agencies published “Tulloch III.” This article tracks the Tulloch Rule since its inception in 1993, and discusses the future implications of its most recent iteration.

Beginning with the “Tulloch Rule” in 1993, the U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) (referred to collectively as the agencies) have attempted to define the scope of Clean Water Act (CWA) jurisdiction over excavation activities in waters of the United States.¹ Their efforts have proven unsuccessful; the Tulloch Rule and its progeny—Tulloch II—have been invalidated by the courts. On December 30, 2008, the agencies published their most recent iteration of the Tulloch Rule—Tulloch III. This article summarizes the agencies’ past regulatory efforts and discusses future implications of their most recent attempt to define the scope of federal jurisdiction over certain excavation activities.

Clean Water Act Jurisdiction

CWA jurisdiction over certain excavation activities has been in a state of flux since 1993. For businesses and individuals that often engage in excavation, the uncertainty of federal jurisdiction sometimes can prove to be a major impediment—or at least a moderate setback—to a project. Excavation activities are common in a variety of industries and contexts. Land development, in particular, often encompasses such excavation activities as landclearing, ditching, drainage construction, trenching, and channelization. Excavation activities also are common to mining and site cleanup activities. When excavation activities take place in waters of the United States, the prospect—and accompanying uncertainty—of CWA jurisdiction arises.

The CWA prohibits “the discharge of any pollutant” into “waters of the United States” without a permit.² Section 404 of the CWA, administered primarily by the Corps, is the permitting authority for the “discharge of dredged or fill material”—both pollutants under the CWA³—into the waters of the United States.⁴ As the statutory text indicates, § 404 jurisdiction depends on the presence of a *discharge*, which, under the relevant statutory and regulatory definitions, equates to an *addition* of a pollutant or material.⁵ Thus, § 404 permits are required primarily for activities that result in an addition of material to waters of the United States—for example, the filling of jurisdictional wetlands. Excavation activities in waters of the United States, however, generally have not required a § 404 permit, because they typically involve only the removal of material.⁶

The exclusion of many excavation activities from § 404 regulation results in what some consider to be a legal loophole that permits the destruction or degradation of waters of the United States.⁷ In 1993, the agencies began an effort to close the alleged loophole and redefined “discharge of dredged material” to include *any redeposit* of dredged or excavated material into waters of the United States.⁸ The agencies’ revision reshaped the § 404 regulatory landscape, because nearly all excavation activities result in at least some redeposit of material through “incidental fallback,” which 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 substantially the same place from which

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it was removed.⁹ Accordingly, the effect of the agencies' 1993 revision essentially was to extend § 404 jurisdiction to all excavation activities in waters of the United States through the regulation of incidental fallback.

The agencies' assertion of § 404 jurisdiction over incidental fallback eventually was invalidated by the courts. However, the courts left the agencies an opening to regulate some forms of redeposit of excavated material, and suggested that the agencies undertake rulemaking to better define the line between incidental fallback and a regulable redeposit.

Indeed, the agencies undertook such rulemaking in 2001, but their attempt proved unsuccessful—the rule was invalidated in 2007. The agencies, however, went back to the drawing board and, in December 2008, they promulgated the latest rule defining the “discharge of dredged material.”

The First Attempt to Extend § 404 to Excavation Activities—The “Tulloch Rule”

From 1977 to 1993, the Corps defined the “discharge of dredged material” as “any addition of dredged material into the waters of the United States,” and took the position that excavation activities in waters of the United States, which result in only incidental fallback, do not fall within the ambit of § 404.¹⁰ In 1986, the Corps revised the definition of “discharge of dredged material” to exclude “*de minimis*, incidental soil movement occurring during normal dredging operations.”¹¹ The preamble to the 1986 rule elucidated the Corps' position regarding § 404 application to excavation activities in waters of the United States:

Section 404 clearly directs the Corps to regulate the discharge of dredged material, not the dredging itself. Dredging operations cannot be performed without some fallback. However, if we were to define this fallback as a “discharge of dredged material,” we would, in effect, be adding the regulation of dredging to section 404[,] which we do not believe was the intent of Congress. We have consistently provided guidance to our field offices since 1977 that incidental fallback is not an activity regulated under section 404.¹²

Thus, under the Corps' early regulations, excavation activities were generally excluded from § 404 regulation.

The Original Tulloch Rule

In 1993, the agencies revised their regulations to specifically target excavation activities, essentially reversing the Corps' previous position. The impetus for the change was *North Carolina Wildlife Federation v. Tulloch*.¹³ *Tulloch* involved a 1,800-acre development project in New Hanover County, North Carolina, 700 acres of which were jurisdictional wetlands.¹⁴ Through various excavation techniques, such as welding shut openings in equipment to prevent anything more than incidental fallback, and using dumptrucks to transport soil removed by backhoes, the developer ensured that only *de minimis* amounts of excavated material were redeposited into wetlands.¹⁵ Accordingly, all 700 acres of wetlands were developed without a § 404 permit.¹⁶

As a result, environmental groups filed an action against the agencies, claiming that the developer's excavation activities destroyed and degraded jurisdictional wetlands and, therefore, should be subject to § 404 regulation.¹⁷ As part of the settlement in the *Tulloch* case, the agencies agreed to revise the 1986 rule.¹⁸ Their

1993 revision resulted in what came to be known as the Tulloch Rule.

The Tulloch Rule removed the *de minimis* exception and defined the “discharge of dredged material” to mean “any addition of dredged material into, including any redeposit of dredged material within, the waters of the United States.”¹⁹ The Tulloch Rule further defined “discharge of dredged material” to include:

[a]ny addition, including any redeposit, 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.²⁰

By including within the definition any redeposit of dredged or excavated material, the agencies extended § 404 to incidental fallback. That, in turn, extended § 404 to nearly all excavation activities in waters of the United States because, as the agencies noted in the preamble to the Tulloch Rule:

it is virtually impossible to conduct mechanized landclearing, ditching, channelization or excavation in waters of the United States without causing incidental redeposition of dredged material (however small or temporary) in the process.²¹

Although the Tulloch Rule did contain a *de minimis* exception for incidental additions of dredged material, the exception did not apply to a person engaged in mechanized landclearing, ditching, channelization, and other excavation activities in waters of the United States, unless the person demonstrated, to the satisfaction of the Corps or the EPA as appropriate, prior to the discharge, that the activity would not have the effect of destroying or degrading an area of waters of the United States.²² Accordingly, the exception had little effect; the agencies emphasized “that the threshold of adverse effects for the *de minimis* exception is a very low one.”²³ Through the Tulloch Rule, the agencies had reversed course from the Corps' previous position, held since 1977, that excavation activities were not regulated under § 404 through incidental fallback.

The Courts Invalidate the Tulloch Rule

Various trade associations, whose members engaged in excavation activities, challenged the Tulloch Rule in the U.S. District Court for the District of Columbia, claiming that the agencies exceeded their regulatory authority under the CWA by regulating incidental fallback. In *American Mining Congress v. U.S. Army Corps of Engineers*,²⁴ the district court agreed with the trade associations and held that “[h]ad Congress intended to regulate excavation activities under § 404, it would have done so expressly.”²⁵ According to the court, the appropriate remedy to close the alleged loophole in the CWA is Congressional action.²⁶ The court issued an injunction prohibiting the agencies from enforcing the Tulloch Rule.²⁷

On appeal, the U.S. Court of Appeals for the District of Columbia, in *National Mining Association v. U.S. Army Corps of Engineers*,²⁸ upheld the district court's injunction.²⁹ The court held:

[T]he 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. Because incidental fallback represents a net withdrawal, not an addition, of material, it cannot be a discharge.³⁰

In response to the agencies' argument that, during the dredging process, wetland soil, sediment, debris, or other material undergoes a legal metamorphosis, thereby becoming a “pollutant” for purposes

es of the CWA, the court failed to see how there could be an addition of dredged material when there is no addition of material.³¹

The court, however, did not go so far as to hold that the agencies may not legally regulate some forms of redeposit under § 404; it held only that by asserting jurisdiction over “any redeposit,” including “incidental fallback,” the agencies had gone beyond their statutory authority.³² Thus, the court held that the agencies may regulate some forms of redeposit that result from excavation activities.³³

Indeed, the court noted that a bright line between incidental fallback and a regulable redeposit does not exist, and a “reasoned attempt by the agencies to draw such a line would merit considerable deference.”³⁴ Judge Silberman, in his concurrence, attempted to define the line:

[T]he word “addition” carries both a temporal and geographic ambiguity. If the material that would otherwise fall back were moved some distance away and then dropped, it very well might constitute an “addition.” Or if it were held for some time and then dropped back in the same spot, it might also constitute an “addition.”³⁵

Agencies Revise the Tulloch Rule

In 1999, in response to the *National Mining Association* decision, the agencies revised the Tulloch Rule by: (1) deleting the use of the word “any” as a modifier of the term “redeposit”; and (2) expressly excluding incidental fallback from the definition of discharge of dredged material.³⁶ The agencies did not accept the court’s invitation to draw a bright line between incidental fallback and a regulable redeposit; instead, the rule was deemed a temporary measure to comply with the *American Mining Congress* injunction.³⁷ The agencies noted that they would undertake notice and comment rulemaking in the future to delineate more clearly the scope of their jurisdiction over redeposit and, in the interim, would determine whether a particular redeposit was within its jurisdiction in a case-by-case evaluation.³⁸ Industry groups challenged the 1999 rule as a violation of the *American Mining Congress* injunction, but it was upheld as facially consistent with the injunction because it eliminated § 404 jurisdiction over incidental fallback.³⁹

The Agencies’ Response to *National Mining Association*—“Tulloch II”

In January 2001, the agencies, as promised, promulgated a final rule to delineate more clearly the scope of their jurisdiction over redeposit.⁴⁰ The 2001 rule—or what is commonly known as “Tulloch II”—continued to exclude incidental fallback from the definition of discharge of dredged material. Tulloch II went further than the 1999 rule and offered the following definition of “incidental fallback”:

Incidental fallback is 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.⁴¹

Furthermore, the agencies created the following presumption regarding certain earth-moving activities:

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 the 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. This paragraph does not and is not intended to shift any burden in any administrative or judicial proceeding under the CWA.⁴²

The Courts Invalidate Tulloch II

Almost immediately, several major trade associations filed a facial challenge to both provisions of Tulloch II in the U.S. District Court for the District of Columbia.⁴³ In 2007, after several years of procedural disputes, the district court ruled on the merits in *National Association of Home Builders v. U.S. Army Corps of Engineers*.⁴⁴ The court invalidated the two new provisions of Tulloch II.⁴⁵ The court invalidated the definition of “incidental fallback” because: (1) it improperly included a volume requirement, which, based on the court’s review of *National Mining Association*, is irrelevant to determining whether a redeposit is incidental fallback; and (2) the rule made no reference to the amount of time the material is held before it is dropped, as required by Judge Laurence Silberman’s standard.⁴⁶

With respect to the presumption regarding earth-moving activity, the court noted that, as the *National Mining Association* court made clear, not all uses of mechanized earth-moving equipment may be regulated; accordingly, the “agencies cannot require ‘project-specific evidence’ from projects over which they have no regulatory authority.”⁴⁷ The court expressly adopted Judge Silberman’s standard and held that:

[t]he difference between incidental fallback and redeposit is better understood in terms of two . . . 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.⁴⁸

Going Forward—Tulloch III

After Tulloch II was invalidated, the agencies revised the rule once again. On December 30, 2008, the agencies returned the definition of discharge of dredged material to that set forth in the 1999 rule.⁴⁹ Thus, the agencies eliminated the definition of incidental fallback, as well as the presumption regarding earth-moving activities.⁵⁰ The 2008 rule defines the “discharge of dredged material” as “any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States.”⁵¹ The 2008 rule also defines “discharge of dredged material” to include:

[a]ny 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.⁵²

The new rule does not establish a bright line between a regulable redeposit and incidental fallback. Indeed, whether a particular redeposit of material falls within § 404 will be decided in a case-by-case evaluation, consistent with the agencies’ CWA authority and governing case law.⁵³ Accordingly, going forward, the 2008 rule does not provide businesses and individuals much guidance as to when a § 404 permit is required for excavation activities that involve some form of redeposit; much will be left to the agencies’ discretion. A review of the governing case law, however, may be helpful in discerning the line between a regulable redeposit and incidental fallback.

The Silberman Standard: Distinguishing Regulable Redeposit From Incidental Fallback

Judge Silberman’s standard—adopted by the court in *National Association of Home Builders*—offers the most useful guidance for distinguishing between a regulable redeposit and incidental fallback. Under that standard, two primary factors should be considered: (1) the time the material is held before being dropped back to earth; and (2) the distance between the place where the material is collected and the place where it is dropped.⁵⁴ Furthermore, under the *National Association of Home Builders* decision, volume of material is irrelevant to the analysis.⁵⁵ Accordingly, the longer material is held, or the farther it is moved, between excavation and redeposit, the more likely the redeposit of that material in waters

of the United States will be determined to be a discharge under § 404.

Using Judge Silberman's standard, as well the relevant case law, some fairly concrete examples of a regulable redeposit emerge. The redistribution of excavated material from one geographic place to another within a water of the United States is likely a regulable redeposit. For example, in *United States v. Moses*,⁵⁶ the government prosecuted an Idaho developer for alleged discharges of pollutants without a § 404 permit.⁵⁷ The developer, ignoring repeated warnings from the Corps that the development work required a § 404 permit, conducted various excavation activities that resulted in the massive movement and redistribution of materials from one part of a water of the United States to another.⁵⁸ The Ninth Circuit rejected the developer's argument that such geographic redistribution was merely incidental fallback and held that the developer's activities amounted to a regulable redeposit of material.⁵⁹

In *Green Acres Enterprises, Inc. v. United States*,⁶⁰ a group of landowners brought an action against the Corps under the Federal Tort Claims Act on the grounds that the Corps violated the *American Mining Congress* injunction when it asserted jurisdiction over the landowners' proposed excavation activities to repair a damaged farm levee, which, according to the landowners, involved only incidental fallback.⁶¹ The Corps claimed that the landowners' activities amounted to more than incidental fallback and required a § 404 permit, because such activities would involve bulldozer work that would redeposit soil from one place to another within waters of the United States.⁶² The Eighth Circuit deferred to the Corps' judgment and held that the Corps' assertion of jurisdiction over the landowners' activities did not violate the *American Mining Congress* injunction.⁶³ Although neither *Moses* nor *Green Acres* relied on Judge Silberman's standard, both holdings fit within his two-factor approach.

Furthermore, "sidecasting" likely also results in a regulable redeposit under Judge Silberman's standard. Sidecasting generally has been considered to cause a regulable discharge even before the Tulloch Rule.⁶⁴ Sidecasting is the process of piling excavated material on either side of an excavated ditch and later redepositing that material back into the excavated ditch. Sidecasting often is employed to install various types of underground infrastructure, such as drainage pipes or sewer lines.

The leading case on sidecasting is *United States v. Deaton*.⁶⁵ There, the government brought an action against two individuals for sidecasting dredged material while digging a drainage ditch through a jurisdictional wetland without a § 404 permit.⁶⁶ The individuals argued that their activities resulted in no net addition of material to the wetlands, but the court held that "once that material was excavated from the wetland, its redeposit in that same wetland added a pollutant where none had been before."⁶⁷

The relevant case law does not provide many examples of activities that involve only incidental fallback, but one court has held that the construction of a stormwater detention pond involved only incidental fallback and, therefore, did not require a § 404 permit. In *United States v. Hallmark Construction Company*,⁶⁸ the government brought an action against a developer for constructing a stormwater detention pond in a jurisdictional wetland without a § 404 permit.⁶⁹ The government argued that the defendant discharged a pollutant into the wetland when it redeposited material into the wetland as a byproduct of construction activities in clearing and leveling the wetland.⁷⁰ The defendant responded that its

activities did not involve an addition of material to the wetland; rather, such excavation activities involved only a net withdrawal of material, and any discharge of dredged material was merely incidental fallback from excavation.⁷¹ The court agreed with the defendant and held that the "Corps has no jurisdiction over portions of [the wetland] where the only discharge is in fact incidental fallback rather than a true addition of fill material."⁷²

Agency Guidance

In addition to case law, there is limited agency guidance to assist in interpreting the agencies' latest incarnation of the Tulloch Rule. In 1997, after the first invalidation of the Tulloch Rule, the agencies issued a guidance memorandum that likely is applicable to the 2008 rule.⁷³ The 1997 memorandum provided guidance for interim compliance with the *American Mining Congress* injunction while the decision was on appeal. The decision was affirmed on appeal, but the memorandum later was deemed to apply to the 1999 rule.⁷⁴ Therefore, because the 2008 rule is the reincarnate of the 1999 rule, the memorandum likely applies to the 2008 rule, as well. The 1997 memorandum, however, does not provide much guidance to clarify the distinction between incidental fallback and a regulable redeposit.⁷⁵ However, the memorandum provides some examples of discharges the agencies would consider to be outside the scope of the court's decision, such as sidecasting and activities that result in movement of substantial amounts of dredged material from one location to another in waters of the United States.⁷⁶ These two examples are in line with governing case law discussed above, as well as with Judge Silberman's standard.

Conclusion

After sixteen years of rulemaking and litigation, the regulated community has been left with little guidance to determine whether excavation activities in waters of the United States are subject to § 404 regulation. Unlike the 1999 rule, the 2008 rule is not an interim measure; the agencies gave no indication that they intend to undertake future rulemaking. Accordingly, in the foreseeable future, § 404 jurisdiction will be determined in case-by-case evaluations. Future case law may expound on the Silberman factors and assist in drawing the line between incidental fallback and a regulable redeposit. For now, developers and other businesses or individuals that engage in excavation activities are, in some sense, at the mercy of the agencies' discretion. However, the likelihood of § 404 regulation may be reduced by conducting excavation activities according to Judge Silberman's standard.

Notes

1. "Waters of the United States" is the statutory definition of "navigable waters"—the jurisdictional reach of the Clean Water Act (CWA). 33 U.S.C. § 1362(7). The scope of waters of the United States is the subject of considerable debate and is outside the scope of this article. See, e.g., *Rapanos v. United States*, 547 U.S. 715 (2006). For purposes of this article, "waters of the United States," generally, may be understood as: (1) waters that support interstate commerce; (2) tributaries of interstate waters; and (3) wetlands adjacent to or abutting (1) and (2). See 33 C.F.R. § 328.3(a).

2. See 33 U.S.C. §§ 1311(a) and 1362(7) and (12).

3. 33 U.S.C. § 1362(6).

4. 33 U.S.C. § 1344(a).

5. 33 U.S.C. § 1362(12) (emphasis added); 33 C.F.R. § 323.2(d)(1) and (f) (emphasis added).

6. See *American Mining Congress v. U.S. Army Corps of Engineers*, 951 F.Supp. 267, 269 (D.D.C. 1997). Excavation activities in waters of the United States are not completely exempt from federal regulation. Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, requires a permit from the U.S. Army Corps of Engineers (Corps) “to excavate or fill” in the navigable waters of the United States. The scope of federal jurisdiction under the Rivers and Harbors Act, however, is narrower than that under the CWA and extends only to waters subject to the ebb and flow of the tide or navigable-in-fact waters. See 33 C.F.R. §§ 329.1 and 329.4. Accordingly, the Rivers and Harbors Act does not generally apply to tributaries or wetlands.
7. Burnham, “The Tulloch Rule: Its Rise, Demise & Resurrection. Will the New Version of the Rule Withstand Judicial Scrutiny?” 33 *Conn. L.Rev.* 1349, 1360-63 (2001).
8. See 58 Fed. Reg. 45,008, 45,035 (Aug. 25, 1993) (to be codified at 33 C.F.R. § 323.2(d)(1)) (emphasis added). The Environmental Protection Agency (EPA) also maintains regulations related to the discharge of dredged material at 40 C.F.R. 232.2 that are largely identical to the Corps’ regulations. In the interest of convenience and brevity, this article cites only the Corps’ regulations.
9. See *American Mining Congress*, *supra* note 6 at 270.
10. 42 Fed. Reg. 37,122, 37,145 (July 19, 1977) (to be codified at 33 C.F.R. § 323.2(l)). See also 51 Fed. Reg. 41,206, 41,210 (Nov. 13, 1986) (stating Corps’ position regarding regulation of excavation activities).
11. 51 Fed. Reg. 41,232 (to be codified at 33 C.F.R. § 323.2(d)) (emphasis added).
12. 51 Fed. Reg. 41,210.
13. *North Carolina Wildlife Federation v. Tulloch*, Civ. No. C90-713-CIV-5-BO (E.D.N.C. 1992).
14. See *American Mining Congress*, *supra* note 6 at 269.
15. See *id.*
16. See *id.*; Burnham, *supra* note 7 at 1362-63.
17. See *id.*
18. See *id.*
19. 58 Fed. Reg. 45,035.
20. *Id.*
21. *Id.* at 45,017. See also *Nat’l Mining Ass’n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1401 (D.C. Cir. 1998) (noting that the effect of the new rule was to extend § 404 regulation to virtually all excavation and dredging activities performed in wetlands).
22. 58 Fed. Reg. 45,036 (to be codified at 33 C.F.R. § 323.2(d)(3)(i)).
23. 58 Fed. Reg. 45,020.
24. *American Mining Congress*, *supra* note 6.
25. *Id.* at 273.
26. *Id.* at 278.
27. *Id.*
28. *Nat’l Mining Ass’n*, *supra* note 21.
29. *Id.* at 1401.
30. *Id.* at 1404.
31. *Id.*
32. *Id.* at 1405 (emphasis in original).
33. *Id.* The extension of § 404 to certain redeposits of material was new in the agencies’ regulations, but the concept had received support in the case law as early as 1983. See *Avoyelles Sportsmen’s League, Inc. v. Marsh*, 715 F.2d 897, 923 (5th Cir. 1983) (“The word ‘addition’ as used in the definition of the term ‘discharge,’ may reasonably be understood to include ‘re-deposit.’”).
34. *Nat’l Mining Ass’n*, *supra* note 21 at 1405.
35. *Id.* at 1410 (Silberman, J., concurring).
36. 64 Fed. Reg. 25,120, 25,123 (May 10, 1999) (to be codified at 33 C.F.R. § 323.2(d)(1) and (2)).
37. 64 Fed. Reg. 25,121.
38. *Id.*
39. See *American Mining Congress v. U.S. Army Corps of Engineers*, 120 F. Supp. 2d 23, 29 (D.D.C. 2000).
40. See 66 Fed. Reg. 4,550 (Jan. 17, 2001).
41. 66 Fed. Reg. 4,575 (to be codified at 33 C.F.R. § 323.2(d)(2)(ii)).
42. *Id.* (to be codified at 33 C.F.R. § 323.2(d)(2)(i)).
43. See *Nat’l Ass’n of Home Builders v. U.S. Army Corps of Engineers*, Civ. No. 01-0274 (JR), 2007 WL 259944, *2 (D.D.C. Jan. 30, 2007).
44. *Id.* at *2-4.
45. *Id.* at *3.
46. *Id.*
47. *Id.*
48. *Id.*
49. See 73 Fed. Reg. 79,641, 79,645 (Dec. 30, 2008) (to be codified at 33 C.F.R. § 323.2(d)(1)).
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 79,643.
54. *Nat’l Ass’n of Home Builders*, *supra* note 43 at *3.
55. *Id.*
56. *United States v. Moses*, 496 F.3d 984 (9th Cir. 2007).
57. *Id.* at 985-86.
58. *Id.* at 986, 991-92.
59. *Id.* at 991-92.
60. *Green Acres Enterprises, Inc. v. United States*, 418 F.3d 852 (8th Cir. 2005).
61. *Id.* at 856.
62. *Id.* at 855.
63. *Id.*
64. *American Mining Congress*, *supra* note 6 at 270 n.4 (noting that side-casting has always been regulated under § 404); 58 Fed. Reg. 45,013 (same).
65. *United States v. Deaton*, 209 F.3d 331, 335-36 (4th Cir. 2000).
66. *Id.* at 332.
67. *Id.* at 335-36 (emphasis in original). *Accord United States v. Hummel*, No. 00 C 5184, 2003 WL 1845365, *9 (N.D.Ill. April 8, 2003) (holding defendants’ installation of sewer pipes by process of sidecasting required a § 404 permit).
68. *United States v. Hallmark Construction Company*, 30 F.Supp.2d 1033 (N.D.Ill. 1998).
69. *Id.* at 1035-36.
70. *Id.* at 1036.
71. *Id.*
72. *Id.* at 1037.
73. See “Memorandum: Regulation of Certain Activities in Light of *American Mining Congress v. Corps of Engineers*” (April 11, 1997) (1997 Guidance).
74. See “Memorandum: U.S. Environmental Protection Agency Regional Offices, U.S. Army Corps of Engineers Divisions and Districts, Issuance of Final Rule Responding to National Mining Association Decision” (May 10, 1999).
75. See 1997 Guidance, *supra* note 73. The memorandum offers only the following statement:
[I]f the activity in question involves only “incidental fallback,” . . . it is covered by the Court’s injunction. However, if the activity is associated with other discharges of dredged material or fill material in waters of the United States, it . . . should continue to be regulated.
76. *Id.* ■