Guest Editors’ Introduction: “Land Use and Resources”

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In this issue of the Environmental Law News we focus on some of the land use and resources issues that are currently generating substantial case law as well as controversy. If there is any overarching theme in this land use and resources law today, it is the attempt to achieve the right balance or mix between preserving resources such as endangered species or farmlands and promoting economic development and property rights. The continuing battles in legislatures and in the courts demonstrate that the various economic and environmental stakeholders in this debate are far from reaching any consensus on the appropriate balance between these goals.

The articles in this issue evaluate some of the land use and resources

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Environmental Law Section Mission Statement
Adopted June 23, 1995

The mission of the Environmental Law Section is to provide leadership in advancing the quality, breadth, and availability of environmental law information and services. The Section’s objectives are:

- to provide high quality educational programs, legislative analysis and recommendations, and publications related to environmental issues
- to serve Section members, the legal community, and the California public at large
- to foster diversity in Section membership
- to provide meaningful opportunities for members wishing to participate in Section activities

TOPIC:
Land Use and Resources
Digging Is Not Dumping: Federal Court Invalidates Regulations Restricting Excavation in Wetlands

A federal district court ruled recently that the U.S. Army Corps of Engineers and the Environmental Protection Agency overstepped their authority when they adopted rules to regulate excavation in wetlands. Landowners have hailed the decision, American Mining Congress v. U.S. Army Corps of Engineers, No. 93-1754 SSH (D.D.C. Jan. 23, 1997), as a major victory, vindicating their protests that the agencies have been improperly interfering with lawful activities on private property. Environmentalists have expressed disappointment over the prospect of losing what they considered to be an important tool for preserving wetlands. The court’s decision is only the latest shot in a decades-long battle over the proper scope of the federal government’s wetland regulatory program.

Background

Congress passed the Clean Water Act in 1972 to protect the quality of the nation’s waters by regulating “discharges” of “pollutants” into “waters of the United States.”¹ The Corps and the EPA, charged with implementing the Act, later defined such waters to include “wetlands”² and, over the next two decades, built an extensive and controversial wetland regulatory program.

Notwithstanding the broad scope of the agencies’ regulatory program, the Clean Water Act (“CWA”) is not a comprehensive wetland protection statute. Rather, it is essentially a water quality statute that has been used—and used with some success—to further a purpose for which it was not specifically designed. The Act is less than comprehensive in two respects.

First, it does not cover all wetlands, but only three types listed in the Corps and EPA regulations: (1) interstate wetlands, (2) wetlands adjacent to open waterbodies, and (3) those isolated wetlands that, if used, degraded, or destroyed, could affect interstate commerce.³ To be sure, the agencies view these categories so broadly that one might wonder whether any wetland exists that does not fall into one of them. As confirmed by the court in Hoffman Homes v. EPA,⁴ however, there really are some wetlands beyond the reach of the Corps and the EPA. (In that case, the court overturned the EPA’s assertion of jurisdiction because the wetland in question was neither interstate nor adjacent to any waterbody, and, since it was not used by migratory birds, it did not satisfy the interstate commerce requirement.)

Second, the Act authorizes the agencies to regulate only one type of activity—discharges of pollutants, including dredged and fill materials, into jurisdictional waters and wetlands. The agencies have long acknowledged that other activities are wholly beyond the scope of the Act and may freely be undertaken notwithstanding their adverse effects on wetlands, as long as they are not associated with any discharge of dredged or fill materials.⁵ In years past, such activities generally included removing vegetation, draining, excavating, shading, burning, and flooding.

That changed dramatically in 1993. On August 25 of that year, the Corps and the EPA adopted regulations greatly expanding the scope of activities they regulate in waters and wetlands under the Clean Water Act. The regulations grew out of a lawsuit, North Carolina Wildlife Federation v. Tulloch.⁶ In that case, two landowners drained wetlands by digging ditches, taking care to transport the excavated soil away rather than sidecast it into wetlands along the ditches. The agencies decided that such excavation did not involve a “discharge” of dredged or fill material and, thus, did not require a permit. Environmental groups sued the agencies and the landowners, arguing that such activities degraded wetlands and, therefore, should be regulated under the Clean Water Act. The agencies, rather than defend their position, switched sides; they settled the case by agreeing to revise their regulations so as to regulate excavation and similar activities in the future.

Under the resulting regulations, the Corps and the EPA claimed the authority to regulate any activity in waters or wetlands that (1) results in some movement of soil and (2) destroys or degrades the waters or wetlands. The agencies accomplished this by redefining “discharge of dredged material” to include “[a]n y addition, including any redeposit, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized land-clearing, ditching, channelization, or other excavation.”⁷ The agencies carved out an exception for activities that will not destroy or degrade waters or wetlands as long as the person undertaking those activities demonstrates this beforehand to the satisfaction of the Corps or the EPA.⁸ According to the agencies, an activity “degrades” a water or wetland “if it has more than a de minimis (i.e., inconsequential) effect on the area by causing an identifiable individual or cumulative adverse effect on any aquatic
function." The agencies also gave themselves a break, exempting dredging for navigation, which is generally done by the Corps, from the new rule.

Ironically, in the 30 pages of discussion that accompanied publication of the new regulations redefining the term "discharge," the agencies never said how much dirt must be moved how far to constitute a "discharge." They apparently believed that these activities move enough dirt to qualify as a "discharge." They obviously were thinking small, though, since they took the trouble to say that "walking, bicycling or driving a vehicle" would have de minimis effects except in "extraordinary situations" and the agencies did not intend to devote scarce resources to regulating such typically innocuous activities. They apparently believed that these activities move enough dirt to qualify as a "discharge," so whether the agencies would regulate them depended on the environmental effects of the activities to which the walking, bicycling, or driving were "incidental." Landowners were left to wonder which activities were within the agencies' regulatory reach: Presumably a farmer could scrape off his boots without worry, but if he was contemplating digging a ditch at the time and the agencies were having a slow day, it might be another matter.

**District Court's Decision**

In American Mining Congress, several trade associations sued the Corps and the EPA seeking to invalidate the excavation rule. They contended that the rule was inconsistent with the language and intent of the CWA. The agencies countered that they could regulate the "incidental fallback" that generally occurs during excavation and landclearing and that the court should defer to their expertise in such matters. "Incidental fallback" is the incidental soil movement from excavation and similar activities, such as the soil that is disturbed when dirt is shoveled or the dirt that spills off an excavation bucket and falls back into the same place from which it was removed.

The district court framed the issue by taking stock of the pertinent statutory provisions. The CWA generally prohibits the "discharge" of any "pollutant" into "navigable waters" except in compliance with section 404 (and certain other sections) of the Act. "Pollutant" is defined to include "dredged spoil." Section 404 provides that the Corps "may issue permits...for the discharge of dredged or fill material into the navigable waters at specified disposal sites." "Discharge" is defined as "any addition of any pollutant to navigable waters from any point source." In light of these provisions, said the court, the issue was "whether the incidental fallback that accompanies landclearing and excavation activities is (1) the discharge of dredged material, i.e., the addition of a pollutant, (2) at specified disposal sites." The court first analyzed whether Congress considered incidental fallback to be the addition of a pollutant. Four aspects of the CWA led the court to conclude that Congress did not intend to cover incidental fallback in section 404. First, section 404 refers to "discharges" but not to excavation or dredging. In a different statute, the Rivers and Harbors Act, Congress made it unlawful to "excavate or fill" navigable waters without Corps authorization. "Had Congress intended to regulate excavation activities under § 404," reasoned the court, "it would have done so expressly." Second, the court observed that, although Congress did not specifically mention incidental fallback when it enacted the CWA in 1972 or amended it in 1977, the legislative history reveals that Congress "understood "discharge of dredged material to mean open water disposal of material removed during the digging or deepening of navigable waterways." This understanding, said the court, "excludes the small-volume incidental discharge that accompanies excavation and landclearing activities." Moreover, since common dredging practices involve excavation of a waterway followed by disposal of dredged material at another location, the court concluded that Congress understood the "discharge of dredged material" to involve moving material from one place to another. "Incidental fallback associated with excavation or landclearing," the court noted, "does not add material or move it from one location to another; some material simply falls back in the same general location from which most of it was removed." Third, the court found that Congress, by not amending the CWA, has ratified 18 years of agency and judicial interpretation that incidental fallback is excluded from section 404. Until adoption of the excavation rule in 1993, the agencies had interpreted section 404 to govern disposal, not removal, activities. For example, in the preamble to its 1986 regulations, the Corps stated:

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.

Similarly, several courts have suggested that the CWA does not authorize the agencies to regulate incidental fallback.

Fourth, the court pointed out that several bills have been proposed to expand the scope of regulated activities under section 404, but Congress has not passed any of them. This indicates, the court said, that the issue of whether incidental fallback should be regulated under section 404 is a policy question currently under consideration by the executive and legislative branches and that Congress believes section 404 does not currently authorize the agencies to regulate excavation. The White House may have inadvertently contributed to the court's conclusion on this point. In a press release announcing the excavation rule, the White House urged "Congress [to] amend the Clean Water Act to make it consistent with the agencies'
rulemaking.” 25 This, the court explained, puts the matter backwards: “The executive branch...is supposed to administer laws enacted by Congress, not, in effect, to legislate and then seek ratification of its action by Congress.” 26

Next, the court considered the import of section 404’s provision authorizing the Corps to issue permits to discharge dredged material at “specified disposal sites.” According to the court, the structure of section 404 and the repetition of the idea of “specified disposal sites” indicates that such sites were to be affirmatively selected as such by the agencies. Moreover, noted the court, the provision conveys Congress’ understanding that discharges would relocate material from one site to another. The excavation rule departs from Congress’ intent in this regard, concluded the court:

The [excavation] rule makes the term “specified disposal site” superfluous; under the rule, all excavation sites are considered “specified disposal sites.” This strained reading results in excavation activities involving two disposal sites: the site of excavation, and the place where the dredged material is disposed of. 27

In the end, the court held that “the agencies unlawfully exceeded their statutory authority in promulgating the [excavation] rule.” 28 As for the agencies’ contention that they sought to close a longstanding loophole in the CWA that allowed waters and wetlands to be destroyed without any federal environmental review, the court directed them to Congress:

The appropriate remedy for what the agencies now perceive to be an imperfect statute...is Congressional action; [the agencies’] authority is limited to adopting regulations that effect the will of Congress as expressed in the statute. 29

The court issued its judgment “that the [excavation] rule is declared invalid and set aside, and henceforth is not to be applied or enforced by the Corps of Engineers or the Environmental Protection Agency.” 30

Significance of the Case

In the days following the court’s decision, some in the agencies have questioned whether it applies only in the District of Columbia and not in the rest of the country. The Justice Department reportedly has confirmed that the decision is effective throughout the United States.

The agencies did, however, ask the court to limit its judgment to bar enforcement of the excavation rule against only members of the trade associations that sued the agencies. The court denied the motion.

The agencies have yet to appeal the decision—or to ask that it be stayed pending appeal. They are expected to do so in the coming weeks.

The American Mining Congress decision, if it stands, restores limitations on the federal wetland regulatory program that the Corps and the EPA recognized until a few years ago. It confirms the general principle that the CWA regulates discharges of pollutants and that other activities, regardless of their environmental effects, are beyond the reach of the agencies (under the CWA anyway). The decision establishes, moreover, that the meaning of “discharge” will be guided by commonsense; the CWA does not sanction attempts to regulate other activities through the expedieny of characterizing incidental movements of soil as “discharges.” Among the activities outside the scope of the CWA, obviously, are those that led to the Tulloch and American Mining Congress cases—mechanized landclearing, excavation, and ditching. If, however, such activities are accompanied by “sidecasting,” which involves placing removed soil alongside a ditch, or slop­py disposal practices involving significant discharges into waters, the agencies may regulate those activities as they have for many years. 31

American Mining Congress also appears to establish that plowing does not involve a “discharge” regulated under the CWA. In years past, the Corps generally had acknowledged that plowing, at least for the purpose of producing food, fiber, and forest products, was not regulated. 32 More recently, however, some districts of the Corps have claimed the authority to regulate plowing as a discharge unless the plowing qualifies for the normal-farming-activities exemption. That exemption generally covers only activities that (1) are part of an established, ongoing farming operation and (2) do not convert wetlands to uplands. 33 Plowing that is not exempt, such as plowing of previously unfarmed land, has sometimes been treated as a regulated discharge—much like mechanized landclearing. That practice presumably will be ended by American Mining Congress. Plowing involves just the sort of incidental soil movement that the court found not to constitute a “discharge” under the CWA.

The decision may also change the dynamics of Congressional deliberations on CWA legislation. For years, Congress has considered, but not passed, bills to reform the federal wetland regulatory program. One of the issues typically addressed in those bills has been the scope of activities regulated under the CWA, particularly excavation and landclearing. In the give and take of legislative negotiations, environmentalists have discounted offers to expand the scope of the CWA to encompass such activities (in exchange, of course, for other provisions desired by landowners), feeling that they had already achieved this goal by agency rulemaking. American Mining Congress, by invalidating the agency rules, may restore this issue on the legislative agenda and increase the incentive of those favoring agency regulation of excavation and landclearing to end the longstanding deadlock and press for prompt passage of a CWA reform bill.

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Endnotes

2. 33 C.F.R. § 328.3; 40 C.F.R. § 230.3.
3. 33 C.F.R. § 328.3(a)(2), (3), & (7); 40 C.F.R. § 230.3(e)(2), (3), & (7).
4. 999 F.2d 256 (7th Cir. 1993).
7. 33 C.F.R. § 323.2(d)(1)(iii); 40 C.F.R. § 232.2(1)(iii).
8. 33 C.F.R. § 323.2(d)(3)(i); 40 C.F.R. § 232.2(3)(i).
9. 33 C.F.R. § 323.2(d)(5); 40 C.F.R. § 232.2(5).
10. 33 C.F.R. § 323.2(d)(3)(ii); 40 C.F.R. § 232.2(3)(ii).
17. Slip op. at 9.
19. Slip op. at 12.
20. id.
22. id. at 14.
25. Slip op. at 20 n.20.
26. id.
27. id. at 25.
28. id. at 8.
29. id. at 25.
31. See Slip op. at 5 n.4.
32. See 33 C.F.R. §§ 323.2(d) & (f), 323.4(a)(1)(ii); Regulatory Guidance Letter No. 86-1, "Plowing" (Feb. 11, 1986).
33. 33 U.S.C. § 1344(f); 33 C.F.R. §§ 323.4(a)(1)(ii), 323.4(c).}

Yosemite is Back!

The Environmental Law Institute at Yosemite is one of California's largest and most prestigious gatherings for environmental, land use and natural resources professionals. Scheduled for October 16-19, 1997 at the Tenaya Lodge in Fish Camp, two miles from Yosemite, the Institute has become a tradition for attendees and their families.

Along with some of the state's top environmental lawyers, this year's Institute is honored to include presentations from Justices Stanley Mosk and Cruz Reynoso (Ret.), Professor William H. Rodgers, the leaders of California's largest Air Quality Management Districts, Ellen Garvey and Dr. James Lents, the head U.S. Department of Justice environmental attorney, Assistant Attorney General Lois J. Schiffer, and the EPA Region IX Administrator, Felicia Marcus (all invited).

More information will be in the brochures, available in early May. Sign-up early, as the conference has sold out quickly in previous years. Contact Jayna Blackwell, Meeting and Event Administrator, State Bar of California for more information (415) 541-8885. For other questions regarding the program, please contact Institute Chairs; Peter Hsiao (213) 680-6400 or Katherine Stone (805) 644-7188.

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