Legal Backgrounder

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FEDERAL COURT RETURNS REASON TO WETLAND REGULATION

by

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A federal appellate court has ruled that the U.S. Army Corps of Engineers ("the Corps") and the Environmental Protection Agency ("EPA") overstepped their authority when they adopted rules to regulate excavation in wetlands. The measure, said the court, regulates dumping dirt, etc., into wetlands, not digging it out of such areas. Landowners have hailed the decision, *National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998), as a major victory, vindicating their protests against the agencies' improper interference with lawful activities on private property. Environmentalists have expressed disappointment over losing what they considered to be an important tool for protecting 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." 33 U.S.C. §§ 1311, 1344, 1362(6) & (7). The Corps and EPA, charged with implementing the Act, later defined such waters to include "wetlands" (33 C.F.R. § 328.3; 40 C.F.R. § 230.3) and, over the next two decades, erected 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 a water quality statute that has been used — with some success — to further a purpose for which it was not

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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's 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. 33 C.F.R. § 328.3(a)(2), (3), & (7); 40 C.F.R. § 230.3(s)(2), (3), & (7). To be sure, the agencies view these terms so broadly that one might wonder whether any wetland exists that does not fall into one of these categories. As confirmed by the court in *Hoffman Homes v. EPA*, 999 F.2d 256 (7th Cir. 1993), however, there really are some wetlands beyond the reach of the Corps and the EPA. (In that case, the court overturned 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 CWA 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. In years past, such activities generally included removing vegetation, draining, excavating, shading, burning, and flooding.

That changed radically in 1993. On August 25 of that year, the Corps and EPA adopted regulations significantly expanding the scope of activities they regulate in waters and wetlands under the CWA. The regulations grew out of a lawsuit, *North Carolina Wildlife Federation v. Tulloch*, No. C90-713-CIV-5-BO (E.D.N.C. 1992). 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 CWA. The agencies, rather than defend their position, switched sides and settled the case by agreeing to revise their regulations so as to regulate excavation and similar activities in the future.

Under the resulting rules, the Corps and 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]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 land-clearing, ditching, channelization, or other excavation." 33 C.F.R. § 323.2(d)(1)(iii); 40 C.F.R. § 232.2(1)(iii). 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 EPA. 33 C.F.R. § 323.2(d)(3)(I); 40 C.F.R. § 232.2(3)(I). 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." 33 C.F.R. § 323.2(d)(5); 40 C.F.R. § 232.2(5). The agencies also gave themselves a break, exempting dredging for navigation (an activity commonly undertaken by the Corps) from the new

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rule. 33 C.F.R. § 323.2(d)(3)(ii); 40 C.F.R. § 232.2(3)(ii).

Ironically, in the thirty pages of discussion that accompanied publication of the regulations redefining the term "discharge," the agencies never said how much dirt must be moved how far to constitute a "discharge." They obviously were thinking small, however, since they explained that "walking, bicycling or driving a vehicle" would have *de minimis* effects — except in "extraordinary situations." The agencies also said they did "not intend to devote scarce resources to regulating such typically innocuous activities." 58 Fed. Reg. 45,020 (1993). 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, biking, 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.

The Court's Decision

Several trade associations sued the Corps and EPA, contending that the excavation rule was inconsistent with the language and intent of the Clean Water Act. The agencies countered that they could regulate the "incidental fallback" that generally occurs during excavation and landclearing, 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 decided that "the agencies unlawfully exceeded their statutory authority" and enjoined them from applying the excavation rule anywhere in the nation. The agencies appealed.

The U.S. Court of Appeals for the District of Columbia Circuit upheld the district court decision. Observing that Congress defined "discharge" in the CWA as the "addition of any pollutant to navigable waters," the court reasoned that "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." As the court explained, "[b]ecause incidental fallback represents a net withdrawal, not an addition, of material, it cannot be a discharge."

Moreover, the court noted that thee is a specific statute governing removal of material from waters. The Rivers and Harbors Act (33 U.S.C. § 403) makes it illegal "to excavate or fill" in navigable waters without the Corps' approval. But that Act extends only to "navigable waters" as traditionally defined by the courts, and not to many of the inland waters and wetlands reached by the CWA. Congress could, if it wanted, conform the jurisdictional sweep of the two statutes either by narrowing the reach of the CWA or by broadening that of the Rivers and Harbors Act, said the court, but the agencies cannot do it "simply by declaring that incomplete removal constitutes addition."

Since "dredged material" necessarily comes from waters, any discharge of that material into waters could be termed a "redeposit." Recognizing that, the court acknowledged that some forms of "redeposits" of dredged material, as distinguished from "incidental fallback," might reasonably be regulated under the CWA. The court observed that the agencies' excavation rule,

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however, "makes no effort to draw such a line, and indeed its overriding purpose appears to be to expand the Corps's permitting authority to encompass incidental fallback and, as a result, a wide range of activities that cannot remotely be said to 'add' anything to the waters of the United States."

As a last line of defense, the agencies argued that any injunction should be limited to the parties in the case. Pointing out that the plaintiffs challenged the regulation on its face, the court disagreed and affirmed the district court's injunction prohibiting the agencies from enforcing the regulation anywhere in the country.

In the end, the court referred the agencies to Congress: "In a press release accompanying the adoption of the [excavation rule], the White House announced: 'Congress should amend the Clean Water Act to make it consistent with the agencies' rulemaking.' [Citation.] While remarkable in its candor, the announcement contained a kernel of truth. If the agencies . . . believe that the Clean Water Act inadequately protects wetlands and other natural resources by insisting upon the presence of an 'addition' to trigger permit requirements, the appropriate body to turn to is Congress. Without such an amendment, the Act simply will not accommodate the [excavation rule]."

Significance of the Case

The *National Mining Association* decision restores limitations on the federal wetland regulatory program that the Corps and EPA had recognized until a few years ago. It confirms the 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). Moreover, the decision establishes that the meaning of "discharge" will be guided by common sense and that attempts to regulate other activities through the expediency of characterizing them as "discharges" will not be sanctioned. Among the activities outside the scope of the CWA are those targeted in the excavation rule, i.e. excavation and ditching — as well as perhaps mechanized landclearing, plowing, and similar activities that merely disturb surface soil but otherwise leave it in the same place. 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.

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. *National Mining Association*, 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 press for passage of a CWA reform bill.

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