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Douglas E. Morrison

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National Mining Association v. Army Corps of Engineers

Douglas E. Morrison*

The Circuit Court of Appeals for the District of Columbia limited the ability of the U.S.E.P.A. and Army Corps of Engineers to regulate excavation of wetlands with the 1998 holding of National Mining Association v. U.S. Army Corps of Engineers. The court invalidated and enjoined enforcement of the Tulloch Rule which would have required a Corps permit under Section 404 of the Clean Water Act for any dredging activity in a wetland that produced "incidental fallback." The court reasoned that incidental fallback is not a regulable discharge under Section 404, ignoring the Chevron Rule of deference to agency interpretation of statutes, the damaging effects of dredging on wetlands, and language of the Clean Water Act showing that Congress intended to regulate wetland excavation under Section 404.

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* J.D. candidate, University of California at Berkeley School of Law (Boalt Hall), 2001; M.S., Cornell University 1996; B.S., Arizona State University 1992. I am grateful for the valuable assistance of Professor Peter Menell and Peter Morrisette in producing this article and the patience and support of my wife.
INTRODUCTION

Wetlands are important and endangered ecosystems in the United States. The wildlife, flora, and detritus produced in wetlands provide the basis for many marine and terrestrial food webs. These areas are also critical for fish spawning and waterfowl migration. Additionally, wetlands provide habitats for numerous plants and animals. Wetlands buffer floodwaters and wave action, recharge aquifers, prevent erosion, and control sedimentation of lakes and rivers. The microorganisms and plant life existing in wetlands act as natural water treatment systems, purifying contaminated water as it flows through the ecosystem. Unfortunately, conservation of privately owned

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1. The Environmental Protection Agency (EPA) has defined "wetlands" as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions," including "swamps, marshes, bogs, and similar areas." 33 C.F.R. § 328.3(b) (2000).


3. See 33 C.F.R. § 320.4(b)(2)(I) (2000); Houck & Rolland, supra note 2, at 1247-48 (noting in part that over seventy percent of the marine animals harvested for seafood in the U.S. spend part of their lives in coastal salt marshes and estuaries).


5. See 33 C.F.R. § 320.4(b)(2)(VII); cf. Houck & Rolland, supra note 2, at 1245 (noting that wetlands can remove over 50% of heavy metals in water through concentration of the metals in the tissues of aquatic plants). The flooded, anaerobic sediments in wetlands can also promote the breakdown by microorganisms of persistent organic toxins such as DDT. See AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, TOXICOLOGICAL PROFILE FOR DDT, DDE, AND DDD 89-90 (1991).
wetlands provides little economic value to wetland owners. Land developers and farmers are draining and destroying these ecosystems at an alarming pace; wetlands are disappearing at a rate of 300,000 acres per year.

The tension between preserving and developing these valuable areas has created a storm of controversy concerning the regulation of wetlands. This controversy came into focus in 1998 with the D.C. Circuit's decision in National Mining Association v. Army Corps of Engineers that invalidated the Tulloch Rule. The Tulloch rule was an attempt by the Environmental Protection Agency (EPA) and the Army Corps of Engineers (the Corps) to close a loophole through which developers were draining and destroying thousands of acres of wetlands while escaping the permitting requirements of Sections 301 and 404 of the Clean Water Act (CWA). This Note will examine the impact of National Mining on the Corps' regulation of wetland excavation under the CWA. This Note concludes that the D.C. Circuit, in order to limit the regulatory power of EPA and the Corps over dredging of wetlands, improperly reopened the regulatory loophole closed by the Tulloch Rule by narrowly interpreting the meaning of "addition of pollutant" in Section 404 failing to defer to the agencies and the CWA itself. The court's decision has severely limited the Corps' ability to protect wetland ecosystems because the Corps can no longer require a permit for many excavations of small, isolated wetlands.

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7. See Houck & Rolland, supra note 2, at 1251. Historically, agricultural development has been responsible for 90 percent of wetland losses nationwide; however, the rate of agricultural conversion of wetlands has declined considerably in recent years. See SCODARDI, supra note 6, at 12, 76.
8. The regulation of wetlands has been described by one regulator as a "tough, nasty business" involving over 10,000 permit applications per year. See Houck & Rolland. supra note 2, at 1243.
11. Id. § 1344 (1994).
CASE SUMMARY

A. Background

1. Regulatory History

The excavation of wetlands within the United States is regulated under two statutes, Section 404 of the CWA, and Section 10 of the Rivers and Harbors Act of 1899. Both statutes authorize the Corps to regulate the dredging of U.S. waters, but each has a different trigger and scope. The Rivers and Harbors Act requires a permit from the Corps “to excavate or fill” navigable waters of the United States but applies only to tidal waters, rivers, and lakes that are used for interstate commerce. This Act has never been interpreted to extend to non-navigable wetlands. The CWA, in contrast, requires a permit for “the discharge of any pollutant” into the “navigable waters” of the United States. Although the language of the CWA does not explicitly cover wetlands, the Corps interprets its jurisdiction to include wetlands, and the Supreme Court has upheld this authority.
NATIONAL MINING

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The Corps regulates dredging under Section 404 of the CWA. Dredging is the removal of sediments and plant material from a body of water or wetland in order to drain or re-channel the water and is usually accomplished by use of backhoes for ditching and draglines, or bulldozers, for larger excavations. These activities produce discharges through the movement and redeposit of excavated sediments. The small amount of sediment and other material that falls from dredging equipment as it is raised from or scraped across the sediments on the bottom of a water body is referred to as "incidental fallback." This incidental fallback is nearly unavoidable during excavation in wetlands; it can result simply from the movement of dredging equipment in sediments or from soil falling from uprooted trees. Consequently, regulation of incidental fallback brings all dredging within the Corps' jurisdiction.

Prior to the National Mining decision, the Corps had progressively extended its authority over dredging under Section 404, but still permitted certain dredging activities to evade the Corps' jurisdiction. Although the statute itself does not authorize the Corps to regulate dredging of wetlands, it does authorize the Corps to require a permit for "the discharge of dredged or fill material into the navigable waters [of the United States] at specified disposal sites." In Avoyelles Sportsmen's League, Inc. v. Marsh, the Fifth Circuit held that the redeposit of dredged material in a wetland was a regulable discharge.

wetlands) . . ." id. § 328.3(a)(7).
23. Ditching, channelization and other dredging are used for the diversion of water for irrigation, rerouting of streams, draining of wetlands, and creation of open water ponds from wetlands. See id. at 45,016, 45,018.
24. See id. at 45,018.
25. National Mining, 145 F.3d 1399, 1403 (D.C. Cir. 1998). This is to be distinguished from material that is deliberately sidecast to another part of the wetland. Sidecasting is the placement of dredged soil and sediment in another part of the wetland some distance from the point of origin. See id. at 1402.
26. See id. at 1403.
28. See National Mining, 145 F.3d at 1401.
30. 715 F.2d 897 (5th Cir. 1983) (Avoyelles II).
31. Id. at 923.
Avoyelles II, the Corps issued a series of Regulatory Guidance Letters\(^ {32} \) to its field offices that initially stated that "[the CWA] does not authorize the Corps to regulate dredging,"\(^ {33} \) but shifted the regulatory animus the following year from the discharge itself to the nature of the activity producing the discharge.\(^ {34} \) The Corps issued a final rule in 1986 that defined discharge as any addition of a pollutant to navigable waters from any point source but exempted "de minimis, incidental soil movement occurring during normal dredging operations."\(^ {35} \) Under this rule, dredging operations that produced only incidental fallback were specifically exempted from the jurisdiction of the Corps.\(^ {36} \)

This exemption for incidental fallback came under fire in 1990, in North Carolina Wildlife Federation v. Tulloch.\(^ {37} \) Tulloch dealt with a developer who had attempted to use the exemption to drain 700 acres of wetlands in an 1800-acre development without obtaining a permit from the Corps. The developer first met with the local Corps district office to determine the exact limits of Section 404 jurisdiction. The developer then went to great lengths to drain and destroy the wetland to avoid the Corps' jurisdiction:

Using computer modeling, the developer's consultant determined that by excavating ditches four feet deep every two hundred feet, the wetlands in the first conversion area could be drained, eliminating the presence of wetland hydrology and wetland vegetation, and thereby removing the

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34. See RGL 85-04, supra note 32; Douglas, supra note 33, at 493.


36. See Douglas, supra note 33, at 495.

area from Section 404 jurisdiction. After these ditches were completed and the water table had dropped sufficiently, the Wilmington District released the tract from jurisdiction. The developer used this technique in several other tracts which were also later released from jurisdiction.38

The developer had all of the openings in the dredging equipment welded shut and all of the dredged material trucked away to avoid any discharges of dredged material other than incidental fallback, thereby avoiding a Section 404 permit.39

Several environmental groups sued the developer, EPA, and the Corps, charging that the excavation activities, which destroyed and degraded wetlands, should have required a permit under Section 404 despite the lack of the Corps jurisdiction over dredging that does not create discharges. The agencies settled, agreeing to revise the definition of "discharged of dredged material" to include incidental fallback.40 The Corps and EPA codified the settlement language on August 25, 1993, as a modification of the regulations under Section 404;41 the modified regulation is known as the "Tulloch Rule."42

The Tulloch Rule redefined "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."43 The Tulloch Rule only exempted from permit requirements "any incidental addition, including redeposit, of dredged material associated with any activity that does not have or would not have the effect of destroying or degrading an area of waters of the United States."44 Wetland excavators bear the burden of proving that their activities would not have destructive or degrading effects on the wetlands.45 This brought virtually all

40. The settlement agreement was non-binding; it stipulated that the plaintiffs would dismiss their action if the revised Corps rule was "substantially similar" to the proposed regulation of incidental fallback in the settlement. See Final Rule, Clean Water Act Regulatory Programs, 58 Fed. Reg. 45,008, 45,008 (1993).
41. See id. at 45,035.
42. See National Mining, 145 F.3d at 1402.
45. See id. Degradation was defined as any effect that is more than "de minimis (i.e., inconsequential)" and causes an "identifiable individual or cumulative adverse
dredging operations in wetlands within the sphere of the Corps' authority under Section 404.46

2. The Tulloch Rule is Challenged in District Court

In American Mining Congress v. United States Army Corps of Engineers,47 a coalition of industry groups involved in wetland excavation48 brought a facial pre-enforcement challenge49 to the Tulloch Rule in the District Court for the D.C. Circuit.50 The plaintiffs argued that regulation of incidental fallback under the Tulloch Rule: (1) was inconsistent with the language and intent of the CWA; (2) was arbitrary, capricious, and otherwise not in accordance with the law;51 (3) violated plaintiffs' due process rights because the regulation was vague and unlawfully shifted the burden of proof to regulated parties; and (4) violated the rulemaking requirements of the Administrative Procedure Act (APA).52

The Corps and EPA contended that the Tulloch Rule closed the loophole in the CWA,53 and argued that the court should defer to the agencies' expertise in their interpretation of Section 404 in accordance with the rule established by the U.S. Supreme Court in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.54 In Chevron, the Court established a two-prong test for determining the facial validity of a regulation under its enabling statute.55 Under the first prong of the test, when the language or Congressional purpose behind a statute is clear, "that is the end of the matter; for the court, as well as the effect on any aquatic function." 33 C.F.R. § 323.2(d)(5) (2000); See also National Mining, 145 F.3d at 1403.

46. See National Mining, 145 F.3d at 1403.
47. See National Mining, 145 F.3d at 1403.
48. The plaintiffs were the American Mining Congress, the American Road & Transportation Builders Association, the National Aggregates Association, and the National Association of Home Builders. See id. at 268.
49. "Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted, absent a statutory bar or some other unusual circumstance . . . ." Abbots Laboratories v. Gardner, 387 U.S. 136, 153 (1967).
50. See National Mining, 145 F.3d at 1401.
52. See American Mining Congress, 951 F. Supp. at 270.
53. See id.
55. See id. at 842-44.
agency, must give effect to the unambiguously expressed intent of Congress." When the court does not find such clarity in the statutory language or legislative history, however, it must show deference to the expertise of the agency charged with enacting the legislation:

If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

The District Court held that the Tulloch Rule exceeded the agencies' statutory authority under the CWA because the language of Section 404 does not include incidental fallback as a regulable discharge and because Congress never intended to regulate incidental fallback as an "addition of pollutant" under Section 404. Because the court found the intent of Congress in Section 404 to be clear, it only analyzed the Tulloch Rule under the first prong of the Chevron test and thus found no reason to defer to the agencies' interpretation of the statute. The court granted summary judgment for the plaintiffs and issued a nationwide injunction invalidating and setting aside the Tulloch Rule and banning its enforcement by either the Corps or the EPA. The Corps and EPA appealed the decision to the U.S. Court of Appeals for the D.C. Circuit.

B. Opinion of the Court of Appeals for the D.C. Circuit

In National Mining Association v. Army Corps of Engineers, a three-judge panel of the D.C. Circuit unanimously upheld the injunction invalidating the Tulloch Rule. In the majority opinion, the court first reviewed the history of the 1977 and 1986 regulations issued by the Corps under Section 404, including the interpretation of "navigable waters" to include wetlands.

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56. Id. at 842-43.
57. Id. at 843 (emphasis added).
58. See American Mining Congress, 951 F. Supp. at 270-72.
59. See id. at 277.
60. See id. at 278. Because the court granted summary judgment for the plaintiffs on the grounds that the Tulloch Rule was inconsistent with the CWA, the court did not address the other causes of action. See id. at 270.
61. 145 F.3d 1399 (D.C. Cir. 1998).
62. See id. at 1401-02. The court noted the decision in United States v. Wilson,
The court also noted that the 1986 regulations covered sidecasting but not incidental fallback. The court then reviewed the Tulloch case and the Corps' subsequent redefinition of "discharge of dredged material" in the Tulloch Rule. Noting that "incidental fallback is a practically inescapable by-product of [dredging, landclearing, and channelization]," Judge Williams concluded that "the Tulloch Rule effectively requires a permit for all those activities, subject to a limited exception for the ones that the Corps in its discretion deems to produce no adverse effects on waters of the United States.

1. The D.C. Circuit's Analysis

The D.C. Circuit held that incidental fallback is a net withdrawal of material, not an addition, and therefore the Tulloch Rule's classification of incidental fallback as a discharge under Section 404 was "manifestly unreasonable." The court was not persuaded by the agencies' argument that sediments become a pollutant upon dredging: "Although the Act includes 'dredged spoil' in its list of pollutants ... Congress could not have contemplated that the attempted removal of 100 tons of that substance could constitute an addition simply because only 99 tons of it were actually taken away." The court then compared the regulation of dredging under the Rivers and Harbors Act to that under the Clean Water Act, noting the possible incongruity of regulating excavation under a narrower statute than that regulating discharges, but rejecting the ability of the agencies to resolve that incongruity.

The agencies argued that, because Congress exempted certain agricultural activities in Section 404(f), it must have intended overall regulation of dredging, or it would have had no

133 F.3d 251 (4th Cir. 1997), that bringing all wetlands under Section 404 went beyond statutory authority because they would include intrastate waters not used for navigation. See National Mining, 145 F.3d at 1401 n.2.
63. See National Mining, 145 F.3d at 1402.
64. See id.
65. Id. at 1403.
66. Id.
67. Id. at 1404, 1406 n.8. The court cited hypothetical arguments that cutting down a tree or riding a bicycle in a wetland could require a permit under the Tulloch Rule to illustrate the unreasonableness of the Rule. See id. at 1404 n.4.
68. The Corps and EPA had argued that wetland material "undergoes a legal metamorphosis during the dredging process, becoming a 'pollutant' for purposes of the Act." Id. at 1403.
69. Id. at 1404 (citation omitted).
71. See National Mining, 145 F.3d at 1404-05.
reason to create exemptions. Moreover, the parties noted that Section 404(f)(1) describes the effect of the exempted activities as "discharge of dredged or fill material." The court rejected this argument, writing that the exempted activities either produced "actual discharges" of pollutants or no discharges at all, and the exemptions merely showed that Congress wanted to protect these "bucolic pursuits." The court sidestepped the argument of amicus National Wildlife Federation (NWF) that the holding "reads the regulation of dredged material out of the statute" by requiring all regulated discharges to come from outside sources. The court conceded that NWF "correctly" argued that any discharge of dredged material could be a "redeposit" and called on the agencies to establish a "bright line between incidental fallback . . . and regulable redeposits . . . [noting that] a reasoned attempt by the agencies to draw such a line would merit considerable deference." The court distinguished all of the cases cited by the agencies in support of their position, emphasizing that all of the cases predated the Tulloch Rule and did not address the issue of incidental fallback.

2. The Court's Reasoning for Why the Chevron Rule Does Not Require Deference to the Tulloch Rule

Finally, the court rejected the agencies' "last-ditch argument" that, because plaintiffs mounted a facial challenge to the Tulloch Rule, the court should replace the Chevron Rule with an "administrative-law version" of the more deferential test used in United States. v. Salerno. In Salerno, the Supreme Court held that for a facial challenge to a statute to succeed, "the challenger

73. National Mining, 145 F.3d at 1405.
74. Id.
75. See Avoyelles II, 715 F.2d at 924.
76. National Mining, 145 F.3d at 1405.
77. See id. at 1406; Avoyelles II, 715 F.2d at 924 (finding that redeposit from deliberate leveling of sloughs was a discharge, though not addressing incidental fallback); United States v. M.C.C. of Florida, 772 F.2d 1501, 1506 (11th Cir. 1985) (finding that sidecasting of dredged spoil onto adjacent sea grass beds is a discharge of pollution), Judgment vacated by M.C.C. of Florida, Inc. v. U.S., 481 U.S. 1034 (1987); United States v. Wilson, 133 F.3d 251, 259, 273 (4th Cir. 1997) (Neimeyer, J.; Payne, J., dissenting in part) (split decision on whether sidecasting is an "addition" of pollutant); Rybacheck v. EPA, 904 F.2d 1276, 1285 (9th Cir. 1990) (finding that discharge of waste material extracted from streambed for placer mining back into stream was an "addition" of pollutant); Minnehaha Creek Watershed District v. Hoffman, 597 F.2d 617, 626 (8th Cir. 1979) (finding that construction of dams and riprap was a deliberate placement).
must establish that no set of circumstances exists under which the Act would be valid." The Corps argued that, because the plaintiffs challenged the Tulloch Rule but not the 1986 rule that exempted incidental fallback, under Salerno, the court had to consider every possible circumstance in which the Corps could require a permit under the Tulloch Rule but not the 1986 rule. The Tulloch Rule was valid, the Corps argued, unless the plaintiffs could prove that the Corps was exceeding its Section 404 authority in every one of these cases. The D.C. Circuit responded that Salerno did not apply to a facial challenge to a regulation charged as incompatible with its underlying statute and rejected, in dicta, three hypothetical examples under which the plaintiffs’ challenge would fail the Salerno test. The court noted that each case would have been regulated under the 1986 rule and declined to address whether Salerno would be satisfied by “marginal cases” of incidental soil movements from dredging that “nonetheless somehow result in a transfer 'between unrelated water bodies of different water quality.'”

The D.C. Circuit rejected the agencies' attempt to use the deferential holding of the Supreme Court in Babbitt v. Sweet Home Chapter, Communities for a Greater Oregon, stating that the Sweet Home Court found the Secretary of the Interior’s interpretation of the Endangered Species Act to be reasonable because it was based on the overall statute, not on “a few hypothetical instances of valid application....” Following

79. Id. at 745 (emphasis added).
80. The Corps gave three examples of activities that would only be regulated under the Tulloch Rule: mechanized land clearing of wetlands; redeposit of dredged sediments at various points from the dredging location; and suspension of sediments in the water during dredging. See National Mining, 145 F.3d at 1407.
81. See id.
82. In rejecting the Salerno argument, the court stated that the Chevron test can be used to invalidate regulations as “facially inconsistent with governing statutes despite the presence of easily imaginable valid applications.” See id.
83. Mechanized land clearing would be regulated under the 1986 rule from Auquelles II; redeposits at various distances from point of removal would be “sidecasting” which “has ‘always been regulated under Section 404’” (quoting Final Rule, Clean Water Act Regulatory Programs, 58 Fed. Reg. 45,008, 45,013 (1993)); and resuspension of dredged material in water either (i) falls under Rybachek holding (1986 rule) or (ii) covers incidental fallback, which “contradicts the statutory requirement of an addition.” National Mining, 145 F.3d at 1407.
84. National Mining, 145 F.3d at 1407 (quoting DuBois v. Department of Agric., 102 F.3d 1273, 1297-98 (1st Cir. 1996)).
85. 515 U.S. 687, 697 (1995) (upholding the Secretary of Interior's interpretation of "harm" in Endangered Species Act as reasonable against a facial challenge) (Sweet Home).
86. National Mining, 145 F.3d at 1408 (referring to the agencies' Salerno argument).
Justice Scalia's dissent in *Sweet Home*, the D.C. Circuit found that because the Tulloch Rule ignored the Section 404 "addition" requirement in its regulation of incidental fallback, "[a] facial attack on the rule should not fail simply because the Corps might apply it to cases where an addition is present." The plaintiffs' challenge also did not require the court to assume that "the agency will exercise its discretion unlawfully . . . or will misapply the regulation" because even proper application of the Tulloch Rule would "carry the agency beyond its statutory mandate."

Despite its examination of *Salerno* and *Sweet Home*, the D.C. Circuit did not engage in a detailed *Chevron* analysis. Although the Appeals Court acknowledged the district court's finding that the language of Section 404 was unambiguous, the D.C. Circuit appears to have used the second prong of *Chevron* to invalidate the Tulloch Rule as a "manifestly unreasonable" interpretation of Section 404:

> [s]ince the Act sets out no bright line between incidental fallback on the one hand and regulable redeposits on the other, a reasoned attempt by the agencies to draw such a line would merit considerable deference. . . . But the Tulloch Rule makes no effort to draw such a line, and indeed its overriding purpose appears to be to expand the Corps's [sic] 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.

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87. Judge Williams wrote, "[I]t would have been remarkable for the Court [in *Sweet Home*] to find that the regulation omitted an element made essential by the statute, and then proceed to uphold the regulation against facial attack because that element might happen to be present on the facts of a particular case." *Id.; see Sweet Home*, 515 U.S. at 731 (Scalia, J., dissenting).


89. *Id.* (citing *Action Alliance of Senior Citizens of Greater Philadelphia v. Heckler*, 789 F.2d 931, 941 (D.C. Cir. 1986); *Union of Concerned Scientists v. Nuclear Regulatory Comm'n*, 880 F.2d 552, 558-59 (D.C. Cir. 1989)).

90. The opinion stated that the plaintiffs repeated their argument from *American Mining Congress* that the Tulloch Rule violates the unambiguous terms of Section 404 and thus falls the first tier of the *Chevron* test. *See id.* at 1403.

91. The D.C. Circuit did not seem to find the language of Section 404 as unambiguous as did the district court, however, and thus applied the second tier of the *Chevron* test. Judge Silberman explicitly stated this in the concurrence. *See id.* at 1410 (Silberman, J., concurring); *id.* at 1406 n.8.

3. The D.C. Circuit Upheld the District Court's Injunction and Bar Against Enforcement of the Tulloch Rule

After holding the Tulloch Rule invalid as an overextension of the Corps' and EPA's authority under Section 404, the D.C. Circuit upheld the nationwide injunction against enforcement of the Rule.93 The court found that the district court exercised proper discretion in awarding the injunction and was not required to make express findings that the elements of a permanent injunction were fulfilled, as argued by the Corps and EPA.94 Citing the APA,95 the D.C. Circuit also rejected the agencies' argument that the nationwide injunction was in error because of its grant of relief to nonparties.96 The court reasoned that the injunction would prevent a "flood of duplicative litigation" in the D.C. Circuit because suits against agency regulations often come before the D.C. Circuit.97

The court concluded its opinion by calling for Congressional action to clarify how dredging should be regulated under Section 404. The court concluded by stating,

If the agencies and [amicus] NWF 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 Tulloch Rule.98

C. Post-judgment Rulings

Although some commentators expected the Corps and EPA

93. See National Mining, 145 F.3d at 1408-10.
94. See id. at 1408 (citing Wagner v. Taylor, 836 F.2d 566, 575 (D.C. Cir. 1987)). The elements that must ordinarily be considered by a court before issuing a permanent injunction against enforcement of a regulation are: (1) irreparable harm to the plaintiff if the regulation is enforced; (2) a showing by the plaintiff of success on the merits; (3) the inadequacy of legal remedies; and (4) a balancing of competing claims of injury to the plaintiff and public interest in enforcement. See Temple University v. White, 941 F.2d 201, 214-15 (3rd Cir. 1991). In National Mining, the agencies did not identify any adequate legal remedy, reasoned the court, and monetary damages were unavailable and inappropriate because of sovereign immunity and the pre-enforcement nature of the challenge to the regulation. See National Mining, 145 F.3d at 1408-09. There was also no need to show irreparable injury after the Tulloch Rule was declared illegal. See id. at 1409.
95. "The reviewing court shall... hold unlawful and set aside agency action, findings, and conclusions found to be... in excess of statutory jurisdiction, authority, or limitations...." 5 U.S.C. § 706(2)(C) (2000).
96. See National Mining, 145 F.3d at 1409.
97. Id.
98. Id. at 1410.
to appeal the *National Mining* decision, the agencies did not petition for certiorari to the U.S. Supreme Court. The Corps instead tried to circumvent the ruling by ordering its offices to act under the latest ruling of the district court, which had stayed the injunction against enforcement of the Tulloch Rule. The D.C. Circuit, however, quickly threw out the stay. The Corps and EPA then issued a joint guidance memorandum describing the effect of the holding on regulations under Section 404. The agencies instructed their field officers to closely scrutinize any attempt to use the incidental fallback exemption to avoid a permit for a large wetland excavation project. As a result, developers are unlikely to be able to drain large areas of wetland while the local Corps office looks the other way, but small, "surgical" excavations, in which sediments only fall back to their point of origin, can still escape the jurisdiction of the Corps under Section 404. The invalidation of the Tulloch Rule could especially pose a threat to small, isolated wetlands in the headwaters of streams, which are particularly vulnerable to small-scale dredging.

The effect of the *National Mining* decision on holdings in other courts has been ambiguous. For example, in *United States v. Hallmark Construction Co.*, the court for the Northern District of Illinois held that the Corps did not have jurisdiction over an excavation of a wetland that only produced incidental fallback.

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100. See *Clean Water Act: Chances for Clean Water Bill Dim; EPA to Use Existing Authorities on Nonpoint Sources*, Daily Environment Report Outlook '99 Water Issues, 12 DAILY ENV. REP. S-18 (Jan. 20, 1999). The agencies may have elected to wait for a case with more favorable facts before pursuing a case up to the Supreme Court.
101. The injunction was stayed by the district court pending appeal. See *Froebel v. Meyer*, 13 F. Supp.2d 843, 867 (E.D. Wis. 1998).
104. See JOINT GUIDANCE MEMORANDUM, supra note 103, at 3-4.
105. See *Douglas*, supra note 33, at 508-09.
108. See id. at 1037.
in question in *Froebel v. Meyer* was not dredging. District courts in Michigan and Florida have also distinguished *National Mining*, holding that the challenged activities involved sidecasting and discharge of fill material.

II

ANALYSIS

The D.C. Circuit sidestepped the facts, judicial precedent, and the language of the Clean Water Act itself to prevent the Corps from regulating dredging. Rather than recognize the need for regulation of wetland dredging and defer to the expertise of the Corps and EPA, the court ignored the *Chevron* test and invalidated the Tulloch Rule through a single-minded devotion to the idea that incidental fallback is not an "addition."

A. Regulation of Dredging is Permissible and Necessary Under the Clean Water Act

The Tulloch Rule filled a regulatory gap in a way that was both permissible under the CWA and necessary to prevent widespread destruction of wetlands. The broad express purpose of the Clean Water Act, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," requires the regulation of wetland excavations. Although Sections 402 and 404 of the CWA require permits for "discharges" rather than for excavation activities per se, the intent of Congress to protect the nation's waters shows that Congress intended to regulate dredging activities that destroy or degrade wetlands. The Supreme Court has upheld the ability of agencies to adapt their regulations to evolving information about environmental harms.

Various provisions of Section 404 further show that Congress intended for the Corps and EPA to address the total

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109. *See Froebel*, 13 F. Supp.2d at 869 (finding that the flow of sediments through a partially removed dam was not "dredging").


111. The irony of the D.C. Circuit's position and the resistance of developers to obtaining a Section 404 permit is that the Corps rejects only a few permit applications under Section 404, preferring instead to negotiate mitigation measures. *See Houck & Rolland, supra* note 2, at 1258.

112. CWA § 101(a); 33 U.S.C. § 1251(a) (1994).


effects of dredging on wetland ecology under the CWA. The language of the "recapture" provision in the exemptions for agricultural activities under Section 404(f)(2) also demonstrates that Congress intended Section 404 to regulate the dredging activity itself. That exemption requires a permit to be issued based on the "use to which [the wetland] was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced . . . ." In addition, the CWA authorizes the EPA to base its acceptance of disposal sites for dredged material on effects on aquatic ecosystems and municipal water supplies. The EPA guidelines for selection of the disposal sites, which have not been challenged, also require consideration of secondary effects of dredging on wetlands. Secondary effects are defined as "effects on an aquatic ecosystem that are associated with a discharge of dredged or fill materials, but do not result from the actual placement of the dredged or fill material." These effects include fluctuating water levels and leachate and runoff from development on fill. Draining of wetlands and similar environmental alteration is clearly a secondary effect associated with the discharge of dredged material. These provisions demonstrate that Congress was concerned with the overall impact of activities in wetlands and intended to regulate actions that adversely impact wetlands under the auspices of Section 404.

At present, the Corps' permit program under Section 404 is the only way to fully protect wetlands from destructive

115. See Riverside Irrigation Dist. v. Andrews, 758 F.2d 508, 512 (10th Cir. 1985) (upholding the Corps' denial of nationwide permit coverage for discharges from a dam based on total environmental impact of the dam operation, including impacts on downstream flows); Final Rule, Clean Water Act Regulatory Programs, 58 Fed. Reg. 45,008, 45,012 (1993).
121. 40 C.F.R. § 230.11(b)(1).
122. See id. § 230.11(b)(2).
excavation because the CWA is the only federal environmental statute that mandates both nationwide jurisdiction over wetlands and regulatory oversight of activities that damage wetlands.\textsuperscript{124} Wetland conservation is addressed directly by several federal statutes, but these laws provide only for habitat acquisition by the government or voluntary conservation and restoration plans.\textsuperscript{125} Other statutes provide protection for wetlands, but only in limited circumstances.\textsuperscript{126} Wetland habitat can also be protected under the Endangered Species Act (ESA),\textsuperscript{127} but this protection can only be invoked if a listed species is present\textsuperscript{128} or the wetland is designated as critical habitat.\textsuperscript{129} Finally, land management statutes such as the Federal Land Policy and Management Act\textsuperscript{130} and the National Forest Management Act\textsuperscript{131} only provide jurisdiction over wetlands on federal lands,\textsuperscript{132} and their multiple-use mandates are less protective of wetlands than the water quality requirements and permitting process of the CWA.

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\item \textsuperscript{124} The Supreme Court has sustained the jurisdiction of the CWA over wetlands as "waters of the United States." United States v. Riverside Bayview Homes, 474 U.S. 121, 131-32 (1985).
\item \textsuperscript{127} 16 U.S.C. § 1531 et seq. (1994); see Sweet Home, 515 U.S. at 697-98.
\item \textsuperscript{130} 43 U.S.C. § 1761 et seq. (1994).
\item \textsuperscript{131} 16 U.S.C. § 1600 et seq. (1994).
\item \textsuperscript{132} The federal government owns only 13 percent of all wetlands in the United States. See U.S. DEPT OF THE INTERIOR, U.S. FISH AND WILDLIFE SERVICE, WETLANDS: MEETING THE PRESIDENT'S CHALLENGE 19 (1990); see also Scodardi, supra note 6, at 16.
\end{itemize}
B. The D.C. Circuit Assumed that Incidental Fallback Is not an Addition of Pollutant

Throughout the National Mining opinion, the D.C. Circuit assumed its conclusion that incidental fallback is not an "addition" of pollutant. The court began its opinion by relying on the flawed reasoning that "because incidental fallback represents a net withdrawal, not an addition, of material, it cannot be a discharge." This reasoning ignores the issue of the damaging effects of incidental fallback. This assumption dominated the rest of the opinion. The court used this reasoning to dismiss the agencies' argument and extensive scientific evidence that re-suspension of sediments constitutes an addition of pollutants to a wetland. The court responded to this proposition by stating, "Regardless of any legal metamorphosis that may occur at the moment of dredging, we fail to see how there can be an addition of dredged material when there is no addition of material."

The court also used this assumption to ignore the inclusion of "dredged spoil" in the list of pollutants regulated under the CWA, focusing instead on a simplistic view of the impacts of dredging, stating that "Congress could not have contemplated that the attempted removal of 100 tons of that substance could constitute an addition simply because only 99 tons of it were actually taken away." The court completely ignored the destructive impacts of removal of 99 tons of plants and sediment, drainage of water, and re-suspension of one ton of sediments and associated pollutants caused by that removal. Suspended sediments can smother aquatic plant life, insects, and fish spawning beds. Highly toxic contaminants such as PCBs and mercury accumulate in sediments and are re-

133. National Mining, 145 F.3d at 1404.
134. Id.
137. See Avoyelles I, 473 F. Supp. at 534.
138. Polychlorinated biphenyls, mixtures of compounds formerly used as industrial lubricants and electrical insulators. PCBs are known carcinogens and suspected endocrine disrupters and have been banned from commercial use. See AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, TOXICOLOGICAL PROFILE FOR POLYCHLORINATED BIPHENYLS 2, 6-7 (1991).
139. The EPA has found PCBs and mercury to be the contaminants in sediments which pose the greatest health risk to aquatic life. See U.S. EPA OFFICE OF WATER, THE INCIDENCE AND SEVERITY OF SEDIMENT CONTAMINATION IN SURFACE WATERS OF THE UNITED STATES, VOLUME 1: NATIONAL SEDIMENT QUALITY SURVEY (EPA 823-R-97-006), xxiv (1997).
suspended in the water during dredging activities, leading to their bioaccumulation in aquatic food webs and toxicity to humans and predatory birds. The cumulative impact of numerous small discharges of sediments “can result in a major impairment of the water resources and interfere with the productivity and water quality of existing aquatic ecosystems.”

The D.C. Circuit also disregarded the Congressional intent to regulate incidental fallback found within the language of Section 404(f). The Corps and EPA made a valid argument that the agricultural activities exempted from the permit requirements under Section 404(f)(1)(A) and (C), if carried out in wetlands, would produce suspension and redeposit of sediments similar to incidental fallback. The intent of Congress to regulate incidental fallback resulting from wetland development under Section 404 is clearly demonstrated by the language of Section 404(f)(2):

\[\text{Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.}\]

Dredging channels to drain the water from hundreds of acres of wetlands, thereby both destroying the wetlands for development and bringing them out of the Corps’ jurisdiction, is obviously an activity intended to impair the flow of navigable waters, reduce their reach, and subject the wetlands to a new use. Consequently, the incidental fallback regulated by the Tulloch Rule falls within the scope of Section 404(f)(2).

The court did not acknowledge the similarity to dredging as the basis for listing agricultural activities in the Section 404(f)(1)
exemptions, however, and selectively ignored the language of Section 404(f)(2). Instead, the court postulated that Congress either intended to exempt agricultural discharges other than fallback or left its legislative intent mysterious,\textsuperscript{145} concluding that "Congress emphatically did not want the law to impede these bucolic pursuits."\textsuperscript{146} The court used the same flawed reasoning to dismiss existing caselaw that upheld the Corps' jurisdiction over dredging activities.\textsuperscript{147} The D.C. Circuit had clearly made up its mind that incidental fallback should not be regulated, and the court was not about to be swayed by either the facts or the law.

C. The D.C. Circuit Ignored the Chevron Rule

The fate of the Tulloch Rule in \textit{National Mining} was ostensibly decided under the second prong of the \textit{Chevron} test. However, the court seemed determined to ignore Supreme Court precedent requiring deference to reasonable agency interpretations of statutes. Other Supreme Court holdings have followed this rule of deference. The Court earlier held, in \textit{Citizens to Preserve Overton Park v. Volpe},\textsuperscript{148} that although judicial review under the arbitrary and capricious standard "is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."\textsuperscript{149} The Court also broadly deferred to the Secretary of the Interior's interpretation of "harm" to endangered species\textsuperscript{150} under the Endangered Species Act\textsuperscript{151} in \textit{Sweet Home}.\textsuperscript{152} The D.C. Circuit itself held, in \textit{National Wildlife Federation v. Gorsuch},\textsuperscript{153} that "EPA's interpretation [of the word 'addition'] must be accepted unless manifestly unreasonable . . . ."\textsuperscript{154}

The court does not appear to have been overly concerned

\begin{footnotes}
\begin{itemize}
\item \textsuperscript{145} See \textit{National Mining}, 145 F.3d at 1405.
\item \textsuperscript{146} \textit{id.}
\item \textsuperscript{147} See, e.g., \textit{United States v. M.C.C. of Florida}, 772 F.2d 1501, 1506 (11th Cir. 1985) [discussing displacement of dredged spoil onto adjacent seagrass beds by boat propellers]; \textit{Rybacheck}, 904 F.2d at 1285 (discussing discharge of dredged spoil from placer mining). The D.C. Circuit should have examined the nature and effects of the regulated discharges in these cases rather than distinguishing them merely on the principle that they did not address incidental fallback, because incidental fallback was exempted from Section 404 permits at the time these cases were decided.
\item \textsuperscript{148} 401 U.S. 402 (1971).
\item \textsuperscript{149} \textit{id.} at 416.
\item \textsuperscript{150} See 50 C.F.R. § 17.3 (2000).
\item \textsuperscript{151} 16 U.S.C. §§ 1531, 1538(a)(1) (1994).
\item \textsuperscript{152} 515 U.S. at 697.
\item \textsuperscript{153} 693 F.2d 156 (D.C. Cir. 1982).
\item \textsuperscript{154} \textit{id.} at 175.
\end{itemize}
\end{footnotes}
with the *Chevron* test. In fact, the court concerned itself more with rejecting the proposed application of the *Salerno* test.\(^{155}\) The court mentioned *Chevron* only three times in passing but did not address its language;\(^{156}\) the closest the court came to a *Chevron* analysis was the assertion, without explanation, that the holding was consistent with *Gorsuch* because the agencies' interpretation of incidental fallback as an "addition" is "manifestly unreasonable."\(^{157}\)

A thoughtful analysis under the second prong of *Chevron* should have resulted in a finding that the Tulloch Rule was a reasonable interpretation of Corps' jurisdiction under Section 404. The impacts of dredging and redeposition of sediments on wetlands are well documented,\(^{158}\) and the Congressional intent to protect wetlands is demonstrated in the language of Section 404.\(^{159}\) Consequently, the agencies' inclusion of incidental fallback within Section 404 was not "manifestly unreasonable." The EPA and the Corps are better equipped than the D.C. Circuit to determine the effects of suspension and redeposit of sediments and other impacts of dredging on wetland ecosystems. These agencies are therefore entitled to deference by the court.\(^{160}\) Rather than defer to a "permissible construction of the statute" by the agencies, as required under *Chevron*, the court chose to "simply impose its own construction" on Section 404.\(^{161}\) Justice Scalia's words in another decision aptly describe the *National Mining* holding: "This is not an interpretation but an evisceration of *Chevron*."\(^{162}\)

**CONCLUSION**

Although the *National Mining* decision was a major setback for the protection of wetlands by the Corps and EPA, developers are unlikely to have the freedom to drain wetlands as they did

\(^{155}\) See *National Mining*, 145 F.3d at 1406-07.

\(^{156}\) See id. at 1403, 1406-07.

\(^{157}\) Id. at 1406 n.8.

\(^{158}\) See supra text accompanying notes 138-42.

\(^{159}\) See supra text accompanying notes 143-45.


\(^{161}\) *Chevron*, 467 U.S. at 843; see Moore, supra note 160, at 247.

\(^{162}\) Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 454 (1987) (Scalia, J., concurring in judgment only) (disagreeing with majority's use of legislative intent rather than deference to INS interpretation of statute). The D.C. Circuit's disdain for the Chevron Rule is further shown by the fact that it did not even cite this non-deferential holding in support of its position.
before the Tulloch Rule.\textsuperscript{163} The scope of the holding is limited to the permitting of incidental fallback; all mechanized land-clearing and most other excavation activities in wetlands will still fall under the Corps' jurisdiction.\textsuperscript{164} Despite this limited scope, carefully planned and executed "surgical" excavations, particularly those on a small scale, may now be able to escape regulation by the Corps,\textsuperscript{165} and developers are becoming more sophisticated at exploiting this loophole.\textsuperscript{166}

The National Mining decision demonstrates the need for Congress to clarify the scope of the Corps' jurisdiction to protect wetlands under Section 404 of the CWA.\textsuperscript{167} Congress appears more interested in delegating authority to the states,\textsuperscript{168} however, and the states, in turn, either favor developers or choose not to act.\textsuperscript{169} The promulgation, and subsequent invalidation, of wetland regulations through litigation is a costly and inefficient way to prevent the loss of this critical ecological resource. This regulatory rollercoaster creates great confusion and inconsistency for both the Corps\textsuperscript{170} and the developers who must work under the regulations.\textsuperscript{171} Congress must take the responsibility to provide a consistent and predictable regulatory framework so that both the Corps and commercial excavators can do their jobs while protecting and enhancing the integrity of the nation's wetlands.

\begin{enumerate}
\item[163.] See Douglas, supra note 33, at 501.
\item[164.] See id. at 507.
\item[165.] See id. at 508.
\item[167.] EPA Assistant Administrator for Water, Chuck Fox, recently "called on Congress to 'close a regulatory gap that threatens the loss of tens of thousands of acres of wetlands to drainage and excavation each year.'" EPA Calls for Congress to Fix Tulloch, 21 NAT'L WETLANDS NEWSL. 19 (Nov.-Dec. 1999):
\item[168.] See Houck & Rolland, supra note 2, at 1243-44.
\item[169.] See id. at 1252-53.
\item[170.] An informal survey of district offices conducted by the Corps prior to promulgation of the Tulloch Rule showed that the districts varied widely in interpreting their jurisdiction over wetland excavation under Section 404. See Final Rule, Clean Water Act Regulatory Programs, 58 Fed. Reg. 45,008, 45,014-15 (1993).
\item[171.] See Douglas, supra note 33, at 507.
\end{enumerate}