importance of a project is based on its net impacts, after considering both positive and negative impacts, i.e., its respective benefits and detriments.” (Footnotes omitted.)

Under this decision, the MDEQ will now play a major role in weighing the social and economic benefits and detriments of new developments that require NPDES permits. This serves as an open invitation to anti-growth groups to exploit antidegradation policies to challenge new land uses, and will entangle the MDEQ in land use policy decision-making. Federal guidance clearly explains that the antidegradation policy was never designed or intended to be a “no-growth” rule. See, Water Quality Handbook, 2d ed., ch. 4.5.

Because Brookside ultimately abandoned the MHP project, the question of how York will effect agency decision-making remains unclear. Some troubling possibilities can be found in the York opinion. The opinion holds that the MDEQ must entertain contentions, such as those presented by York Township, that the loss of agricultural land that may result from new development may outweigh the social and economic benefits of the proposed development.

The opinion also states that the issue of whether a new project complies with local zoning ordinances, while not determinative, “is certainly indicative of the social importance the local unit of government assigns the proposed use.” Further, the opinion directs the MDEQ to consider whether the economic benefits that will result from a project may be offset by those that are foregone, such as increased costs incurred for governmental services. Finally, the opinion indicates that the question of whether there may be other more suitable properties or locations where a project could be developed is a relevant consideration under the antidegradation analysis. The York opinion places the MDEQ squarely in the role of a land use planning authority with uncertain statutory authority or limitation. It also threatens to make the state’s antidegradation policy a potentially powerful tool for opposing new development, contrary to the original intent of that policy.

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**CLEAN WATER ACT JURISDICTION OVER EXCAVATION ACTIVITIES—THE MOST RECENT ITERATION OF THE ‘TULLOCH RULE’**

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Clean Water Act (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 can sometimes 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. But excavation activities are common to mining and site cleanup activities as well. 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. Section 404 of the CWA, administered primarily by the Army Corps of Engineers (the “Corps”), is the permitting authority for the “discharge of dredged or fill material”—both pollutants under the CWA—into the “waters of the United States.” 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. Thus, § 404 permits are required primarily for activities that result in an addition of material to “waters of the United States,” such as the filling of jurisdictional wetlands. Excavation activities in “waters of the United States,” however, have not generally required a § 404 permit because they typically involve only the removal of material.

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.” In 1993, the Corps and Environmental Protection Agency (EPA) (together, 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.” The Agencies’ revision reshaped the § 404 regulatory landscape because nearly all excavation activities result in at least some redeposit of material through what is known as “incidental fallback.” “Incidental fallback” is the incidental movement of soil resulting from excavation, such as the soil that is disturbed as dirt is shoveled, or the back-spill from a bucket that falls back into substantially the same place from which it was removed. Accordingly, the effect of the Agencies’ 1993 revision was, essentially, to extend § 404 jurisdiction to all excavation activities in “waters of the United States” via the regulation of “incidental fallback.”

The Agencies’ assertion of § 404 jurisdiction over “incidental fallback” was eventually invalidated by the courts. But the courts left the Agencies an opening to regulate some forms of redeposit of excavated material and suggested 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, promulgated their latest rule defining the “discharge of dredged material.” This article tracks the history of the Agencies’ efforts to establish § 404 jurisdiction over excavation activities and discusses the future of § 404 regulation under the new 2008 rule.

The Agencies’ 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. Indeed, in 1986, the Corps revised the definition of “discharge of dredged material” to exclude “de minimis, incidental soil movement occurring during normal dredging operations.” The preamble to the 1986 rule elucidated the Corps’ position regarding applying § 404 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.

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

In 1993, however, 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. Tulloch involved a 1,800-acre development project in New Hanover County, North Carolina, 700 acres of which were jurisdictional wetlands. 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. Accordingly, all 700 acres of wetlands were developed without a § 404 permit. 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. As part of the settlement in the Tulloch case, the Agencies agreed to revise the 1986 rule. 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.” 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.” By including any redeposit of dredged or excavated material within the definition, the Agencies extended § 404 to “incidental fallback.” That, in turn, extended § 404 regulation 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.” Although the Tulloch Rule did contain a de minimis exception for incidental additions of dredged material, the exception did not apply to persons 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 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.” Accordingly, the exception had little effect; indeed, the Agencies emphasized “that the threshold of adverse effects for the de minimis exception is a very low one.” Via the Tulloch Rule, the Agencies had reversed course from the Corps’ previous position, held since 1977, that excavation activities were not regulated under § 404 via “incidental fallback.”

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, 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.” According to the court, the appropriate remedy to close the alleged loophole in the CWA is Congressional action. The court issued an injunction prohibiting the Agencies from enforcing the Tulloch Rule.

On appeal, the United States Court of Appeals for the District of Columbia, in National Mining Association v. U.S. Army Corps of Engineers, upheld the district court’s injunction. 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.

In rejecting 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 of the CWA, the court concluded there could not be an addition of dredged material when there is no addition of material.

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. Thus, the court held that the Agencies may regulate some forms of redeposit that result from excavation activities. 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.” 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.”

In 1999, in response to the National Mining Association decision, the Agencies revised the Tulloch Rule by deleting the use of the word “any” as a
modifier of the term “redeposit,” and expressly excluding “incidental fallback” from the definition of “discharge of dredged material.” The Agencies did not accept the court’s invitation to draw a bright line between “incidental fallback” and a regulable redeposit. The revised rule was deemed a temporary measure to comply with the American Mining Congress injunction. 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. 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.”

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

In January 2001, the Agencies, as promised, promulgated a final rule to more clearly delineate the scope of their jurisdiction over redeposit. The 2001 rule—or what is commonly known as “Tulloch II”—continued to exclude “incidental fallback” from the definition of “discharge of dredged material,” but 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.

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.

Almost immediately, several major trade associations filed a facial challenge to both provisions of Tulloch II in the United States District Court for the District of Columbia.

In 2007, after several years of procedural disputes, the district court finally ruled on the merits in National Association of Home Builders v. U.S. Army Corps of Engineers. The court invalidated the two new provisions of Tulloch II. The court invalidated the definition of “incidental fallback” because it improperly included a volume requirement, which, based on the court’s review of National Mining Association, is irrelevant in determining whether a redeposit is “incidental fallback”; and the rule made no reference to the amount of time that the material is held before dropped, as required by Judge Silberman’s opinion. In regards 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.” 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.”

Going Forward—Tulloch III

After Tulloch II was invalidated, the Agencies revised the rule once again. On Dec. 30, 2008, the Agencies returned the definition of “discharge of dredged material” to that set forth in the 1999 rule. Thus, the
Agencies eliminated the definition of “incidental fallback,” as well as the presumption regarding earth-moving activities. 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.” 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.”

As may be gleaned, 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 on a case-by-case basis, consistent with the Agencies’ CWA authority and governing case law. Accordingly, going forward, the 2008 rule does not provide businesses and individuals specific guidance as to when a § 404 permit is required for excavation activities that involve some form of redeposit; indeed, 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.”

Judge Silberman’s standard—adopted by the court in National Association of Home Builders—offers the most useful guidance to distinguish 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. Furthermore, under the National Association of Home Builders decision, volume of material is irrelevant to the analysis. 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. For example, 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, the government prosecuted an Idaho developer for alleged discharges of pollutants without a § 404 permit. The developer, ignoring repeated warnings from the Corps that the development work required a § 404 permit, conducted various excavation activities that resulted in the movement and redistribution of a massive amount of material from one part of a “water of the U.S.” to another. 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.

In Green Acres Enterprises, Inc. v. United States, 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.” 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 a “waters of the U.S.” 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. Although neither Moses nor Green Acres relied on Judge Silberman’s standard, both holdings fit nicely within his two-factor approach.

“Sidecasting” likely also results in a regulable redeposit under Judge Silberman’s standard. Indeed, “sidecasting” was generally considered to cause a regulable discharge even before the Tulloch Rule. “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” is often 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. In Deaton, 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. 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.”

The relevant case law does not provide many examples of activities that involve only “incidental fallback,” but one court 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, the government brought an action against a developer for constructing a stormwater detention pond in a jurisdictional wetland without a § 404 permit. The government argued that the defendant had discharged a pollutant into the wetland when it redeposited material to the wetland as a byproduct of clearing and leveling the wetland. 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. 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.”

In addition to limited case law, there is limited agency guidance to assist in interpreting the Agencies’ latest incarnation of the Tulloch Rule. After the invalidation of the first Tulloch Rule, the Agencies, in 1997, issued a guidance memorandum that provided guidance for interim compliance with the American Mining Congress injunction while the decision was on appeal. Of course, the decision was affirmed on appeal, but the memorandum was later deemed to apply to the 1999 rule. 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 clarity as to the distinction between “incidental fallback” and a regulable redeposit. But the memorandum does provide some examples of discharges that 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.” These two examples are in line with governing case law discussed above, as well as 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. And, unlike the 1999 rule, the 2008 rule is not an interim measure; the Agencies have given no indication that they intend to undertake future rulemaking. Accordingly, into the foreseeable future, § 404 jurisdiction will be determined on a case-by-case basis. Future case law may expound on the Silberman factors and assist in drawing the line between “incidental fallback” and a regulable redeposit, but, for now, developers and other businesses or individuals that engage in excavation activities are, in some sense, at the mercy of the Agencies’ discretion. Nonetheless, the likelihood of § 404 regulation may be evaluated by looking to Judge Silberman’s standard and conducting excavation activities accordingly.