Wetlands Regulatory Morass: the Missing Tulloch Rule

Anjali Kharod

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I. INTRODUCTION

Wetlands regulation under the Clean Water Act (CWA) is a highly controversial means of environmental protection. The controversy stems from two divergent concerns: those of environmentalists who seek to preserve the wetlands’ unique ecosystems, and those of property owners who seek to obtain the full agricultural and economic value of their land. The categorization and regulation of wetlands is crucial to both of these parties, namely for regulatory and legal purposes.

Prior to the 1970s, people perceived wetlands, such as bogs, swamps and marshes, as breeding areas for disease. Many of the nation’s wetlands were drained, filled and converted into dry land as a result of this perception. Over time, increased scientific knowledge revealed that wetlands provide a habitat for wildlife, waterfowl and fish, as well as flood and water quality protection for humans. Improved scientific knowledge increased awareness of the need to protect the nation’s wetlands.

The Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) claim regulatory jurisdiction of “waters of...
the United States," which include wetlands. Wetlands regulation falls primarily under Section 404 of CWA because wetlands development consists mainly of dredging and filling. In order to be subject to Section 404, wetlands development must fall under Section 301 of CWA and "discharge a dredged material into a navigable water from a point source." The phrase "discharge of a dredged material" has created much debate between the regulated and the regulating communities and the courts. The phrase carries significant regulatory implications for the agricultural community.

Prior to 1992, "discharge of dredged material" excluded de minimis - small volume - movement of soil during dredging operations. Thus, these activities did not require a Section 404 permit. Many developers took advantage of this "loophole" in the 404 permit process. Consequently, in North Carolina Wildlife Federation v. Tulloch, the court pronounced the "Tulloch Rule," which


11. See Borden Ranch P'ship v. United States Army Corps of Eng'rs, 261 F.3d 810, 815 (9th Cir. 2001) (discussing whether farming technique creates "addition of pollutant"); Rybachek v. U.S.E.P.A, 904 F.2d 1276, 1285 (9th Cir. 1990) (discussing whether returning sifted soil to stream bed constitutes "addition of pollutant"); United States v. Deaton, 209 F.3d 331, 335 (4th Cir. 2000) (discussing whether deposit of dredged or excavated material from wetland into same wetland qualifies as "addition of pollutant"). But see Nat'l Mining Ass'n v. United States Army Corps of Eng'rs, 145 F.3d 1399, 1404 (D.C. Cir. 1998) (stating incidental fallback is not "addition of pollutant").


13. See Burnham, supra note 1, at 1351 (stating pre-Tulloch Rule definition of "discharge of dredged material").


15. See Burnham, supra note 1, at 1351 (stating that Tulloch exemplified egregious conduct within loophole).

revised the definition of "discharge of dredged material" to include small volume redeposit of dredged material within the waters of the United States.\(^{17}\) Five years later, the Court of Appeals for the District of Columbia Circuit (D.C. Circuit) set aside the Tulloch Rule and prohibited enforcement of the Rule through a nationwide injunction in \textit{National Mining Ass'n v. United States Army Corps of Engineers}.\(^{18}\) In response, the Corps modified its definition of "discharge of dredged material" and promulgated a new rule to regulate redeposit of material, other than incidental fallback, into United States waters.\(^{19}\)

Despite the Tulloch Rule's establishment and revision since 1992 and discussion in \textit{National Mining}, the Rule is curiously absent from the Ninth Circuit's and Supreme Court's analyses of \textit{Borden Ranch Partnership v. United States Army Corps of Engineers}, a recent case dealing with redeposit of dredged material.\(^{20}\) The Supreme Court's reticent affirmation of the Ninth Circuit's decision in \textit{Borden Ranch} questions the validity of the new Tulloch Rule.\(^{21}\)

This Comment explores the current state of the Tulloch Rule in light of the Supreme Court's decision in \textit{Borden Ranch}. Section II provides a brief overview of wetlands and their controversial regulation.\(^{22}\) Section III surveys the legislative history and statutory authority over wetlands.\(^{23}\) Section IV traces the evolution of the Tulloch Rule.\(^{24}\) Finally, Section V evaluates \textit{Borden Ranch} under a

\(^{17}\) See Burnham, supra note 1, at 1351 (stating part of suit's settlement included EPA's promulgation of Tulloch Rule).

\(^{18}\) 145 F.3d 1399 (D.C. Cir. 1998) (stating Nat'l Mining's holding).


\(^{20}\) See Nat'l Mining, 261 F.3d 810, 814 (9th Cir. 2001) (analyzing "discharge of pollutant" under circuit split over definition of "discharge of pollutant"); see also Borden Ranch, 537 U.S. 99, 100 (2002) (affirming Ninth Circuit's decision 4-4).

\(^{21}\) See Borden Ranch, 537 U.S. at 100 (2002) (providing no analysis on wetlands issue).

\(^{22}\) For a discussion on wetlands regulation, see infra notes 27-45 and accompanying text.

\(^{23}\) For a discussion of wetlands statutory history, see infra notes 46-75 and accompanying text.

\(^{24}\) For a discussion of the Tulloch Rule, see infra notes 76-132 and accompanying text.
Tulloch Rule analysis. Section VI concludes with an analysis of the Tulloch Rule’s effectiveness as a regulatory guideline.

II. THE WETLANDS CONTROVERSY

A. Definition

Federal wetlands regulation breeds conflict between private landowners and the government because the Corps, along with other agencies, controls and regulates the activities of private wetland-owners. A wetland is subject to the CWA and EPA regulations and to the EPA’s and the Corps’ regulatory jurisdiction. The Corps defines 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.” Wetlands generally include swamps, bogs and marshland. Wetlands also include “adjacent wetlands,” which are separated from other waters of the United States by man-made dikes, natural river berms, beach dunes or other barriers.

B. Wetland Function

Wetlands preserve the environment for habitats to flourish and for ecosystems to thrive. A wetlands ecosystem is as biologically

25. For discussion of analysis, see infra notes 133-82 and accompanying text.
26. For discussion of conclusion, see infra notes 183-98 and accompanying text.
29. Id. (stating regulatory definition of wetlands).
30. Id. (enumerating examples of wetlands).
31. Definitions, supra note 8, 33 C.F.R. § 328.3 (c)(2002) (defining adjacent wetland); see also United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 122 (1985) (holding adjacent wetlands are “waters of the United States”).
32. McBeth, supra note 4, at 204-07 (discussing environmental and economic benefits of wetlands).
diverse and productive as a rainforest or coral reef. The shallow water and vegetation provide primary habitats for many fish and wildlife throughout the food chain. Wetlands also control floods by intercepting storm runoff and storing storm waters. They also improve soil and water quality by filtering mineral impurities.

Wetlands habitat also has commercial value. Wetlands support ecotourism activities, such as hunting, fishing, bird watching and photography, as well as the commercial and recreational fishing industries. Additionally, wetlands have an aesthetic value, providing tourists an opportunity to watch, feed and photograph wildlife.

C. Wetlands Condition

It is estimated that over 220 million acres of wetlands existed prior to European settlement of the contiguous United States. During this time, people viewed wetlands as "mosquito havens" requiring draining and filling. Until the 1980s, developers systematically destroyed, drained and converted wetlands into dry land. As a result, between the mid-1980s and the late 1990s, the United States lost over 58,000 acres of wetlands annually due to the transformation and conversion of wetlands into malls, farmlands, hous-

34. Id. (explaining wetland function).
35. Id. (explaining how wetlands function as sponges and temper erosive potential of floodwater).
36. Id. Wetlands slow water flow, allowing sediment from fertilizer, manure, and sewage to drop to the wetland floor before it leaves a wetland. Id.
37. McBeth, supra note 4, at 205 (stating that ninety-five percent of commercially harvested fish and shellfish are wetland dependent).
38. Function and Value Website, supra note 33 (stating that wetlands ecotourism added fifty-nine billion dollars, and commercial, fishing and recreational industry added seventy-nine billion dollars, to United States economy in 1991).
40. Status and Trends Website, supra note 5 (delineating history of United States wetlands).
41. McBeth, supra note 4, at 215 (citing Fla. Rock Indus. v. United States, 18 F.3d 1560, 1566 (Fed. Cir. 1994)) (stating that “yesterday’s Everglades swamp to be drained as a mosquito haven is today’s wetland to be preserved for wildlife and acquifer recharge”).
42. Status and Trends Website, supra note 5 (stating that 1950s-70s was era of major wetlands loss).
ing developments and roads. Wetlands degradation and destruction increased flood and drought damage and decreased bird populations. In the past thirty years, increased wetlands regulation and its enforcement steadily reduced wetlands loss.

III. WETLANDS LAW

No specific federal wetlands protection law exists. Section 404 of the CWA governs federal wetlands protection. Section 404 delegates to the Corps the authority to "issue permits for the discharge of dredged or fill material into navigable waters at specified disposal sites." Section 301(a) of the CWA prohibits the discharge of any pollutant without a permit.

The CWA definition of "pollutant" includes "rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water." Section 502 of the CWA defines "discharge of a pollutant" as any "addition of any pollutant to navigable waters from any point source." Furthermore, the statute defines "navigable waters" as United States waters and territorial seas; this definition includes wetlands. The Corps has jurisdiction over navigable waters, their tributaries and adjacent wetlands.

43. See id. (describing amount of wetlands destruction); Burnham, supra note 1, at 1354 (chronicling wetlands destruction).
44. Status and Trends Website, supra note 5 (stating that degradation of wetlands function has diminished resources).
46. Burnham, supra note 1, at 1358 (stating that no specific CWA provision is designated for wetlands protection). See also McBeth, supra note 4, at 212 (describing state initiatives to protect wetlands). Federal wetlands programs that protect wetlands include the Food Security Act Swampbuster provisions, Wetlands Reserve Program (WRP), Water Bank Program, Farmers Home Administration (FmHA), and North American Wetlands Conservation Act of 1989. Id. at 209-12.
47. See id. at 217 (stating that Swampbuster provisions of National Food Security Act and CWA have overshadowed early Congressional attempts for wetlands regulation).
51. Id. at § 1362(12)(A) (defining "discharge of a pollutant").
52. Id. at § 1362(7) (defining "navigable waters"); see also Definitions, supra note 8, 33 C.F.R. § 328.3 (2002) (defining navigable waters of United States to include wetlands).
Whether or not an activity falls within the jurisdictional definition of a Section 404 discharge is important for regulatory purposes, including the issuance of permits. If an activity satisfies the jurisdictional definition, anyone conducting the activity must apply for a Section 404 permit. The Corps issues permits according to EPA guidelines (404(b)(1) Guidelines) for specifying each disposal site. The EPA Administrator may deny or restrict use of a defined area as a disposal site if it determines that discharge of materials into the area will have an adverse effect on the environment. Additionally, the Corps' Regulations provide guidelines regarding the review, denial, modification, suspension or revocation of permits.

The application process for a Section 404 permit must comply both with the Corps' "public interest review" and with EPA's 404(b)(1) Guidelines. The public interest review balances the benefits and detriments of the permit applicant's activity under a three-prong test. The test considers: (1) the public need for the permit applicant's activity; (2) the practicability of using reasonable alternative locations and methods to accomplish activity; and (3) the extent of the activity's benefits and detriments. The EPA 404(b)(1) Guidelines prohibit discharge if a practicable alternative with a less adverse impact on the ecosystem exists, taking into consideration cost, technology and logistics.
In addition, the Bush Administration has renewed the "no net loss" policy, which requires permit applicants to submit a wetlands mitigation plan with the permit. Additionally, the Corps requires replacing the wetlands' functional loss.

Section 404 contains a regulatory ambiguity, which some environmentalists refer to as a "loophole." The ambiguity is central to the Tulloch Rule. Section 301 of the CWA requires a Section 404 permit for activities that "discharge dredged or fill materials." The ambiguity exists in the Corps' definition of "discharge of dredged material." Under the Corps' definition, "discharge of dredged material" means the "addition of dredged material into waters of the United States." Consequently, the regulations require a Section 404 permit if there is an "addition" of a pollutant.

The regulations recognize the redeposit of dredged material as an "addition," but they exclude "incidental fallback." Thus, activities resulting in a small volume, or incidental, discharge are exempt from a Section 404 regulation. Environmentalists view this exclusion as a regulatory loophole because even small volume discharges can have potentially adverse environmental effects. Strict constructionists and developers continue to drain or insert pilings into

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64. Regulatory Guidance Letter, supra note 63, at 2 (stating that Corps' regulations require appropriate and practicable mitigation to replace aquatic wetlands resource).

65. Burnham, supra note 1, at 1360 (explaining regulatory gap existing in regulation).

66. Id. (stating that loophole is pivotal to Tulloch Rule).


68. Dredged Materials, Definitions, supra note 19, 33 C.F.R. § 323.2(d)(1) (2000) (defining "discharge of dredged material" with undefined terms such as "addition" and "redeposit").

69. Id. (defining "discharge of dredged material").

70. See Burnham, supra note 1, at 1360-61 (discussing "addition" requirement to permitted discharge).

71. Dredged Materials, supra note 19, 33 C.F.R. § 323.2(d)(1)(iii) (2002) (including "addition, including redeposit other than incidental fallback, of dredged material" under regulation).

72. Id. at § 323.2(d) (2002) (exempting incidental fallback from regulation).

73. See Burnham, supra note 1, at 1361 (stating possibility of wetlands destruction without "addition" of pollutant by release of small volumes of sequestered pollutants resulting in significant environmental effects).
wetlands because they believe that doing so conforms to Section 404 of the CWA's intent. Confusion regarding Section 404 destroys an estimated 300,000 acres of wetlands annually.

IV. THE TULLOCH RULE

A. Origins of the Tulloch Rule

In 1986, the Corps defined “discharge of dredged material” under Section 404 as “any addition of dredged material into the waters of the United States,” and expressly excluded “‘de minimis,’ incidental soil movement occurring during normal dredging operations.” Tulloch demonstrated that developers took advantage of this definition because it left room for them to exploit the environment. Tulloch involved a 1,800-acre project to build a residential development and golf course in Hanover County, North Carolina. Although the Corps determined that approximately thirty-nine percent of the site was wetlands, the developer completed the project without obtaining a Section 404 permit.

The developer circumvented Section 404 permit requirements by tailoring the development to fall under the de minimis exception of the 1986 regulation. Specifically, the developer excavated the land matter so only drippings from the dredging buckets fell back into the wetlands. This allowed the developer to eliminate

74. Id. at 1361-62 (explaining developer’s exploitation of loophole).
77. See id. (stating that Tulloch Rule developed in response to litigation); Burnham, supra note 1, at 1363 (stating Tulloch case’s egregious facts). First, the developer cleared the land by pushing the vegetation from the wetland area. See id. Then, he excavated ponds and drainage ditches by using draglines and backhoes. Id. Finally, he placed the excavated soil into sealed containers on the truck in a manner that only drippings from the buckets fell onto the ground. Id. In another area, the developer used the excavations to drain the wetlands. Id.
79. See id. at 1362-63 (stating that Corps determined that seven hundred of eighteen hundred acres were wetlands).
80. Id. (stating developer avoided Section 404 permit by applying strategic and sophisticated techniques).
81. Id. (describing manner of excavation).
the wetlands hydrology and vegetation, thereby removing the area from the Corps’ jurisdiction.82

Environmentalists sought Section 404 action due to concern that the developer’s activities would adversely affect the wetlands.83 As part of the Tulloch settlement, the EPA and the Corps agreed to revise the permit requirements and the definition of “discharge of dredged material,” which laid the foundation for the 1993 Tulloch Rule.84 The 1993 Tulloch Rule stated:

The term discharge of dredged material means any addition of dredged material into, including any redeposit of dredged material within, the waters of the United States. The term includes, but is not limited to, the following. . . .(iii) any addition, including 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.85

The 1993 Tulloch Rule essentially included incidental soil movement associated with dredging activities in the definition of “discharge of dredged material.”86 “Incidental fallback” is the de minimis soil movement due to excavation, including soil that is disturbed when shoveled or the back-spill from a bucket that falls back into the original place.87

The 1993 Tulloch Rule contained a de minimis exception granting a small discharge allowance, but it shifted the burden to the developer to show that the discharge has non-destructive, non-degrading environmental effects.88 An incidental addition, including a redeposit of dredged material that does not or would not have the effect of destroying or degrading United States waters, did not

82. Id. (stating Section 404 no longer applied to developer’s land).
84. Id. (explaining Tulloch settlement).
88. See Nat’l Mining, 145 F.3d at 1403 (stating Tulloch Rule de minimis exception).
require a permit. Those engaged in "mechanized landclearing, ditching, channelization, or other excavation," bore the burden of proving that the activities did not have destructive or degrading effects. The 1993 Tulloch Rule allowed the Corps to assert jurisdiction over all discharges, regardless of size, unless the Corps believed that the activities with which they are associated had only minimal adverse effects.

B. Demise of the 1993 Tulloch Rule

Mining and other trade associations vigorously challenged the Tulloch Rule. In American Mining Congress v. United States Army Corps of Engineers, plaintiffs contended that the Tulloch Rule was (1) inconsistent with the CWA's intent and (2) was arbitrary, capricious and otherwise not in accordance with the law. The district court held that the agencies unlawfully exceeded their statutory authority in promulgating the Tulloch Rule. Thus, American Mining invalidated and set aside the Tulloch Rule.

In evaluating whether the Tulloch Rule was consistent with the CWA's legislative intent, the district court applied the standard of review established by the Supreme Court in Chevron U.S.A., Inc. v. National Resource Defense Council, Inc. The Chevron standard requires courts to give effect to unambiguous Congressional intent.

89. See id. (citing 33 C.F.R. § 323.2(d)(3)(i) (1993)).
90. Id. (defining degradation as anything creating more than de minimis or inconsequential effect).
91. See Nat'l Mining, 145 F.3d 1399, 1403 (D.C. Cir. 1998) (stating preamble to Tulloch Rule as indicating that Corps recognized virtual impossibility of conducting mechanized landclearing, ditching, channelization, or excavation in United States waters without inconsequential fallback).
92. See infra notes 94-105 and accompanying text.
94. Id. at 270. Plaintiffs had a four-count argument: (1) the Tulloch Rule was inconsistent with the CWA's language and intent; (2) it is arbitrary, capricious, and otherwise not in accordance with the law, violating the Administrative Procedures Act (APA); (3) it violated plaintiff's Fifth Amendment due process rights; and (4) the rule was promulgated in violation of the APA. Id.
95. Id. at 278 (stating district court's conclusion).
96. See id. at 271 (finding Tulloch Rule exceeds Corps' scope of statutory authority).
98. Id. First, the court must consider if Congress spoke directly to the pertinent issue. Id. If Congressional intent is clear, then the court and agency must give effect to the unambiguously expressed Congressional intent. Id. If Congressional intent is ambiguous, then the court must defer to the administrative agency's interpretation, provided that such interpretation is both permissible and reasonable. Id.
In *American Mining*, the district court reasoned that: (1) Congress did not intend to regulate excavation activities; (2) though Congress did not mention the term “incidental fallback,” it gave “discharge” a definite meaning; and (3) Congress ratified eighteen years of the Corps/EPA and judicial interpretation that excluded incidental fallback from Section 404 regulation.99 Thus, the 1993 Tulloch Rule failed the *Chevron* standard of review.100

The district court in *American Mining* concluded that incidental fallback was not an “addition of a pollutant,” and excavation sites were not specified disposal sites.101 The court reasoned that Congress never intended to regulate incidental fallback.102 Also, even if the term “addition of a pollutant” included incidental fallback, the 1993 Tulloch Rule still failed because to be subjected to the Rule, one must dispose incidental fallback at a specified disposal site.103 Therefore, under the Tulloch Rule, the term “specified disposal site” in Section 404 would have no meaning.104 Thus, the district court held that the Tulloch Rule exceeded the scope of Corps’ authority.105

The Corps and the EPA appealed the *American Mining* decision to the D.C. Circuit in *National Mining Ass’n v. United States Army Corps of Engineers.*106 *National Mining* affirmed that incidental fallback did not constitute an addition of dredged material.107 The circuit court noted that “because incidental fallback represents a net withdrawal, not addition, of material, it cannot be a discharge.”108 The court further stated that “regardless of any legal metamorphosis that may occur at the moment of dredging, we fail

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100. *See id.* at 277 (stating that agencies may not disregard specific statutory scheme Congress provided).
101. *Id.* at 278 (stating district court’s conclusion).
102. *Id.* (explaining district court’s interpretation of Congressional intent).
103. *Id.* (stating district court’s reasoning based on statutory phrase “specified disposal site,” requiring discharge placed in disposal site affirmatively selected by Corps).
104. *Id.* (interpreting Section 404 of CWA language).
107. *See id.* at 1410 (stating that if CWA inadequately protects wetlands, Congress should alter definition of “addition” of pollutant).
108. *Id.* at 1404 (reiterating that “addition” cannot reasonably include removal).

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to see how there can be an addition of dredged material when there is no addition of material."\(^{109}\)

The D.C. Circuit clarified the *American Mining* holding by stating that the Corps exceeded its statutory authority by asserting jurisdiction over "any redeposit," including incidental fallback.\(^{110}\) The *National Mining* decision held the 1993 Tulloch Rule invalid, resulting in a nationwide injunction.\(^{111}\)

C. Revision of Tulloch Rule

The Corps and the EPA ceased litigation over the 1993 Tulloch Rule and proposed a new version of the Rule.\(^{112}\) The proposed rule sought to redefine "discharge of dredged material."\(^{113}\) The proposed rule established a rebuttable presumption that mechanized landclearing, ditching, channelization activity or other mechanized excavation activity in United States waters would result in more than incidental fallback.\(^{114}\) Due to the fallback, a Section 404 permit is required.\(^{115}\) Under the revision, those desiring to undertake such activities bear the burden of proving that any redeposits of dredged materials into United States waters were incidental fallback and that no regulated discharges would occur.\(^{116}\) This type of regulation would require the Corps’ review even before a permit would issue.\(^{117}\) To demonstrate that only incidental fallback would occur, parties proposing the wetland activity need to show that the dredged material returned "virtually to the same spot from which it came."\(^{118}\) Parties failing to meet this burden must apply for a Section 404 permit in order to continue with the dredging.\(^{119}\)

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\(^{109}\) Id. (rejecting "legal metamorphosis" of material).

\(^{110}\) Id. at 1405 (stating that Corps only exceeds statutory authority by asserting jurisdiction over incidental fallback under Tulloch Rule). The Corps may legally regulate some forms of redeposit. Id.

\(^{111}\) See *Nat’l Mining*, 145 F.3d at 1410 (stating circuit court’s holding).

\(^{112}\) Burnham, *supra* note 1, at 1369, 1396 (stating that agencies chose to propose new rule in lieu of appealing *Nat’l Mining* decision).

\(^{113}\) See id. at 1369 (stating proposed definition of "discharge of dredged material").

\(^{114}\) Id. (describing rebuttable presumption of required permit).

\(^{115}\) Id. (summarizing proposed Rule’s effect).

\(^{116}\) Id. (explaining Rule’s burden of proof).

\(^{117}\) Burnham, *supra* note 1, at 1370 (stating that each potentially-regulated activity would require some level of Corps review).

\(^{118}\) See id. (explaining effect of permit applicant’s failure to meet burden of proof).

\(^{119}\) Id. (explaining result of permit applicant’s failure to meet burden of proof).
The Corps promulgated the final version of the Tulloch Rule on January 17, 2001 to be effective in April 2001. The Corps modified the final rule according to the comments received on the proposed rule. The final rule removed the burden on dredgers to show that only incidental fallback would occur. To determine whether an activity results in a "discharge of dredged materials" in United States waters, the Corps will consider the "use of mechanized, earth-moving equipment to conduct land clearing, ditching, channelization, in-stream mining or other earth-moving activity." The only exception is if a "project-specific evidence shows that the activity results in only incidental fallback." The Corps will evaluate the horizontal and vertical relocation of dredged material, as well as material that is "suspended or disturbed such that it is moved by currents and resettles beyond the place of initial removal." Additionally, the Corps' evaluation shall determine the volume of material redeposited.

The final rule also defines "incidental fallback," which excludes "dredged material." Incidental fallback is the redeposit of small volumes of dredged material that is incidental to excavation activity in the 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


121. Dredged Materials, supra note 19, 33 C.F.R. § 323 (2002) (codifying final rule). See also Burnham, supra note 1, at 1370 (stating incorporation of modifications to final rule).

122. Dredged Materials, supra note 19, 33 C.F.R. § 323.3(d)(2)(i) (2002) (stating requirement for project-specific evidence showing that activity results in incidental fallback by developer and is not intended to shift any burden in administrative or judicial proceeding under CWA). See also Burnham, supra note 1, at 1370 (stating modifications of new rule).

123. Dredged Materials, supra note 19, § 323.2(d) (describing exceptions to general requirements).

124. Id. at § 323.2(d)(2)(i) (defining exceptions to “discharge of dredged materials”).

125. See Burnham, supra note 1, at 1371 (quoting 66 Fed. Reg. 4553 (Jan. 17, 2001), which discusses elements of pollution under Section 404).

126. Id. (stating Corps’ evaluation will account for amount and volume of redeposited material).

127. 33 C.F.R. § 323.2(c) (defining dredged material); see also Burnham, supra note 1, at 1371 (explaining “incidental fallback”).
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. 128

The final rule also excludes from regulation activities that result in de minimis environmental effects. 129

Two main differences distinguish the old and new Tulloch Rule. 130 Unlike the old Tulloch Rule, the new Rule includes: (1) a Section 404 exemption for activities resulting in incidental fallback; and (2) a definition of incidental fallback. 131 Under the new Tulloch Rule, the developer will not need a Section 404 permit if a developer can prove, through project-specific evidence, that only a small volume of soil falls off his equipment into substantially the same place from its initial place of removal. 132

V. REvised TULLOCH RULE IN LIGHT OF Borden Ranch

The new Tulloch Rule’s application may change the outcome of certain cases involving “discharged material” added to a wetland. 133 In Borden Ranch, however, the Ninth Circuit and Supreme Court did not apply the newly promulgated Tulloch Rule to such a situation. 134 Application of the Tulloch Rule would have fostered a different result. 135

The Ninth Circuit’s Borden Ranch case concerned the authority of the Corps and EPA over a form of agricultural activity performed in wetlands called “deep plowing/ripping.” 136 The Petitioner, a

129. Id. at § 323.2(d)(4)(i) (stating incidental addition, including redeposit “which does not or would not have destructive effect of United States waters, does not require 404 permit”).
130. Burnham, supra note 1, at 1372 (contrasting original and revised Tulloch Rules).
131. Id. (citing 66 Fed. Reg. 4550, 4575 (Jan. 17, 2001)).
132. Id. at 1373 (stating that original Tulloch Rule failed to define “incidental fallback”).
133. Id. at 1375 (discussing likely challenges to new Tulloch Rule).
134. See Borden Ranch P’ship v. United States Army Corps of Eng’rs, 261 F.3d 810, 814 (9th Cir. 2001), aff’d 537 U.S. 99 (2002) (analyzing case under Ninth Circuit precedent).
135. For a discussion of Borden Ranch, see infra notes 136-98 and accompanying text.
136. See Borden Ranch, 261 F.3d at 813 (concluding deep ripping can constitute discharge of pollutant under CWA). This process has two different terms to offer connotations favorable to either party - “deep plowing” for a petitioner defending an agricultural practice and “deep ripping” for a respondent seeking to conjure an image of wetlands destruction. See Brief for Petitioner at 1, Borden Ranch P’ship v. U.S. Army Corps of Eng’rs, 537 U.S. 99 (2002) (No. 01-1243) (re-
real estate developer, purchased Borden Ranch, which contained significant hydrological features including vernal pools, swales and intermittent drainage.\textsuperscript{137} The Petitioner intended to convert the ranchland into vineyards and orchards.\textsuperscript{138} The Petitioner's plan required an agricultural technique, called "deep plowing/ripping," in which a plow penetrates the earth.\textsuperscript{139} Specifically, the procedure requires a tractor to drag four-to-seven foot long metal prongs to plow/gouge to the soil's restrictive layer.\textsuperscript{140} The Corps asserted Section 404 jurisdiction over the deep ripping activity because it "discharged dredged material" into the wetlands.\textsuperscript{141}

The Petitioner challenged the Corps' jurisdiction, arguing that deep plowing/ripping does not constitute "addition of a pollutant" because it simply moves the soil and essentially replaces it from where it came.\textsuperscript{142} The Petitioner relied on the D.C. Circuit court's decision in \textit{National Mining} to argue that no "addition of pollutant" existed because there was no addition of material.\textsuperscript{143} Therefore, if no "addition" of pollutant existed, then Sections 301 and 404 of CWA would not govern the activity and the Corps would not have jurisdiction.\textsuperscript{144}

The Ninth Circuit rejected Petitioner's challenge.\textsuperscript{145} The court relied on its own precedent in \textit{Rybachek v. U.S.E.P.A.},\textsuperscript{146} holding that removing material from a streambed, sifting out the gold and returning the material to the streambed was an "addition" of a pollutant.\textsuperscript{147} Furthermore, the circuit court relied on the Fourth

\begin{footnotes}
\item[137.] See \textit{Borden Ranch}, 261 F.3d at 812 (defining vernal pools, swales, and intermittent drainages).
\item[138.] \textit{Id.} (stating factual background).
\item[139.] \textit{Id.} (explaining that conversion required mechanical penetration of soil's restrictive layer and describing terminology connotation).
\item[140.] \textit{Id.} at 819 (affirming Corps' jurisdiction over deep ripping under CWA).
\item[141.] \textit{Id.} (stating Petitioner's contention that deep ripping is not "addition" of "pollutant").
\item[142.] \textit{Borden Ranch}, 261 F.3d at 812 (enumerating Petitioner's argument).
\item[143.] \textit{Id.} at 819 (Gould, J. dissenting) (claiming that \textit{Nat'l Mining} rule should govern case).
\item[145.] \textit{Borden Ranch}, 261 F.3d at 814 (noting inconsistency between Petitioner's argument and Ninth Circuit precedent).
\item[146.] \textit{Rybachek v. U.S.E.P.A.}, 904 F.2d 1276, 1285 (9th Cir. 1990) (asserting that activity may require permit even if there is no addition of pollutant).
\item[147.] See \textit{id.} at 1276 (creating precedent for redeposit of material as addition of pollutant).
\end{footnotes}
Circuit's precedent in *United States v. Deaton*, holding that once material was excavated from the wetland, its redeposit in that same wetland added a pollutant to where none had previously existed. Accordingly, the Ninth Circuit in *Borden Ranch* concluded that the deep plowing/ripping constitutes an “addition” of a pollutant and, therefore, is subject to Section 404 regulation.

Surprisingly, the Ninth Circuit failed to use the Tulloch Rule in its analysis. The Ninth Circuit heard the case in July 2001, three months after the new Tulloch Rule’s effective date. The circuit court declined to comment on whether the deep plowing activity was a mechanized earth-moving activity or if it created soil disturbances that moved the soil to substantially the same place from where it came. Under the old Tulloch Rule, the dischargetment of soil from the deep ripper would have required a Section 404 permit.

The new Tulloch Rule creates an ambiguous result. Applying the new Tulloch Rule would have decided whether the petitioner’s activity would require a Section 404 permit. The Ninth Circuit could have addressed three colorable arguments concerning the Tulloch Rule: (1) whether the Tulloch Rule survives the APA “arbitrary and capricious” standard of review; (2) whether the Tulloch Rule shifts the burden of proof to the defendant in violation of Fifth Amendment Due Process; and (3) whether, on the merits, the deep plowing requires a permit under the Tulloch Rule.

149. *See id.* (expounding Ninth Circuit theory on transformation of nonpollutant to statutory pollutant).
150. *Borden Ranch*, 261 F.3d at 819 (stating 4th Circuit court’s conclusion).
151. *See id.* at 810 (analyzing case under Ninth Circuit precedent).
154. Dredging Materials, 33 C.F.R. § 323.3(d) (1993) (stating that “discharge of dredged material” included any discharge and redeposit, including incidental fallback).
155. *See Burnham, supra* note 1, at 1375 (discussing potential challenges to new Tulloch Rule).
157. *See infra* notes 158-79 and accompanying text for a discussion of Ninth Circuit arguments; *see also* Burnham, *supra* note 1, at 1373-95 (analyzing potential challenges to current Tulloch Rule).
A. Whether the Tulloch Rule is an Arbitrary and Capricious Agency Action

Courts review substantive aspects of agency action, including rulemaking, under the Administrative Procedure Act standard, evaluating whether an action is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law."158 Under this standard, if the agency considers relevant factors and articulates a rational relationship between the facts and agency action, then courts will uphold the agency action.159

The Tulloch Rule requires that all activities involving mechanized earth-moving equipment in United States waters require Corps' review to determine whether such activities result in incidental fallback, thereby, falling out of Corps' jurisdiction.160 In making this determination, the Corps considers (1) whether the activity substantially, horizontally or vertically relocates dredged material; (2) whether the activity results in the release of sequestered pollutants other than incidental fallback; and (3) whether the volume released is only small volume.161 Neither the EPA nor the Corps has established quantifiable standards for considering relevant factors.162 Additionally, the agencies have failed to define "substantial relocation" or "small volume" in the regulation.163

The Corps and the EPA admit that the Rule grants the Corps "substantial flexibility" to consider types of activities proposed and determine on a case-by-case basis whether an activity requires regu-


159. See Burnham, supra note 1, at 1386. Agency action is presumed valid, and courts must determine the rational relation between the factors and agency action. Id. An agency action is considered arbitrary and capricious if the agency has (1) relied on factors that Congress has not intended it to consider, (2) entirely failed to consider an important aspect of the problem, (3) offered an explanation for its decision that runs counter to the evidence before [it], or (4) is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. See id. (quoting N.R.D.C. v. U.S.E.P.A., 790 F.2d 289, 297-98 (3d Cir. 1986)).


162. See Burnham, supra note 1, at 1386 (stating that Corps' failure to establish standard questions standard's validity).

163. See id. at 1387 (stating regulatory ambiguity in relevant factors).
The agencies assert that the fact-specific nature of the activity renders bright line standards inappropriate, and instead endorses a totality of factors test. Additionally, in 2000, the District of Columbia district court determined that the Corps may determine whether redeposit constitutes incidental fallback on a case-by-case basis. Thus, because courts appear highly deferential to agency policy, they may not render the Tulloch Rule arbitrary and capricious.

Nevertheless, the Borden Ranch Petitioner's argument that the Corps has "entirely failed to consider an important aspect of the problem" in promulgating the Tulloch Rule is strong. The court failed to consider that, although the Corps itself is the main dredger of United States waters, it is itself exempt from the regulation under the Tulloch Rule. For its own activities, the Corps undertakes an unofficial review process. A brighter line approach would create transparency in the permit issuance process to private individuals, as well as the Corps.

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165. See Burnham supra note 1, at 1388 (stating that quantifiable standards are not technically feasible).


167. See Burnham, supra note 1, at 1386 (stating that since agency action is presumptively valid, courts would apply deferential standard of review and uphold Tulloch Rule).


170. Interview with Barry Gale, General Counsel, United States Army Corps of Eng'rs, Philadelphia District, Philadelphia, PA (Mar. 20, 2003) (stating that for its own activities, Corps must make an environmental assessment, environmental impact statement, follow 404(b)(1) Guidelines, and consider same factors as it does for private permits).

171. See Am. Mining, 951 F. Supp. at 270 n.3. The district court stated that because the Corps directly or indirectly conducts navigational dredging, the 1993 Tulloch Rule exception applied primarily to it. See id. The new Tulloch Rule contains similar language, providing a navigational dredging exception that applies primarily to the Corps. 33 C.F.R. § 323.2(d)(4)(iii) (2002) (indicating that some discharge does not require permits).
B. Burden Shifting as Due Process Violation

The Tulloch Rule arguably shifts the burden of showing that the regulated party is not subject to the federal government's jurisdiction, prior to project commencement.172 The regulated party may claim: (1) the Tulloch Rule assumes that the use of mechanized equipment in United States waters results in discharge of dredged material unless project-specific evidence shows that the activity only results in incidental fallback and (2) the Rule requires persons undertaking earth-moving activities to demonstrate that the activity will destroy or degrade United States waters.173 The Tulloch Rule expressly states that it does not shift any burden in any administrative or judicial proceedings under the CWA.174 The Tulloch Rule, however, creates de facto requirements that shift the burden of proof to the regulated community.175

C. On the Merits

On the merits, the Petitioner could have argued that deep plowing "neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material" or "destroys or degrades" the wetlands by producing project-specific evidence that the fallback was incidental.176 Accordingly, the soil would be categorized as incidental fallback, and it would not require a Section 404 permit.177

The Respondents, however, would argue that the regulation specifically addresses deep plowing since it requires mechanized equipment to excavate the land, subsequently creating the effect of destroying or degrading the wetlands.178 The Corps would evaluate the substantial horizontal deposits of soil created by the process.179

172. See Burnham, supra note 1, at 1392-94 (discussing potential due process violation).
173. Id. (discussing burden-shifting claims).
174. 33 C.F.R. § 323.2(d)(2)(i) (stating that requirement to present project-specific evidence indicating that activity results in incidental fallback is not intended to shift burden).
175. Burnham, supra note 1, at 1392 (positing plaintiff's potential claim against Tulloch Rule).
177. Id. at § 323.2(d)(3)(iii) (stating that "discharge of dredged material" does not include "incidental fallback").
178. Borden Ranch, 261 F.3d 810, 812 (9th Cir. 2001) (describing deep ripping as process whereby tractors drag four to seven foot metal prongs through soil to gouge its restrictive layer).
In dispositively accepting or rejecting these arguments, the Ninth Circuit would have clarified the new Tulloch Rule’s application and limitations.\(^{180}\) Alternatively, it could have remanded the case to the EPA to consider the Tulloch Rule.\(^{181}\) In declining to address the Rule, the Ninth Circuit added to the precedential morass regarding the “addition/incidental fallback” issue.\(^{182}\)

VI. THE EFFECTIVENESS OF THE TULLOCH RULE AFTER BORDEN RANCH

The Supreme Court affirmed the Ninth Circuit decision in a per curiam decision on December 16, 2002.\(^{183}\) The Court provided no guidance on the issues of the *Borden Ranch* case or the new Tulloch Rule.\(^{184}\) The Supreme Court’s reticence seems appropriate because lower courts did not argue the Tulloch Rule.\(^{185}\) The decision left open the “addition/incidental fallback” issue and failed to provide guidance.\(^{186}\)

The Supreme Court likely was hesitant to decide the *Borden Ranch* case and evaluate the Tulloch Rule for a number of reasons.\(^{187}\) First, federal jurisdiction over wetlands is a highly controversial issue.\(^{188}\) In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)*,\(^{189}\) the Court effectively lim-

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\(^{180}\) *Borden Ranch*, 261 F.3d at 820 (demonstrating Ninth Circuit’s ability to analyze different theories on “addition of pollutant,” thereby clarifying Ninth Circuit’s position).

\(^{181}\) See *Cement Kiln Recycling Coalition v. E.P.A.*, 255 F.3d 855 (D.C. Cir. 2001) (remanding case to EPA for further proceedings consistent with circuit court’s opinion).

\(^{182}\) For a discussion of precedent, see *supra* notes 146-49 and accompanying text.

\(^{183}\) *See Borden Ranch*, 537 U.S. at 100 (2002) (affirming Ninth Circuit’s decision).

\(^{184}\) *Id.* (stating that one justice recused himself from case).

\(^{185}\) *See JACK FRIEDENTHAL, ET. AL., CIVIL PROCEDURE: HORNBOOK SERIES, § 14.7* (3rd ed. 1999) (stating that full res judicata effect will be given to judgments based on invalid judicial rules so long as there was fair opportunity to raise issue in first proceeding or appeal).

\(^{186}\) *See Borden Ranch*, 537 U.S. at 100 (2002) (affirming Ninth Circuit’s decision without analysis).

\(^{187}\) For a discussion, see *infra* note 188-95 and accompanying text.

\(^{188}\) *See Burnham, supra* note 1, at 1349 (explaining controversial nature of United States wetlands policy).

\(^{189}\) 531 U.S. 159 (2001) (holding that federal government had no jurisdiction over migratory bird habitat because non-navigable, isolated, intrastate waters under CWA).
ited the Corps' jurisdiction over United States wetlands. The Court may not have wanted to limit further the Corps' jurisdiction over wetlands activity by reversing the Ninth Circuit's Borden Ranch decision and parsing the Tulloch Rule. Second, the Bush Administration's policy is to assure that wetlands suffer "no net loss." The Court may opt to keep the Corps' jurisdiction broad to effectuate this goal.

Finally, the Borden Ranch fact pattern may not have been appropriate for the Supreme Court to overturn the Ninth Circuit's carefully crafted decision due to the rancher's knowing violation of the CWA permit regulations. In Borden Ranch, the rancher knowingly violated permit regulations despite having conferred and negotiated with the Corps.

How the courts will apply the Tulloch Rule in the future remains to be seen. Until a party challenges the rule, it remains good law. The Borden Ranch decisions and the absence of the courts' analyses under the Tulloch Rule, however, exemplify how good law may be rendered useless if the courts refuse to apply the law.

Anjali Kharod

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190. See id. at 171 (rejecting Corps' jurisdiction over non-navigable, isolated, intrastate waters).
193. Id. (acknowledging SWANCC's effective limitation on federal authority over wetlands).
194. Id.; see also SWANCC, 531 U.S. 159, 165 (2001). The Court ruled favorably for plaintiffs that followed CWA permit procedures, obtained special permit from the state, and secured water quality certification. See id.
195. See Borden Ranch P'ship v. U.S. Army Corps of Eng'rs, CIV. S-97-0858 GEB JFM, 1999 U.S. Dist. LEXIS 21389 at Section I.A. (E.D. Cal. Nov. 8, 1999) (stating plaintiff's awareness that most or all activities required CWA permit). Plaintiff had familiarity with Corps and had applied for permits under CWA § 404. Id. The plaintiff also contacted Corps to inquire whether he needed to obtain a Section 404 permit for the Borden Ranch land conversion. Id.
196. See Burnham, supra note 1, at 1372-96 (analyzing potential outcomes of Tulloch Rule judicial review).
197. 5 U.S.C. § 706(2) (2000) (establishing criteria by which reviewing court may declare agency action invalid); see also Burnham, supra note 1, at 1386 (stating that agency action is presumptively valid).
198. See supra notes 180-86 and accompanying text.