NOTES

National Mining Association v. United States Army Corps of Engineers: The District of Columbia Circuit Drains Wetlands Protection from the Clean Water Act

I. OVERVIEW

Citing their shared authority under the Clean Water Act (CWA or the Act)[1] to regulate discharges of dredged material into wetlands, the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) issued a regulation aimed at reducing wetland destruction caused by dredging and excavation activities, such as landclearing, ditching, and channelization.[2] The regulation, commonly known as the *Tulloch* rule, did not expressly regulate dredging and excavation per se;[3] rather, it included within the ambit of the Corps' permitting authority the "incidental fallback" of dredged material associated with such activities.[4] The term "incidental fallback" refers to the incidental movement of material, such as

1. Federal Water Pollution Control Act §§ 101-607, 33 U.S.C. §§ 1251-1387 (1997) (commonly referred to as the Clean Water Act). Section 404 of the CWA authorizes the Corps to issue permits, pursuant to EPA guidelines and subject to EPA withdrawal, for the discharge of dredged material into the water. *See id.,* 33 U.S.C § 1344(a)-(c).

2. *See* 33 C.F.R § 323.2(d)(1)(iii) (1997) (Corps regulation); 40 C.F.R. § 232.2(1)(iii) (1997) (EPA regulation).

3. *See* American Mining Congress v. United States Army Corps of Eng'rs, 951 F. Supp. 267, 270 n.3 (D.D.C. 1997) ("The *Tulloch* rule does not regulate mere removal activities; a discharge to waters of the United States is 'an absolute prerequisite' to the assertion of § 404 jurisdiction." (quoting 58 Fed. Reg. 45,011 (1993)), *motion to amend denied*, 962 F. Supp. 2 (D.D.C. 1997), *aff'd sub nom*. National Mining Ass'n v. United States Army Corps of Eng'rs, 145 F.3d 1399 (D.C. Cir. 1998).

4. *See* National Mining Ass'n v. United States Army Corps of Eng'rs, 145 F.3d 1399, 1401 (D.C. Cir. 1998) (distinguishing the general term "redeposit," which occurs when material is returned to the water from which it was removed, from the more narrowed term "fallback," defined as redeposit taking place in the same or general location as the initial removal).

sediment, during removal activities and the subsequent redeposit of the material in the same or general location as the initial disturbance.[5]

The plaintiffs, a mining organization and other trade associations, filed suit in the United States District Court for the District of Columbia claiming that the *Tulloch* rule was facially invalid.[6] The plaintiffs argued that by allowing the EPA and the Corps (the agencies) to regulate incidental fallback, which is inherent in dredging and excavation,[7] the rule thereby provided for federal regulation of removal activities under the CWA, contrary to the language and intent of the Act.[8] According to the plaintiffs, Congress intended, in enacting the CWA, to regulate only disposal activities, and limited the agencies' wetland jurisdiction to the addition or introduction of dredged material into wetlands.[9]

The district court granted the plaintiffs' motion for summary judgment, holding that the *Tulloch* rule exceeded the authority delegated to the agencies under the CWA.[10] The court invalidated the rule and set it aside, thereby prohibiting the nationwide application or enforcement of the rule by either the Corps or the EPA.[11] The District of Columbia Circuit Court of Appeals affirmed the district court's decision, reasoning that incidental fallback represented a net withdrawal of dredged material, whereas the agencies were only delegated authority to regulate the addition of such material into the water.[12] The court also determined that a nationwide injunction was a proper remedy given both the broad discretion that a district court enjoys in granting injunctive relief and the need to avoid repetitious litigation of the issue.[13] *National Mining Association v. United States Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998).

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5. *See id.* at 1403.
6. *See id.* at 1401.
7. *See id.* at 1403 (Incidental "fallback is a practically inescapable by-product of all [removal] activities.").
8. *See American Mining Congress*, 951 F. Supp. at 270-71. Plaintiffs challenged the *Tulloch* rule on four grounds; however, because the district court granted summary judgment to the plaintiffs on the ground that the rule was inconsistent with the language and intent of the CWA, the court did not address the plaintiffs' three remaining claims. *See id.* at 270.
9. *See id.* at 271, 272; *National Mining Ass'n*, 145 F.3d at 1403.
10. *See American Mining Congress*, 951 F. Supp. at 278.
11. *See id.*
12. *See National Mining Ass'n*, 145 F.3d 1404.
13. *See id.* at 1408-10.

II. BACKGROUND

The agencies derive their authority to regulate wetlands from section 404 of the CWA.[14] Under section 404(a), the Corps is authorized to issue permits "for the discharge of dredged or fill material into the navigable waters."[15] CWA jurisprudence has expanded the traditional definition of "navigable waters" to encompass waters that are not navigable in fact nor subject to the ebb and flow of the tides, thus including wetlands within the section 404 permitting system.[16]

Extending the jurisdiction of the CWA to wetlands comports with congressional intent to improve and maintain water quality.[17] In enacting the CWA, Congress broadly established the statutory objective of restoring and maintaining "the chemical, physical, and biological integrity of the Nation's waters."[18] The oft-quoted statement of Senator Muskie extends these goals to the protection of wetlands under section 404: "The unregulated destruction of [wetlands] is a matter which needs to be corrected and which implementation of section 404 has attempted to achieve."[19] Although congressional proclamation of such noble goals may not equate to a legislative mandate that the goals be fully implemented,[20] the Supreme Court, in *United States v. Riverside Bayview Homes*, concluded that Congress recognized that a broad delegation of authority to control pollution was a prerequisite to the protection of aquatic ecosystems.[21]

Following the passage of section 404 in 1972 and its implementation over time, a loophole in the federal wetlands

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14. *See supra* note 1.

15. 33 U.S.C. § 1344(a) (1997). Section 301(a) of the CWA prohibits the discharge of dredged material unless authorized by a Corps permit issued pursuant to section 404. *See id.* § 1311(a).

16. *See* United States v. Riverside Bayview Homes, 474 U.S. 121, 133 (1985) (holding that Congress intended "to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term"); *see also National Mining Ass'n*, 145 F.3d at 1401-02 ("For purposes of the Act, the phrase 'navigable waters' has been construed to include wetlands." (citing *Riverside Bayview Homes*, 474 U.S. at 131-32 & n.8)).

17. *See Riverside Bayview Homes*, 474 U.S. at 132.

18. 33 U.S.C § 1251(a) (1997); *see also Riverside Bayview Homes*, 474 U.S. at 132 (recognizing that "[t]his objective incorporated a broad, systemic view of the goal of maintaining and improving water quality").

19. Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 915 (5th Cir. 1983) (quoting remarks of Senator Muskie made during August 4, 1977, Senate debate).

20. *See* National Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 178 (D.C. Cir. 1982).

21. 474 U.S. at 132-33.

regulatory scheme became apparent.[22] The Act defines a "discharge" as an "addition" of a pollutant,[23] and Corps regulations mirror this definition, defining a "discharge of dredged material" as "any addition of dredged material into . . . the waters of the United States."[24] In 1986, the Corps refined its "discharge" definition, excluding *de minimis* incidental fallback associated with dredging activities from the section 404 permit requirement.[25] The federal scheme, therefore, functioned to prevent the destruction of wetlands from unauthorized filling, yet readily allowed developers to dredge and excavate wetlands, and thereby destroy them, unencumbered by the federal permitting process.[26] Arguably, the ambitious developer seeking to exploit the 404 loophole needed only to safeguard against a voluminous fallback of dredged material to avoid the permitting process.[27]

In *North Carolina Wildlife Federation v. Tulloch*, environmental groups seeking to close the section 404 loophole brought suit against the agencies.[28] The *Tulloch* plaintiffs claimed that the adverse environmental effects resulting from the draining and clearing of 700 acres of wetlands warranted enforcement of the section 404 permit requirement, irrespective of the fact that only minimal incidental fallback occurred during removal activities.[29] The settlement agreement reached in *Tulloch* required the agencies to promulgate a rule expanding their "discharge" definition to include all incidental

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22. *See* Michael Lenetsky, *President Clinton and Wetlands Regulation: Boon or Bane to the Environment?*, 13 TEMP. ENVTL. L. & TECH. J. 81, 88-89 (1994) (discussing the section 404 loophole).

23. 33 U.S.C. § 1362(12)(A) (1997). Section 502 of the CWA includes "dredged spoil" within the definition of a "pollutant." *Id.* § 1362(6).

24. 33 C.F.R. § 323.2(d)(1) (1997). The regulations define "dredged material" to mean "material that is excavated or dredged from waters of the United States." *Id.* § 323.2(c).

25. *See* 33 C.F.R. § 323.2(d) (1997); *see also National Mining Ass'n*, 145 F.3d at 1402 (quoting preamble to 1986 Corps regulation).

26. *See* Lenetsky, *supra* note 22, at 88-89; *see also* American Mining Congress v. United States Army Corps of Eng'rs, 951 F. Supp. 267, 269 (D.D.C. 1997) (noting that until 1993, the agencies did not attempt to regulate excavation activities, "such as landclearing, ditching, and channelization," regardless of their adverse impact on wetlands). Although the Corps has long held the authority to regulate dredging and excavation under the Rivers and Harbors Act of 1899 § 10, 33 U.S.C. § 403 (1997), such authority is limited to traditionally navigable waters and does not extend to wetlands. *See* 33 C.F.R. § 329.4 (1997) (defining navigable waters as "those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce").

27. *See American Mining Congress*, 951 F. Supp. at 270 n.4 (noting that "sloppy disposal practices involving significant discharges" are subject to section 404).

28. Civ. No. C90-713-CIV-5-BO (E.D.N.C. filed Nov. 30, 1990).

29. *See National Mining Ass'n*, 145 F.3d at 1402.

fallback from any activity destructive of wetlands.[30] The *Tulloch* rule effectively removed the *de minimis* fallback exception and focused the regulatory scheme not on the volume of the discharge, but on the environmental impact of the activity causing the discharge.[31] The rule limited the extension of section 404 jurisdiction to incidental fallback associated with activities destructive of wetlands by creating a rebuttable presumption shifting the burden to the party engaged in the activity to show that the activity would not destroy or degrade existing wetlands.[32] The *Tulloch* rule thereby created its own *de minimis* exception; incidental fallback associated with activities proven to have only minimal or inconsequential adverse effects would not require a section 404 permit.[33] The agencies recognized the virtual impossibility of conducting removal activities without causing incidental fallback,[34] yet proclaimed a very low threshold for what constitutes adverse effects in excess of the *de minimis* exception.[35]

The Supreme Court has established a test to determine the validity of agency promulgated regulations, such as the *Tulloch* rule. Under the doctrine set forth in *Chevron U.S.A. v. Natural Resources Defense Council*, a court reviewing an agency's construction of a statutory provision that it administers must first resolve the threshold question of whether Congress has expressly addressed the specific question at issue.[36] To decipher congressional intent, a court must determine the plain meaning of the applicable provision in reference to its statutory language, "as well as the language and design of the statute as a whole."[37] An unambiguous expression of congressional intent concludes the inquiry; both the agency and the court must abide by the clear intent of Congress.[38] However, if the court concludes that congressional intent is lacking or ambiguous regarding the specific

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30. *See id.* The rule specifies, as susceptible to the section 404 permit requirement, "[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." 33 C.F.R. § 323.2(d)(1)(iii) (1997) (Corps regulation); 40 C.F.R. § 232.2(1)(iii) (1997) (EPA regulation).

31. *See American Mining Congress*, 951 F. Supp. at 270.

32. *See id.*; *National Mining Ass'n*, 145 F.3d at 1402-03; *see also* 33 C.F.R. § 323.2(d)(3)(i) (1997).

33. *See National Mining Ass'n*, 145 F.3d at 1402-03; *see also* 33 C.F.R. § 323.2(d)(3)(i), (d)(5) (1997).

34. *See* Clean Water Act Regulatory Programs, 58 Fed. Reg. 45,008, 45,017 (1993); *National Mining Ass'n*, 145 F.3d at 1403.

35. *See* Clean Water Act Regulatory Programs, 58 Fed. Reg. at 45,020 (1993); *National Mining Ass'n*, 145 F.3d at 1403.

36. 467 U.S. 837, 842 (1984).

37. K-mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988).

38. *See Chevron*, 467 U.S. at 842-43.

issue, it must then determine whether the agency's interpretation is a reasonable construction of the statute.[39] A reasonable construction need not be the only permissible construction, nor must it be a construction the court would have adopted.[40] When faced with a statute that is silent or incomplete, the reviewing court must defer to agency regulations reflecting a reasonable construction of a statutory provision; the court may not impose the interpretation that it deems best.[41]

The District of Columbia Circuit Court of Appeal recently considered Congress's intended meaning of the term "discharge" as applied in section 401 of the CWA.[42] Relying upon the Act's "discharge" definition, the court, in *North Carolina v. Federal Energy Regulatory Commission* (*FERC*), reasoned that the "nearest evidence" of congressional intent reflected "that the word 'discharge' contemplates the addition, not the withdrawal, of a substance or substances."[43]

Shortly after the *FERC* decision, Fourth Circuit Judge Niemeyer employed substantially the same reasoning to hold that "sidecasting" is not a discharge within the meaning of the CWA.[44] Sidecasting occurs during ditching activities when sediment excavated from a wetland is redeposited in the wetland alongside the drainage ditch being created.[45] Judge Niemeyer's opinion in *United States v. Wilson*, one not joined in by other members of the court, reasoned that a "rational interpretation" of the CWA leads to the conclusion that dredged soil excavated from one area of a wetland and redeposited in another, although a regulated pollutant under the Act, does not constitute an addition of material into the wetland.[46] Only if the discharge deposited new material into the wetland, or resulted in an increase in the quantity of material already present in the wetland, would a statutorily regulated "addition" occur.[47]

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39. *See id.* at 843.
40. *See id.* at 843 n.11.
41. *See id.* at 843-44 (noting that a "gap" in the statute may constitute an implicit legislative "delegation of authority to the agency to elucidate a specific provision of the statute by regulation.").
42. *See* North Carolina v. Federal Energy Regulatory Comm'n, 112 F.3d 1175, 1187 (D.C. Cir. 1997).
43. *Id. But see id.* at 1199 (Wald, J., dissenting) ("[T]he Clean Water Act is not to be constrained by artificial limitations such as the majority's 'substance-adding' standard.").
44. *See* United States v. Wilson, 133 F.3d 251, 258-60 (4th Cir. 1997).
45. *See id.* at 259.
46. *Id.*
47. *See id.*

Judge Niemeyer's reasoning in *Wilson*, regarding the issue of sidecasting, was criticized as an errant interpretation of the CWA in the concurring opinion of Judge Payne.[48] Judge Payne reasoned that the extracted material moved during the excavation of a wetland, which is statutorily defined as a pollutant, in turn releases material into the waters of the wetland.[49] Material formerly sequestered in the sub-surface of the wetland is thereby added to the surrounding waters and to the surface layer of the wetland where the material is redeposited.[50] Judge Payne concluded that the release of dredged material into a wetland during excavation clearly constitutes a regulated discharge, because, as the term "addition" is commonly understood, pollutants are added to waters under the jurisdiction of the CWA.[51]

Prior to the promulgation of the *Tulloch* rule, several other circuits addressed the applicability of section 404 to the redeposit of dredged material.[52] In *Rybachek v. EPA*, the Ninth Circuit held that the removal of material from a streambed and the subsequent discharge of the material into the stream from which it was removed, constituted an addition of a pollutant to navigable waters under the CWA.[53] The *Rybachek* court concluded that placer mining, a process whereby sediment is excavated from a waterway and then redeposited after any gold in the sediment is extracted, is subject to regulation under the CWA.[54] Notably, the court commenced its disposition by citing the adverse impacts on water quality and the possible release of toxic metals associated with discharges from placer mining.[55]

The Ninth Circuit's holding in *Rybachek* followed prevailing precedent in the Fifth and Eleventh Circuits.[56] The Fifth Circuit, in *Avoyelles Sportsmen's League, Inc. v. Marsh*, concluded that the redepositing of materials removed from wetlands during landclearing activities constituted a "discharge" as defined in the CWA.[57] The

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48. *See id.* at 269-75 (Payne, J., concurring in part)(rejecting Judge Neimeyer's opinion that sidecasting is not within the jurisdiction of section 404). Judge Payne, a United States District Judge for the Eastern District of Virginia, sat by designation on the three-judge panel presiding over the *Wilson* case. *See id.* at 253.

49. *See id.* at 273-74.

50. *See id.*

51. *See id.*

52. *See generally* National Mining Ass'n v. United States Army Corps of Eng'rs, 145 F.3d 1399, 1405-06 (D.C. Cir. 1998) (discussing opinions cited by the agencies).

53. 904 F.2d 1276, 1285-86 (9th Cir. 1990).

54. *See id.* at 1285.

55. *See id.* at 1282.

56. *See id.* at 1286 (deciding to "follow the lead of the Fifth and Eleventh Circuits").

57. 715 F.2d 897, 923 (5th Cir. 1983).

court justified its conclusion by citing the significant impact that the activities at issue had on the character of the wetlands and by expressly limiting its holding to activities involving more than a *de minimis* disturbance.[58] Similarly, the Eleventh Circuit cited severe environmental damage in rendering its holding that the churning of boat propellers, causing bottom sediment to be dredged and redeposited on adjacent sea grass beds, constituted a discharge in violation of the CWA.[59] Both the Fifth and the Eleventh Circuits agreed that interpreting the Act's definition of "discharge" to include redeposit was reasonable in light of the Act's broad objectives and legislative history.[60]

III. THE COURT'S DECISION

In the noted case, the District of Columbia Circuit Court of Appeals first addressed the plaintiffs' claim that incidental fallback is not an addition of dredged material and, therefore, not a discharge within the Corps' section 404 jurisdiction.[61] The court promptly agreed with the plaintiffs' contentions, concluding that incidental fallback could not reasonably be included within the Act's definition of a discharge.[62] The court reasoned that incidental fallback denotes a "net withdrawal" of material, not an addition as required by the Act.[63] In support of its conclusion, the court cited its *FERC* decision, holding that the best evidence of congressional intent reflects that the term "discharge" does not contemplate the withdrawal of material.[64] The court noted its reluctance to accept the agencies' argument that material in a wetland, such as sediment and debris, which is otherwise not considered a pollutant, could constitute a pollutant under the CWA upon being dredged.[65] However, in light of its determination that incidental fallback did not add material to the water, the court saw no

58. *See id.* at 923 n.41.

59. *See* United States v. Michael's Constr. Co., 772 F.2d 1501 (11th Cir. 1985), *vacated on other grounds*, 481 U.S. 1034 (1987).

60. *See id.*; Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 923 (5th Cir. 1983).

61. *See* National Mining Ass'n v. United States Army Corps of Eng'rs, 145 F.3d 1399, 1403-04 (D.C. Cir. 1998).

62. *See id.* at 1404.

63. *Id.*

64. *See id.* (quoting North Carolina v. Federal Energy Regulatory Comm'n, 112 F.3d 1175, 1187 (D.C. Cir. 1997)).

65. *See id.* at 1403 (noting that the argument requires that the material undergo a "legal metamorphosis during the dredging process"); *see also id.* at 1404 (dismissing the argument as "ingenious but unconvincing").

need to consider whether incidental fallback could result in the addition of a pollutant.[66]

The court next proceeded to attack the reasonableness of the agencies' construction of section 404.[67] The court opined that it would be unreasonable to conclude that Congress intended to regulate the attempted removal of one hundred tons of dredged material simply because one ton would fall back into the wetland during the successful excavation of the other ninety-nine.[68] Had Congress intended to require a permit to excavate wetlands, the proper place to locate the permitting requirement would be within the Rivers and Harbors Act's coverage of excavation, not within the CWA's regulation of discharges.[69] The court considered the *Tulloch* rule to be an unreasonable attempt by the agencies to compensate for an obvious incongruity in the reach of federal jurisdiction under the two statutes.[70] The agencies could not expand the reach of section 404 to regulate "incomplete removal" simply because coverage under the Rivers and Harbors Act does not extend to wetlands.[71]

Responding to complaints that its understanding of what constitutes an "addition" effectively prohibits the regulation of dredged material under the CWA, the court sought to qualify its holding.[72] The court denied that its holding forbade federal regulation of all forms of redeposit, and countered that the *Tulloch* rule was held invalid only because it was an overbroad assertion of federal jurisdiction over "any redeposit."[73] The court noted that the CWA lacked a clear distinction between incidental fallback and otherwise "regulable redeposits," and conceded that a reasonable attempt by the agencies to make such a distinction would warrant great deference.[74] However, the court showed no deference, concluding instead that the *Tulloch* rule was an unreasonable attempt to expand the scope of section 404 beyond activities resulting in the addition of dredged material into the water.[75]

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66. *See id.* at 1404.
67. *See id.* at 1404-05.
68. *See id.* at 1404.
69. *See id.*
70. *See id.* at 1404-05 (noting "an incongruity in Congress's assignment of extraction activities to a statute (the Rivers and Harbors Act) with a narrower jurisdictional sweep then that of the statute covering discharges (the Clean Water Act)"); *see also supra* note 26 (discussing the jurisdictional reach of the Rivers and Harbors Act).
71. *See National Mining Ass'n*, 145 F.3d at 1404-05.
72. *See id.* at 1405.
73. *Id.*
74. *Id.*
75. *See id.*

The court then addressed circuit court opinions, cited by the agencies, supporting the regulation of redeposit under section 404.[76] The court summarily disposed of all the decisions at the outset, concluding that because they arose prior to the promulgation of the *Tulloch* rule, the decisions did not directly address the issue of incidental fallback.[77] The court chose to limit each holding to the particular facts of the case, concluding that nothing in the language of any cited case suggested that regulation of incidental fallback would be permissible under section 404.[78] For instance, although noting that the Ninth Circuit's decision in *Rybachek* provided the strongest support for the agencies' argument, the court nevertheless found *Rybachek* inapplicable to the issue presented by the *Tulloch* rule because the Ninth Circuit did not expressly consider incidental fallback.[79] The court reasoned that the regulable discharge identified by the *Rybachek* court was the discrete disposal of the mined material into the stream after the gold had been removed.[80]

Following its analysis of the case law cited by the agencies, the court entertained the agencies' argument that the deferential *Chevron* test was inapplicable to a facial challenge to a regulation.[81] The agencies argued that the court should apply a more lenient standard, established by the Supreme Court in *United States v. Salerno*[82] to test a facial constitutional challenge to a legislative act.[83] The *Salerno* test would require the plaintiffs, in order to prevail upon their challenge, to show that under no set of circumstances would the *Tulloch* rule be within the Corps's permitting authority.[84] Although the court expressed its doubts that the plaintiffs would fail to carry the *Salerno* burden, and went so far as to superficially apply the test to discharges which the agencies claimed the *Tulloch* rule would validly cover, its statements were mere dicta given its subsequent holding that *Salerno* was not applicable.[85] Because the Supreme Court established the *Salerno* test to assess the validity of a legislative act challenged as facially unconstitutional, and never applied the test to a regulation

76. *See id.* at 1405-06.
77. *See id.* at 1406.
78. *See id.*
79. *See id.* (discussing the applicability of Rybachek v. EPA, 904 F.2d 1276 (9th Cir. 1990)).
80. *See id.*
81. *See id.* at 1406-07.
82. 481 U.S. 739 (1987).
83. *See National Mining Ass'n*, 145 F.3d at 1406-07.
84. *See id.*; *Salerno*, 481 U.S. at 745.
85. *See National Mining Ass'n*, 145 F.3d at 1407.

attacked as facially invalid under governing statutory law, the court concluded that the *Tulloch* rule could be held facially invalid regardless of whether it may be applied to circumstances wherein an addition is present.[86]

To further qualify its rejection of *Salerno*, the court distinguished the agencies' argument that a "no set of circumstances" test should apply from a proposition that a facial challenge should be rejected when it rests on an assumption that the regulation will be misapplied or that the executing agency will unlawfully abuse its discretion.[87] The court noted the plaintiffs did not proceed under any such assumption; the *Tulloch* rule, the court concluded, fails simply because its faithful execution would exceed the Corps's delegated authority under the CWA.[88]

Having determined the agencies' construction of section 404 to be unreasonable, and finding no support in the case law for the proposition that incidental fallback may be regulated as a discharge of material under the CWA, the court then addressed the final question of remedy.[89] The court concluded that the district court was well within the broad discretion it enjoys in granting injunctive relief to find that the plaintiffs' complaint was sufficient to give notice to the agencies that injunctive relief was one of the remedies sought.[90] The court cited the stark inadequacy of legal remedies other than an injunction as obviating any need for the district court to make explicit findings as to the requisite elements for a permanent injunction.[91] Addressing the agencies' argument against the breadth of the injunction, the court held that the district court's decision to set aside the *Tulloch* rule was a proper response to a regulation found to be unlawful.[92] The court feared that a refusal to grant a nationwide injunction would result in an overwhelming amount of duplicative litigation, as parties adversely affected by the *Tulloch* rule may likely exercise their statutory right to seek judicial review in the District of Columbia Circuit.[93] Although the court recognized that the grant of a nationwide injunction foreclosed the agencies' ability to litigate the issue in other circuits, it reasoned that because the threat of a flood of relitigation was unique to this circuit, foreclosure was simply "an

86. *See id.* at 1407-08.
87. *See id.* at 1408.
88. *See id.*
89. *See id.*
90. *See id.* at 1408.
91. *See id.*
92. *See id.* at 1409-10.
93. *See id.* at 1409. *See generally* 28 U.S.C. § 1391(e) (1997) (venue rules).

inevitable consequence of the venue rules," and a conclusion necessitated by the Administrative Procedure Act's command that regulations exceeding statutory authority be set aside.[94]

IV. ANALYSIS

In the noted case, the court arguably makes the proper decision to reject the application of *Salerno* in favor of the *Chevron* doctrine;[95] however, the court fails to apply *Chevron* as prescribed by the Supreme Court. Because the court concluded that the *Tulloch* rule was an unreasonable construction of section 404,[96] it must be assumed that the court answered the threshold question of unambiguous congressional intent in the negative; that Congress had not directly spoken to the issue of incidental fallback.[97] Thus, the court is confined to the second tier of the *Chevron* analysis and must determine only whether the agencies' inclusion of incidental fallback within the jurisdiction of section 404 is a reasonable construction of the statute.[98] The court, however, fails to show the requisite deference entitled to an agency's construction of an ambiguous statutory provision, opting instead to impose a static definition of the term "addition" with no regard to agency expertise or the broad purposes of the CWA.[99]

A court proceeding under the second tier of the *Chevron* analysis should not "dwell on the plain language of [a] statute" determined to be ambiguous.[100] Yet, the District of Columbia Circuit Court of Appeals refused to proceed past its limited understanding of the term "addition" and address the reasonableness of the agencies'

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94. *National Mining Ass'n*, 145 F.3d at 1409-10 (citing 5 U.S.C. § 706(2)(C)(1997)).

95. Although the Supreme Court has not overtly distinguished facial challenges requiring the deferential standard of *Chevron* from those wherein the more lenient standard of *Salerno* would apply, the Court has, in at least one case, favored *Chevron* in addressing a facial challenge that regulations are unauthorized by governing statutory law, while opting for the *Salerno* standard to decide a simultaneous claim that the regulations are facially unconstitutional. *See* Rust v. Sullivan, 500 U.S. 173, 183-84 (1991); *see also* Sullivan v. Everhart, 494 U.S. 83 (1990) (noting that Supreme Court review of "challenges to an agency's interpretation of its governing statute is well established" and applying test established in *Chevron*).

96. *See National Mining Ass'n*, 145 F.3d at 1406 n.8.

97. *See supra* text accompanying notes 35-37 (discussing the first tier of the *Chevron* analysis).

98. *See supra* text accompanying notes 38-40 (discussing the second tier of the *Chevron* analysis).

99. *See* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984) (concluding that the lower court had committed a "basic legal error" by adopting "a static judicial definition of [a] term . . . when it had decided that Congress itself had not commanded that definition").

100. *Rust*, 500 U.S. 173 at 184.

interpretation in light of the objectives Congress sought to achieve in the CWA.[101] When applying a static definition of addition, it may appear unreasonable to view incidental fallback as a quantitative addition of material; however, such a simplistic response recognizes neither the expertise of the agencies charged with administering the section 404 program nor "the realities of the problem of water pollution that the Clean Water Act was intended to combat."[102] It is well within the expertise of the agencies, and likely far removed from the knowledge of the court, to determine that a discharge has occurred when sediments are disturbed during dredging and extraction activities, such that pollutants sequestered in the sediments are released into the water or redeposited on the surface of a wetland.[103] The broad goals of the CWA, supplemented by the broad authority granted to agencies with specific expertise to achieve them, clearly support such a determination and demand that it be shown great deference on review.[104]

The circuit court further disregarded the mandates of the *Chevron* doctrine by adjudging the reasonableness of the *Tulloch* rule against what the court considered to be a reasonable regulation of redeposit.[105] The court expressed its unwillingness to show deference to the agencies' construction of section 404, absent a "reasoned attempt" by the agencies to distinguish between incidental fallback and what the court regarded as "regulable redeposits."[106] Stated more succinctly, the court simply would not show deference to a regulation that attempted to regulate incidental fallback. The court's conditioning of deference on what it perceived to be a permissible construction of the statute clearly conflicts with the *Chevron* Court's requirement of deference to administrative interpretations and demand that a reviewing court not impose the interpretation it deems most appropriate.[107]

Furthermore, since a discharge is the only statutory prerequisite for the assertion of section 404 jurisdiction, the court's analysis should focus on of whether the agencies' attempt to regulate

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101. *See Chevron*, 467 U.S. at 861 ("[T]he meaning of a word must be ascertained in the context of achieving particular objectives.").

102. United States v. Riverside Bayview Homes, 474 U.S. 121, 132 (1985).

103. *See supra* text accompanying notes 47-50.

104. *See* Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 703 (1995).

105. *See* National Mining Ass'n v. United States Army Corps of Eng'rs, 145 F.3d 1399, 1405 (D.C. Cir. 1998).

106. *See id.*

107. *See supra* text accompanying notes 39-40.

incidental fallback is a reasonable attempt to regulate the discharge of dredged material.[108] However, the court begins its analysis under a misguided premise, which it continues to rely upon throughout its disposition. The court incorrectly perceives the *Tulloch* rule to be a regulation of removal activities rather than an attempt to regulate actual discharges. The court reasons that incidental fallback denotes a net withdrawal of material and cannot, therefore, be a discharge within the meaning of the Act.[109] Indeed, the activity producing the incidental fallback may well result in a net withdrawal of material; however, the *Tulloch* rule does not attempt to regulate material successfully removed from the wetland.[110] The court may well be correct in assuming that Congress did not intend to regulate the removal of one hundred tons of material simply because only ninety-nine tons were successfully removed, but to correctly frame the question in light of the issue at hand would be to ask whether Congress could have reasonably considered the fallback of one ton of dredged material, a statutorily defined pollutant, to be a discharge within the meaning of the CWA. In light of the broad goals of the CWA, to ask the question is to answer it.

V. CONCLUSION

In the noted case, the District of Columbia Circuit Court of Appeals could have chosen to support the broad goals of the CWA and the protection of our nation's wetland ecosystems from development and destruction. The court could have accepted the realities of water pollution and the efforts of agencies equipped with scientific expertise and charged with task of eliminating water pollution. Instead, the court chose to cower behind a limited statutory interpretation, unsupported by the language and design of the statute as a whole, while demanding that only Congress can act to close the section 404 loophole. In affirming the nationwide injunction handed down by the district court, the court of appeals calls upon the need for congressional action not with a whisper, but with a shout. As it appears that justice is indeed blind, one can only hope that Congress is not deaf.

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108. *See supra* note 3.
109. *See National Mining Ass'n*, 145 F.3d at 1404.
110. *See id.* at 1405.