

Activity-Based Jurisdiction: An Update on the Tulloch Rule

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Jurisdictional Fusses Aren't All *Rapanos*

- To be covered by CWA, an activity needs to result in a “discharge” into water of the US
- CWA: “discharge” means “addition”
 - 404: discharge of dredged or fill material
 - Underlying issue: when is dredged material “added”
 - Raises questions when excavation or land-clearing results in regulated redeposit of dredged material



“Tulloch” Litigation -- History

- 1993: Tulloch Rule
 - Result of 1987 challenge to *de minimis* exception the regulations included in 1980s
 - Indicated “any redeposit” from excavation, mechanized landclearing, etc. was a regulable discharge
 - 1998: D.C. Cir in *NMA* struck down as overly broad since “any” might regulate “incidental fallback”
 - noted some types of redeposit subject to CWA



“Tulloch” Litigation – History, cont.

- 1999: Final rule to clarify CWA not regulate “incidental fallback,” without defining
- 2001: Tulloch II Rule
 - Defined incidental fallback as small amount of material falling back into substantially the same place
 - Indicated agencies “regard” mechanized equipment as resulting in more than incidental fallback
 - Unless project-specific evidence shows otherwise
- *NAHB* challenged, arguing Tulloch II improperly:
 - Defined “incidental fallback” in terms of volume
 - Established impermissible presumption



“Tulloch” Litigation – *NAHB*

- 2007: D.D.C. invalidated Tulloch II rule, placed injunction on its enforcement
- Basis for decision:
 - Defined “incidental fallback” in terms of absolute volume
 - Definition does not consider amount of time material is held
 - Dicta: doesn’t like “regard” language
 - Agencies can’t require “project-specific evidence” from projects that are not regulated



Regulating Redeposit after *NAHB*

- *NAHB* and its predecessor *NMA* suggest at least two bases for regulating redeposit:
 - time material is held
 - distance material is moved
- Agencies view redeposit that is not incidental fallback as regulated
 - Considering best next steps for clarifying
 - Stay tuned!



Questions for Discussion

- What type of activities in your State/Tribe result in redeposit of dredged material?
 - How common?
- What resources appear to be at particular risk?
 - How extensive?



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← Incidental fallback?

