

## **The Evolving Concept of the Discharge Of Dredged and Fill Material**

By Ragna Henrichs, Porter & Hedges, L.L.P.

The concepts of what constitutes the discharge of dredged material and the discharge of fill material are fundamental to Clean Water Act (33 USC §§ 1251 ff.) Section 404 permitting. This paper will discuss developments in these areas.

At the federal level, discharges to regulated wetlands are governed by the Clean Water Act (CWA or the act). Section 301 of the CWA prohibits the discharge of any pollutant by any person except in accord with certain other provisions of the act, including the permit programs under Section 402 and Section 404. Section 402 authorizes the issuance of permits by the U.S. Environmental Protection Agency for the discharge of pollutants; Section 402 permits primarily govern wastewater and stormwater discharges. Section 404 authorizes the issuance of permits by the U.S. Army Corps of Engineers for the discharge of dredged or fill material.

Section 502 of the act provides several important definitions. First, “discharge of a pollutant” means “any addition of any pollutant to navigable waters from any point source . . .” 33 USC Section 1362 (12). The act defines a “pollutant” as

dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water.  
*Id.* at Section 1362 (6).

Hence, the CWA defines “pollutant” to include dredged and other material regulated under Section 404. The act does not define either “dredged material” or “fill,” leaving further clarification of these terms to the regulatory agencies and the courts.

EPA and the Corps have agreed on relevant regulatory definitions for these terms, and have published identical definitions in the respective regulations of each agency. See 40 CFR §232.2 (EPA) and 33 CFR § 323.2 (Corps). Each agency defines the “discharge” of dredged or “discharge” of fill material as the “addition” of such material to waters of the United States. *Id.* Each agency has also promulgated a definition of “dredged material” and of “fill” (*Id.*) which will be discussed further below.

### **Discharge of Fill Material – *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council et al***

Because dredged material and other material that is defined as fill are also defined as “pollutants,” the overlap has generated controversy over whether discharges of certain dredged or fill material must be authorized by a permit under only Section 404 or under both Sections 402 and 404. The question is complicated by the fact that “fill” is defined to include material such as “rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in water of the United States” (33 CFR Section 323.2) and such materials could also be pollutants or even wastes. The regulatory definition of fill is generally focused on purpose, although trash and garbage are expressly excluded from the definition regardless of the purpose for their deposit. Further complications arise from the fact that New Source Performance Standards enforceable through incorporation into EPA-issued Section 402 permits apply to processes that generate some pollutants that can be Corps-governed fill. Early in 2009, the U.S. Supreme Court answered questions raised by this overlap. The U.S. Supreme Court in *Coeur Alaska, Inc. v. Southeast*

*Alaska Conservation Council et al*, 129 S. Ct. 2458 (2009) answered an important question: what agency regulates discharges of fill material that also meet the definition of a process wastewater for which new source performance standards have been promulgated—the EPA under Section 402 or the Corps under Section 404? At issue in this case was a permit required for the discharge of a gold mining waste material consisting of a mixture of water and rock called “slurry” to an Alaskan lake located some three miles from the mine. The slurry consists of the residue from the froth flotation process that churns mined rock in tanks of water causing the gold-bearing materials to float to the surface. The gold is removed and a residue, a mixture of crushed rock and water called a slurry, results. In the circumstance of this case, the Kensington gold mine proposed that the slurry be discharged to a 23-acre lake approximately 2,000 feet long and 800 feet wide with the expectation that the lake would ultimately be filled with more than 50 feet of the slurry material. Authorization for the fill was granted by the Corps’ issuance of a CWA Section 404 permit. EPA did not object to, or veto, the permit.

Environmental groups challenged the project on grounds that the discharge should have been regulated by a Section 402 permit issued by EPA, in particular because New Source Performance Standards apply to the discharge of froth flotation process wastewater from the mining of gold, and these standards were neither considered nor implemented by the Corps in its issuance of the Section 404 permit for the slurry.

The U.S. Supreme Court reached two conclusions. First, the Corps is the exclusive permitting authority for the discharge in this case. The discharge constitutes fill as defined by both EPA and the Corps and permitting for the discharge of fill is solely within the jurisdiction of the Corps. Second, the New Source Performance Standards do not apply to discharges of fill, but only to discharges subject to permitting under Section 402 of the act.

In the course of its decision, the U.S. Supreme Court relied on EPA and Corps definitions of fill which include:

material placed in waters of the United States where the material has the effect of: (i) replacing any portion of a water of the United States with dry land; or (ii) changing the bottom elevation of any portion of a water of the United States. 40 CFR Section 232.2; 33 CFR Section 323.2 (e).

In the course of determining the proper permitting program for the discharge of the slurry, the U.S. Supreme Court concurred that the discharge at issue was properly determined to be of fill material.

Although the feature at issue in the *Coeur Alaska* case was a lake, the permit was required because the discharge was to waters of the United States. Since regulated wetlands are waters of the United States, such a discharge to wetlands also would be governed exclusively by a CWA Section 404 permit.

In its decision, the Court noted that EPA concurred in issuance of the Section 404 permit in this case; EPA had authority to veto the permit should there be a determination that the discharge would impose unreasonable environmental harm, and the discharge from the outflow from the lake to a river constituting waters of the United States was subject to a permit issued by EPA under Section 402 of the CWA.

What is the impact of the decision? Clearly it establishes that, if a discharge constitutes fill, an applicant is required only to obtain a Section 404 permit for its discharge. Hence, the applicant will not be caught in overlapping permitting regimes of Sections 402 and 404. Although the Section 404 permit will be issued by the Corps, EPA will have a voice in the process through application of the 404(b)(1) guidelines and the veto power.

The environmental groups expressed concern about such a result on grounds that this interpretation would provide a basis for an applicant to evade the New Source Performance Standards applicable to a categorical discharge, thus creating a loophole in the regulatory system. The Court discussed drawing a line between the discharge of fill and a discharge that contains solids. This issue had been discussed extensively as the regulatory definition of fill material was developed. In short, the U.S. Supreme Court concurred in the distinction made by agencies between fill material that would raise the bed of waters of the United States or provide an addition of dry land and a discharge of wastewater that contained trace amounts of settleable material. The Court blessed the historical distinctions in the regulatory definitions.

### **Discharge of Dredged Material – Incidental Fallback**

Yet again, EPA and the Corps have grappled with the question of what constitutes dredged or fill material, in particular in circumstances where the “dredged material” consists of a redeposit of dirt or soil during normal dredging or other earth-moving activities. The issue has embroiled the agencies, industry, and environmental groups in litigation and controversy for more than 20 years.

In 1986, the Corps regulated any addition of dredged material into waters of the United States but specifically excluded incidental fallback, the *de minimis* incidental movement of soil occurring during normal dredging operations. 51 *Fed. Reg.* 51206 (Nov. 13, 1986). The exclusion of incidental fallback was challenged in *North Carolina Wildlife Federation v. Tulloch*, No. C90-713-CIV-5-BO (stipulated dismissal Mar. 4, 1992) a case regarding the Corps’ decision not to regulate a project involving land clearing and draining of some 700 acres of wetlands because only incidental deposits of soil and dredged material would result. In response to the *Tulloch* lawsuit, in 1993 the Corps redefined the discharge of dredged material to include virtually all redeposit of dredged or excavated material including that incidental to any activity, such as mechanized land clearing or other excavations. 58 *Fed. Reg.* 45008 (Aug. 25, 1993).

In a 1998 ruling on an industry challenge to this absolutist approach of the 1993 rule, the Court of Appeals for the District of Columbia determined that the 1993 rule was inconsistent with the CWA definition of “discharge” which required the “addition” of a pollutant. In *National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998), the Court found that

the straightforward statutory term “addition” cannot reasonably be said to encompass the situation in which material is removed from waters of the United States and a small portion of it happens to fall back. *Id.* at 1404.

In 1999 the agencies responded by modifying the regulatory definition to expressly exclude incidental fallback, but to retain jurisdiction over redeposits that are not incidental fallback. 64 *Fed. Reg.* 25120 (May 10, 1999). Two years later the agencies further clarified that incidental fallback is

the redeposit of small volumes of dredged material that is incidental to excavation activities in waters of the United States when such material falls back to substantially the same place as the initial removal. 66 *Fed. Reg.* 4550, 4575 (Jan. 17, 2001).

The agencies also incorporated into the regulation their view that use of mechanized earth-moving equipment would result in a discharge of dredged material unless there was specific evidence to establish that only incidental fallback resulted. Industry viewed this regulatory presumption as an impermissible attempt to regulate mechanized earth moving. In response to industry’s challenging of this rule, in 2007

the district court for the District of Columbia invalidated the definition of incidental fallback as a redeposit based on volume, but concluded that a determination of what could be considered a discharge of dredged material could be based on the time the material is held before redeposit, or the distance of the redeposit from the location of its initial collection. *National Association of Home Builders, et al v. U.S. Army Corps of Engineers, et al*, 2007 U.S. Dist. LEXIS 6366 (D.D.C. Jan. 30, 2007). The Court also ruled invalid the agencies' attempt to regulate all mechanized earth-moving activity.

The agencies responded to this latest setback in a new rule promulgated on December 30, 2008, which expressly excluded incidental fallback as a regulated redeposit but did not further define "incidental fallback." Hence, such a determination must now be made on a case-by-case basis in accord with governing case law. *73 Fed. Reg.* 79642 (Dec. 30, 2008). Since the language of the 2008 rule reverts to that of the 1999 rule (but without any reference to mechanized land clearing or other specific activities), agency guidance associated with the judicial decision and the 1999 rule may again be helpful.

In court decisions, the agencies have made it clear that incidental fallback is not regulated as a discharge of either dredged or fill material. Although the district court in *National Association of Home Builders* commented on the factors that could be considered to determine what level of redeposit of dredged material could actually be regulated, the change to the regulation did not elaborate on these factors beyond deleting the former reference to volume. The Court specifically noted that the determination of whether a redeposit of dredged material would be subject to Section 404 could depend on the time elapsing between the dredging and the redeposit, and the distance of the redeposit from the initial dredging. The agencies were silent on these issues in their 2008 rule. However, the regulatory guidance that accompanied the 1999 regulations provides at least some insight. In the 1999 guidance, EPA noted that the Court of Appeals for the District of Columbia acknowledged that incidental fallback does not include soil movement away from the original site and that sidecasting and sloppy disposal practices can be regulated. Although the 1999 guidance relies in part on the now impermissible factor of volume, EPA even then stated that examples of unregulated incidental fallback include

dredged material that falls from a dredge bucket as it is raised up through the water column; dredged material that falls from a dredge cutterhead or clamshell bucket as it is moved through the sediment to pick up and remove soil; and the movement of dredged material around a backhoe bucket as it is moved through the soil in its normal, routine use in lifting the removing sediment.

EPA, "Memorandum: Regulation of Certain Activities in Light of American Mining Congress v. Corps of Engineers," April 11, 1997, incorporated into "Memorandum U.S. Environmental Protection Agency Regional Offices U.S. Army Corps of Engineers Divisions and Districts," May 10, 1999.

Examples of regulated activity include

- ditching activity where an excavated material is sidecast into waters of the United States, and
- temporary or permanent stockpiling or disposal of dredged material in waters of the United States. *Id*

In 1999, EPA also noted that mechanized land clearing that involves pushing and moving substantial amounts of soil with bulldozer blades from one location to another in waters of the United States in amounts greater in volume and different in kind from incidental fallback could be regulated. *Id*. While the reference to volume is now suspect, the "different in kind" concept merits consideration. Finally, the 1999

guidance identified activities that could involve either incidental fallback or regulated activity, depending on case specific facts. These include

- mining activities;
- ditching and draining activities;
- maintenance dredging activities and excavation for flood control, irrigation and drainage projects;
- channelization or reconfiguration of streams; and
- “other excavation activities.”

In short, if the above activities and waters of the United States are involved, further evaluation of specific project facts is needed to determine if the activity constitutes incidental fallback or, alternatively, if permitting under Section 402 or Section 404 is necessary.

#### **About the Author**

Ragna Henrichs is a partner in the environmental law section at Porter & Hedges, one of the premier business law firms based in Houston. Ms. Henrichs has concentrated her practice exclusively in environmental law and has had extensive experience with remediation projects, enforcement and compliance matters, permitting and regulatory counseling. She may be reached at [rhenrichs@porterhedges.com](mailto:rhenrichs@porterhedges.com).