

Final "Tulloch" Clarification: Enhanced Wetlands Protections

The Environmental Protection Agency (EPA) and the U. S. Army Corps of Engineers have promulgated a final regulation to strengthen wetlands protection which went into effect on April 17, 2001. The new rule will stem the loss of the Nation's wetlands by clarifying the types of activities that are likely to result in a discharge of dredged material regulated under the Clean Water Act. The agencies estimate that since 1998 at least 20,000 wetland acres have been targeted for ditching, draining, and destruction and 150 miles of streams channelized because of a regulatory loophole. While today's action is an important step to protect the Nation's wetlands, there is no regulatory action that can fully close the loophole in the Clean Water Act that has led to this type of wetlands destruction.

Background

Wetlands provide a number of economically and environmentally important functions such as flood control, water quality protection, groundwater recharge, spawning areas for commercially important fish, and wildlife habitat. The Clean Water Act requires a permit before dredged or fill material may be discharged into wetlands. This permit program ensures that the environmental impacts of proposed discharges are minimized, and that unavoidable impacts are offset through compensatory mitigation efforts such as wetlands restoration. In fiscal year 1999, approximately 21,500 acres of permitted wetland losses took place, but these were offset by approximately 46,000 acres of compensatory mitigation.

Each year, valuable aquatic resources are lost due to mechanized land clearing, ditching and drainage, and in-stream mining or channelization activities in wetlands or other waters of the United States. In 1993, EPA and the U.S. Army Corps of Engineers issued a final regulation in 1993 (commonly referred to as the "Tulloch rule") to revise the definition of "discharge of dredged material" to better protect wetlands from these practices. A 1998 court decision, however, found that EPA and the Corps of Engineers lacked authority under the Clean Water Act to regulate such activities if conducted so as to result in only "incidental fallback" (excavated material that falls back to substantially the same place as the initial removal). In May 1999, EPA and the Corps of Engineers issued a final rule modifying the definition of "discharge of dredged material" in order to respond to the Court's finding and to ensure compliance with the Court decision. In August 2000, EPA and the Corps of Engineers proposed further revisions that were finalized and went into effect on April 17, 2001.

Since the 1998 court decision, there has been confusion as to what activities are likely to result in discharges regulated under the Clean Water Act. Since the Court decision,

upwards of 20,000 wetland acres have been targeted for ditching, draining, and destruction and approximately 150 miles of streams channelized without environmental review under the Clean Water Act, and without compensatory mitigation. The final rule seeks to stem such losses by clarifying the scope of activities that typically produce discharges subject to environmental review under the Act.

Final Revisions

The final rule (published at 66 Fed. Reg. 4549) by EPA and the Corps of Engineers enhances protection of the Nation's aquatic resources, including wetlands, by clarifying those types of activities that are likely to result in a discharge of dredged material subject to Clean Water Act Section 404. The final rule modifies the definition of "discharge of dredged material" by clarifying what types of activities EPA and the Corps of Engineers believe typically result in regulable discharges, based on the nature of the equipment and agency experience. The rule indicates that the Corps and EPA regard the use of mechanized earth moving equipment to conduct landclearing, ditching, channelization, in-stream mining, or other earth-moving activity in waters of the U.S. as resulting in a discharge of dredged material, unless project-specific evidence shows that the activity results in only "incidental fallback." The rule also provides a definition of what constitutes non-regulable incidental fallback that is consistent with the Court decision.

Additional Protections

Tens of thousands of wetlands acres and hundreds of miles of streams will receive improved protection as a result of this final rule. By clarifying what types of activities are likely to result in regulable discharges, the rule will also help achieve greater consistency and environmental protection in implementing the section 404 program's wetlands protections.

State Partners in Wetlands Protection

A number of states have wetlands protection programs, and some of these do specifically regulate ditching and drainage activities. Such state law "backstops" can help stem ditching and drainage of wetlands within these particular states. However, we believe that without federal protection, it is difficult to adequately protect common resources such as interstate lakes and streams that also lie in states that may not have such aquatic resource protection programs in place.

Cost

We do not anticipate that this final rule will result in significant costs for either large and small entities. The rule does not alter or enlarge program jurisdiction, but identifies what types of activities the agencies believe are likely to result in a regulable discharge. Therefore, it does not affect a discharger's obligation to obtain a section 404 permit for any discharge into waters of the U.S. This final rule identifies what types of activities are likely to give rise to an obligation to obtain such a permit under the definition of "discharge of dredged material" contained in the agencies' existing regulations.

Additional Information

For general information on the final rule or the importance of wetlands as a natural resource, visit EPA's wetlands website at <http://www.epa.gov/owow/wetlands> or contact the Wetlands Helpline at (703) 748-1304 or (800) 832-7828.