"TULLOCH" CHRONOLOGY

11/13/86 -- Corps and EPA promulgate rules defining "discharge of dredged material" to exclude "*de minimis*, incidental soil movement occurring during normal dredging operations." 51 FR 41232 (§ 323.2(d)). Preamble suggests intent to exempt "the fallback in a 'normal dredging operation.'" Id. 41210.

7/18/90 -- Corps issues Regulatory Guidance Letter 90-5, stating "it is our position that mechanized landclearing activities in jurisdictional wetlands result in a redeposition of soil that is subject to regulation under section 404. Some limited exceptions may occur, such as cutting trees above the soil's surface with a chain saw, but as a general rule, mechanized landclearing is a regulated activity."

2/24/92 -- Settlement agreement signed in North Carolina Wildlife Federation v. Tulloch, E.D.N.C. C90-713-CIV-5-BO. That suit had been filed against the Corps, EPA and a developer, challenging use of the 1986 regulations in connection with a North Carolina development project that destroyed hundreds of acres of wetlands without a permit. The settlement provided for the Corps and EPA to propose revisions to the definition of "discharge of dredged material," and further provided that if the Corps and EPA promulgated as final regulations the proposal or other regulatory language "substantially similar in language and effect," plaintiffs would dismiss their suit.

6/16/92 -- Corps and EPA propose regulatory amendments pursuant to the settlement agreement. 57 FR 26894.

2/18/93 -- In preliminary injunction decision concerning a development project in Delaware, a U.S. district court questions validity of RGL 90-5. Salt Pond Associates v. US Army Corps of Engineers, 815 F. Supp. 766, 778-83 (D. Del. 1993).

8/25/93 -- Corps and EPA promulgate final regulatory amendments (commonly referred to as the "Tulloch rule") pursuant to the 6/16/92 proposal. 58 FR 45008.

8/24/93 -- American Mining Congress and other industry plaintiffs file suit against the Corps and EPA, challenging the Tulloch rule. American Mining Congress v. US Army Corps of Engineers, D.D.C. Civ. No. 93-1754 (Suit was filed after the rule was signed on 8/19/93 but before publication.)

1/23/97 -- U.S. District Court for the District of Columbia rules that "the so-called *Tulloch* rule is declared invalid and set aside, and henceforth is not to be applied or enforced by the Corps of Engineers or the Environmental Protection Agency." American Mining Congress v. US Army Corps of Engineers, 951 F. Supp. 267, 278 (D.D.C. 1997).

4/2/97 -- U.S. District Court for the District of Columbia denies the Corps' and EPA's motion for stay pending appeal. American Mining Congress v. US Army Corps of Engineers, 962 F. Supp. 2 (D.D.C. 1997).

6/25/97 -- U.S. Court of Appeals for the District of Columbia Circuit grants stay pending appeal.

6/19/98 -- U.S. Court of Appeals for the District of Columbia Circuit affirms district court's January 1997 judgment. Natl. Mining Assn. v. US Army Corps of Engineers, 145 F.3d 1399 (D.C. Cir. 1998). The court found that the Tulloch rule improperly regulated "incidental fallback,"

id. 1405, which occurs when dredged material is redeposited "virtually to the spot from which it came." Id. 1403. The court cautioned, however, that "we do not hold that the Corps may not legally regulate some forms of redeposit under its § 404 permitting authority." Id. 1405. For example, the court recognized that redeposit of dredged material at "some distance" from the point of removal -- including the short distance from a ditch to the edge of a ditch -- is properly subject to section 404 regulation. Id. 1407, 1402. "Since the Act sets out no bright line between incidental fallback on the one hand and regulable redeposits on the other, a reasoned attempt by the agencies to draw such a line would merit considerable deference." Id. 1405.

7/9/98 -- U.S. Court of Appeals for the District of Columbia Circuit vacates its previously granted stay pending appeal.

5/10/99 -- In response to D.C. Circuit's decision, Corps and EPA issue regulation providing that "incidental fallback" is not subject to regulation under section 404. 64 FR 25120. In the preamble, the agencies announce their intent to undertake further rulemaking: "The Agencies are particularly concerned that, without further action to clarify the definition of 'discharge of dredged material,' large-scale destruction of wetlands could occur, resulting in increased flooding or runoff and harm to neighboring property, pollution of streams and rivers, and loss of valuable habitat. Moreover, available information indicates that such losses are already occurring. Accordingly, the Agencies will expeditiously undertake additional notice and comment rulemaking in furtherance of the CWA's objective to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters.' ... Further rulemaking ... is appropriate not only to ensure that the Nation's wetlands and other waters of the U.S. will continue to receive the protection required by section 404 of the CWA, but also to enhance clarity, certainty, and consistency in determining what activities are subject to section 404 in light of the *NMA* decision." Id. 25121.

8/13/99 -- National Association of Home Builders, one of the plaintiffs in the National Mining Association litigation, files a motion in the U.S. District Court for the District of Columbia, attacking the 5/10/99 remand regulation.

4/7/00 -- U.S. Court of Appeals for the Fourth Circuit issues decision disagreeing with the interpretation of the Clean Water Act enunciated by the D.C. Circuit in Natl. Mining Assn.: "In deciding to classify dredged spoil as a pollutant, Congress determined that plain dirt, once excavated from waters of the United States, could not be redeposited into those waters without causing harm to the environment. Indeed, several seemingly benign substances like rock, sand, cellar dirt, and biological materials are specifically designated as pollutants under the Clean Water Act. See 33 U.S.C. § 1362(6). Congress had good reason to be concerned about the reintroduction of these materials into the waters of the United States, including the wetlands that are a part of those waters." United States v. Deaton, 209 F.3d 331, 336 (4th Cir. 2000).

8/16/00 -- Corps and EPA propose further changes to definition of "discharge of dredged material." 65 FR 50108.

9/13/00 -- U.S. District Court for the District of Columbia denies National Association of Home Builders' 8/13/99 motion attacking the 5/10/99 regulation. American Mining Congress v. US Army Corps of Engineers, 120 F. Supp. 2d 23 (D.D.C. 2000).

1/17/01 -- Corps and EPA promulgate final regulation pursuant to the 8/16/00 proposal. 66 FR 4550. The regulation provides (inter alia):

"The Corps and EPA regard the use of mechanized earth-moving equipment to conduct landclearing, ditching, channelization, instream mining or other earth-moving activity in waters of the United States as resulting in a discharge of dredged material unless project-specific evidence shows that the activity results in only incidental fallback. This paragraph (i) does not and is not intended to shift any burden in any administrative or judicial proceeding under the CWA."

66 FR 4575 (33 CFR § 323.2(d)(2)(i)).

"*Incidental fallback* is the redeposit of small volumes of dredged material that is incidental to excavation activity in 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 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."

Id. (33 CFR § 323.2(d)(2)(ii)).

2/6/01 -- National Association of Homebuilders files suit attacking the 1/17/01 rule. National Association of Homebuilders v. US Army Corps of Engineers, D.D.C. Civ. No. 01-274.

2/12/01 -- National Stone, Sand and Gravel Association files suit attacking the 1/17/01 rule. National Stone, Sand and Gravel Association v. US Army Corps of Engineers, D.D.C. Civ. No. 01-320.

2/15/01 -- Corps and EPA publish notice announcing that effective date of the 1/17/01 regulation is being postponed from 2/16/01 to 4/17/01. 66 FR 10367.

4/16/01 -- EPA Administrator Whitman announces that EPA "is moving forward" with the January 2001 rule. "Today's action, taken jointly with the U.S. Army Corps of Engineers, clarifies that wetlands are protected from many types of discharges that have contributed to the loss of wetlands in the United States." EPA Headquarters Press Release, "Administration Endorses Rule to Protect America's Wetlands" (4/16/01).