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NOTES AND COMMENTS

Be All That You Can Be, But Nothing More: *National Mining Association v. U.S. Army Corps of Engineers* and the Corps' Critical Loss of Wetlands Control

MATTHEW M. D'AMICO*

I. Introduction

In a detrimental blow to federal wetlands regulation, the United States Court of Appeals for the District of Columbia Circuit recently held the United States Army Corps of Engineers (hereinafter "the Corps") had exceeded its authority under section 404 of the Federal Water Pollution Control Act Amendments of 1972.[1] The court determined that the Corps, by requiring permits pursuant to the Tulloch Rule[2] for all dredging activities that caused an "addition" of pollutants to navigable waters, had exceeded its authority because the rule considered incidental fallback, which is the inevitable resettling of miniscule amounts of material during dredging, to be an "addition" rather than a net "withdrawal." In finding for the defendant, the National Mining Association (hereinafter "NMA"), the D.C. Circuit held first that the Tulloch Rule wrongfully disregarded the established exemption to the CWA's permit requirements of "de minimis, incidental

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1. *See* National Mining Assn v. United States Army Corps of Engineers, 145 F.3d 1399 (D.C. Cir. 1998). *See also* Federal Water Pollution Control Act [hereinafter "FWPCA"] § 404(a) (1972), 33 U.S.C. § 1344(a) (1994). The Federal Water Pollution Control Act Amendments of 1972 are commonly referred to as the "Clean Water Act" [hereinafter "CWA"].

2. *See* 58 Fed. Reg. 450,008 (proposed Aug. 25, 1993). The Tulloch Rule is a 1993 rulemaking that altered the preexisting regulatory framework of section 404 by removing its de minimis exception and by adding incidental fallback. *See* discussion *infra* Part II.

soil movement occurring during normal dredging operations."[3] Second, the court held National Mining Association's facial challenge to the Tulloch Rule (i.e., that the rule is incompatible with governing statutory law) was subject to the deferential *Chevron*[4] test, rather than a more stringent standard for facial challenges to statutes. Such a stricter standard would require showing no "set of circumstances exists under which the rule would be within the Corps' statutory authority."[5] Third, the court held the district court, in exercising its broad discretion to award injunctive relief, was not required to make explicit findings as to the elements necessary for a permanent injunction against the Corps' enforcement of the Tulloch Rule, particularly in light of the district court's declaration that the rule was facially invalid.[6] Finally, the court held that a national injunction against the enforcement of the Tulloch Rule was appropriate in order to avoid a "flood of duplicative litigation."[7]

A persistent point of confusion in federal wetlands law concerns which activities in wetlands are lawful and which are unlawful. The CWA prohibits "discharges" of pollutants without, or not in compliance with, a permit.[8] When one fills a wetland with dirt or other material, the action must be authorized by a section 404(a) permit which is issued by the Corps. A violation of section 404(a), therefore, contemplates a discharge of some kind.[9] The Corps has long held it lacks the statutory authority under the Act to regulate any wetlands-destroying activity other than the filling covered by section 404(a).[10] Nevertheless, the Corps, in settling a previous lawsuit regarding this issue,[11] agreed to propose regulations controlling the draining of wetlands, which were finalized in

3. 145 F.3d at 1402 (quoting 51 Fed. Reg. 41,206, 41,232 (1986)).

4. *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

5. 145 F.3d at 1407.

6. *See id.* at 1408.

7. *Id.*

8. *See* CWA § 301(a), 33 U.S.C. § 1311(a) (1994).

9. *See* CWA § 404(a), 33 U.S.C. § 1344(a) (1994).

10. *See* MARGARET N. STRAND, *Federal Wetlands Law: A Supplement, reprinted in* WETLANDS DESKBOOK, 2D EDITION 1 (Envtl. L. Inst. 1997).

11. *See* North Carolina Wildlife Federation v. Tulloch, Civ.No. C90-713-CIV-5-BO (E.D.N.C. 1992).

August 1993.[12] These regulatory changes were quickly challenged in federal district court, where they were struck down.[13]

National Mining Ass'n poses a substantial setback to the Corps and environmental groups seeking greater protection for wetlands through stricter regulatory devices.[14] The case sheds light on the limits of the Corps' regulatory power as a federal agency, and on the serious need for clear legislative action in wetlands regulation to avoid the promulgation of questionable regulations by the Corps and other federal environmental agencies. Such clear legislation is also sorely needed because federal wetlands law has been characterized as a "confused conglomeration of several statutes, regulations, and agency policies lacking uniformity."[15]

This Case Note intends to show how the District of Columbia Circuit Court's rejection of the Tulloch Rule seriously damages the Corps' ability to use the CWA to limit dredging activities in wetlands, streams and rivers.[16] The Tulloch Rule and similar regulations have, in many instances, been necessary because Congress has failed to adequately legislate wetlands protection. Such necessity notwithstanding, the question remains: Was the D.C. Circuit Court correct in striking down the Tulloch Rule if the Rule was inconsistent with the Corps' authority under the CWA? The answer is yes. Courts are obliged to interpret law and not to create it, and the D.C. Circuit here followed the CWA as it is written and intended. Part I of this Case Note will show how *National Mining Ass'n* was rightly decided, with a certain exception the court should possibly have followed.

Part II of this Case Note examines the development of federal wetlands regulation under the CWA, including the reasons for regulating wetlands, and in particular, the statutory authority provided to the Corps. The Corps' role under section 404 of the Act is discussed, since understanding its role is essential to properly an-

12. *See* 58 Fed. Reg. 450,008 (proposed Aug. 25, 1993). This is the so-called "Tulloch Rule," named after a party to the original lawsuit.

13. *See* American Mining Congress v. United States Army Corps of Engineers, 951 F. Supp. 267 (D.D.C. 1997).

14. *See* STRAND, *supra* note 10, at 1.

15. STRAND, *supra* note 10, at 4.

16. *See* 33 U.S.C. §§ 403, 407 (1988). Historically, the Corps has had the authority to regulate dredging and filling activities in streams and rivers (i.e., "navigable waters") under section 10 of the Rivers and Harbors Act of 1890, and to prohibit the deposit of refuse into navigable waters without a permit under section 13 of the amendments added by the Refuse Act of 1899. *See id.*

alyzing the D.C. Circuit Court's ruling. Part II also discusses the case law and regulations that have arisen out of the CWA, and how they relate to and shape the Corps' section 404 powers. Part III examines the facts, holding, and reasoning of the *National Mining Ass'n* decision, including the arguments made by both parties. Part IV analyzes the court's decision in *National Mining Ass'n* against the backdrop of the statutes, regulations, and cases discussed in Part II, and shows that the court properly construed the laws and precedent. Furthermore, Part IV considers whether the power to regulate any redeposit (i.e., the power given the Corps under the Tulloch Rule) is not more appropriately given by Congress rather than developed by the Corps itself. Finally, Part V concludes that the decision in *National Mining Ass'n* should serve as a message to Congress demanding legislation that further protects wetlands, or expands the Corps' authority. The decision illustrates the judiciary's aversion to upholding regulations that have no statutory basis, even if the result negatively impacts the environment. Consequently, Congress must legislate a solution.

II. Background

A. The Value of Protecting Wetlands

The ecological value of wetlands is often described by examples of their benefits to water quality; as wildlife habitats; as conveyances for floodwater; and as barriers to erosion and resedimentation.[17] "Wetlands are among the most important of natural features to environmentalists and businesses alike."[18] To environmentalists, wetlands constitute "irreplaceable areas of biological . . . diversity," valued for their wildlife productivity, aesthetic properties, and as recreational sites.[19] To businesses and private landowners, wetlands inhibit the development of vast areas of privately owned land.[20] Consequently, wetlands regulation arises in the context of private property management, which involves balancing the public's interest in the many ecological bene-

17. *See* STRAND, *supra* note 10, at 5. Wetlands are the swamps, marshes, and wet areas that make up a substantial amount of our nation's land. *See id.*

18. Michael B. Gerrard, *Tumult in Federal Wetlands Regulation*, 220 N.Y. L.J. 3 (1998).

19. *Id.*

20. *See* STRAND, *supra* note 10, at 5.

fits of wetlands against the substantial rights of the private property owner.[21]

B. Statutory Background to the Tulloch Rule

1. Legislative History

The conflict, which pits private property management against public interest, is reflected in the federal laws that protect wetlands. There is no uniformity in federal wetlands regulation and no single federal wetlands law.[22] Instead of developing a comprehensive wetlands law, Congress has inserted wetlands provisions into laws that primarily target other concerns, such as water pollution, agricultural production, fish and wildlife habitat, and certain federal benefits programs.[23] Existing federal law does not address the abatement of the loss of wetlands, as the political and legal debates over wetlands continue to flourish.[24] Though comprehensive wetlands legislation has been proposed in Congress,[25] the primary statute that regulates activities in wetlands today is still the CWA.[26]

The CWA was promulgated upon its nineteenth century predecessors.[27] The U.S. Army Corps of Engineers has long had the authority to improve and promote navigation of waterways.[28] Section 10 of the Rivers and Harbors Act, authorizes the Corps to regulate dredging and filling activities in navigable waters,[29] while section 13 prohibits the deposit of refuse without a permit.[30] Though the focus of the Rivers and Harbors Act was not originally on water pollution control but rather on navigation, it nevertheless evolved into a tool to regulate water pollution based on its

21. *See* STRAND, *supra* note 10, at 5.

22. *See* Gerrard, *supra* note 18, at 3.

23. *See, e.g.*, CWA §§ 101-607, 33 U.S.C. §§ 1251-1387 (1994); The Food Security Act, 16 U.S.C. §§ 3801-3862 (1985); The Fish and Wildlife Coordination Act, 33 U.S.C. § 403 (1988); The National Food Insurance Act, 42 U.S.C. §§ 4001-4128 (1988).

24. *See* STRAND, *supra* note 10, at 5.

25. *See, e.g.*, H.R. Res. 1330, 102d Cong., 1st Sess. (1991).

26. *See* CWA § 404, 33 U.S.C. § 1344 (1994).

27. *See* STRAND, *supra* note 10, at 7 (referring to the Rivers and Harbors Act of 1890, and the Refuse Act of 1899).

28. *See* Rivers and Harbors Act of 1890, ch. 907, 26 Stat. 426, 453-54 (1890), and the amendments added by the Refuse Act of 1899, ch. 425, 30 Stat. 1121 (1899) (current version at 33 U.S.C. §§ 403, 407 (1988) (collectively, "The Rivers and Harbors Act")).

29. *See* 33 U.S.C. § 403 (1988).

30. *See id.* at § 407.

prohibition against permitless discharge of "refuse."[31] In this manner, in the 1960s, industrial water pollution came under the Corps' authority.[32]

A truly comprehensive attempt to regulate water pollution was not made until Congress passed the Federal Water Pollution Control Act Amendments of 1972.[33] Known as the "Clean Water Act," the statute embraced as its objective the restoration and maintenance of the "chemical, physical, and biological integrity of the nation's waters."[34] In order to achieve these goals, section 301(a) provides that "the discharge of any pollutant by any person shall be unlawful"[35] except in compliance with sections 402 and 404 of the Act.[36] The CWA defines any "discharge of pollutants" to include "any addition of any pollutant to navigable waters from any point source,"[37] and also defines "navigable waters" as waters of the United States.[38] The term "waters of the United States," in turn, has been interpreted to include "traditional navigable waters, their tributaries, and adjacent wetlands . . . ."[39] Consequently, wetlands fall within the boundaries of the CWA and particularly within the scope of section 404.[40]

2. Section 404

Section 404 of the CWA is the principal source of federal wetlands regulatory authority, since it gives the Corps power to require permits for discharge of dredge or fill material.[41] Section 404 is administered jointly by the Corps and the U.S. Environmental Protection Agency (hereinafter "EPA"), and authorizes the Secretary of the Army, acting through the Corps, to issue permits allowing the "discharge" at "specific disposal sites."[42] The Corps has the main regulatory authority over discharges of fill based on the Corps' prior experience administering the Rivers and Harbors Act, and controlling navigation and other dredging.[43] However,

31. *See id.* at § 407.
32. *See* STRAND, *supra* note 10, at 7.
33. *See* CWA §§ 101-607, 33 U.S.C. §§ 1251-1387 (1994).
34. CWA § 101(a), 33 U.S.C. § 1251(a).
35. CWA § 301(a), 33 U.S.C. § 1311(a).
36. *See* CWA §§ 301(a), 402, 404, 33 U.S.C. §§ 1311(a), 1342, 1344.
37. CWA § 502, 33 U.S.C. § 1362(12).
38. CWA § 502, 33 U.S.C. § 1362(7).
39. 33 C.F.R. § 328 (1996).
40. *See* CWA § 404, 33 U.S.C. § 1344.
41. *See id.*
42. *Id.*
43. *See* STRAND, *supra* note 10, at 8.

the EPA retains a highly controversial veto power over the Corps' permits if it determines that the discharge of fill material would "have an unacceptable effect on municipal water supplies . . . , wildlife, or recreational areas."[44] Furthermore, the Fish and Wildlife Service of the U.S. Department of the Interior, and the U.S. Department of Agriculture's Soil Conservation Service have the authority to regulate the discharge of pollutants into wetlands.[45]

3. The 1986 Corps Rule

In 1986, the Corps issued a regulation which defined the phrase "discharge of dredged material" in section 404 to exclude "incidental movement of dredged material occurring during normal dredging operations."[46] The Corps explained that mere "fallback" of dredged material (e.g., bucket drippings) from "normal dredging operations" would generally not require a permit.[47] However, if the displaced material were more than de minimis and "disposed of" in water, a permit would be required.[48] While the regulation did not define "normal dredging operations," its preamble gave some guidance as to the de minimis exception's coverage:

Section 404 clearly directs the Corps to regulate the discharge of dredged material, not the dredging itself. Dredging operations cannot be performed without some fallback. However, if we were to define this fallback as a "discharge of dredged material," we would, in effect, be adding the regulation of dredging to section 404 which we do not believe was the intent of Congress.[49]

Therefore, the Corps' power would arise only where the fallback is something more than "incidental" fallback.

4. The Tulloch Rule

The controversy over whether "discharge" included the inevitable side effect of most dredging, "incidental fallback," did not

44. CWA § 404(c), 33 U.S.C. § 1344(c).

45. *See* Michael Lenetsky, *President Clinton and Wetlands Regulation: Boon or Bane to the Environment?*, 13 TEMP. ENVTL. L. & TECH. J. 81 (1994). All four agencies have created their own systems of policies, guidelines and practices regarding wetlands, and confusion has often resulted because of these separate regulatory actions by the agencies. *See id.* at 84.

46. 33 C.F.R. § 323.2(d)(3)(ii) (1990).

47. *Id.*

48. *Id.*

49. *Id.*

end with the 1986 regulations. In 1992, in a case called *North Carolina Wildlife Federation v. Tulloch*,[50] environmental groups challenged a developer's efforts to drain and clear 700 acres of wetlands in North Carolina.[51] The developer had decided to dig drainage ditches to "dry up" the wetlands on the 700-acre site, and then to fill them indiscriminately once they were dry and no longer subject to the CWA.[52] To evade regulation, the developer removed most of the dredged material from the ditches to upland, discharging only a relatively small portion of it back into the wetlands.[53] Under the previous Corps policy, these relatively small discharges did not trigger regulation, so the developer was able to proceed with the massive destruction of the 700 acres of wetlands.[54]

The settlement agreement reached in *Tulloch* called for the EPA and the Corps to propose new rules governing the permit requirements under section 404 of the CWA for "land-clearing and excavation activities."[55] Adoption of the Tulloch Rule, as it came to be known, eliminated the 1986 "de minimis" exception, and placed "incidental" fallback or "redeposit" of dredged material within the Corps' permit jurisdiction.[56] The Tulloch Rule prevented any activity that altered the waters of the United States to such an extent that they could no longer be considered waters by redefining the definition of pollutant that occurred during dredging or piling activities.[57]

C. Subsequent Case Law to the Tulloch Rule

1. "Discharge" Cases

A substantial body of case law has arisen from the CWA and the Corps' authority to regulate under section 404.[58] These cases not only help delineate the Corps' authority, they help to deter-

50. Civ. No. C90-713-CIV-5-BO (E.D.N.C. 1992).
51. *See* Gerrard, *supra* note 18, at 3.
52. *See* Civ. No. C90-713-CIV-5-BO (E.D.N.C. 1992).
53. *See id.*
54. *See id.*
55. Gerrard, *supra* note 18, at 3.
56. *See* 58 Fed. Reg. 450,008 (Aug. 25, 1993).
57. *See* Lenetsky, *supra* note 45, at 89-90.
58. *See, e.g.*, Minnehaha Creek Watershed Dist. v. Hoffman, 597 F.2d 617 (8th Cir. 1979); Avoyelles Sportsmen's League v. Marsh, 715 F.2d 897 (5th Cir. 1983); United States v. M.C.C. of Florida, 772 F.2d 1501 (11th Cir. 1985); Rybachek v. United States Envtl. Protection Agency, 904 F.2d 1276 (9th Cir. 1990); Dubois v. United States Dep't of Agric., 102 F.3d 1273 (1st Cir. 1996); North Carolina v. Fed. Energy Regulatory Comm'n, 112 F.3d 1175 (D.C. Cir. 1997). The D.C. Circuit Court discussed and relied

mine what constitutes "discharge," "addition," "withdrawal," and "redeposit."

In *Minnehaha Creek Watershed District v. Hoffman*,[59] a group of plaintiffs brought an action for declaratory judgment and injunctive relief against regulatory jurisdiction asserted by the U.S. Army Corps of Engineers over a lake and its outlet.[60] The United States District Court for the District of Minnesota permanently enjoined the Corps from asserting its regulatory jurisdiction over the lake, and over the placement of riprap and the construction of dams on the lake.[61]

The United States Court of Appeals for the Eighth Circuit reversed, holding that the lake constituted "navigable water" within the meaning of the CWA.[62] More importantly, the court held that both dams and riprap in navigable waters are "discharges." By broadly defining "pollutant" under the Act, the court reasoned a dam's introduction into a lake or river constituted "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water," which was Congress' intent to regulate.[63]

Similarly, the issue of discharge arose in *Avoyelles Sportsmen's League v. Marsh*.[64] The United States District Court for the Western District of Louisiana had enjoined landowners from any additional clearing, except by permit, of certain lands determined by the district court to constitute wetlands.[65] The United States Court of Appeals for the Fifth Circuit affirmed in part and reversed in part, holding that the district court had erred in substituting its own wetlands determination for EPA's final wetlands determination.[66] The court held that a wetlands determination has limited judicial review and "is entitled to . . . a standard of review [that] is highly deferential."[67] The district court, while empowered to make a "searching and careful" inquiry, nevertheless "is not empowered to substitute its judgment for that of

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on these cases in National Mining Ass'n v. United States Army Corps of Eng'rs concerning "discharges."

59. 597 F.2d 617 (8th Cir. 1979).
60. *See id.*
61. *See id.* at 620-621.
62. *See id.* at 624.
63. 597 F.2d at 625 (1972) (quoting 33 U.S.C. § 1362(19)).
64. 715 F.2d 897 (5th Cir. 1983).
65. *See id.*
66. *See id.* at 907.
67. *Id.* at 907, 904.

the agency," when the agency's final wetlands determination is not "arbitrary" or "capricious."[68]

The Fifth Circuit also held that the district court had not erred in concluding that the landowners' land-clearing activities, which resulted in significant digging up of earth and leveling of land, were subject to the Corps' permit requirement.[69] By plaintiffs tearing up "large chunks of earth," the district court could have properly decided through eyewitness testimony that "discharges" had occurred.[70] The court reasoned that, as section 502(12) of the CWA defines "discharge" as any "addition of pollutant to the waters of the U.S.," and dredged material necessarily comes from the water, such a substantial "redeposit" has to constitute a discharge.[71]

Courts have held that, even when the dredging activities were not intentional, the parties causing the redeposit have violated section 404 if they do not have a permit.[72] In *United States v. M.C.C. of Florida, Inc.*,[73] the United States, on behalf of the Corps, brought a civil action against a corporation for violations of the Rivers and Harbors Act[74] and the CWA following the corporation's construction of a bridge in the Florida Keys.[75] The corporation had originally received permits from the Corps for truck transportation during construction, but just before construction, the corporation decided to use barges and did not inform the Corps of the change. As a result, no environmental impact study was done concerning the barges, and no permits were given for them.[76] The barges' propellers caused dredging of vegetation and sediment from the ocean bottom, which settled on adjacent sea grass beds.[77] The Corps issued a cease and desist order, which the corporation ignored.[78] The United States District Court for the Southern District of Florida ordered the corporation to pay $200,000 for "restoration projects," and to pay $20,000 as a civil penalty.[79]

68. *Id.* at 904.
69. *See* 715 F.2d at 922.
70. *See id.*
71. *See id.*
72. *See* United States v. M.C.C. of Florida, Inc., 772 F.2d 1501 (11th Cir. 1985).
73. *Id.*
74. 33 U.S.C. §§ 403, 407 (1988).
75. *See* 772 F.2d at 1502.
76. *See id.* at 1503.
77. *See id.* at 1504.
78. *See id.* at 1505.
79. *See id.* at 1507.

The United States Court of Appeals for the Eleventh Circuit, affirming in part and reversing in part, held that the corporation had violated both statutes, was not entitled to a jury trial under the Seventh Amendment to the United States Constitution, and had been properly ordered to pay the penalties.[80] The court agreed with the district court's finding that the corporation "willfully violated" the Rivers and Harbors Act when it "knowingly created [a] propeller-dredged channel," which is an excavation in violation of section 403.[81] The corporation made over 112 trips with the barges, even after it was served with the cease and desist order.[82]

Furthermore, the court held the activities violated the CWA as a "discharge of a pollutant."[83] Since the CWA's objective, in section 101, "is to restore and maintain the . . . physical . . . integrity of the Nation's waters," and the resettled dredged material was really a redeposit that damaged such integrity, the dredged material constituted an "addition" within the meaning of "discharge."[84]

The Eleventh Circuit thus moved its standard closer to the future Tulloch Rule definition, that seemingly any redeposit could be a discharge under the Act.[85]

Courts have continuously shown deference to the Corps and the EPA in their interpretations of "discharge of pollutants" under the CWA.[86] In *Rybachek v. United States Environmental Protection Agency*, petitioners challenged EPA's authority to regulate gold mining under the CWA.[87] In a long and complex decision, the United States Court of Appeals for the Ninth Circuit held that placer mining was subject to the CWA, which charged the EPA with developing comprehensive programs to prevent the discharge of any pollutant except in compliance with the Act.[88] The court, examining placer mining, determined "placer mines excavate the dirt and gravel in and around waterways, extract any gold, and discharge the dirt and any non-gold material into the water."[89]

80. *See* 772 F.2d at 1501.
81. *Id.* at 1505.
82. *See id.*
83. *See id.* at 1506.
84. *Id.*
85. *See* 58 Fed. Reg. 450,008 (Aug. 25, 1993).
86. *See* Rybachek v. United States Envtl. Protection Agency, 904 F.2d 1276, 1284 (9th Cir. 1990). Most of the case is beyond the scope of this discussion.
87. 904 F.2d at 1276.
88. *See id.* at 1285.
89. *Id.*

Congress defined "discharge" as any "addition . . . to navigable waters from any point source," including, presumably, the streambed itself, and defined "pollutant" as "dredged . . . rock, sand, [and] cellar dirt . . . ."[90] The court thus reasoned that "'pollutant' . . . encompasses the materials segregated from gold in placer mining," and that resuspension of those materials, even though from the streambed itself, "may be interpreted as an addition under the Act."[91] The court viewed the "redeposit" as a "discrete act . . . [of] regulable discharge," a significant distinction from incidental fallback.[92]

Following the addition of the Tulloch Rule, some federal circuit courts have distanced themselves from the notion that redeposit necessarily meant addition to constitute a discharge, and have held that incidental fallback represented a "net withdrawal," not an addition, of a material, and could not be a discharge.[93] In *North Carolina v. Federal Energy Regulatory Comm'n*, the United States Court of Appeals for the District of Columbia Circuit denied a petition by the State of North Carolina seeking review of the Federal Energy Regulatory Commission's (hereinafter "FERC") decision to amend its license to the City of Virginia Beach, Virginia, which allowed the City to build an intake structure within a power project's boundaries and withdraw water for transport to Virginia Beach.[94] At issue was a seventy-six mile pipeline originating in Lake Gaston and terminating in Norfolk, Virginia.[95] Lake Gaston is a "navigable waterway" within the meaning of the CWA, traversing the states of Virginia and North Carolina.[96] Virginia Beach received a section 404 permit from the Corps for the dredge and fill operation in Virginia, as the pipeline would cause the "addition" of discharged "redeposit" from North Carolina in Virginia.[97] Virginia Beach also had FERC amend its license for the withdrawal of water from North Carolina.[98] The State of North Carolina petitioned against the amendment, arguing that the removal of the water would cause discharge and rede-

90. *Id.*
91. *Id.*
92. 904 F.2d at 1285.
93. *See* North Carolina v. Fed. Energy Regulatory Comm'n, 112 F.3d 1175 (D.C. Cir. 1997); *see also* Dubois v. United States Dep't of Agric., 102 F.3d 1273 (1st Cir. 1996).
94. *See* North Carolina v. Fed. Energy Regulatory Comm'n, 112 F.3d at 1180.
95. *See id.*
96. *See id.*
97. *Id.* at 1181.
98. *See id.*

posit which had to be permitted under section 404, and approved under section 401 by North Carolina.[99]

The D.C. Circuit disagreed, holding that neither the withdrawal of the water from the lake nor the sediment displaced "results in a discharge."[100] The court reasoned that the "definitional intent of Congress reflects . . . that the word 'discharge' contemplates the addition, not the withdrawal, of a substance or substances."[101] In the present case, only the redeposit in Virginia constituted an addition, and it was properly permitted under section 404.[102] By contrast, the court reasoned, the removal of water and sediment settlement in North Carolina constituted a "withdrawal," Congress did not intend to regulate in promulgating the Act.[103]

Consequently, the D.C. Circuit articulated the distinction between an addition and a withdrawal that would be essential to the final outcome in the *National Mining Ass'n* case.

2. Facial Challenge Standards for Agency Regulations and Statutes

Agency regulations can be challenged by a petition for review to the appropriate court, and in certain cases, they have been challenged.[104] In *Chevron, U.S.A., Inc., v. Natural Resource Defense Council*, petitioners filed for review of an EPA regulation allowing states to treat all "pollution-emitting devices within [the] same industrial grouping as though they were encased within [the same] 'bubble'" based on construction of the term "stationary source" in the Clean Air Act, section 111(a)(3).[105] The United States Supreme Court noted that Congress failed to explicitly define the Clean Air Act's "stationary source," and that the legislative history did not squarely address the issue.[106] When a court reviews

99. *See* 112 F.3d at 1182-83.

100. *Id.* at 1187.

101. *Id.*

102. *See id.*

103. *See id.*

104. *See* Chevron, U.S.A., Inc., v. Natural Resources Defense Council, 467 U.S. 837 (1984) (challenge to EPA regulation); Sullivan v. Zebley, 493 U.S. 521 (1990) (challenge to Secretary of Health and Human Services' regulations); Health Ins. Ass'n of America, Inc., v. Shalala, 23 F.3d 412 (D.C. Cir. 1994); *cf.* United States v. Salerno, 481 U.S. 739 (1987) (challenge to Bail Reform Act [statute] authorization of pretrial detention).

105. 467 U.S. at 2778.

106. *Id.* at 2779.

an agency's construction of the statute it administers, the Supreme Court has stated,

> [the court] is confronted with two questions. First . . . is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for [all] . . . must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[107]

Consequently, the Court held the EPA's definition of "stationary source" was a permissible construction of the statutory term.[108] The Court reasoned that Congress' explicit "gap" in the legislation "is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."[109] Here, the agency filled such a gap.[110] The Supreme Court, however, provided a very pertinent caveat: "The judiciary is the *final authority* on issues of statutory construction and *must reject* administrative constructions which are contrary to clear congressional intent."[111]

Despite such deference shown to an administrative rule in *Chevron*, the Supreme Court has had little trouble striking down a regulation when it violates its statutory authority.[112] At issue in *Sullivan v. Zebley* were regulations of the Secretary of Health and Human Services that determined whether a child was disabled for purposes of receipt of supplemental security income benefits under the Social Security Act.[113] Under the Act, a child "is entitled to supplemental security income benefits if his impairment is as severe as one that would prevent an adult from working."[114] Under the challenged regulations, a child who could not show that his impairment "matched or was equal to a listed impairment"

107. *Id.* at 2781-82.
108. *See id.* at 2779.
109. *Id.* at 2782.
110. *See* 467 U.S. at 2782.
111. *Id.* (emphasis added).
112. *See* Sullivan v. Zebley, 493 U.S. 521 (1990).
113. *See id.* at 521.
114. *Id.* at 529 (quoting Social Security Act § 1614(a)(3)(A),(B), 42 U.S.C. § 1382c(a)(3)(A),(B) (1994)).

was denied benefits, however, an adult who could not show his impairment matched or was equal nevertheless could still qualify for benefits if he could show he could not engage in past work or other work, "given his age, education, and work experience."[115] The United States District Court for the Eastern District of Pennsylvania granted the Secretary's motion for summary judgment, which was vacated by the Court of Appeals for the Third Circuit.[116]

The United States Supreme Court, in affirming, held that the social security regulations violated the Social Security Act, because under the regulations a child could suffer from a comparable impairment to one that would render an adult disabled, but not classify as disabled.[117] The Court reasoned that the fact that some of the child disability listings under the social security regulations included functional criteria, did not overcome the facial challenge: "[A] facial challenge is a proper response to the systemic disparity between the statutory standard and [the regulations'] approach to child disability claims."[118]

The *Zebley* court thus set a standard for facial challenges of administrative regulations. Even if there are clearly valid applications of the regulation, courts will uphold facial challenges if there are also some applications that could violate the statutory mandate.[119]

In *Health Ins. Ass'n of America, Inc. v. Shalala*,[120] certain health insurers challenged new Medicare regulations implemented by the Department of Health and Human Services.[121] At issue were certain amendments to Medicare, codified and referred to as the "Medicare as Secondary Payer" statute,[122] and the regulations that derived from the statute.[123]

Turning to consideration of the facial challenge issue, the D.C. Circuit conceded that the statute was ambiguous, and that reviewing the agency's construction of an ambiguous statute would essentially mean reviewing the agency's policy judgment.[124]

115. *Id.* at 535-36.
116. *See id.* at 521.
117. *See Zebley*, 493 U.S. at 536-37.
118. *Id.* at 537.
119. *See id.*
120. 23 F.3d 412 (D.C. Cir. 1994).
121. *See* 23 F.3d at 415.
122. 42 U.S.C. § 1395y(b) (1984).
123. *See* 23 F.3d at 414.
124. *See id.* at 416.

Although such judgments are generally "entitled to judicial deference,"[125] the court stated "we cannot accept them if they seem wholly unsupported or if they conflict with the policy judgments that undergird the statutory scheme."[126] Thus, the *Chevron* test would apply only after showing that the agency's interpretation "is a reasonable policy choice for the agency to make."[127]

By contrast, courts have been less inclined to invalidate statutes through facial challenges than administrative rules.[128] In *United States v. Salerno*,[129] defendants challenged the Bail Reform Act,[130] which subjected them to pretrial detention based on the district judge's determination of defendants' "future dangerousness."[131] Defendants appealed their pretrial detention to the United States Court of Appeals for the Second Circuit, and won.[132] The United States Supreme Court reversed the Second Circuit's decision, holding that the Act was constitutional.[133] Looking at the legislative intent, the Court held that the Act did not violate substantive due process, was not an impermissible punishment before trial, and was carefully limited to the most serious crimes. "The legislative history of the . . . Act clearly indicates . . . the pretrial detention provisions [are not] punishment for dangerous individuals. . . . There is no doubt that preventing danger to the community is [the] legitimate regulatory goal."[134] Defendants thus failed to carry their burden, the underlying principle of the case. A facial challenge to the "validity of a legislative act must establish that no set of circumstances exists under which the act is valid."[135]

3. "Discretion and Breadth of Injunctive Relief" Cases

Injunctions are court-ordered restraints on action or speech, sometimes interim, sometimes permanent, but always restrictive of a person's ability to do some specified act.[136] Consequently, in-

125. *Id.*, citing Wagner Seed Co. v. Bush, 946 F.2d 918, 923 (D.C. Cir 1991).
126. *Id.*
127. *Id.*, citing Chevron, 467 U.S. at 845.
128. *See* United States v. Salerno, 481 U.S. 739 (1987).
129. 481 U.S. 739 (1987).
130. 18 U.S.C. § 3142(e) (1984).
131. 481 U.S. at 739.
132. *See id.*
133. *See id.* at 745.
134. *Id.* at 747.
135. *Id.* at 745.
136. *See* BLACK'S LAW DICTIONARY 784 (6th ed. 1990).

junctions have been challenged as judicial abuses of discretion.[137] In *Wagner v. Taylor*,[138] appellant "sued for interim injunctive relief to prevent his employer's retaliation while he pursued a Title VII civil rights claim."[139] The United States District Court for the District of Columbia denied the injunctive request, concluding that on the facts presented, no ground for an injunction existed: "[T]here is no clear indication that [appellant] has experienced reprisal . . . or that he will experience any interference . . . in the future."[140] Appellant then argued the district court had abused its discretion.[141]

The United States Court of Appeals for the District of Columbia Circuit disagreed, holding that district courts "have broad discretion to evaluate the irreparability of alleged harm and to make determinations regarding the propriety of injunctive relief."[142] To overcome that, the appellant "carries the heavy burden of demonstrating an abuse of discretion."[143] The court concluded that, as the district court had found previously, the "facts fail[ed] to require . . . intervention,"[144] and so the prior decision was "unassailable."[145]

The case of *Baeder v. Heckler*[146] presented a different situation, where plaintiff challenged an administrative regulation that had denied his application for disability benefits under the Social Security Act.[147] The United States District Court for the District of New Jersey invalidated the regulation as it applied to plaintiff, and went further, enjoining the Secretary of Health and Human Services from using the regulation in any other case.[148]

The United States Court of Appeals for the Third Circuit affirmed in part and reversed in part, agreeing with the regulation's invalidation as applied to plaintiff, but disagreeing with a nation-

137. *See, e.g.*, Wagner v. Taylor, 836 F.2d 566 (D.C. Cir. 1987); Harmon v. Thornburgh, 878 F.2d 484 (D.C. Cir. 1989); Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990); Baeder v. Heckler, 768 F.2d 547 (3d Cir. 1985).

138. 836 F.2d 566 (D.C. Cir. 1987).

139. *Id.*

140. *Id.* at 569.

141. *See id.* at 570.

142. *Id.* at 576.

143. 836 F.2d at 576.

144. *Id.*

145. *Id.*

146. 768 F.2d 547 (3d Cir. 1985).

147. *See id.* at 548.

148. *See id.* at 550.

wide injunction.[149] The court held that the application of the regulation to plaintiff did not "conform to the statutory mandate," and therefore was invalid.[150] However, the court refused to affirm the "all-encompassing" injunction: "We do not believe . . . that in the context of [plaintiff's] claim for disability benefits, the district court had the authority to issue an injunction aimed at controlling the Secretary's behavior in every disability case in the country."[151] For the Third Circuit, an injunction for plaintiff's individual benefit would have been appropriate, but a nationwide injunction was far too sweeping in its effect, and therefore, could not be permitted.[152]

III. *National Mining Ass'n v. United States Army Corps of Engineers*[153]

A. Facts

The plaintiffs in *National Mining Ass'n* were various trade associations whose members engaged in dredging and excavation.[154] The plaintiffs mounted a challenge to the Tulloch Rule, claiming that it exceeded the scope of the Corps' authority under the CWA's section 404 by regulating incidental fallback during dredging operations as a "discharge."[155] The United States District Court for the District of Columbia agreed with the plaintiffs, and granted summary judgment invalidating the Tulloch Rule.[156] Additionally, the district court enjoined the Corps and the EPA from enforcing the Tulloch Rule anywhere in the United States.[157] The Corps appealed the decision to the United States Court of Appeals for the District of Columbia Circuit.[158]

B. Appellants' Arguments

The Corps argued that the terms of the CWA demonstrated that fallback might be classified as a discharge.[159] The Act de-

149. *See id.* at 553.
150. *Id.*
151. 768 F.2d at 553.
152. *Id.*
153. 145 F.3d 1399 (D.C. Cir. 1998).
154. *See id.* at 1401.
155. *See id.* The lower court case, in the United States District Court for the District of Columbia, was American Mining Congress v. United States Army Corps of Eng'rs, 951 F. Supp. 267 (D.D.C. 1997). *See id.*
156. *See id.*
157. *See id.*
158. *See id.* at 1400.
159. *See* Brief of Appellant (Corps) at 2, National Mining Ass'n v. United States Army Corps of Eng'rs, 145 F.3d 1399 (D.C. Cir. 1998).

fined a discharge as the addition of any pollutant to navigable waters, and defined "pollutant" to include "dredged spoil," as well as "rock, sand, and cellar dirt."[160] The Corps, in turn, defined "dredged material" as "material that is excavated or dredged from the waters of the United States."[161] Thus, according to the Corps, wetland soil, debris or sediment during dredging "becomes a pollutant" for purposes of the Act.[162] If a portion of the material being dredged were to fall back into the water, it would constitute an addition of a pollutant, the regulation of which was required by the Act.[163]

The Corps maintained that National Mining Association's (hereinafter "NMA") argument that no addition of a pollutant occurred when indigenous material was redeposited had been consistently rejected by most federal appellate courts.[164] The cases have held that the agencies have reasonably interpreted "addition" to include "redeposit" of dredged material taken from waters of the United States back into those waters.[165] In no case, the Corps continued, was there any indication that the courts considered the precise spatial relationship between the dredging activity and the redeposit site to be significant, let alone that such spatial considerations would set limits on the agencies' authority under the CWA.[166] On the contrary, the federal appellate courts have emphasized the harmful environmental effects in each particular case, and deferred to the agencies' statutory interpretation.[167]

Appellant National Wildlife Federation (hereinafter "NWF") argued that the district court's understanding of "addition" effectively read the regulation of dredged material out of the Act.[168] NWF noted that since dredged material came from the waters of the United States, any discharge of such material could technically be described as a "redeposit," and cited *Avoyelles Sportsman's League v. Marsh*[169] for that proposition.[170]

160. *Id.* at 1403.
161. *Id.*
162. *Id.*
163. *See id.*
164. *See* Brief of Appellant (Corps) at 7, National Mining Ass'n v. United States Army Corps of Eng'rs, 145 F.3d 1399 (D.C. Cir. 1998).
165. *See id.* (citing *Avoyelles*, 715 F.2d at 923-24; *M.C.C. of Florida*, 772 F.2d at 1506; *Rybachek*, 904 F.2d at 1286).
166. *See id.* at 8.
167. *See id.*
168. *See* 145 F.3d at 1405.
169. 715 F.2d 897 (5th Cir. 1983).
170. *See* 145 F.3d at 1405 (citing *Avoyelles*, 715 F.2d at 924).

The Corps again argued that *Rybachek v. United States Envtl. Protection Agency*[171] stood for the proposition that material taken from the water itself, if resuspended in the water, could be interpreted as an addition of pollutant under the Act.[172] Therefore, the Corps argued, extraction accompanied by incidental fallback of dirt and gravel constituted "addition of pollutant."[173]

Next, the Corps argued that the facial challenge to the Tulloch Rule should have been evaluated under the strict standard of *United States v. Salerno*,[174] which involved a facial challenge to a statute, rather than the more lenient standard of *Chevron, U.S.A., Inc., v. Natural Recourses Defense Council*,[175] which set the standard for administrative regulation challenges.[176] Lastly, the Corps challenged the district court's grant of nationwide injunctive relief, challenging both the district court's discretion and the breadth of the injunction.[177]

C. Appellees' Arguments

NMA argued that the Tulloch Rule exceeded the Corps' statutory jurisdiction under section 404.[178] NMA "argued that fallback, which returns dredged material virtually to the spot from which it came, cannot be said to constitute an addition of anything."[179] Therefore, NMA contended, the Tulloch Rule conflicted with the CWA's "unambiguous terms and cannot even survive the deferential scrutiny called for by *Chevron*."[180] The *Salerno* test could not apply, because the Tulloch Rule was an administrative rule undeserving of statutory protection.[181]

Finally, NMA maintained that the injunction was within the district court's discretion, as articulated in *Wagner v. Taylor*.[182] Concerning the breadth of the injunction, NMA cited *Harmon v. Thornburgh*[183] and *Lujan v. National Wildlife Federation*:[184]

171. 904 F.2d 1276 (9th Cir. 1990).
172. *See* 145 F.3d at 1406 (*see Rybachek*, 904 F.2d at 1276).
173. *Id.*
174. 481 U.S. 739 (1987).
175. 467 U.S. 837 (1984).
176. *See* 145 F.3d at 1406-07 (*see Salerno*, 481 U.S. at 739; *Chevron*, 467 U.S. at 837).
177. *See id.* at 1408-09.
178. *See id.* at 1403.
179. *Id.*
180. *Id.*, referring to *Chevron*, 467 U.S. at 837.
181. *See* 145 F.3d at 1407 (referring to *Salerno*, 481 U.S. at 739).
182. *See id.* at 1408 (referring to *Wagner*, 836 F.2d at 575).
183. 878 F.2d 484 (D.C. Cir. 1989).

"When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated – not that their application to the individual petitioner is proscribed."[185]

D. The D.C. Circuit Court's Holding and Reasoning

The D.C. Circuit agreed with NMA, holding that the "straightforward statutory term 'addition' cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back."[186] Referring to *North Carolina v. Federal Energy Regulatory Comm'n*,[187] since "incidental fallback represents a net withdrawal, not an addition, of material, it can not be a discharge [within the meaning of the CWA]."[188] The court disagreed with the Corps argument that fallback constituted an "addition of any pollutant," because material became a pollutant only upon dredging.[189] "Regardless of any legal metamorphosis that may occur at the moment of dredging, we fail to see how there can be an addition of dredged material when there is no addition of material."[190] The court distinguished *Avoyelles* (holding that the Corps could legally regulate some forms of redeposit under section 404) stating that "by asserting jurisdiction over any redeposit, including incidental fallback, the Corps outran its statutory authority with the Tulloch Rule."[191] The D.C. Circuit found neither *United States v. M.C.C. of Florida, Inc.*,[192] nor *Dubois v. United States Dep't of Agriculture*[193] persuasive, holding the Tulloch Rule entirely too overreaching, encompassing incidental fallback and a wide range of activities that "cannot remotely be said to 'add' anything to the waters of the United States."[194] The court noted *Rybachek* as the Corps' strongest authority, but ultimately distinguished it, finding that *Rybachek* did not hold that "extraction accompanied by incidental fallback of dirt and gravel constituted addition of a pollutant, but instead it identified the regulable discharge as the

184. 497 U.S. 871 (1990).
185. 145 F.3d at 1409 (citing *Harmon*, 878 F.2d at 495; *Lujan*, 497 U.S. at 871).
186. *Id.* at 1404.
187. 112 F.3d 1175 (D.C. Cir. 1997).
188. 145 F.3d at 1404 (referring to North Carolina v. Fed. Energy Regulatory Comm'n, 112 F.3d at 1187).
189. *See id.*
190. *Id.*
191. *Id.* at 1405.
192. 772 F.2d 1501 (11th Cir. 1985).
193. 102 F.3d 1273 (1st Cir. 1996).
194. 145 F.3d at 1405.

discrete act of dumping leftover material into the stream after it had been processed."[195]

On the facial challenge issue, the D.C. Circuit held that the *Salerno* test did not apply, as the Tulloch Rule is an agency regulation, not a statute.[196] Instead, the *Chevron* standard applied, and the district court was correct if it believed the Corps had acted beyond its statutory mandate, which it had.[197]

Lastly, the court held that a nationwide injunction was within the district court's discretion.[198] The D.C. Circuit noted that, under *Wagner,* "district courts enjoy broad discretion in awarding injunctive relief."[199] Here, "the district court was well within its discretion in finding that the complaint placed the agencies on notice that NMA sought both declaratory and injunctive relief."[200] Concerning the breadth of the injunction, the D.C. Circuit held that such breadth was required by *Harmon* and *Lujan.* "[I]f the plaintiff prevails, the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual."[201] The D.C. Circuit reasoned that the nationwide injunction would obviate a "flood of duplicative litigation."[202] Additionally, the court distinguished *Baeder v. Heckler*,[203] finding that it "did not involve a facial challenge to the validity of a regulation; the Third Circuit there held simply that a sweeping injunction would not be a proper remedy in the context of [an individual plaintiff's] claim for disability benefits."[204]

In conclusion, the D.C. Circuit stated that Congress was the appropriate body to effectuate such a change in wetlands regulation, and thus, the Corps did not have the power to alter the CWA.[205] Therefore, the Act could not accommodate the Tulloch Rule.[206]

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195. *Id.* at 1406.

196. *See id.* at 1406-07.

197. *See id.* at 1407. The court cited *Zebley*, 493 U.S. at 521, in support of the *Chevron* standard. *See id.*

198. *See* 145 F.3d at 1408-09.

199. *Id.* at 1408.

200. *Id.*

201. *Id.* at 1409 (citing *Lujan*, 497 U.S. at 913).

202. *Id.*

203. 768 F.2d 547 (3d Cir. 1985).

204. 145 F.3d at 1409 (citing *Baeder*, 768 F.2d at 553).

205. *See id.* at 1410.

206. *See id.*

IV. Analysis: The D.C. Circuit's "Correct" Approach

In arriving at its decision, the *National Mining Ass'n* court considered the plain meaning of the Clean Water Act to better comprehend the scope of the authority provided to the Corps. In so doing, it distinguished much of the precedent related to wetlands regulation. However, much of the case law distinguished by the D.C. Circuit was decided prior to introduction of the Tulloch Rule, and therefore did not explicitly relate to that particular aspect of the Corps' authority. Determining the plain meaning of "addition" to mean an addition of something, the court could not allow the Corps' regulatory power to be all-encompassing by interpreting addition and redeposit as whatever the Corps saw fit. Incidental fallback is a practically inescapable by-product of all dredging activity. As the court aptly put it: "Congress could not have contemplated that the attempted removal of 100 tons of [dredged material] could constitute an addition simply because only ninety-nine tons of it were actually taken away."[207]

However, some of the case law supports the notion that the Tulloch Rule, or something approaching it, is a permissible regulation under the CWA. For example, the Eleventh Circuit declared in *M.C.C. of Florida, Inc.* that the CWA's objective was to maintain the integrity of the nation's waters, and that any resettled dredged material violated that integrity so as to constitute an "addition" within the meaning of "discharge."[208]

The D.C. Circuit understood the case law related to section 404(a), and determined the Tulloch Rule was simply far too overbroad: *Minnehaha Creek* concerned dams added to waterways, which are considerable "additions" that in no way resemble incidental fallback;[209] *Avoyelles* dealt with the intentional tearing up of large chunks of earth, which through eyewitness testimony was determined to be a "discharge";[210] *Rybachek* concerned gold mining, with "redepositing" found to have been a discrete act of adding a discharge highly distinguishable from incidental fallback.[211] *North Carolina v. Federal Energy Regulatory Comm'n*, the D.C. Circuit's own standard for "additions" and "withdrawals," the court held that the mere resettling of displaced sediment cannot

207. *Id.* at 1404.
208. 772 F.2d 1501 (11th Cir. 1985).
209. 597 F.2d 617 (8th Cir. 1978).
210. 715 F.2d 897 (5th Cir. 1983).
211. 904 F.2d 1276 (9th Cir. 1989).

result in a "discharge," because discharge must constitute an "addition" and not a "withdrawal."[212]

Balancing the weight of the case law, the D.C. Circuit properly determined that precedent, both in its own circuit and throughout the country, required it to invalidate the Tulloch Rule.[213] Similarly, the court had to follow the precedent of *Chevron*, *Sullivan* and *Shalala*, concerning the standard for facial challenges to an agency regulation. These cases required the D.C. Circuit to invalidate the Tulloch Rule despite any valid applications it may have had under the CWA, because its invalid applications automatically crippled the entire rule. *Salerno* was inapplicable because it dealt with a statutory facial challenge rather than a regulatory facial challenge.[214]

Did the court have to permanently enjoin the Corps, on a nationwide scale, from ever using the Tulloch Rule? The answer is yes. Following the precedent of *Wagner*, *Harmon*, *Lujan*, and *Baeder*, the D.C. Circuit rightly decided that an injunction had to be sweeping in scope and it had to be permanent.[215] In this manner, and only in this manner, the court could avoid the duplicative litigation against the Tulloch Rule that would inevitably occur as a result of the decision.

Strict adherence to statutory mandates is important to the continued legitimacy of our system of laws, but in *National Mining Ass'n,* the D.C. Circuit was perhaps too limiting in its consideration of the Corps' power under the CWA.[216] Essential to a consideration of perceived statutory authority is an understanding of the potential harms and benefits of exceeding a statutory mandate.[217] The Tulloch Rule was not a dangerous abuse of power on the Corps' part, but an important loophole-plugging rule that prevented land developers from destroying hundreds of acres of wetlands and miles of streams with few constraints or second thoughts for what it meant to people and wildlife.[218]

Nevertheless, the Tulloch Rule was overreaching in its application, as *National Mining Ass'n* revealed. Such incidental fallback could not be said to be a true addition of anything, and it

212. 112 F.2d 1175 (D.C. Cir. 1997).
213. *See id.*
214. 481 U.S. 739 (1998).
215. North Carolina v. Fed. Energy Regulatory Comm'n, 112 F.3d 1175 (D.C. Cir. 1997).
216. 145 F.3d 1399 (D.C. Cir. 1998).
217. *See id.*
218. *See id.*

would be a stretch to liken it even to the redeposit found in *Rybachek*, which was regulable by the Corps under the CWA even before the introduction of the Tulloch Rule.[219] In striking down the Tulloch Rule, the D.C. Circuit Court did not say how far the Corps' power to protect wetlands and other waterways would be cut back.[220]

Turning to the question of the appropriate facial challenge standard, the D.C. Circuit's consideration was less clearly proper. The cases discussed suggested that the proper standard in the present situation was the *Chevron* test, since the Tulloch Rule was a regulation, not a statute. Statutes deserve considerably more deference from courts than agency regulations, as the cases have shown. Both *Zebley*[221] and *Shalala*[222] illustrated occasions invalidating "agency regulations challenged as facially inconsistent with governing statutes despite the presence of easily imaginable valid applications."[223] The argument can be made, however, that the D.C. Circuit failed to defer, as it should, to the Corps' construction of the ambiguous statutory provision (i.e., section 404) dealing with "addition."[224] The construction would therefore have been of the CWA, not merely a regulation; an agency's statutory construction in such a situation must receive greater respect than was shown by the court, as mandated by the *Chevron* test. The court chose not to make such an inquiry, and perhaps left an opening for appeal.

Following Supreme Court and federal appellate precedent, the D.C. Circuit properly held the district court's injunctive authority to be broad, under cases such as *Wagner*, *Harmon*, and *Lujan*.[225] Moreover, the nationwide injunction was proper for the reasons the court stated: the ordinary result of the invalidation of agency regulations "is programmatic relief that affects the rights of parties not before the court . . . to obviate duplicative litigation."[226] The D.C. Circuit consistently followed well-established

219. 904 F.2d 1276 (9th Cir. 1990).

220. *See* North Carolina v. Fed. Energy Regulatory Comm'n, 112 F.3d 1175 (D.C. Cir. 1997).

221. 493 U.S. 521 (1990).

222. 23 F.3d 412 (D.C. Cir. 1994).

223. *See* Nat'l Mining Ass'n, 145 F.3d at 1407-08.

224. *See* North Carolina v. Fed. Energy Regulatory Comm'n, 112 F.3d 1175 (D.C. Cir. 1977).

225. *See id.* at 1408-09.

226. *Id.* at 1409.

precedent in invalidating the over-broad Tulloch Rule, and as a result, its decision stands on firm ground.

V. Conclusion: The Need for Legislative Action

As expressed by attorney Howard I. Fox, who represented the National Wildlife Federation in supporting the Tulloch Rule, expresses, the decision in *National Mining Ass'n* represents a serious setback for wetlands protection.[227] By contrast, Virginia Albrecht, the attorney who represented National Mining Association, believes the unnecessary and overly strict rule had posed a major obstacle to legitimate public works departments across the country for many years.[228]

Both sides raise legitimate arguments. Among the harms that could result from the D.C. Circuit's ruling are: loss of the bottomland hardwood wetlands of the Southeast, which would destroy fish and wildlife habitats while reducing water quality and increasing flooding; wetlands losses in the prairie potholes of the upper Midwest, which would threaten waterfowl habitats and also increase flooding while reducing water quality; scraping and scouring of riparian areas throughout the West, destroying the anadramous fish habitat and downstream water quality.[229]

The Tulloch Rule had some very beneficial protections, but also had some illegitimate aspects not permitted under the CWA. The courts want to protect wetlands, but not at the expense of the law's legitimacy. Therefore, the court had to deny the Corps' attempt at usurping legislative power, represented in the Tulloch Rule, because the Corps was and could never be a legislative body. The Corps must only enforce the laws given it by Congress. This begs the question: Where are the laws which the Corps needs to properly protect wetlands, and when will Congress enact them? In the meantime, the courts must find a middle ground that allows the Corps to adequately regulate and protect wetlands without drastically overstepping its statutory authority under the CWA. Only in this manner can wetlands be protected in the absence of effective statutory means.

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227. *See* Bureau of National Affairs, *Wetlands: Dredge Material Fallback Does Not Require Section 404 Permit*, 29 ENV'T. REP. (BNA) 461 (1998).

228. *See id.*

229. *See* Press Release, *Court of Appeals Hangs Wetlands Out to Dry*, CLEAN WATER NETWORK (June 19, 1998).