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METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

9-18

February 25, 1997

To: Board of Directors (Legal & Claims Committee -- Information)
(Water Planning & Resources Committee -- Information)

From: General Counsel 

Subject: Federal Court Invalidates Wetlands Rule on Land-Clearing and Excavation Activities - American Mining Company v. U.S. Army Corps of Engineers

RECOMMENDATION:

For information only.

EXECUTIVE SUMMARY:

On January 23, 1997, in a very significant decision, a Federal District Court held that the U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) had illegally adopted a regulation, known as the "Tulloch rule", which broadly expanded the wetlands activities subject to regulation by those agencies under section 404 of the Clean Water Act to include mechanized land-clearing, ditching, channelization, and other excavation. The Court has ordered that the Tulloch rule is not to be applied or enforced by the Corps or EPA and that those agencies' only remedy is to seek Congressional action.

From the Clean Water Act's enactment in 1972 until 1993 both the Corps and EPA had interpreted the section 404 regulation of "discharge of dredged or fill material into the navigable waters at specified disposal sites," as authorizing them to require a permit only for the addition of materials to waters including wetlands. Activities involving the removal of materials from wetlands did not require a permit even if they adversely impacted wetlands. On August 23, 1993 the Corps and EPA jointly adopted the Tulloch rule which redefined the term, "discharge of dredged or fill material" to include "incidental fallback". Incidental fallback involves minor soil movement associated with excavation, such as soil disturbed when dirt is shoveled or the backfill coming off a bucket falls back into the same place from which it is removed.

As the result of the Court's opinion, (1) the Corps may not require permits for excavation, land-clearing, ditching, or channelization activities or require mitigation for adverse impacts associated with such removal activities; (2) neither the Corps, EPA nor the Justice Department may initiate enforcement actions based on land-clearing and excavation activities; (3) all ongoing land-clearing and excavation mitigation requirements which are part of existing permits are subject to modification; (4) to the extent that the new Nationwide Permits published by the Corps in December 1966 rely on the Tulloch rule to define the scope of federal authority or require mitigation, they are no longer effective; and (5) the Court's decision may have an impact on Congressional dynamics, and possibly make some Administration officials and environmentalists more receptive to the idea of passing amendments to section 404.

DETAILED REPORT:

Background

Section 404 of the Clean Water Act is the statutory foundation of the Federal Wetlands Program and regulates the "discharge of dredged or fill material into the navigable waters at specified disposal sites." From the time of the Act's enactment in 1972 until 1993 both the Corps and EPA interpreted this language as authorizing them to require a permit only for the addition of materials to waters including wetlands. Activities that involved the removal of materials from wetlands, namely excavation, land-clearing, ditching, and channelization, did not require a permit even if they adversely impacted wetlands. For example, grading and filling a wetlands to develop a subdivision would require a permit while excavation of a wetlands to construct a storm water basin would not. On August 23, 1993 in response to a lawsuit filed by environmental groups, the Corps and EPA jointly adopted the "Tulloch rule" which redefined the term, "discharge of dredged or fill material" to include "incidental fallback". Incidental fallback involves minor soil movement associated with excavation, such as soil disturbed when dirt is shoveled or the backspill coming off a bucket falls back into the same place from which it is removed. Since excavation and land-clearing in almost all cases results in incidental fallback, the Tulloch rule made such removal activities subject to a section 404 permit requirement.

The American Mining Company Decision

On January 23, 1997 the Federal District Court in Washington D.C. issued a very significant decision (American Mining Company v. U.S. Army Corps of Engineers, Civil Action No. 93-1754) in which it held that the Corps and EPA had illegally adopted a regulation, known as the "Tulloch rule", which broadly expanded the wetlands activities subject to regulation by those agencies under section 404 of the Clean Water Act to include mechanized land-clearing, ditching, channelization and other excavation.

The Court ordered that the "Tulloch rule" is not to be applied or enforced by the Corps or EPA and that those agencies' only remedy is to seek Congressional action. The

Corps and EPA have requested that the U.S. Justice Department appeal and seek a stay of the Court's ruling. While these agencies agree that the Court's decision is effective throughout the United States, they are attempting to narrow the scope of the decision through papers filed February 6, 1996 in which they are requesting that the Court "alter and amend" its judgment so that it would only benefit members of the Plaintiff associations - the American Forest and Paper Association, the American Road and Transportation Builders Association, the National Aggregates Association, the National Association of Home Builders, and the National Mining Association. The plaintiffs feel this position to be totally unsupportable and have promised that they will vigorously oppose any such proposed modification of the judgment.

Significance

The Court's comprehensive 26-page opinion has an immediate, broad impact on the wetlands regulatory program with the following primary impacts:

- As of January 23, 1997 the Corps may not require permits for excavation, land-clearing, ditching, or channelization activities or require mitigation for adverse impacts associated with such removal activities. For example, Metropolitan's shoreline regulation maintenance activities at Lake Mathews, which had been limited to hand clearing techniques under the Tulloch rule, may now be undertaken by some mechanized clearing techniques.
- As of January 23, 1997 neither the Corps, the EPA nor the Justice Department may initiate enforcement actions based on land-clearing and excavation activities.
- All ongoing land-clearing and excavation mitigation requirements which are part of existing permits are subject to modification.
- To the extent that the new Nationwide Permits published by the Corps in December 1966 rely on the Tulloch rule to define the scope of federal authority or to require mitigation, they are no longer effective. We are reviewing the new Nationwide Permits to determine the extent to which they rely on the Tulloch rule.
- The Court's decision may also have an impact on Congressional dynamics, and possibly make some Administration officials and environmentalists more receptive to the idea of passing amendments to section 404.