

1-1-1997

# American Mining Congress v. Army Corps of Engineers: Ignoring Chevron and the Clean Water Act's Broad Purpose

Bradford Mank

*University of Cincinnati College of Law*, [brad.mank@uc.edu](mailto:brad.mank@uc.edu)

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## Recommended Citation

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*AMERICAN MINING CONGRESS v. ARMY CORPS OF ENGINEERS:*

IGNORING *CHEVRON* AND THE CLEAN WATER ACT'S BROAD PURPOSES

*by Bradford C. Mank*<sup>1</sup>

In 1993, the United States Army Corps of Engineers ("Corps") and the Environmental Protection Agency (EPA) (hereinafter "agencies") used their shared authority to protect wetlands under section 404 of the Clean Water Act ("Act") to jointly promulgate the so-called *Tulloch* rule to regulate the harmful environmental effects of incidental fallback from dredging operations.<sup>2</sup> In *American Mining Congress v. Army Corps of Engineers*,<sup>3</sup> the United States District Court for the District of Columbia concluded that Congress did not intend that incidental fallback from excavation or dredging should be considered the discharge of dredge or fill material into navigable waters under the Act and, accordingly, that the agencies did not have the authority to require a permit for this activity.<sup>4</sup>

Under the principles of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>5</sup> Judge Harris should have deferred to the agencies' interpretation of section 404(a). While there is little specific support in the Act's text or legislative history for the agencies' interpretation, Judge Harris overstated the extent to which Congress had indicated that it did not want the agencies to regulate incidental fallback. As long as a statute is ambiguous, *Chevron* requires a court to defer to an agency's interpretation even if a different interpretation may have somewhat stronger support in the statute or better fit the judge's

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1. Professor of Law, University of Cincinnati College of Law. A.B., Harvard, 1983; J.D., Yale Law School, 1987.

2. Army Corps of Engineers & EPA, Clean Water Act Regulatory Programs, 58 Fed. Reg. 45008, 45009-13 (1993) (codified at various C.F.R. sections, including 33 C.F.R. Pts. 323 & 328); Federal Water Pollution Control Act Amendments of 1972, § 404(a), 33 U.S.C. § 1344(a) (1997).

3. 951 F. Supp. 267 (D.D.C. 1997).

4. *Id.* at 272-78.

5. 467 U.S. 837 (1984).

policy views.<sup>6</sup> Because section 404(a) is ambiguous regarding the agencies' authority to regulate incidental fallback material from dredging and the agencies' interpretation plausibly serves the Act's broad purposes in protecting wetlands, the district court erred in striking down the *Tulloch* rule. On appeal, the Court of Appeals for the District of Columbia Circuit ought to reverse the district court and reinstate the *Tulloch* rule.

Part I of this article will provide a brief introduction to section 404 of the Clean Water Act. Part II will examine the *Tulloch* rule. Part III will examine the district court's opinion. Finally, part IV will demonstrate that section 404(a) is ambiguous regarding whether incidental fallback from dredging may in some circumstances constitute disposal under the statute and, accordingly, that under the *Chevron* doctrine the district court erred in failing to defer to the agencies' *Tulloch* rule.

#### I. SECTION 404 REQUIRES PERMITS FOR DISCHARGING DREDGE OR FILL

The Rivers and Harbors Appropriations Act of 1899<sup>7</sup> requires a permit for dredging or filling activities that may obstruct navigation in navigable waters<sup>8</sup> suitable for commercial transportation, and applies to waters or tidal wetlands located below mean high water.<sup>9</sup> Section 10 of the Rivers and Harbors Appropriations Act of 1899 defines the Corps' jurisdiction over excavation activities.<sup>10</sup>

In 1972, Congress enacted the Federal Water Pollution Control Act (Clean Water Act).<sup>11</sup> Section 404 of the Act seeks to pro-

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6. *Id.* at 842-43.

7. See 33 U.S.C. §§ 401, 403, 407 (1986).

8. See 33 C.F.R. § 329.4 (1998) which defines navigable waters as "those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce."

9. See 33 U.S.C. §§ 401, 403, 407; 33 C.F.R. § 329.4 (1997); *Bayou des Familles Dev. Corp. v. United States Corps of Eng'rs*, 541 F. Supp. 1025, 1034 (E.D. La. 1982); See generally Carol E. Dinkins et al., *Regulatory Obstacles to Development and Redevelopment: Wetlands and Other Essential Issues*, in *THE IMPACT OF ENVIRONMENTAL LAW ON REAL ESTATE AND OTHER COMMERCIAL TRANSACTIONS*, SB18 ALI-ABA 731, 734 (Oct. 10, 1996).

10. 33 U.S.C. § 403 (1997) (Stating that the Corps must authorize excavation or filling of navigable waters).

11. 33 U.S.C. §§ 1251-1387 (1997).

tect wetlands by requiring any person who “discharge[s] dredge or fill material into the navigable waters at specified disposal sites” to obtain a permit from the Corps.<sup>12</sup> The term “pollutant” encompasses “dredged spoil.”<sup>13</sup> Section 502(12) defines a “discharge” as “any addition of any pollutant to navigable waters from any point source.”<sup>14</sup> While the Corps has primary responsibility for issuing permits,<sup>15</sup> subject to the EPA’s veto authority,<sup>16</sup> both agencies have authority to issue binding regulations and guidance documents to regulate the disposal of dredged materials in waters.<sup>17</sup>

## II. THE TULLOCH RULE

The Corps defines “discharge of dredged material” as the addition of material excavated or dredged from waters of the United States, including runoff from a dredged material disposal area.<sup>18</sup> From 1972 until 1993, the agencies did not regulate under section 404 incidental fallback or movement from dredging or excavation of materials from navigable waters, including landclearing, ditching, or channelization, unless the agency could establish substantial environmental impacts or the relocation of the dredged materials.<sup>19</sup>

In *North Carolina Wildlife Federation v. Tulloch*,<sup>20</sup> environmental organizations sued the Corps, the EPA and two landowners alleging that landclearing and excavation activities involving 700 acres of wetlands caused significant environmental damage and, therefore, should be subject to regulation under section 404.<sup>21</sup> In 1992, the agencies settled the case by agreeing to

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12. Federal Water Pollution Control Act Amendments of 1972 § 404(a), 33 U.S.C. § 1344(a) (1997).

13. *Id.* § 1362(6).

14. *Id.* § 1362(12).

15. *Id.* § 1344(a).

16. *Id.* § 1344(c).

17. *Id.* § 1344(b)(1).

18. 33 C.F.R. §§ 323.2(2), 323.2(c), 323.2(d) (1997); *see also* Dinkins, *supra* note 9, at 735.

19. *See* 51 Fed. Reg. 41206, 41210 (1986); *American Mining Congress v. Army Corps of Eng’rs*, 951 F. Supp. 267, 269 (D.D.C. 1997); *United States v. Lambert*, 589 F. Supp. 366 (M.D. Fla. 1984); Dinkins, *supra* note 9, at 735-36.

20. Civil No. C90-713-CIV-5-BO (E.D.N.C. filed Nov. 30, 1990). The case is noted in *Current Developments*, 24 Env’t Rep. (BNA) 1681 (Jan. 21, 1994).

21. *See* 58 Fed. Reg. at 45016 (noting the *Tulloch* case involved excavation causing extensive destruction of hundreds of acres of wetlands).

propose a rule regulating the addition or redeposit of dredged materials, including excavated materials, into wetlands.<sup>22</sup> After providing a sixty-day public comment period, on August 25, 1993, the agencies issued a final rule that essentially incorporated the terms of the settlement agreement.<sup>23</sup>

The *Tulloch* rule redefines the term "discharge of dredged material" to include small-volume incidental fallback unless the party conducting the activity can establish that it will not harm or degrade wetlands or waters of the United States.<sup>24</sup> Incidental fallback includes any soil that is disturbed when a shovel excavates dirt, or any back-spill that falls from a shovel or bucket and falls back into the same place from which it was removed.<sup>25</sup> Incidental fallback does not include soil moved or deposited away from the original site.<sup>26</sup> Under section 404, the agencies have from the beginning regulated so-called "sidecasting," which involves depositing removed soil alongside a ditch, and careless disposal practices involving significant discharges into waters.<sup>27</sup>

The *Tulloch* rule significantly increased the scope of the agencies' section 404 jurisdiction because any mechanized landclearing or dredging activities will result in some incidental fallback, and, accordingly, the rule brings mechanized landclearing, ditching, channelization, or other excavation operations within the section 404 permit program.<sup>28</sup> Previously, the agencies only regulated incidental fallback if it caused substan-

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22. 58 Fed. Reg. 45008 (1993).

23. 58 Fed. Reg. 45008, 45009-13, 45035-38 (1993) (codified at various C.F.R. sections, including 33 C.F.R. Pts. 323 & 328).

24. See 33 C.F.R. §§ 323.2(d)(1)(iii), (d)(3)(i), (d)(4) (1998) (Corps regulations); 40 C.F.R. §§ 232.2(1)(iii), 232.2(3)(i), (4) (1998) (EPA regulations); 58 Fed. Reg. at 45019-21 (1993) (defining "destroy" and "degrade," 45035-38); see also *American Mining Congress*, 951 F. Supp. at 270 & n.3; Dinkins, *supra* note 9, at 735.

25. 33 C.F.R. § 323.2(d)(1)(iii) (1998) (Corps regulations); 40 C.F.R. § 232.2(1)(iii) (1998) (EPA regulations); 58 Fed. Reg. at 45009-13 (1993); see also *American Mining Congress*, 951 F. Supp. at 270 & n.4.

26. 33 C.F.R. § 323.2(d)(1)(iii) (1998) (Corps regulations); 40 C.F.R. § 232.2(1)(iii) (1998) (EPA regulations); 58 Fed. Reg. at 45009-13 (1993); see also *American Mining Congress*, 951 F. Supp. at 270 & n.4.

27. 33 C.F.R. § 323.2(d)(1)(iii) (1998) (Corps regulations); 40 C.F.R. § 232.2(1)(iii) (1998) (EPA regulations); 58 Fed. Reg. at 45014 (1993); see also *American Mining Congress*, 951 F. Supp. at 270 & n.4; Dinkins, *supra* note 9, at 736.

28. See 33 C.F.R. § 323.2(d)(1)(iii) (1998) (Corps regulations); 40 C.F.R. § 232.2(1)(iii) (1998) (EPA regulations); 58 Fed. Reg. at 45017-19 (1993) (describing mechanized landclearing, ditching, channelization and other excavation activities); see also *American Mining Congress*, 951 F. Supp. at 270 & n.3.

tial environmental impacts, and the presumption was against regulation of incidental fallback even if large discharges were involved, unless the agencies could establish environmental effects.<sup>29</sup> The *Tulloch* rule creates a rebuttable presumption that shifts the burden to the regulated party to demonstrate, before beginning a project, that the federal government does not have jurisdiction over the activity.<sup>30</sup> To rebut this presumption, the regulated party must show that the activity will have *de minimis* environmental impacts and not harm or degrade wetlands or waters of the United States.<sup>31</sup> The agencies announced in the *Tulloch* rule that they would apply a very low threshold for what constitutes an environmental effect and, accordingly, there is a significant burden on regulated parties to show that their activities will cause no harm.<sup>32</sup> In determining what constitutes an environmental impact that may harm or degrade waters of the United States, the agencies not only examine the direct environmental impacts of the incidental fallback, but also claim the authority to regulate indirect or secondary environmental effects associated with dredging, mechanized landclearing, ditching, channelization or excavation activities as long as there is a discharge of dredged or fill material, including incidental fallback.<sup>33</sup>

Because a discharge to navigable waters of the United States is "an absolute prerequisite" to the exercise of government authority under section 404, the *Tulloch* rule does not apply to mere removal activities.<sup>34</sup> Furthermore, the rule excludes *de minimis* soil movement incidental to any activity that does not or

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29. 33 C.F.R. § 323.2(d)(1)(iii) (1998) (Corps regulations); 40 C.F.R. § 232.2(1)(iii) (1998) (EPA regulations); 58 Fed. Reg. at 45009-13, 45035-38 (1993); see also *American Mining Congress*, 951 F. Supp. at 270 & n.3.

30. See 33 C.F.R. §§ 323.2(c)(2), 323.2(d)(3)(i) (1998) (Corps regulations); 40 C.F.R. §§ 232.2(2), 232.2(3)(i) (1998) (EPA regulations); 58 Fed. Reg. at 45021-22 (1993) (creating presumption that dredging and excavation activities destroy or degrade); see also *American Mining Congress*, 951 F. Supp. at 270 & n.3.

31. See 33 C.F.R. §§ 323.2(d)(1)(iii), (d)(3)(i), (d)(4) (1998) (Corps regulations); 40 C.F.R. §§ 232.2(1)(iii), 232.2(3)(i), (4) (1998) (EPA regulations); 58 Fed. Reg. at 45019-22, 45035-38 (1993) (defining "destroy" and "degrade" and "*de minimis*" and creating presumption that dredging and excavation activities destroy or degrade); *American Mining Congress*, 951 F. Supp. at 270 & n.3; Dinkins, *supra* note 9, at 735.

32. See 58 Fed. Reg. at 45020-21 (1993).

33. See 58 Fed. Reg. at 45011-13 (1993); see *supra* note 28 and accompanying text.

34. 58 Fed. Reg. at 45011 (1993).

would not have the effect of destroying or degrading wetlands or waters, which means that the activity alters an area so it would no longer be a water of the United States.<sup>35</sup> Conveniently, the agencies exempted incidental movement of dredged material resulting from dredging designed to improve navigation in navigable waters, an exemption that applies as a practical matter only to the Corps.<sup>36</sup>

### III. THE DISTRICT COURT'S DECISION

#### A. *The Parties' Arguments*

The American Mining Congress and other development interests filed suit challenging the *Tulloch* rule as exceeding the agencies' authority under section 404 of the Act because Congress never intended for incidental fallback to be within the statute's jurisdiction.<sup>37</sup> They contended that the *Tulloch* rule used the concept of "incidental fallback" as a justification for expanding the agencies' jurisdiction to regulate excavating and landclearing activities that are not otherwise within the scope of the section 404 permit program.<sup>38</sup>

By contrast, the agencies maintained that they were authorized to regulate incidental fallback, and that *Chevron* required the district court to defer to their expertise in interpreting the Act.<sup>39</sup> They argued that incidental fallback was always regulated by them, but that they had created a narrow exception from the permit requirement for *de minimis* discharges.<sup>40</sup> The agencies contended that the *Tulloch* rule merely closes a loophole in the Act by tightening a *de minimis* exception within their discre-

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35. See 33 C.F.R. §§ 323.2(d)(1)(iii), (d)(3)(i), (d)(4) (1998) (Corps regulations); 40 C.F.R. §§ 232.2(1)(iii), 232.2(e)(3)(i), (4) (1998) (EPA regulations); 58 Fed. Reg. at 45019-21, 45026, 45035-38 (1993) (defining "destroy" and "degrade" and excluding incidental soil movement during "normal" dredging operations); see also *American Mining Congress*, 951 F. Supp. at 270 & n.3; Dinkins, *supra* note 9, at 735.

36. See *American Mining Congress*, 951 F. Supp. at 270 n.3; 58 Fed. Reg. at 45009-13, 45035-38 (1993).

37. See *American Mining Congress*, 951 F. Supp. at 268-71.

38. See *id.* at 271.

39. *Id.*

40. See 33 C.F.R. §§ 323.2(d)(1)(iii), (d)(3)(i), (d)(4) (1998) (Corps regulations); 40 C.F.R. §§ 232.2(1)(iii), 232.2(3)(i), (4) (1998) (EPA regulations); 58 Fed. Reg. at 45019-21, 45035-38 (1993) (defining "destroy" and "degrade" and "*de minimis*"); see also *American Mining Congress*, 951 F. Supp. at 270 & n.3; Dinkins, *supra* note 9, at 735.

tion, and that the rule effectuates the statute's goals in protecting wetlands from degradation.<sup>41</sup>

### B. The District Court's Decision

#### 1. Incidental Fallback Is Not the "Addition of a Pollutant."

The district court concluded that incidental fallback is not the "addition of a pollutant" to navigable waters and, therefore, does not constitute a "discharge" within the agencies' section 404(a) authority.<sup>42</sup> Because section 404(a) only authorizes the agencies to regulate "discharge[s]" of "dredge or fill material,"<sup>43</sup> it is crucial to determine whether incidental fallback constitutes a discharge.

The American Mining Congress and other plaintiffs argued that by defining a "discharge" to require the "addition" of a "pollutant," Congress intended to regulate only the introduction or placement of dredged material into water, and not the incidental fallback that accompanies the removal of material from navigable waters.<sup>44</sup> Instead, section 10 of the Rivers and Harbors Appropriations Act of 1899 defines the Corps' jurisdiction over excavation activities.<sup>45</sup>

The defendant agencies argued that the term "addition of pollutants" is ambiguous and that the district court should defer to its interpretation under the *Chevron* doctrine.<sup>46</sup> While the district court properly concluded that Congress did not want the agencies to regulate *de minimis* amounts of incidental fallback, the court should have given the agencies more latitude in determining when incidental fallback may constitute an "addition of

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41. Compare 33 C.F.R. §§ 323.2(d)(1)(iii), (d)(4) (1998) (Corps regulations) and 40 C.F.R. §§ 232.2(1)(iii), 232.2(4) (1998) (EPA regulations) and 58 Fed. Reg. at 45019-21, 45035-38 (1993) (defining "destroy" and "degrade" and "*de minimis*" very broadly to protect the environment from effects of dredging and excavation activities) with *American Mining Congress*, 951 F. Supp. at 271 (criticizing the agencies' broad definition of degradation and the agencies' rule placing the burden on the regulated party to prove its activities are *de minimis*).

42. *American Mining Congress*, 951 F. Supp. at 272-78.

43. See Federal Water Pollution Control Act Amendments of 1972 § 404(a), 33 U.S.C. § 1344(a) (1997).

44. *American Mining Congress*, 951 F. Supp. at 272.

45. See 33 U.S.C. § 403 (1997) (Corps must authorize excavation or filling of navigable waters).

46. *American Mining Congress*, 951 F. Supp. at 272.

pollutants” and “discharge” under the Act.

*a. Under section 404(a), excavation or dredging activities do not constitute a “discharge.”*

The district court correctly concluded that under section 404(a) excavation or dredging activities do not constitute a “discharge,” but erroneously inferred as a result that incidental fallback may never constitute an “addition of pollutant” and “discharge.” Because section 10 of the Rivers and Appropriations Act of 1899 explicitly defines the Corps’ jurisdiction over excavation activities<sup>47</sup> and section 404 does not expressly refer to such matters, the district court argued that Congress intended to regulate removal activities only under the former statute and the disposal of material only under the latter.<sup>48</sup> Even if section 404(a)’s jurisdiction does not reach removal activities, that does not resolve whether incidental fallback constitutes an “addition of pollutant” or “discharge” under the Act.

*b. Under the Act, the term “discharge” does not include incidental fallback.*

While acknowledging that neither the Act’s 1972 or 1977 legislative history specifically refers to “incidental fallback,” the district court argued that Congress had a very definite view regarding the meaning of the term “discharge” under section 404(a) and that its intent was that incidental fallback does not constitute disposal under the statute.<sup>49</sup> According to the district court, Congress intended the term “discharge of dredged material to mean open water disposal of material removed during the digging or deepening of navigable waterways,” and that this purpose “excludes the small-volume incidental discharge that accompanies excavation and landclearing activities.”<sup>50</sup> In 1977, Senator Muskie, a leading force in writing the Act, stated that the statute was not intended to regulate “*de minimis*” activities.<sup>51</sup>

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47. See 33 U.S.C. § 403 (1997) (Corps must authorize excavation or filling of navigable waters).

48. *American Mining Congress*, 951 F. Supp. at 272-73.

49. *Id.* at 273-74.

50. *Id.* at 273.

51. *Id.* (quoting Senate Report on section 1952, 95th Cong., reprinted in 1977 Legis. Hist. at 645).

Furthermore, in 1977, Senator Domenici indicated that Congress did not intend the Act to regulate someone who merely “mov[es] a little bit of earth . . . .”<sup>52</sup> Because landclearing or dredging activities routinely result in some incidental fallback, the district court maintained that the remarks of Senators Muskie and Domenici suggest that Congress did not intend the statute to reach such small and routine movements of soil as disposal activities.<sup>53</sup> Neither Senator Muskie nor Domenici’s statements, however, clearly address whether the agencies may regulate incidental fallback that causes environmental degradation.

The district court also argued that Congress intended that the term “disposal” refers to the movement of dredged material from one place to another, and that incidental fallback is not an “addition” of soil because “some material simply falls back in the same general location from which most of it was removed.”<sup>54</sup> In support, the district court quoted Senator Ellender’s statement during the 1972 debates on the Act: “The disposal of dredged material does not involve the introduction of new pollutants; it merely moves the material from one location to another.”<sup>55</sup> Senator Ellender’s remarks, however, could be interpreted to provide an even narrower definition of disposal than the district court’s, that dredge material is never the addition of a pollutant, but merely involves moving it from one place to another. Because Senator Ellender did not specifically address the issue of incidental fallback and his statement represents only his views rather than that of an entire committee or the Senate as a whole, his remarks cannot be considered conclusive.

*c. Congress implicitly ratified the agencies’ earlier interpretation that excluded incidental fallback from section 404.*

The district court also contended that Congress implicitly ratified “through its lack of amendment” the agencies’ and courts’ earlier interpretation that excluded incidental fallback

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52. *Id.* at 273 (quoting Senate Report on section 1952, 95th Cong., reprinted in 1977 Legis. Hist. at 924).

53. *Id.* at 273.

54. *Id.* at 273-74.

55. *See id.* at 273 (quoting Senate Debate on section 2770, reprinted in 1972 Legis. Hist. at 1386).

from section 404.<sup>56</sup> The failure of Congress to amend a statute, however, is of only very limited value in determining the intent of the original enacting Congress in 1972. Furthermore, the failure of Congress to amend a statute can result from a number of causes other than agreement with an agencies' interpretation, including internal congressional divisions or lack of interest.<sup>57</sup> Because congressional inaction may stem from many different reasons, courts only apply the principle of *de facto* ratification in those rare cases where there is clear evidence that Congress knew about an agency interpretation and relied on that interpretation as a primary reason not to take legislative action. There is no clear evidence that Congress explicitly relied on the agencies' pre-*Tulloch* interpretation of section 404.<sup>58</sup> The court's related argument that Congress implicitly ratified the agencies' prior interpretation that dredging and incidental fallback are not disposal activities because Congress amended other subsections of 404 several times without disturbing the prior interpretation of subsection 404(a) regarding incidental fallback,<sup>59</sup> suffers from the same flaw. There is no evidence cited by the plaintiffs or the district court that Congress explicitly considered the incidental fallback issue or extensively debated it when it periodically amended the Act.

Similarly, the fact that there have been several proposals in recent years to expand the scope of section 404 and that Congress has not enacted any of them<sup>60</sup> does not prove the intent of the 1972 statute. Legislative failure often results from complex causes involving the building of coalitions, legislative inertia, overlapping environmental jurisdiction among committees, especially in the House of Representatives, and lobbying by interest groups.<sup>61</sup> Furthermore, members of Congress who sought to

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56. *Id.* at 274-75.

57. See *National Petroleum Refiners Assoc. v. F.T.C.*, 482 F.2d 672, 695-96 (D.C. Cir. 1973) (observing that there are many causes for congressional inaction), *cert. denied*, 415 U.S. 951 (1974); see generally Bradford C. Mank, *The EPA's Regulatory Reform Initiatives: The Need for Legislative Action*, 24 *Ecology L.Q.* (forthcoming 1998) (addressing reasons for congressional gridlock and fragmentation in addressing environmental legislation).

58. See *National Petroleum Refiners*, 482 F.2d at 695-97.

59. See *Public Citizen v. FAA*, 988 F.2d 186, 194 (D.C. Cir. 1993) ("Congress is presumed to be aware of an administrative or judicial interpretation when it re-enacts a statute without change.") (citation omitted).

60. *American Mining Congress*, 951 F. Supp. at 276.

61. See *National Petroleum Refiners Assoc. v. F.T.C.*, 482 F.2d 672, 695-96 (D.C.

broaden section 404 may have been attempting to clarify what they consider an ambiguous statute or to avoid litigation rather than repealing a restrictive statute that clearly did not allow the agencies to regulate incidental fallback from excavation.<sup>62</sup> Analogously, the fact that a White House press release announcing the *Tulloch* rule stated that Congress should amend the Act<sup>63</sup> does not prove that the Act clearly forbids that rule's interpretation, but it may merely suggest that section 404 is ambiguous regarding whether incidental fallback may be regulated or that officials were seeking to avoid potentially lengthy litigation. The district court drew far too many inferences from mere legislative inaction or proposals when there were many other interpretations, including the possibility that leaders in Congress or the White House thought that section 404 was ambiguous regarding the regulation of incidental fallback.

## 2. *Excavation Sites Are Not "Specified Disposal Sites"*

According to the district court, "Even if the term 'addition of a pollutant' were broad enough to cover incidental fallback, the court would still hold that the *Tulloch* rule departs from Congress' intent that the material must be discharged at a 'specified disposal site'."<sup>64</sup> The court argued that the language "specified disposal site" indicated that the "site must have been affirmatively selected as a disposal site by the agencies," and "also conveys Congress' understanding that 'discharges' would result in the relocation of material from one site to another."<sup>65</sup> The court contended, "The *Tulloch* rule makes the term 'specified disposal site' superfluous; under the rule, all excavation sites are considered 'specified disposal sites'."<sup>66</sup> As a result, according to Judge Harris, the *Tulloch* rule misreads the statute by treating

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Cir. 1973) (observing that there are many causes for congressional inaction), *cert. denied*, 415 U.S. 951 (1974); see generally Mank, *supra* note 57.

62. See *National Petroleum Refiners*, 482 F.2d at 696 (observing that Congress may amend a statute "out of uncertainty, understandable caution, and a desire to avoid litigation").

63. See *American Mining Congress*, 951 F. Supp. at 276 & n.20 (citing White House Office on Environmental Policy, *Protecting America's Wetlands: A Fair, Flexible, and Effective Approach* 23 (Aug. 24, 1993)).

64. *American Mining Congress*, 951 F. Supp. at 278.

65. *Id.*

66. *Id.*

excavation sites as disposal sites when the plain language of the statute means that "specified disposal sites" are "the place[s] where the dredged material is disposed of" rather than where it is excavated.<sup>67</sup> In addition, the court invoked the statutory canon *noscitur a sociis*,<sup>68</sup> to maintain that its interpretation of "disposal" as referring to the movement of soil was reinforced by Congress' use of the term "specified disposal sites" in section 404(a)9.<sup>69</sup>

#### IV. UNDER *CHEVRON*, THE DISTRICT COURT SHOULD HAVE DEFERRED TO THE TULLOCH RULE

##### A. *The Chevron Doctrine*

Under *Chevron*, a court first examines "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 the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."<sup>70</sup> If a statute is ambiguous or contains a gap, however, the court in the second level of analysis must defer to the agency's interpretation if it is "permissible," or in other words, if it is reasonable.<sup>71</sup> If a statute contains a "gap" or is ambiguous, the *Chevron* doctrine creates a presumption that Congress implicitly delegated the resolution of this issue to the agencies.<sup>72</sup>

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67. *Id.*

68. "It is known from its associates." Under the canon of *noscitur a sociis*, the meaning of an uncertain or questionable word is gathered from the words surrounding it. See, e.g., *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995) (resolving statutory question with *noscitur a sociis*); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 702 (1995) (discussing application of the doctrine to a regulation promulgated under the Endangered Species Act).

69. *American Mining Congress*, 951 F. Supp. at 273-74.

70. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

71. See *id.* at 840, 843-45; Bradford C. Mank, *Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist?: Why Pragmatic Agency Decisionmaking Is Better than Judicial Literalism*, 53 WASH. & LEE L. REV. 1231, 1242 (1996); Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 284 (1986).

72. See *Chevron*, 467 U.S. at 843-44 (finding that Congress sometimes implicitly delegates to the agency the authority to fill in the gaps in the statute); Mank, *supra* note 71, at 1244 (explaining that "*Chevron* appeared to presume that whenever Congress delegated authority to administer a statute, it also delegated authority to the agency to fill in any gaps present in the statute, rather than leaving that role to the judiciary"); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE

*Chevron* does not require judicial acquiescence to all agency interpretations. A court makes an independent judgment in deciding whether the statute has directly spoken to a question, and does not defer to the agency in determining whether the legislation is ambiguous.<sup>73</sup> In making its independent assessment of a statute's meaning and congressional intent, a court may "employ[] traditional tools of statutory construction,"<sup>74</sup> and may examine particular statutory language, the language and structure of the statute as a whole, and, where appropriate, legislative history.<sup>75</sup>

Nevertheless, the *Chevron* principle does not require an agency's interpretation to be the most likely or popular, but merely a permissible interpretation of an ambiguous statute.<sup>76</sup> Indeed, Justice Scalia has argued that "*Chevron* becomes virtually meaningless, it seems to me, if ambiguity exists only when the arguments for and against various interpretations are in absolute equipoise,"<sup>77</sup> and that judges must defer to an agency interpretation "when two or more reasonable, though not equally valid, interpretations exist."<sup>78</sup> Judge Harris failed to recognize that the agencies' interpretation that incidental fallback can be a form of disposal under section 404 was a plausible interpretation of an ambiguous statutory provision, even if his own interpretation may be a better reading of the Act.

### B. *The District Court's Argument for Not Following Chevron*

The district court rebuffed all of the agencies' arguments about the importance of deferring to agency expertise under the *Chevron* doctrine because the court was firmly convinced that Congress did not intend for the agencies to regulate under section

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L.J. 969, 979 (1992) (stating that "*Chevron* in effect adopted a fiction that assimilated all cases involving statutory ambiguities or gaps into the express delegation or 'legislative rule' model"); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516-17 (suggesting that *Chevron* presumes that ambiguities entail delegation of interpretative power).

73. See *Cajun Elec. Power Coop. v. FERC*, 924 F.2d 1132, 1136 (D.C. Cir. 1991).

74. *Chevron*, 467 U.S. at 843 n.9.

75. See *Chemical Mfrs. Ass'n. v. United States Env'tl. Protection Agency*, 919 F.2d 158, 162 (D.C. Cir. 1990).

76. See *Chevron*, 467 U.S. 837, 842-43 (1984).

77. See Scalia, *supra* note 70, at 520.

78. Scalia, *supra* note 70, at 521.

404 either dredging or the incidental fallback that inevitably accompanies such operations, but intended that provision to govern only the disposal of dredged material in another location.<sup>79</sup> The district court cited both prior agency pronouncements and caselaw to demonstrate that both excavation activities and incidental fallback from such operations were beyond the scope of the statute.<sup>80</sup> According to the district court, only one prior case had considered incidental fallback to be a regulated discharge, *Reid v. Marsh*,<sup>81</sup> a 1984 decision by a federal district court in Northern Ohio. The *Reid* court, however, held that the Corps was limited to considering the effects of the discharge itself, and that the Corps could not address the overall effects of the entire dredging activity.<sup>82</sup> Because incidental fallback is a normal byproduct of dredging and Congress did not intend to regulate removal activities under section 404, the district court concluded that Congress could not have intended to regulate incidental fallback pursuant to that statutory provision.<sup>83</sup>

In addition, Judge Harris argued that dredging or removal activities are outside the Act's jurisdiction because such operations are exclusively within the domain of section 10 of the 1899 Rivers and Harbors Appropriations Act.<sup>84</sup> Even the *Reid* court acknowledged that dredging in itself is regulated by section 10, and is not within the scope of section 404 unless there is a discharge of fill or dredged material that causes direct environmental effects.<sup>85</sup> While the act of dredging or excavation in itself is probably exclusively within the reach of the 1899 statute, however, that does not directly answer whether incidental fallback

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79. *American Mining Congress v. Army Corps of Eng'rs*, 951 F. Supp. 267, 274 (D.D.C. 1997).

80. *Id.* (citing *Salt Pond Assocs. v. United States Army Corps of Eng'rs*, 815 F. Supp. 766, 778, 782 (D. Del. 1993); *United States v. Lambert*, 18 Env't Rep. Cas. (BNA) 1294, *aff'd*, 695 F.2d 535 (11th Cir. 1983); 51 Fed. Reg. at 41210).

81. *Reid v. Marsh*, 20 Env't Rep. Cas. (BNA) 1337, 1342 (N.D. Ohio 1984) (holding that even *de minimis* incidental fallback from dredging activities may constitute disposal under section 404 of the Clean Water Act).

82. *See id.*; 58 Fed. Reg. at 45012 (arguing *Reid* improperly limited Corps jurisdiction to environmental effects of discharge and that Corps actually has authority to regulate indirect effects associated with dredging).

83. *American Mining Congress*, 951 F. Supp. at 274-75.

84. *See id.* at 272-73; 33 U.S.C. § 403 (Corps must authorize excavation or filling of navigable waters).

85. *See Reid*, 20 Env't Rep. Cas. (BNA) at 1342.

from such activities is outside section 404. In addition, the agencies also claimed the authority to regulate indirect or secondary environmental degradation associated with dredging, mechanized landclearing, ditching, channelization or excavation activities as long as there is a discharge of dredged or fill material, including incidental fallback.<sup>86</sup>

Furthermore, the district court contended that the *Tulloch* rule impermissibly focuses on the “environmental effects of [landclearing or excavation] activit[ies] resulting in the discharge, rather than on the discharge itself.”<sup>87</sup> The district court is absolutely correct that a discharge is a prerequisite for section 404 jurisdiction and that the agencies simply do not have the authority under the Act to regulate environmental impacts in the absence of a discharge but, again, this point does not resolve whether incidental fallback can ever be a form of discharge.<sup>88</sup>

The court also argued that the agencies’ reinterpretation was entitled to less weight because of its inconsistency with their prior interpretations.<sup>89</sup> The court acknowledged that “[a]gencies are, of course, permitted to revise their interpretations” of an ambiguous statute, but maintained that the statute was not ambiguous.<sup>90</sup> The agencies had contended that their increased experience with the harmful environmental effects of excavation and landclearing activities provided a “reasoned analysis for the change.”<sup>91</sup> The district court rejected this argument, however, because “it is not apparent to the Court how this experience would alter the agencies’ interpretation of congressional intent.”<sup>92</sup>

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86. See 58 Fed. Reg. at 45011-13; see also *supra* part III.A.

87. *American Mining Congress*, 951 F. Supp. at 275 n.18.

88. *Id.*

89. *Id.* at 274 n.13 (citing *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987)).

90. *Id.* (citing *Rust v. Sullivan*, 500 U.S. 173, 184-88 (1991)).

91. *Texas Rural Legal Aid v. Legal Servs. Corp.*, 940 F.2d 685, 690 (D.C. Cir. 1991) (holding that agency may change policy if it provides reasoned analysis for change); see 58 Fed. Reg. at 45015 (stating agencies’ belief that change in agency policy in *Tulloch* rule “is warranted in light of our increased understanding of the severe environmental effects often associated with the activities covered by the rule” and is based on “reasoned analysis”); see also *Motor Vehicle Mfrs. Ass’n. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (observing that change in agency policy must be based on “reasoned analysis”).

92. *American Mining Congress*, 951 F. Supp. at 274 n.13.

### C. *Why Chevron Is Applicable*

Section 404 is ambiguous regarding whether incidental fallback from dredging, landclearing or excavation operations constitutes "disposal" under section 404, and, accordingly, the district court erred in failing to defer to the agencies' plausible interpretation of the Act. While the available legislative history suggests that Congress in 1972 or 1977 did not intend to regulate *de minimis* incidental fallback from dredging or excavation activities that do not cause environmental degradation,<sup>93</sup> Congress did not clearly address the possibility that incidental fallback might be significant in volume or environmental effects. Accordingly, there is an ambiguity or gap in the statute regarding whether the agencies may regulate incidental fallback that causes environmental degradation. Because Congress did not specifically address whether incidental fallback is a form of "disposal" or the "addition of a pollutant," the *Chevron* doctrine creates a presumption that Congress implicitly delegated the resolution of this issue to the agencies.<sup>94</sup>

Even if the agencies' interpretation is not the most likely one, the *Tulloch* rule is a permissible interpretation of an ambiguous statute. While the agencies in 1986 and many prior judicial decisions had rejected that interpretation,<sup>95</sup> the *Reid* decision in 1984 had read the term "discharge" to include the direct environmental impacts of even *de minimis* incidental fallback.<sup>96</sup> In addition, the agencies have plausibly suggested that Congress did not address whether the agencies should have the authority to regulate indirect or secondary environmental degradation associated with dredging, mechanized landclearing, ditching, channelization or excavation activities as long as there is a discharge of dredged or fill material, including incidental fallback and, accordingly, have suggested that their interpretation to include such secondary effects is entitled to deference under the *Chevron* doctrine.<sup>97</sup> Because section 404 is ambiguous regarding whether incidental fallback causing environmental degradation consti-

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93. See *supra* Part III.B.1.

94. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 843-44 (1984).

95. See *American Mining Congress*, 951 F. Supp. at 275 n.17.

96. *Reid v. Marsh*, 20 Env't Rep. Cas. (BNA) 1337, 1342 (N.D. Ohio 1984).

97. See 58 Fed. Reg. at 45011-13.

tutes the "addition of a pollutant" and "disposal," then, contrary to the district court's assertion, the agencies' experience that incidental fallback has important environmental effects constitutes reasonable grounds for changing their interpretation of the statute and issuing the *Tulloch* rule.<sup>98</sup>

Furthermore, the *Tulloch* rule serves the Act's broad purposes, which are to "restore and maintain the chemical, physical and biological integrity of the Nation's waters."<sup>99</sup> While the district court properly observed that such broad purposes are relevant only if a statute is ambiguous and does not demonstrate that Congress intended to delegate "unrestricted authority" to an agency,<sup>100</sup> the Supreme Court has sometimes given an agency the benefit of the doubt in deciding whether a complex regulatory statute is ambiguous if its interpretation advances a statute's broad purposes.<sup>101</sup>

While the district court is probably right that a distinction ought to be made between an excavation site and a "specified disposal site," the court again fails to consider the possibility that the statute is ambiguous when incidental fallback causes environmental degradation at the excavation site. If that is so, then the *Tulloch* rule appropriately recognizes that excavation sites also can be, under some circumstances, disposal sites as well.

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98. Compare *Texas Rural Legal Aid v. Legal Servs. Corp.*, 940 F.2d 685, 690 (D.C. Cir. 1991) (observing that agency experience is grounds for altering its interpretation of a statute) and 58 Fed. Reg. at 45015 (stating agencies' belief that change in agency policy in *Tulloch* rule "is warranted in light of our increased understanding of the severe environmental effects often associated with the activities covered by the rule" and is based on "reasoned analysis") with *American Mining Congress*, 951 F. Supp. at 274 n.13 (arguing that agency experience is irrelevant if statute's original intent contradicts agency interpretation).

99. See 33 U.S.C. § 1251(a).

100. *American Mining Congress*, 951 F. Supp. at 277.

101. See *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 703-08 (1995) (invoking *Chevron* deference principle and statute's broad purposes as grounds for deferring to Secretary of Interior's interpretation of term "harm" in Endangered Species Act); Mank, *supra* note 71, at 1265, 1278-90 (arguing that courts should give considerable deference to agency interpretations of complex regulatory statutes).

## V. CONCLUSION

While *Chevron* was supposed to increase judicial deference to agency interpretations, some empirical evidence suggests that courts are no more, or even less, likely to defer to such interpretations than before the Supreme Court unanimously decided that case.<sup>102</sup> Courts too frequently are unwilling to defer to an agency interpretation that a judge believes is less plausible than her own explication of statutory meaning.<sup>103</sup> There are significant costs when a court fails in appropriate circumstances to defer to an agency's interpretation because: (1) agencies are closer to the political branches than courts, and hence more likely to provide an interpretation consistent with popular values; (2) agencies normally possess greater scientific and technical expertise than courts; (3) agencies can provide greater flexibility by changing a statutory interpretation when experience demonstrates the need for a change; and (4) agencies can provide greater uniformity than lower courts by providing a consistent interpretation that does not vary from circuit to circuit.<sup>104</sup> For all these reasons, agencies are often more capable of interpreting complex "intransitive" regulatory statutes that have no clear meaning than

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102. See Linda R. Cohen & Matthew L. Spitzer, *Solving the Chevron Puzzle*, 57 LAW & CONTEMP. PROBS. 65, 103 (1994) (concluding that affirmance rates in federal appellate courts dropped from mid-70% range in 1983-1987 to mid-60% range in 1988-1990); Mank, *supra* note 71, at 1245-47 (citing sources); Merrill, *supra* note 72, at 982 (explaining that during the late 1980s and early 1990s, Supreme Court applied *Chevron* in only one-third of applicable cases); Richard J. Pierce, *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 750-52, 762-63 & *passim* (1995) (explaining that during 1990-1994, the Supreme Court frequently invoked the "plain meaning" principle to avoid invoking *Chevron* deference); Peter H. Shuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1038 (finding that although *Chevron* initially increased deference by federal appellate courts, most of this effect had weakened by 1988).

103. See generally Mank, *supra* note 71, at 1278-92 (arguing that textualist judges frequently ignore the spirit of *Chevron* by arguing that statute's text has a plain meaning); Pierce, *supra* note 102, at 750-52.

104. See generally Mank, *supra* note 71, at 1278-90 (arguing that agencies provide greater political sensitivity, expertise and flexibility than courts); Peter Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987) (contending that judicial deference to agency interpretations enhances regulatory uniformity because the Supreme Court can review so few cases, and, therefore, agency interpretations provide more uniformity than potentially conflicting lower court decisions).

generalist Article III judges.<sup>105</sup>

Judge Harris makes a number of reasonable arguments in contending that Congress did not intend section 404 to regulate dredging activities or the inevitable incidental fallback from such operations. He failed to demonstrate, however, that Congress in 1972, 1977 or any time since, specifically addressed the issue of incidental fallback. Accordingly, there is a gap, silence or ambiguity in what Congress' intent was regarding this issue and *Chevron* compels judicial deference to the agencies' plausible interpretation of the statute.

In addition, Judge Harris' decision would undermine the broad purposes of the Act by preventing the agencies from regulating incidental fallback that causes environmental degradation. The *Tulloch* rule appropriately exempted incidental fallback that had only *de minimis* environmental impact, although it placed a significant burden on regulated parties to demonstrate that their activities would not cause environmental degradation.<sup>106</sup> While reasonable people might disagree with whether the burden should be on the agencies or on the regulated to establish that their dredging operations will cause only *de minimis* effects, courts should defer to the agencies' experience regarding where to place that burden.<sup>107</sup>

Judge Harris would have required the agencies to rescind the *Tulloch* rule on a nationwide basis.<sup>108</sup> Fortunately, the Court of Appeals has stayed Judge Harris' decision pending the outcome

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105. See Mank, *supra* note 71, at 1280-81; see also Edward L. Rubin, *Modern Statutes, Loose Canons, and the Limits of Practical Reason: A Response to Farber and Ross*, 45 VAND. L. REV. 579, 580-87 (1992) (explaining that most federal statutes are addressed to specialized audiences).

106. See 33 C.F.R. §§ 323.2(d)(1)(iii), (d)(4) (Corps regulations); 40 C.F.R. §§ 232.2(1)(iii), 232.2(4) (EPA regulations); 58 Fed. Reg. at 45019-21, 45035-38 (defining "destroy" and "degrade" and "*de minimis*"); *American Mining Congress v. Army Corps of Eng'rs*, 951 F. Supp. 267, 270 & n.3 (D.D.C. 1997); Dinkins, *supra* note 9, at 735.

107. See 58 Fed. Reg. at 45015 (stating agencies' belief that change in agency policy in *Tulloch* rule "is warranted in light of our increased understanding of the severe environmental effects often associated with the activities covered by the rule" and is based on "reasoned analysis"); Fed. Reg. at 45021-22 (creating a presumption that dredging and excavation activities destroy or degrade).

108. *American Mining Congress v. Army Corps of Eng'rs*, 962 F. Supp. 2 (D.D.C. 1997). On defendants' motion to alter or amend judgment, the District Court, Judge Stanley Harris, held that injunctive relief would not be restricted to plaintiffs, but would apply nationwide. *Id.*

of the agencies' appeal.<sup>109</sup> Following *Chevron*, the Court of Appeals for the District of Columbia Circuit should reverse the district court and reinstate the *Tulloch* rule.

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109. See *Wetlands: Corps Again to Require Excavation Permits as Appeals Court Stays Lower Court Ruling*, 28 Env't Rep. (BNA) 596 (1997) (reporting that court of appeals stayed Judge Harris' injunction pending appeal).