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MEMORANDUM: REGULATION OF CERTAIN ACTIVITIES IN LIGHT OF AMERICAN MINING CONGRESS V. CORPS OF ENGINEERS

April 11, 1997

A. INTRODUCTION AND SUMMARY OF AGENCY GUIDANCE

1. On January 23, 1997, the U.S. District Court for the District of Columbia handed down a decision in American Mining Congress v. United States Army Corps of Engineers, No. 93-1754 SSH, a lawsuit challenging the agencies' revisions to the definition of "discharge of dredged material," which were promulgated jointly by the Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) on August 25, 1993 (58 FR 45008) ("Excavation Rule"). The District Court held that the rule was outside the agencies' statutory authority and contrary to the intent of Congress to the extent that it asserted Clean Water Act (CWA) jurisdiction over activities where the only discharge associated with the activity is "incidental fallback." On this basis, the Court declared that the rule is "invalid and set aside, and henceforth is not to be applied or enforced by the Corps of Engineers or the Environmental Protection Agency." The Court defined "incidental fallback" as "the incidental soil movement from excavation, such as the soil that is disturbed when dirt is shoveled, or back-spill that comes off a bucket and falls into the same place from which it was removed. 'Incidental fallback' does not include soil movements away from the original site. Sidecasting . . . and sloppy disposal practices involving significant discharges into waters have always been subject to section 404." Slip opinion at 5. The District Court did not invalidate provisions adopted by the agencies addressing prior converted croplands and the placement of pilings; those provisions remain in full force and are not addressed in this guidance. In addition, the Court's opinion does not address or in any way affect the Corps' jurisdiction or authority under Section 10 of the Rivers and Harbors Act of 1899.

2. The Army and EPA respectfully disagree with the District Court's decision. The government has filed a notice of appeal with the U.S. Court of Appeals for the District of Columbia and intends to file a motion for stay of the District Court's judgment. Nevertheless, unless and until the decision is stayed or overturned, EPA and the Corps are compelled to comply with the terms of the Court's injunction.

3. The following constitutes interim guidance until such time as the District

Court or Court of Appeals issues any additional ruling affecting the matters addressed in this guidance. This guidance supersedes any earlier guidance addressing the American Mining Congress decision. It is intended to assist Corps and EPA field staff to comply with the Court's injunction during this interim period by providing a general explanation of the decision and its effect on the Section 404 program. It is important to emphasize, however, that the applicability of the decision to a particular project, or part thereof, will depend largely on the particular facts of each case. To the extent that Corps or EPA field staff have questions about whether the Court's decision could be applicable to a particular case, they are directed to contact their respective headquarters office to review the case more completely and reach an appropriate decision.

4. ENFORCEMENT ACTIONS. During this interim period, Corps and EPA field personnel shall not undertake any administrative or judicial enforcement actions for CWA Section 404 violations where the only grounds for jurisdiction over the activities in question are the types of "incidental fallback" discharges of dredged material defined by the Court and quoted in paragraph 1, above. Moreover, if the Corps has issued a permit where the only basis for jurisdiction was "incidental fallback," and the permittee is not complying with the permit terms or conditions, the Corps shall not undertake any enforcement action for such noncompliance during this interim period. If a Corps or EPA field office believes that an enforcement action should be brought or continued to deal with activities causing environmental damage, but the discharger might argue that the activities involve only "incidental fallback," that field office should consult with its respective agency headquarters. In the case of pending administrative penalty actions potentially affected by the Court's decision, EPA and Corps field offices, as appropriate, should notify the Administrative Law Judge or Presiding Officer of the Court's opinion, the government's pending notice of appeal and intent to seek a stay pending appeal, and provide the Judge or Officer with a copy of this guidance. With regard to pending judicial actions, EPA and Corps field staff should coordinate closely with DOJ and the U.S. Attorneys' offices, as appropriate.

5. NEW OR PENDING PERMIT APPLICATIONS. During this interim period, consistent with the Court's decision, activities involving only "incidental fallback" do not require a Section 404 permit. If a Corps district office receives an application for a permit covering activities involving only "incidental fallback", or is already processing such a permit application, the Corps office should inform the permit applicant that, based on the American Mining Congress decision, no permit is presently required for the activity. Nevertheless, the Corps should state that, as an accommodation to the applicant, the Corps will process the permit if the applicant requests in writing that the Corps do so. Accordingly, Corps district personnel should invite the applicant to choose one of the following options: (1) withdraw the permit application; (2) request the Corps to retain the permit application without processing it pending a ruling on any motion to stay the District Court's decision; or (3) request in writing that the Corps process the permit application (in which case the Corps will process the application and issue the permit, with any necessary conditions, if appropriate). If a permit applicant fails to express any preference for how the application should be handled, the Corps will retain the application without processing it during this interim period.

6. RESPONDING TO QUESTIONS FROM THE PUBLIC. During this interim period, and pending further guidance, Corps and EPA field offices

will not issue any additional guidance documents relating to the District Court's decision. However, in responding to questions from the press or the regulated public on the subject of the District Court's decision, it is appropriate to recognize that the Corps and EPA disagree with the District Court's decision, and that the government has filed a notice of appeal with the U.S. Court of Appeals for the District of Columbia and intends to file motion to stay the District Court's judgment. Any person who is contemplating undertaking any of the activities specified below in this document should be encouraged to consult with the appropriate Corps District office before proceeding.

7. During this interim period, the following considerations are provided to assist Corps and EPA field offices in making determinations whether specific enforcement actions and permit applications might be affected by the District Court's decision.

B. SCOPE OF COURT'S DECISION

The Court's decision only has implications for a particular subset of discharges of dredged material, i.e., those activities where the only discharges to waters of the U.S. are the relatively small volume discharges described by the Court as "incidental fallback", i.e., "the incidental soil movement from excavation, such as the soil that is disturbed when dirt is shoveled, or the back-spill that comes off a bucket and falls into the same place from which it was removed." Slip opinion at 5. Enforcement actions and permit processing covering activities that the Corps and EPA would clearly regulate because they involve discharges of dredged or fill material to waters of the U.S. other than "incidental fallback" should continue and should not be delayed by this guidance.

1. Types of Discharges Covered by the Court Decision

Examples of "incidental fallback" include: dredged material that falls from a dredge bucket as it is raised up through the water column; dredged material that falls from a dredge cutterhead or clamshell bucket as it is moved through the sediment to pick up and remove soil; and the movement of dredged material around a backhoe bucket as it is moved through the soil in its normal, routine use in lifting and removing sediment.

2. Types of Discharges Not Addressed by Court Decision

The Court's decision states that, "Incidental fallback does not include soil movements away from the original site. 'Sidecasting,' which involves placing removed soil alongside a ditch, and sloppy disposal practices involving significant discharges into waters, have always been subject to Section 404. 58 Fed. Reg. at 45,013." Slip opinion at 5, n. 4. Consistent with the Court's decision, examples of activities involving discharges other than "incidental fallback" include ditching activities where the excavated material is sidecast into waters of the U.S., and activities that result in either the temporary or permanent stockpiling or disposal of dredged material in waters of the United States.

If an activity results in the movement of substantial amounts of dredged material from one location to another in waters of the United States (i.e., the material does not merely fall back at the point of excavation), then the

regulation of that activity is not affected by the Court's decision. For example, based on many years of experience, the Corps and EPA believe that mechanized landclearing typically involves pushing and moving substantial amounts of soil with bulldozer blades and other equipment from one location to another in waters of the United States in amounts that are greater in volume and different in kind from the "incidental fallback" defined in the District Court's decision. Nevertheless, during this interim period, determining whether a proposed mechanized landclearing activity is affected by the American Mining Congress decision should be made on a case-by-case basis. To assist the regulated public, agency field staff should be available to consult with any member of the public who believes that he or she can conduct mechanized landclearing activities in waters of the U.S. with no discharges other than "incidental fallback", as defined by the District Court.

3. Activities Potentially Affected by Court Decision

Discharges associated with the following activities might, in certain specific circumstances, consist entirely of "incidental fallback"; alternatively, these activities can also be associated with more substantial discharges that would trigger Section 404 even under the Court's decision. (Note that any of these activities that occur in traditionally navigable waters of the U.S., i.e., Section 10 waters, requires a permit under Section 10 of the Rivers and Harbors Act of 1899.) Each situation should be carefully evaluated to determine whether, and to what extent, the activity is potentially affected by the Court's decision. The following activities are among those that require case-by-case examination to determine whether they are affected by the Court's decision. The list is not intended to be exhaustive of the types of activities potentially covered by the Court's decision.

- mining activities, including sand and gravel mining, aggregate mining, precious metals and gem mining, recreational mining, and small-instream hydraulic dredges;
- ditching and draining activities, including ditching to lower the water table, ditching to drain wetlands, and removal of beaver dams;
- maintenance dredging activities and excavation for currently used flood control projects or for previously abandoned flood control, and irrigation or drainage projects;
- channelization and the reconfiguring or straightening of streams;
- other excavation activities.

In sum, if the activity in question involves only "incidental fallback", as defined by the District Court, it is covered by the Court's injunction. However, if the activity is associated with other discharges of dredged or fill material in waters of the United States, it is not affected by the Court's injunction and should continue to be regulated. Corps and EPA field staff are advised to contact their respective headquarters office if additional guidance is desired.

FOR THE COMMANDER:

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