

United States Government

Department of Energy

memorandum

DATE: August 23, 2000

REPLY TO

ATTN OF: Office of Environmental Policy and Guidance:Banicki:65193

SUBJECT: Proposed Rule to Protect the Nation's Wetlands

TO: Distribution

EH-412 routinely distributes material on Environmental Protection Agency (EPA) *Federal Register* notices not otherwise transmitted to program and field offices in order to make the Department of Energy complex aware of information that may be of relevance to its operations. What follows is a summary of a recent EPA proposed rule that clarifies the current regulations under the Clean Water Act, Section 404, addressing environmentally destructive earth-moving activities associated with ditching and draining wetlands.

Proposed Rule: Further Revisions to the Clean Water Act Regulatory Definition of "Discharge of Dredged Material." (FR Volume 65, Number 159, August 16, 2000).

The EPA and U.S. Army Corps of Engineers (Corps) have jointly proposed a rule that would amend Clean Water Act (CWA) Section 404 regulations defining the term "discharge of dredged material." The proposed rule identifies various activities, such as mechanized land clearing, ditching, channelization, in-stream mining, or other mechanized excavation activities in waters of the United States that are likely to result in a discharge of dredged material subject to CWA Section 404 regulations. EPA and the Corps issued a final regulation in 1993 (commonly referred to as the "Tulloch Rule") to revise the definition of "discharge of dredged material" to better protect wetlands from the effects of these activities. However, that definition was challenged by a number of trade associations and overturned in January 1997 by the U.S. District Court for the District of Columbia. The U.S. Court of Appeals affirmed that ruling which resulted in a loophole in the wetlands regulatory program, leaving certain activities essentially unchecked. Since that court decision, it is estimated that nearly 20,000 acres of wetlands have been

destroyed and more than 150 miles of streams channeled without environmental review or mitigation.

This proposed rule attempts to close the regulatory loophole by establishing a rebuttable presumption that because of the nature of the equipment and activities, mechanized land clearing, ditching, channelization, in-stream mining, or other mechanized excavation activity in waters of the United States produce more than incidental fallback and result in a regulable discharge of dredged material subject to environmental review under Section 404 of the CWA.

Questions concerning this memorandum should be directed to Lee Banicki of my staff (leroy.banicki@eh.doe.gov; 202-586-5193).

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