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Further Revisions to the Clean Water Act Regulatory Definition of Discharge of Dredged Material; Final Rule

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 323

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 232

[FRL–6933–2]

Further Revisions to the Clean Water Act Regulatory Definition of "Discharge of Dredged Material"

AGENCIES: Army Corps of Engineers, Department of the Army, DOD; and Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) are promulgating a final rule to amend our Clean Water Act (CWA) section 404 regulations defining the term "discharge of dredged material." Today's final action is being taken to follow-up on our earlier proposed rulemaking of August 16, 2000, in which we proposed to amend the regulations to establish a rebuttable presumption that mechanized landclearing, ditching, channelization, in-stream mining, or other mechanized excavation activity in waters of the U.S. result in more than incidental fallback, and thus involve a regulable discharge of dredged material.

As a result of the comments we received, today's final rule reflects several modifications from the proposal. In response to concerns raised by some commenters that the proposal would have shifted the burden of proof to the regulated community as to what constitutes a regulable discharge, we have revised the language to make clear that this is not the case. Additionally, we received numerous comments requesting that we provide a definition of "incidental fallback" in the regulatory language. In response, today's final rule does contain such a definition, which is consistent with past preamble discussions of that issue and is drawn from language contained in the relevant court decisions describing that term. Today's final rule will both enhance protection of the Nation's aquatic resources, including wetlands, and provide increased certainty and predictability for the regulated community. At the same time, it continues to allow for case-by-case evaluations as to whether a regulable discharge of dredged material results from a particular activity, thus retaining necessary program flexibility to address the various fact-specific situations that are presented.

EFFECTIVE DATE: February 16, 2001.

FOR FURTHER INFORMATION CONTACT: For information on today's rule, contact either Mr. Mike Smith, U.S. Army Corps of Engineers, ATTN CECW–OR, 441 "G" Street, NW, Washington, DC 20314–1000, phone: (202) 761–4598, or Mr. John Lishman, U.S. Environmental Protection Agency, Office of Wetlands, Oceans and Watersheds (4502F), 1200 Pennsylvania Avenue N.W., Washington, DC 20460, phone: (202) 260–9180.

SUPPLEMENTARY INFORMATION:

I. Potentially Regulated Entities

Persons or entities that discharge material dredged or excavated from waters of the U.S. could be regulated by today's rule. The CWA generally prohibits the discharge of pollutants into waters of the U.S. without a permit issued by EPA or a State approved by EPA under section 402 of the Act, or, in the case of dredged or fill material, by the Corps or an approved State under section 404 of the Act. Today's rule addresses the CWA section 404 program's definition of "discharge of dredged material," which is important for determining whether a particular discharge is subject to regulation under CWA section 404. Today's rule sets forth the agencies' expectations as to the types of activities that are likely to result in a discharge of dredged material subject to CWA section 404. Examples of entities potentially regulated include:

Category	Examples of potentially regulated entities
State/Tribal governments or instrumentalities	State/Tribal agencies or instrumentalities that discharge dredged material into waters of the U.S.
Local governments or instrumentalities	Local governments or instrumentalities that discharge dredged material into waters of the U.S.
Federal government agencies or instrumentalities	Federal government agencies or instrumentalities that discharge dredged material into waters of the U.S.
Industrial, commercial, or agricultural entities	Industrial, commercial, or agricultural entities that discharge dredged material into waters of the U.S.
Land developers and landowners	Land developers and landowners that discharge dredged material into waters of the U.S.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities that are likely to be regulated by this action. This table lists the types of entities that we are now aware of that could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your organization or its activities are regulated by this action, you should carefully examine EPA's applicability criteria in section 230.2 of Title 40 of the Code of Federal Regulations, the Corps regulations at part 323 of Title 33 of the Code of Federal Regulations, and the discussion in section II of today's preamble. If you have questions regarding the applicability of this action to a particular entity, consult one of the persons listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

II. Background

A. Plain Language

In compliance with President Clinton's June 1, 1998, Executive Memorandum on Plain Language in government writing, this preamble is written using plain language. Thus, the use of "we" in this action refers to EPA and the U.S. Army Corps of Engineers (Corps), and the use of "you" refers to the reader.

B. Overview of Previous Rulemaking Activities and Related Litigation

Section 404 of the CWA authorizes the Corps (or a State with an approved section 404 permitting program) to issue permits for the discharge of dredged or fill material into waters of the U.S. Two States (New Jersey and Michigan) have assumed the CWA section 404 permitting program. On August 25, 1993 (58 FR 45008), we issued a regulation (the "Tulloch Rule") that defined the

term "discharge of dredged material" as including "any addition, including any redeposit, of dredged material, including excavated material, into waters of the U.S. which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation that destroys or degrades waters of the U.S." The American Mining Congress and several other trade associations challenged the revised definition of the term "discharge of dredged material," and on January 23, 1997, the U.S. District Court for the District of Columbia ruled that the regulation exceeded our authority under the CWA because it impermissibly regulated "incidental fallback" of dredged material, and enjoined us from applying or enforcing the regulation. That ruling was affirmed on June 19, 1998, by the U.S. Court of Appeals for the District of Columbia Circuit. *Americian Mining Congress* v. *United States Army Corps of Engineers,* 951 F.Supp. 267 (D.D.C. 1997) ("*AMC*"); aff'd sub nom, *National Mining Association* v. *United States Army Corps of Engineers,* 145 F.3d 1339 (D.C.Cir. 1998) ("*NMA*").

On May 10, 1999, we issued a final rule modifying our definition of "discharge of dredged material" in order to respond to the Court of Appeals' holding in *NMA,* and to ensure compliance with the District Court's injunction (64 FR 25120). That rule made those changes necessary to conform the regulations to the courts' decisions, primarily by modifying the definition of "discharge of dredged material" to expressly exclude regulation of "incidental fallback."

The *NMA* court did not find that all redeposits are unregulable, and recognized that redeposits at various distances from the point of removal are properly the subject of regulation under the CWA. As explained in the preamble to the May 10, 1999, rulemaking, our determination of whether a particular redeposit of dredged material in waters of the U.S. requires a section 404 permit would be done on a case-by-case basis, consistent with our CWA authorities and governing case law. The preamble to that rulemaking also described and summarized relevant case law (see 64 FR 25121), for example, noting that the *NMA* decision indicates incidental fallback ". . . returns dredged material virtually to the spot from which it came" (145 F.3d at 1403) and also describes incidental fallback as occurring "when redeposit takes place in substantially the same spot as the initial removal." 145 F.3d at 1401. The *NMA* court also noted that "incidental fallback" occurs when a bucket used to excavate material from the bottom of a river, stream, or wetland is raised and soils or sediments fall from the bucket back into the water; the court further noted that "fallback and other redeposits" occur during mechanized landclearing, when bulldozers and loaders scrape or displace wetland soil as well as during ditching and channelization when draglines or backhoes are dragged through soils and sediments. 145 F.3d at 1403. The preamble also noted that the district court in *AMC* described incidental fallback as "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 back into the same place from which it was removed." 951 F.Supp. at 270.

The *NMA* Court noted that the CWA "sets out no bright line between incidental fallback on the one hand and regulable redeposits on the other" and that "a reasoned attempt to draw such a line would merit considerable deference." (145 F.3d at 1405). The preamble to our May 10, 1999, rulemaking stated that we would be undertaking additional notice and comment rulemaking in furtherance of the CWA's objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

Subsequent to our May 10, 1999, rulemaking the National Association of Homebuilders (NAHB) and others filed a motion with the district court that issued the *AMC* injunction to compel compliance with that injunction. The NAHB motion, among other things, asserted that the May 10, 1999, rule violated the court's injunction by asserting unqualified authority to regulate mechanized landclearing. A decision on that motion was still pending at the time we issued our August 16, 2000 proposal (65 FR 50108) to establish a rebuttable presumption that mechanized landclearing, ditching, channelization, in-stream mining, or other mechanized excavation activity in waters of the U.S. will result in regulable discharges of dredged material.

As explained in the preamble, the proposed rule set forth:

> * * * our expectation that, absent a demonstration to the contrary, the activities addressed in the proposed rule typically will result in more than incidental fallback and thus result in regulable redeposits of dredged material. It would not, however, establish a new formal process or new record keeping requirements, and Section 404 permitting and application requirements would continue to apply only to regulable discharges and not to incidental fallback.

65 FR 50113.

As with today's final rule, the proposal addressed only matters related to the "discharge of dredged material" under section 404 of the CWA. We note that other regulatory authorities may be applicable to activities in waters of the U.S., including stormwater permitting requirements under CWA section 402, and, in the case of "navigable waters of the U.S." (so-called navigable in fact waters), section 10 of the Rivers and Harbors Act of 1899. Readers should refer to the preamble of the proposal for further information on those authorities (65 FR 50114).

The proposed rule had a 60 day comment period, which ended on October 16, 2000. While that public comment period was still open, on September 13, 2000, the district court denied NAHB's motion to compel compliance with the *AMC* injunction, finding that our earlier May 10, 1999, rule was consistent with its decision and injunction, and the decision of the D.C. Circuit in *NMA. American Mining Congress* v. *U.S. Army Corps of Engineers,* Civil Action No. 93–1754 SSH (D.D.C. September 13, 2000) (hereafter referred to as "NAHB Motion Decision").

In that decision the court found that, "Inasmuch as this Court in *AMC,* and the Court of Appeals in *NMA,* invalidated the Tulloch Rule because it regulated incidental fallback, the Court's order enjoining the agencies from applying or enforcing the Tulloch Rule must be understood to bar the agencies from regulating incidental fallback." NAHB Motion Decision, slip op. at 8–9. The court then went on to determine that by making clear that the agencies may not exercise section 404 jurisdiction over redeposits of dredged material to the extent that the redeposits involve only incidental fallback, the May 10, 1999, rulemaking did not violate the court's injunction and is consistent with the decisions in *AMC* and *NMA.* Id. at 10–11.

C. Discussion of Final Rule

We received approximately 9,650 comments on the August 16, 2000, proposal (because the numbers given are rounded off, we refer to them as "approximate.") Approximately 9,500 were various types of individual or form letters from the general public expressing overall support for the rule or requesting it be strengthened. We received approximately 150 comments from various types of organizations, state or local agencies, or commercial entities, 75 of which provided detailed

comments, with approximately 50 of these expressing opposition to the rule. Organizations opposing the rule were primarily construction and development interests, mining and commerce interests, as well as local agencies or water districts with agricultural, flood control, or utility interests. These commenters often expressed the view that the proposal was inconsistent with the *AMC* and *NMA* opinions and the CWA. These comments also often expressed concern that the rebuttable presumption would be difficult or impossible to rebut and should be removed from the rule, and also frequently stated that a definition of incidental fallback was necessary, with many expressing preference for a "brightline" definition.

Organizations supporting the proposal or its strengthening included state and local natural resource and environmental protection agencies and environmental organizations. In addition, one detailed letter from a group of wetland scientists associated with a variety of institutions was received, and expressed support for the proposed rule and its strengthening. Commenters favoring the rule or its strengthening generally believed that the proposed rule's presumption that mechanized landclearing, ditching, channelization, in-stream mining, or other mechanized excavation activity in waters of the U.S. result in more than incidental fallback, and thus involve a regulable discharge of dredged material, was appropriate. Many of these commenters, especially environmental organizations, requested that the rule be strengthened in a number of ways, particularly by identifying certain activities as always requiring a permit, and making clear that if chemical constituents are released into the water column or if material is moved in a way that permits its more ready erosion and movement downstream, a regulable discharge occurs. In addition, many of the commenters favoring the proposed rule or requesting that it be strengthened also expressed the view that it should define incidental fallback.

We have carefully considered all the comments received on the proposal in developing today's final rule. A detailed discussion of those comments and our responses is set out in section III of today's preamble.

Like the proposal, today's rule modifies our definition of "discharge of dredged material" in order to clarify what types of activities we believe are likely to result in regulable discharges. As described in the preamble to the proposed rule (65 FR 50111–50113), based on the nature of the equipment, we believe that the use of mechanized earth moving equipment to conduct landclearing, ditching, channelization, in-stream mining, or other mechanized excavation activity in waters of the U.S. is likely to result in regulable discharges of dredged material.

However, in response to comments we received expressing concern that the proposal would result in a shift in the burden of proof and impose undue burdens on project proponents to "prove a negative," we have made a number of changes to clarify that this is not our intent and will not be a result of this rule. Because these concerns primarily appeared to arise out of the proposed rule's use of a rebuttable presumption formulation, we have redrafted the rule language to eliminate use of a rebuttable presumption.

As we had explained in the proposed rule preamble, the proposal was intended to express our expectation that the activities in question typically result in regulable discharges, not to create a formal new process or record keeping requirements (65 FR 50113). The rule now provides that the agencies regard the use of mechanized earth-moving equipment to conduct landclearing, ditching, channelization, in-stream mining or other earth-moving activity in waters of the U.S. as resulting in a discharge of dredged material unless project-specific evidence shows that the activity results in only incidental fallback

By no longer employing a rebuttable presumption, we believe it is more evident that we are not creating a new process or altering existing burdens under the CWA to show a regulable discharge of dredged material has occurred. To make this point unmistakably clear, we also have added a new sentence to the rule language that expressly provides the rule does not and is not intended to shift any burden in any administrative or judicial proceeding under the CWA. In addition, the rule language has been clarified to make it more evident that we will not look to project proponents alone to provide information that only incidental fallback results. Thus, the rule language now refers to "project-specific evidence show[ing] that the activity results in only incidental fallback." While this might consist in large part of information from project proponents, we also will look to all available information, such as that in agency project files or information gained from site visits, when determining if a discharge of dredged material results.

We also received a number of comments questioning how the presumption contained in the proposed rule might apply to particular equipment, or asserting that the presumption in the proposal was too broad. We thus are clarifying in the final rule language itself that we are addressing mechanized "earth-moving" equipment (*e.g.*, bulldozers, graders, backhoes, bucket dredges, and the like). Earth-moving equipment is designed to excavate or move about large volumes of earth, and we believe it is reasonable and appropriate for the agencies to view the use of such equipment in waters of the U.S. as resulting in a discharge of dredged material unless there is case specific information to the contrary. The administrative record of today's rule contains additional information on the nature of this equipment and its operation.

We received a large number of comments, both from those opposed to the proposed rule, as well as those supporting the proposal (or its strengthening), requesting us to provide a definition of "incidental fallback." The proposed rule had not done so, instead providing preamble discussion of the relevant case law addressing that term, as well as referring readers to the preamble to our earlier May 10, 1999, rule (65 FR 50109–50110; 64 FR 25121). Subsequent to the proposal, as many of the commenters opposed to the proposal noted, the court, in its decision on the NAHB motion to compel compliance with the *AMC* court's injunction, cautioned against parsing the *AMC* and *NMA* language to render an overly narrow definition of incidental fallback. NAHB Motion Decision, slip opinion 12–14.

In light of numerous comments requesting that a definition of incidental fallback be included in the regulations, and consistent with our preamble discussions of relevant case law and the more recent discussion in the court's NAHB Motion Decision, we have provided a descriptive definition in the final rule. That language, which is based on the *AMC* and *NMA*, cases and the NAHB Motion Decision, provides that:

> Incidental fallback is the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal. Examples of incidental fallback include soil that is disturbed when dirt is shoveled and the back-spill that comes off a bucket when such small volume of soil or dirt falls into substantially the same place from which it was initially removed.

This language is fully consistent with the spirit and intent of those decisions. As noted in the *AMC* decision, incidental fallback involves "incidental soil movement from excavation" (951

F.Supp. 270); thus the definition in today's rule refers to the redeposit of small volumes of dredged material incidental to excavation activities. (See also *NMA*, 145 F.3d at 1404 (the statutory term "addition" does not cover the situation where material is removed "and a small portion of it happens to fall back")). The rule language refers to "incidental fallback" as returning dredged material to "substantially the same place" from which it came, a formulation consistent with the *AMC* and *NMA* decisions. AMC, 951 F.Supp. at 270; *NMA*, 145 F.3d. at 1403; see also, NAHB Motion Decision at 13. The examples of incidental fallback given in the rule's definition are drawn from the *AMC* decision. See, *AMC*, 951 F.Supp. at 270. We, therefore, believe the definition reflects an objective and good faith reading of the *AMC* and *NMA* decisions. See, NAHB Motion Decision, slip op. at 14.

We believe today's rule both ensures environmental protection consistent with CWA authorities and increases regulatory certainty in a manner fully consistent with the *AMC* and *NMA* decisions and the district court injunction. This has been accomplished through regulatory language that serves to put agency staff and the regulated community on notice that absent information to the contrary, it is our expectation that the use of mechanized earth moving equipment to conduct landclearing, ditching, channelization, in-stream mining, or other mechanized excavation activity in waters of the U.S. is likely to result in discharges of dredged material. In addition, in response to comments, and in order to provide a descriptive standard of what constitutes non-regulable incidental fallback, we have provided in the rule a descriptive definition of that term which we believe to be fully consistent with an objective and good faith reading of the *AMC*, *NMA*, and NAHB Motion decisions.

At the same time, today's rule is not unnecessarily prescriptive and still allows for the case-by-case consideration of whether a discharge results. In making that determination, the agencies will consider any available information on project plan or design, as well as other information, such as site visits or field observations, during and after project execution. Information which we will consider includes that from project proponents, as well as other available information.

In determining if a regulable discharge of dredged material occurs, we will carefully evaluate whether there has been movement of dredged material away from the place of initial removal. In doing so, we will look to see if earth-moving equipment pushes or relocates dredged material beyond the place of excavation, as well as whether material is suspended or disturbed such that it is moved by currents and resettles beyond the place of initial removal in such volume as to constitute other than incidental fallback, and thus be a regulable discharge. See e.g., *United States* v. *M.C.C. of Florida*, 722 F.2d 1501 (11th Cir. 1985), vacated on other grounds, 481 U.S. 1034 (1987), readopted in relevant part on remand, 848 F.2d 1133 (11th Cir. 1988) (resettling of material resulting from propeller rotation onto adjacent seagrass beds is jurisdictional). In appropriate situations, we also will include consideration of whether the operation results in the release of pollutants to the environment that were formerly physically or chemically bound up and sequestered from the environment prior to the dredging or excavation of the sediments. See e.g., *United States* v. *Deaton*, 209 F. 3d 331 (4th Cir. 2000) at 335–336 (discussing release of pollutants in determining sidecasting to be jurisdictional). In considering whether material is relocated, we will look at both horizontal and vertical relocation. For example, sidecasting, which involves horizontal relocation to the side of the ditch, is a regulable discharge. See e.g., *Deaton*, supra; NAHB Motion Decision at n. 3. Similarly, where activities involve the vertical relocation of the material, such as occurs in backfilling of trenches, a regulable discharge results. See e.g., (*United States* v. *Mango*, 997 F. Supp. 264, 285 (N.D.N.Y. 1998), affirmed in part, reversed in part on other grounds, 199 F.3d 85 (2d Cir. 1999); see, *Iroquois Gas Transmission System* v. *FERC*, 145 F.3d 398 at 402 (2nd Cir. 1998) (backfilling of trenches is jurisdictional).

We also will take into account the amount or volume of material that is redeposited. Incidental fallback at issue in *AMC* and *NMA* was the small-volume fallback from excavation. Similarly, today's rule defines incidental fallback as the "small volumes of dredged material" falling back to substantially the same place as the initial removal. Therefore, we will consider the volume redeposited in deciding whether the activity results in only incidental fallback.

Thus, the determination of whether an activity results in a regulable discharge of dredged material or produces only incidental fallback involves consideration of the location and the amount of the redeposit. Because of the fact-specific nature of the assessment of these factors, and their interrelated nature, we do not believe it to be feasible or appropriate to establish hard and fast cut-off points for each of these factors. Rather, the totality of the factors will be considered in each case.

Finally, we note that the proposed rule would have removed existing paragraph 3(iii) from the Corps' regulations at 33 CFR 323.2(d) and the counterpart EPA regulation at 40 CFR 232.2. Those paragraphs contained identical "grandfather" provisions for certain activities to be completed by August 24, 1995, and were proposed for deletion as being outdated. 65 FR 501211. Today's final rule, consistent with the original proposal, removes those paragraphs from the regulations.

III. Discussion of Comments

A. Legality of Proposal

1. Proposal as Inconsistent With NMA and Ruling on NAHB Motion to Compel

A number of commenters contended that the proposed rule conflicts with the rulings of the courts in *AMC*, *NMA*, and the NAHB Motion Decision. Among other things, they characterized the rule as an "end-run" around the nationwide injunction affirmed in *NMA;* "an attempt to re-promulgate [the 1993 Tulloch Rule];" and an effort to regulate the activities that the *NMA* court said were not regulable. In particular, these commenters characterized the *NMA* decision as holding that regulating any redeposit of dredged material during removal activities outruns the section 404 provisions of the CWA and that the agencies may only regulate activities that cause a net addition to waters of the U.S. They then argued that the rule is at odds with that holding. In addition, they asserted that the presumption would result in regulating effects as opposed to discharges and would make all excavation and landclearing activities regulated. Several commenters also noted that using a presumption does not address the *NMA* court's instruction that the agencies attempt to draw a bright line between what is a regulable redeposit versus non regulated incidental fallback.

As discussed in more detail in the sections below, we believe that the changes that we have made in today's rule address such concerns. Moreover, we do not agree with the legal analysis in many of the comments. In a number of respects, we believe the commenters have simply read the *NMA* decision too broadly. The court in *NMA* stated: "[W]e do not hold that the Corps may not legally regulate some forms of redeposit under its section 404 permitting authority. We hold only that by asserting jurisdiction over 'any

redeposit,' including incidental fallback, the Tulloch Rule outruns the Corps' statutory authority." 145 F. 3d at 1405. Thus, the court explicitly recognized that some redeposits are regulable and indicated that the agencies' attempt to draw a line between incidental fallback and regulable redeposits would be entitled to deference. The court also acknowledged that sidecasting, the placement of removed soil in a wetland some distance from the point of removal, has always been regulated by the agencies; and finally, it recognized that removal of dirt and gravel from a streambed and its subsequent redeposit in the waterway after segregation of minerals constitutes an addition.

The court's acceptance of these principles undercuts the conclusion suggested by some that its statement that "incidental fallback represents a net withdrawal, not an addition" must be read to mean that activities that involve removal of material can never constitute a discharge. Similarly, the court's statement that "Congress could not have contemplated that the attempted removal of 100 tons [of dredged spoil] could constitute an addition simply because only 99 tons were actually taken away" must also be reconciled with the court's clear recognition that some redeposits constitute an addition.

In addition, the Court's NAHB Motion Decision supports the agencies' view that a more narrow reading of the *NMA* decision than some commenters are advocating is correct. The court stated:

> Inasmuch as this Court in *AMC*, and the Court of Appeals in *NMA*, invalidated the Tulloch Rule because it regulated incidental fallback, the Court's order enjoining the agencies from applying or enforcing the Tulloch Rule must be understood to bar the agencies from regulating incidental fallback [footnote omitted] * * * The May 10th Rule is facially consistent with the Court's injunction because it eliminates § 404 jurisdiction over incidental fallback, and removes the language asserting jurisdiction over "any" redeposit of dredged material. The rule makes clear that the agencies may not exercise § 404 jurisdiction over redeposits of dredged material *to the extent that the redeposits involve only incidental fallback* [citation omitted] (emphasis added).

Court's Denial of Motion to Compel, at 9–10.

Thus, the sweeping claims that "any redeposit" and all removal activities are beyond the scope of the CWA can not be substantiated based on *NMA* or other existing law. Today's rule provides a definition of "incidental fallback" that adheres to the judicial guidance provided in the *AMC* and *NMA* cases and the NAHB Motion Decision, while making clear to the public the types of activities that we believe are properly regulated.

a. *Excavation not covered.* The contention that excavation and other removal activities can never be regulated fails to recognize that "discharges of pollutants" can occur during removal activities even where the ultimate goal is withdrawal of material. That the CWA definition of "pollutants" does not include "incidental fallback from dredging operations" is of no significance, contrary to the suggestion of one commenter, because it does include "dredged spoil." Several commenters referenced dictionary definitions of "excavate" and "discharge" to buttress their view that a removal activity can not involve a discharge. One commenter, in particular, argued that "discharge" denotes an intentional act, and that redeposits from excavation activity may not be regulated because they do not involve an intentional act. These definitions, however, do not indicate whether, in a given situation, pollutants were added to waters of the U.S. within the meaning of the CWA, the only issue we are concerned with here. First, as indicated in section III. A. 4 of this preamble, there is no support under the CWA for the position that a discharge must be an intentional act. In addition, as indicated in the preamble to the proposed rule, as a general matter, excavation and other earth-moving activities that are undertaken using mechanized earth-moving equipment typically result in the addition of a pollutant to navigable waters because the nature of such equipment is to move large volumes of material within and around the excavation site.

The court in *NMA* also recognized that redeposits associated with earth-moving activities could be regulated. ("But we do not hold that the Corps may not legally regulate some forms of redeposit under its section 404 permitting authority." 145 F. 3d at 1405.). As described in the preamble to the proposed rule, the machinery used for excavation, mechanized landclearing, and other removal activities generally results in substantial soil movement beyond the area from which the material is being removed (See also section III D of today's preamble). This substantial soil movement and distribution of material makes the situations involving mechanized earth-moving equipment akin to the numerous cases in which the courts have found that the redeposit of material constituted the discharge of a pollutant. See e.g., *Avoyelles Sportsmen's League* v. *Marsh*, 715 F. 2d 897, 923 (5th Cir. 1983)(recognized that the term "discharge" covers the redepositing of materials taken from wetlands); *United States* v. *Mango*, 997 F. Supp. 264, 285 (N.D.N.Y. 1998), *affirmed in part, reversed in part on other grounds*, 199 F. 3d 85 (2d Cir. 1999)(found that backfilling of trenches with excavated material was a discharge); *United States* v. *M.C.C. of Florida, Inc.*, 772 F. 2d 1501 (11th Cir. 1985)(holding that redeposition of seabed materials resulting from propeller rotation onto adjacent sea grass beds was an "addition" of dredged spoil); *Slinger Drainage Inc.*, CWA Appeal No. 98–10 (EPA Environmental Appeals Board Decision (EAB)(holding that backfilling by a Hoes trenching machine is a regulable discharge of dredged material, not incidental fallback)(appeal pending); *United States* v. *Deaton*, 209 F. 3d 331 (4th Cir. 2000)(holding that sidecasting is a regulated discharge); *see also United States* v. *Huebner*, 752 F. 2d 1235 (7th Cir.), *cert denied*, 474 U.S. 817 (1985) (sidecasting materials along a ditch and then using a bulldozer to spread material over several acres constituted a discharge of dredged material).

We do recognize, however, that some excavation activities by using specialized techniques or precautions may be conducted in such a manner that no discharge of dredged material in fact occurs. Today's rule specifically provides for consideration of project-specific information as to whether only incidental fallback results in determining jurisdiction under section 404. For example, we acknowledge that some suction dredging operations can be conducted in such a manner that if the excavated material is pumped to an upland location or other container outside waters of the U.S. and the mechanized removal activity takes place without re-suspending and relocating sediment downstream, then such operations generally would not be regulated. Other examples of activities that would generally not be regulated include discing, harrowing, and harvesting where soil is stirred, cut, or turned over to prepare for planting of crops. These practices involve only minor redistribution of soil, rock, sand, or other surface materials. The use of K–G blades and other forms of vegetation cutting such as bush hogging or mowing that cut vegetation above the soil line do not involve a discharge of dredged material.

b. *Too narrow reading of "incidental fallback".* Several commenters incorrectly equate "incidental fallback" with all dredged spoil that is redeposited in regulated waters as a result of activities using mechanized

equipment. As indicated, the *NMA* court made it clear that regulable redeposits could be associated with such activities and, to the extent that they were, the *NMA* decision did not preclude regulation. Today's rule explicitly excludes incidental fallback from the definition of discharge of dredged material. First, it does not alter the May 10, 1999, amendment to the definition of "discharge of dredged material," which explicitly excluded incidental fallback from the definition. In addition, today's rule provides for the consideration of project-specific evidence which shows that only incidental fallback results from the activity. Thus, we have taken the necessary steps to ensure that we do not regulate "incidental fallback" when it is the only material redeposited during certain removal activities. The Court's NAHB Motion Decision found our May 10, 1999, amendment consistent with the injunction in the NMA case, and today's rule does not change or alter the underlying provisions of that rule.

Nevertheless, several commenters have argued that the agencies are interpreting "incidental fallback" too narrowly and have not heeded language in the Court's NAHB Motion Decision that cautioned against applying a too narrow definition of incidental fallback that would be inconsistent with an objective and good faith reading of the *AMC* and *NMA* decisions. Today's rule, however, is entirely consistent with that order and the decisions in *AMC* and *NMA*. First, commenters are incorrect that we have construed the meaning of "incidental fallback" too narrowly because, in formulating the definition in today's regulation, we were guided by the descriptions of incidental fallback in the judicial opinions. The *NMA* decision indicates that incidental fallback " * * * returns dredged material virtually to the spot from which it came." 145 F. 3d at 1403. It also describes incidental fallback as occurring "when redeposit takes place in substantially the same spot as the initial removal." 145 F. 3d at 1401. Similarly, the District Court described incidental fallback as "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 back into the same place from which it was removed." 951 F. Supp. at 270. We believe that adopting a definition that relies heavily on the judicial formulations of "incidental fallback" will ensure consistency with those opinions as well as help project proponents understand the agencies' view of "incidental fallback." We disagree strongly with commenters who suggested that we are trying to inappropriately parse the language of the *AMC* and *NMA* decisions, and believe that our definition of "incidental fallback" is based upon a good faith interpretation of those rulings. See section II C of today's preamble for additional discussion of this issue.

Nevertheless, as discussed in section III E of today's preamble, we did not adopt a definition of incidental fallback that would turn on whether the material was redeposited to "the same general area" from which it was removed. We believe this formulation could potentially be read to mean that incidental fallback would include any dredged material redeposited in the same overall site where excavation occurred, as opposed to the place of initial removal. We believe such a broad formulation would not adequately recognize court decisions that have found a regulable discharge where redeposits have occurred even though only a short distance from the removal point. *See, e.g., Deaton, Mango, etc.*

Moreover, contrary to one commenter's contentions, today's rule is not inconsistent with the approach taken by the agencies in the 1997 Tulloch Guidance ("*Corps of Engineers/ Environmental Protection Agency Guidance Regarding Regulation of Certain Activities in Light of American Mining Congress* v. *Corps of Engineers*," April 11, 1997) ("1997 Guidance"). The commenter pointed to language in the 1997 Guidance stating that if there is "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." Pointing to that language, the commenter went on to assert the 1997 Guidance meant that unless "substantial amounts" of dredged material were moved, then no discharge occurs, and concluded from this that the proposed rule was inconsistent with the 1997 Guidance. In response, we do not believe the 1997 Guidance can be properly read to support the commenter's conclusions. The language quoted by the commenter comes from a portion of the guidance under the section header "Types of Discharge Not Addressed by Court Decision." In addition, it simply provides guidance to field personnel that where an activity results in movement of substantial volumes of dredged material, regulation of the activity is unaffected by the court's decision. The 1997 Guidance thus does not mean we interpreted the *AMC* or *NMA* decisions to allow regulation only if relocation of substantial amounts of dredged material takes place. In fact, the 1997 Guidance provides at page 3 that: "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 * * *" (emphasis added). Nothing in today's rule is inconsistent with the 1997 Guidance.

The preamble to the proposed rule clearly recognized that there can be situations where due to the nature of the equipment used and its method of operation, a redeposit may consist of material limited to "incidental fallback." In addition, that preamble recognized (as do the regulations at 33 CFR 323.2(d)(2)(ii) and 40 CFR 232.2), for example, that the use of equipment to cut trees above the roots that does not disturb the root system would not involve a discharge. Moreover, as discussed in section II C of today's preamble, we have modified today's final rule to make it even more clear that project-specific information may be used to demonstrate that only "incidental fallback" will result. Despite the discussion in the proposed rule's preamble, some commenters contended that we were overreaching. We believe that the language changes reflected in today's rule as well as the discussion in today's preamble clarify that redeposits associated with the use of mechanized earth-moving equipment will only be regulated if more than incidental fallback is involved, while making clear our view that activities involving mechanized earth-moving equipment typically result in more than incidental fallback. Where the redeposits are limited to incidental fallback, they would not be regulated.

c. *Covers same activities as 1993 Tulloch Rule.* A number of commenters argued that the proposed rule was an improper attempt to circumvent the *NMA* decisions and reinstate the invalidated 1993 Tulloch Rule. They contended that the agencies relied on no new information in developing this rule and that large segments of the proposed rule appeared in, and were used to justify, the 1993 Rule. Moreover, as opposed to narrowing the definition of "discharge of dredged material" as instructed by the courts, several argued that the proposed rule simply swept in the same activities and created a vague and impossible standard for rebutting the presumption. Several asserted that the agencies made no attempt to create

a "brightline" distinction between incidental fallback and regulable redeposits as encouraged by the courts and instead, simply shifted the burden to the regulated community. The end result, they argued, would be that the agencies would regulate activities that are not appropriately within the scope of the CWA, because, among other reasons, people lack the resources, wherewithal, or information to rebut the presumption.

The changes that we have made in the rule language further clarify the distinctions between our approach today and the 1993 Tulloch Rule. We believe that today's rule reflects important differences with the 1993 Tulloch Rule that make our action consistent with the *NMA* rulings. First, as discussed previously in this preamble, today's amendments along with those made on May 10, 1999, explicitly and repeatedly exclude incidental fallback from the definition of "discharge of dredged material." Today's rule also provides a descriptive definition of incidental fallback and explicitly indicates that project-specific evidence may be used to show that only incidental fallback will result from the activity. These provisions are a direct response to the *NMA* rulings and to the comments that we received. In contrast, the relevant sections of the 1993 Tulloch Rule included *any* redeposit, including redeposits consisting of only incidental fallback.

Similarly, contrary to the suggestion of one commenter, the rebuttable presumption would not have recast in different legal language the central hypothesis of the Tulloch Rule that every redeposit of dredged material was a discharge subject to regulation under section 404. The commenter referenced language from the 1993 Preamble stating that it is "virtually impossible to conduct mechanized landclearing, ditching, channelization or excavation in waters of the United States without causing incidental redeposition of dredged material (however small or temporary) in the process." 58 FR at 45017. In contrast, the position that we are taking today does not cast the jurisdictional net so broadly. Both the rebuttable presumption in the proposal and today's rule are more narrow in scope because we are not regulating incidental fallback. As discussed in the previous paragraph, the regulations defining the discharge of dredged material were amended on May 10, 1999, to make clear that incidental fallback is not encompassed within that definition and today's rule does not alter that exclusion.

Second, some commenters claimed that the rebuttable presumption that was in the proposed rule is the same as the *de minimis* exception that was added to the regulations as part of the 1993 Tulloch Rule and continues to be a part of the definition of discharge of dredged material today. 33 CFR 323.2(d)(3); 40 CFR 232.2. We believe that this comment misunderstands the relationship between today's rule and the *de minimis* exception contained in the 1993 Tulloch Rule. We have not reopened in this rulemaking the *de minimis* exception from the 1993 rule, since that provision is irrelevant to determining whether an activity results in a discharge of dredged material. As promulgated in the 1993 rule, the *de minimis* exception provides that section 404 authorization is not required for the incidental addition of dredged material associated with an activity that would not destroy or degrade a water of the U.S. Under the 1993 rule, mechanized landclearing, ditching, channelization, or other excavation activity that results in a redeposit into waters of the U.S. were presumed to destroy or degrade waters of the U.S., unless the project proponent demonstrated prior to proceeding with the activity that it would not cause such effects. 33 CFR 323.2(d)(3); 40 CFR 232.2. Thus, the *de minimis* exception in the existing regulations and its associated presumption address the issue of whether otherwise regulable discharges are excluded from section 404 authorization because of minimal effects on the environment, and does not, as some commenters suggested, serve as a means of asserting authority over activities outside our jurisdiction based on the effects of activities.

By contrast, today's rule addresses the issue of whether a regulable discharge of dredged material is even involved. Today's rule does not eliminate the requirement for a "discharge." Instead it reflects the agencies' view that regulable discharges generally are expected to occur when certain activities using mechanized earth-moving equipment are undertaken. The proposed rule described this view in terms of a presumption but allowed project proponents to demonstrate that their activities caused only incidental fallback, which is beyond section 404 jurisdiction. Today's rule does not use the words "presumption" or "presume" to avoid any misunderstanding that we are attempting to shift CWA burdens to the project proponent. If the activity involves only incidental fallback, it would not be regulated regardless of the level of associated environmental impact because the statutory prerequisite of a discharge has not occurred. Moreover, unlike the treatment of mechanized activities when attempting to qualify for the *de minimis* exception, neither the proposed nor final rules require that the project proponent affirmatively demonstrate to the agencies that no discharge will occur prior to proceeding with his activities. Thus, the *de minimis* exception and today's rule serve different purposes and operate differently within the context of the regulation and for that reason the *de minimis* exception was not reopened as part of this rulemaking.

In addition, one commenter charged that by adopting a rebuttable presumption similar to the one proposed in the 1992 proposal but that was dropped prior to final promulgation in 1993, the agencies make clear their intent to sweep into regulation specific activities rather than determine actual discharges. In response, we note that the 1992 proposal actually contained an irrebutable presumption that was more inclusive than what we promulgated in the 1993 Tulloch Rule and than either the proposed or final rules we are addressing today. In fact, contrary to the sentiment expressed in the comment, the allowance for project-specific evidence that the activity results in only incidental fallback reflects our effort to restrict regulation to only regulable discharges.

We do not believe that it is of any significance that there is overlap between the activities addressed by today's rule and the 1993 Tulloch Rule. The *NMA* court did not find that all activities potentially encompassed by that rule were beyond the scope of the CWA, but rather that incidental fallback was excluded. NAHB Motion Decision. Thus, it is no surprise that the two rules address some of the same activities.

d. *Improperly relies on an "effects" test.* Several commenters argued that the proposed rule improperly relies on the broad goals of the CWA and an "effects test" as the basis for establishing jurisdiction. They contended that this approach is inconsistent with the *NMA*-related decisions and with other cases addressing the basis for jurisdiction under the CWA. They stated further that the CWA was not intended to provide comprehensive protection for wetlands. We believe that the commenters misunderstood the purpose and effect of the proposal, as well as have misread the conclusions in the NAHB Motion Decision about an effects based test of jurisdiction.

First, the agencies agree that the CWA regulates "discharges" and today's rule

in no way establishes an effects-based test for asserting CWA jurisdiction. As was indicated in the proposal, the presence of a "discharge" of dredged or fill material into waters of the U.S. is a prerequisite to jurisdiction under section 404. The purpose of this rule is to provide further clarification of what constitutes a "discharge of dredged material." As indicated, we regard the use of mechanized earth-moving equipment to conduct landclearing, ditching, channelization, in-stream mining or other earth-moving activity in waters of the U.S. as resulting in a discharge of dredged material unless there is project-specific information to the contrary. Thus, although significant adverse environmental effects can result from activities undertaken using mechanized earth-moving equipment, the jurisdictional basis is the presence of regulable discharges.

To the extent these comments are addressing the *de minimis* exception contained in the 1993 rule, the comments are outside the scope of this rulemaking because we have not reconsidered that provision here. We note that the continued operation of this existing regulatory provision is consistent with *AMC* and *NMA*. The NAHB Motion Decision affirmatively rejected the position that "the Court's injunction must be understood to bar application and enforcement of the effects-based test of jurisdiction * * * because the Court also rejected this component of the Tulloch Rule * * * [citation omitted.]" The Court stated :

> The Court rejected this test because the agencies were using it to assert jurisdiction over otherwise non-regulable activities; the Court expressly did not determine whether the effects-based test of jurisdiction would be valid if applied to activities that otherwise come within the scope of the Act. [citation omitted] Thus, where the effects-based test is not applied to otherwise non-regulable activities under the Act (such as incidental fallback), the Court's injunction does not bar its application.

NAHB Motion Decision, n. 8.

Likewise today's rule is not in conflict with the *Slinger* decision as asserted by one of the commenters. In *Slinger Drainage, Inc.*, EPA's Environmental Appeals Board affirmed EPA's general view that " the pivotal consideration for purposes of deciding whether an individual activity is or is not subject to the section 404 permitting requirement is whether a discharge of dredged material takes place." *In re: Slinger Drainage, Inc.*, CWA Appeal No. 98–10 (September 29, 1999)(slip opinion), at 19. Notably, the EPA Environmental Appeals Board also stated in that opinion that the requirement for a discharge "is not to say that the 'effects' of a particular activity are of no concern. In a broad sense effects are the driving force behind the entire regulatory scheme to protect wetlands." *Id.*

Finally, one commenter suggested that discussions in the proposed rule's preamble concerning the release of contaminants in the water column indicate that the agencies "base their finding of jurisdiction on analysis of the effects of the mechanized landclearing, ditching, or other activity." This is incorrect. Rather than being regulated based on the effect on water quality, as discussed in section III D of today's preamble, the transport of dredged material downstream or the release of previously bound-up or sequestered pollutants (which are in and part of the dredged material) may constitute a discharge, not by virtue of associated environmental impacts, but by virtue of being added to a new location in waters of the U.S. In evaluating whether suspension or downstream transport results in a regulable discharge or only incidental fallback, we would consider the nature and amount of such suspension and transport.

e. *Inconsistency with District Court "specified disposal site" rationale.* Several commenters contended that today's rule ignores the *AMC* court's analysis of "specified disposal sites." We do not see today's rule as inconsistent with this aspect of the court's decision. The court in *AMC* held that, even if the term "addition of a pollutant" were broad enough to cover incidental fallback, the language "specified disposal sites" in section 404(a) would have led the court to the same holding. Because today's rule does not regulate incidental fallback, it is entirely consistent with this aspect of the court's opinion. Moreover, the court's reasoning in *AMC* was that the 1993 rule effectively made all excavation sites into disposal sites, rendering the statutory language "at specified disposal sites" superfluous. Today's rule does not render the statutory language superfluous because we are only asserting jurisdiction over redeposits that occur outside the place of initial removal.

2. Proposal as Inconsistent With the CWA

Several other claims were made that today's rule is not consistent with the CWA. Those claims included several pronouncements that the CWA only regulates discharges and that the legislative history demonstrates that Congress did not intend the CWA to regulate minor discharges associated with dredging, mechanized landclearing, excavation, ditching, channelization, and other *de minimis* discharges. One commenter disagreed with the proposition that section 404(f)(2) supports the proposed rule because it reflects Congressional recognition that these activities result in discharges. This commenter cited an excerpt from the *NMA* court decision—that the court was "reluctant to draw any inference [from section 404(f)] other than that Congress emphatically did not want the law to impede these bucolic pursuits"—to support his assertion. Moreover, one commenter argued that the lack of a specific reference to excavation activities in the CWA is further evidence that small-volume, incidental deposits accompanying landclearing and excavation activities were not intended to be covered under section 404. Several commenters also contended that the CWA does not require a person to make a prima facie showing that activities are exempt from regulation under the Act and the agencies can not administratively impose this requirement.

As discussed in section III A d, we recognize that the statute and legislative history require a discharge for the requirements of the CWA to apply. The definition of discharge of dredged material contained in today's rule is, therefore, grounded on the statutory term "discharge of a pollutant" contained in section 502(12) of the Act and relevant court decisions that have construed the discharge requirement. We think, however, that some commenters' assertion that legislative intent mandates a broad construction of the term "incidental fallback" finds no support either in section 502(12) (defining "discharge of a pollutant" to include "*any* addition of *any* pollutant" (emphasis added)) or section 404(f). We do not agree that the 1972 and 1977 legislative histories generally indicate that Congress did not intend to regulate minor discharges resulting from certain activities, including excavation. To the contrary, while Congress was focused on preserving the Corps' autonomy with respect to navigational dredging, it is clearly over-reading the history to suggest that other types of removal activities implicitly were contemplated and rejected by the choice of words such as "discharge," "pollutant," "dredge spoil," or "disposal sites," as one commenter suggested.

Moreover, the treatment of incidental discharges in the 1977 Act helps illustrate Congress' view of these types of discharges. The 404(f) exemption was necessary because Congress recognized that, absent an exemption, regulation of discharges "incidental to" certain

activities was encompassed within section 404 under certain circumstances. There is no support in the Act or legislative history for concluding that so-called "minor" discharges associated with excavation were intended by Congress to be categorically excluded from the Act. In fact, the very use of the word "incidental" in section 404(f)(2) suggests just the opposite. Incidental is defined as: "1. being likely to ensue as a chance or minor consequence; 2. occurring merely by chance or without intention or calculation" (Miriam-Webster's Collegiate Dictionary (10th Ed., 1998)); "1. occurring or likely to occur as an unpredictable or minor accompaniment; 2. of a minor, casual, or subordinate nature" (American Heritage Dictionary of the English Language; 4th Ed.); "happening or likely to happen in an unplanned or subordinate conjunction with something else" (Random House Dictionary of the English Language (2d Ed. 1987)). Thus, the use of the word "incidental" in section 404(f)(2) belies the notion that the Act mandates a broad interpretation of incidental fallback.

Senator Muskie, the sponsor of the 1977 CWA amendment, addressed the section 404(f) exemptions as follows:

> 404(f) provides that Federal permits will not be required for those narrowly defined activities that cause little or no adverse effects either individually or cumulatively. While it is understood that some of these activities may result in incidental filling and minor harm to aquatic resources, the exemptions do not apply to discharges that convert extensive areas of water into dry land or impede circulation or reduce the reach or size of the water body. 3 A Legislative History of the Clean Water Act of 1977, 95th Cong., 2d Sess., Ser. No. 95–14 (1978), at 474.

Thus, the Legislative History does not support the commenters' point.

In addition, we have clarified the rule in response to commenters who argued that the proposal was at odds with the CWA because the Act does not specifically require a discharger to make a prima facie case that its activities are exempt from the permit requirements. The revised language in today's rule clarifies that we are not requiring that a project proponent make a prima facie case as to the absence of jurisdiction. Today's rule sets forth the agencies' view that the use of mechanized earth-moving equipment in waters of the U.S. results in a discharge of dredged material unless there is evidence that only incidental fallback results, but expressly provides that the rule does not shift any burdens in administrative or judicial proceedings. This is fully consistent with the Act. See section III B of today's preamble for further discussion.

Some commenters have argued that because the regulatory definition of discharge of dredged material is broad, the presumption is unreasonable and cannot be refuted. As indicated in section II C of today's preamble, we have removed the presumption language and added a descriptive definition of incidental fallback, and also have clarified that the regulation does not shift any burden in any administrative or judicial proceeding under the CWA. We believe the definition mirrors the reach of the statute as interpreted by the courts and, therefore, is not unreasonable. As discussed in section III 1 b, we recognize that there will be situations when the project-specific information indicates that only incidental fallback results from the activity and thus it would not be regulated.

3. Proposal as Misreading Applicable Case Law

A number of commenters claimed that we have misread and are misapplying many of the cases we cited in support of today's action. Most of these comments addressed our analysis of the cases relating to what is a regulable discharge. We do not believe that we are unfairly reading the major cases in this area.

From these cases, we know that the following factors are relevant to determining regulable redeposits: quantity of material redeposited (*Avoyelles* and *Slinger* involved substantial quantities of redeposition); nature and type of relocation (redeposits adjacent to the removal area or backfilling are generally regulated, see *Deaton, Mango, M.C.C. of Florida* and *Slinger*); redeposit after some processing of material (*Rybachek* v. *EPA*, 904 F.2d 1276 (9th Cir. 1990)). As discussed in section II C of today's preamble, an assessment of such factors from the relevant cases will assist in determining whether a regulable redeposit takes place. We believe that in most situations, when applying the factors reflected in the cases, earth-moving activities undertaken using mechanized earth-moving equipment result in a discharge. Today's rule reflects that view while allowing evidence that only incidental fallback will result from the activity to preclude regulation.

Several commenters noted distinguishing facts that they believe undermine our reliance on some of the cases we cited. For example, several commenters noted that *Avoyelles* addresses the "discharge of fill material" not the "discharge of dredged material" and stated that our reliance on that case is misplaced. However, *Avoyelles* addresses the issue of what is an "*addition*," an analysis relevant for both the discharge of fill and the discharge of dredged material. Its conclusion that the redeposit of material constitutes a "discharge" thus is relevant to today's rule. Moreover, the court in *Deaton*, citing *Avoyelles* among other cases, noted that its understanding of the word "addition" as including redeposits was the same as nearly every other Circuit Court to consider the addition question. *Deaton* involved the "discharge of dredged material;" thus, we do not believe it is appropriate to reject *Avoyelles* because the court only expressly addressed how that activity involved a discharge of "fill."

Similar distinguishing facts or other purported problems were asserted with respect to other cases. For example, one commenter argued that we cited *Bay-Houston Towing Company* as if the court had ruled that "temporary stockpiling of peat in a wetland is a regulable discharge." In fact, the parenthetical in the preamble for *Bay-Houston* accurately reflects the court's determination that the activities at issue were subject to regulation ("Spreading the sidecasted bog material from the side of the ditch into the bog for future harvest * * * involves relocating the bog materials * * * for a period of time varying from 'a few hours' to 'a few days'" or more. * * * Thus, while there may be something a step further than 'incidental fallback' which would fall outside of the government's jurisdiction, Bay-Houston's harvesting activities are not it.") *Bay-Houston Towing Company*, No. 98–73252 (E.D. Mich. 2000)(slip opinion) at 8—9. We believe that the cases that we referenced in the proposed and final rule preambles support our action.

Finally, one commenter argued that our discussion of the effects of toxic releases from redeposited material does not justify our attempt to regulate activities that are beyond the scope of the CWA. As we noted in our discussion of the comments concerning the use of an effects based test to establish jurisdiction (see section III A 1 d of today's preamble), today's rule does not attempt to regulate activities beyond the scope of the CWA or base our jurisdiction on effects. We are only asserting jurisdiction over redeposits of dredged material that meet the statutory requirement of a "discharge."

4. Proposal as Complying With Applicable Law

Several other commenters asserted their view that the proposal was

consistent with the court's decision in *NMA*. They noted that the proposal reflected the concept expressed in *AMC* and *NMA* of "incidental fallback." They also noted that the proposal does not regulate incidental fallback, but rather other types of redeposits that exceed incidental fallback. These commenters pointed out that the *NMA* court explicitly declined to hold that the Corps may not legally regulate some forms of redeposit under section 404. For these reasons, the commenters stressed that the proposal fully complied with the *NMA* decision and nationwide injunction. As discussed in section II C of today's preamble, we agree that today's rule is consistent with *AMC* and *NMA* because, among other things, it retains the exclusion of incidental fallback from the definition of discharge of dredged material.

One commenter described the proposal as consistent with *NMA*, even though the proposal may regulate small or unintentional redeposits of dredged material. The commenter argued that *NMA* is misinterpreted when described as standing for the proposition that the word "incidental" in incidental fallback means that no regulable discharge results if only small amounts of material are moved, or material is moved simply as an unintentional consequence of other activity. The commenter stressed that the CWA prohibits the discharge of "any pollutant" not in accordance with a permit, not merely a specific quantity of pollutants. A focus on some concept of "significant" quantity of pollutants by weight, the commenter emphasized, makes no statutory or ecological sense because dredged spoil contains not only inert sediment but also small chemical constituents with potentially large environmental impacts. The commenter also noted that the CWA at no point suggests an added requirement that discharges be intentional.

We agree that neither *NMA* nor the CWA establishes a quantity threshold triggering the permit requirement, but instead regulate any addition of any pollutant which, in the case of dredged material, consists of the dirt, soil or rock that is dredged, including any biological or chemical constituents contained in the dirt, soil or rock. However, the amount of redeposit is a factor that we believe should be considered in determining if a redeposit constitutes more than incidental fallback. We note that under *AMC* and *NMA* incidental fallback involves small volume discharges returned to substantially the same place as the initial removal. We also agree that, under these decisions, incidental fallback does not extend to covering all material that may be incidentally redeposited in the course of excavation activities. Simply because a redeposit of dredged material may be unintended does not mean it is not a discharge, since the CWA requires a permit for *any* addition of a pollutant into waters of the U.S., regardless of the intent of discharger. The broad interpretation of *NMA* urged by other commenters would elevate intent to overarching status in discerning whether an addition has occurred, a result we do not believe appropriate or justified under the CWA scheme. This suggested interpretation would also blur any meaningful distinction between incidental fallback and regulable discharges because it would effectively remove the term "fallback" from EPA's regulation. In our view, to constitute "incidental fallback," a redeposit logically must be both "incidental" (*i.e.*, a minor, subordinate consequence of an activity) and "fallback" (*i.e.*, in substantially the same place as the initial removal). Neither *AMC* nor *NMA* compels us to expand the concept of "incidental fallback" to include all "incidental redeposits" without regard to the volume or location of the redeposit, and we decline to do so for the reasons stated above.

A number of commenters suggested that the agencies should find guidance not only from the *AMC* and *NMA* decisions, but also from other court decisions discussing the discharge of dredged material. In particular, the commenters argued that the "net addition" approach in *NMA* has been explicitly rejected in *Deaton* and implicitly rejected by many others. Two commenters quoted *Deaton* to stress that: "* * *[t]he idea that there could be an addition of a pollutant without an addition of material seems to us entirely unremarkable, at least when an activity transforms some material from a nonpollutant into a pollutant * * *" and that "[i]t is of no consequence that what is now dredged spoil was previously present on the same property in the less threatening form of dirt and vegetation in an undisturbed state." 209 F.3d at 335–36. Based on *Deaton*, several commenters believed there is ample support for a rule considering the redeposit of dredged material outside the place of initial removal as constituting an addition of dredged material. The commenters also noted that such an approach is consistent with the numerous other courts that have concluded that moving around dredged material within the same water body requires a permit. *See, e.g., U.S.* v. *Brace*, 41 F. 3d 117, 122 (3d Cir.), *cert. denied*, 515 U.S. 1158 (1994) (Clearing, churning, mulching, leveling, grading, and landclearing of the formerly wooded and vegetated site was a discharge of a dredged spoil that under the specific facts did not qualify for the 404(f)(1) farming exemption); *United States* v. *Huebner*, 752 F. 2d 1235 (7th Cir.), *cert. denied*, 474 U.S. 817 (1985) (Sidecasting and use of a bulldozer to spread the material over several acres constituted the discharge of dredged material that was not exempt under 404(f)); *Weiszmann* v. *U.S. Army Corps of Engineers*, 526 F. 2d 1302, 1306 (5th Cir. 1976)("Spill" of sediment during dredging of canal was a discharge of a pollutant; court rejected the argument that a spill is not a "discharge.").

We agree that *Deaton* and the other cases cited offer additional support. *Deaton* provides helpful post-*NMA* insights into what is an "addition" of a pollutant, and we note that the NAHB Motion Decision rejected the idea that there is a conflict between *Deaton* and *NMA*. NAHB Motion Decision at 16. We believe today's rule is consistent with *Deaton*, *AMC*, and *NMA*, and complies fully with the injunction affecting the 1993 Tulloch Rule.

Numerous commenters looked to the CWA as a basis for concluding the proposal was consistent with Congressional intent and *NMA*. One commenter observed that numerous courts, including the U.S. Supreme Court, have looked to the underlying policies of the CWA when interpreting authority to protect wetlands. The commenter noted that the goal of the CWA is to maintain the "chemical, physical, and biological integrity of the Nation's waters," and discussed the pollution and adverse effects to aquatic ecosystems caused by wetlands dredging and stream channelization. The commenter emphasized that it would frustrate the goal of the CWA to not regulate the incidental soil movements that occur during excavation. While we agree that regulation of discharges of dredged material into waters of the U.S. is a critical component of achieving CWA goals, consistent with *AMC* and *NMA*, CWA section 404 does not extend to incidental fallback, and today's rule has been drafted to ensure that we regulate only on the basis of the discharge of dredged material.

Some commenters suggested that today's rule also be guided by CWA section 404(f)(2) and its legislative history, which explicitly require the regulation of "incidental" discharges under certain circumstances even if they might otherwise be a result of a specially exempt category of activities. Most of these commenters concluded

that section 404(f)(2) reflects an explicit Congressional intent to regulate minor and unintentional soil movements that occur during the process of constructing a drainage ditch in wetlands or otherwise are incidental to an activity that "impairs circulation and flow or reduces the reach" of waters of the U.S. One commenter concluded that this section of CWA does not provide support for today's rule.

One commenter asserted that section 404(f)(2) conveys important Congressional intent regarding how the term "discharge" should be interpreted, despite the fact that the section does not define the term "discharge." While agreeing with the District Court in *AMC* that the section does not use effects "to regulate activities that do not themselves constitute discharges" (951 F.Supp. 267, 275 n. 18), the commenter argued that section 404(f)(2) makes clear the proposition that: (1) At a minimum some category of "incidental" discharges are regulated by the CWA; (2) regulation under section 404(f)(2) does not depend on whether the "incidental" discharge itself has significant environmental effects but only on whether the activity, to which the discharge may be only "incidental," has certain environmental effects; and (3) regulated "incidental" discharges can occur during the excavation or dredging process, because the language of the section about "reducing the reach" and "impairing the flow" commonly occur through excavation of drainage ditches.

One commenter suggested that language of section 404(f)(1) similarly supported the idea that a permit should generally be required for activities that drained wetlands. For example, the commenter noted section 404(f)(1)(a) provides an exemption for "minor drainage" associated with farming and silvicultural activity. If discharges from such activities trigger the provisions of section 404(f)(2), the commenter asserted, Congress intended "minor drainage" to be regulated. The commenter argued that the plain language in section 404(f)(1) provides guidance for interpreting the term "discharge." Section 404(f)(1) states that "the discharge of dredged or fill material" resulting from these activities "is not prohibited by or otherwise subject to regulation." In other words, the commenter emphasized, the identified activities that may result in a discharge of dredged or fill material "are exempt from section 404 permit requirements" (quoting Corps and EPA implementing regulations, 33 CFR 323.2; 40 CFR 232.3(c)); otherwise, there would be no need for the 404(f)(1) exemptions.

As discussed in section III A 2 above, today's rule is based on the definition of "discharge of a pollutant" contained in section 502 of the Act, as construed by the caselaw, including the *AMC* and *NMA* opinions finding that incidental fallback is not a regulable discharge under the Act. We agree that section 404(f), and in particular the use of the term "incidental" in section 404(f)(2) provides evidence supporting our rejection of some commenters' assertions that the Act restricts us to only regulating substantial or significant redeposits of dredged material.

B. Overall Reasonableness of Presumption

Many commenters expressed views on the overall reasonableness of the presumption contained in the proposed rule. Commenters maintaining that the presumption is reasonable stated that it would not expand the regulatory authority of the agencies or be contrary to relevant court decisions, but instead would clarify how that existing authority would apply. Others noted that the presumption is reasonable because it is consistent with their experience or Corps experience in evaluating discharges of dredged material. Numerous commenters affirmed the validity of the examples of activities in the preamble of the proposed rule that are presumed to result in a discharge of dredged material, including those who asserted that the presumption would decrease regulatory uncertainty as a consequence. These commenters also stated their view that other specific activities (*e.g.*, grading, leveling, bulldozing) and redeposits of sediment away from the point of excavation during ditching and channelization were regulable discharges.

One commenter indicated that the very nature of how some equipment operates means that it will always result in a discharge with more than incidental fallback. Another asserted that dredging or excavation activities conducted in a wetland or stream will always result in a regulable discharge. A number of commenters provided citations from the scientific literature in support of the presumption for these activities. Several commenters maintained that the presumption is reasonable because in any instance a person conducting such activities would be given the opportunity to demonstrate that only incidental fallback would result.

Today's rule reflects a reasonable belief that mechanized earth-moving equipment when used in waters of the U.S. typically will cause regulated discharges because they are made to move large amounts of earth and will typically relocate the dredged material beyond the place of initial removal. We also recognize, however, that the activities addressed in today's rule will not always result in a discharge, and therefore, the final rule allows the necessary flexibility for considering project-specific information that only incidental fallback results.

Other commenters maintained that the presumption was not reasonable, arguing that it was at odds with controlling legal precedent. These commenters argued that to establish a rebuttable presumption, case law requires us to have a record demonstrating that it is more likely than not that the presumed fact exists. See e.g., *National Mining Association* v. *Babbitt*, 172 F.3d 906 (D.C. Cir. 1999). Some commenters asserted that the presumption was unreasonable because it did not clearly articulate the scope of what is not regulated (*i.e.*, what is incidental fallback). Some commenters also maintained that the presumption was not reasonable because it would require a permit for all of the types of activities addressed in the rule, and would thus regulate dredging itself rather than the discharges that result. Some asserted that because the presumption is not always true, it is not reasonable. Other commenters asserted that the recognition in the proposed rule's preamble that specialized and sophisticated techniques and machinery may limit redeposits to incidental fallback undercuts the proposed rule's presumption. One commenter likened the presumption in the proposed rule to the agencies presuming that all land was jurisdictional under section 404 of the CWA and then taking enforcement action based on that presumption without establishing that the agencies had jurisdiction. Another comment asserted that no technical analysis was offered to support the proposed rule's presumption.

As previously discussed in section II C of today's preamble, the final rule does not establish a rebuttable presumption. Therefore, commenters' arguments about not meeting the legal prerequisites for establishing a rebuttable presumption in the legal sense are not relevant to the final rule. Instead of a rebuttable presumption, the rule states our view that we will regard the use of mechanized earth-moving equipment to conduct landclearing, ditching, channelization, in-stream mining or other earth-moving activity in waters of the U.S. as resulting in a discharge of dredged material unless project-specific evidence shows that the activity results in only incidental

fallback. In addition, in response to comments that we received, we have included in the final rule a descriptive definition of "incidental fallback."

As today's rule expressly provides that it does not shift any burden in CWA judicial or administrative proceedings, we do not agree that the rule has the effect of simply presuming jurisdiction, as the burden to show that a regulable discharge occurs has not been altered. Further, because we do not use a rebuttable presumption in today's final rule, the legal standards under the caselaw for judging the adequacy of an agency's record to justify a rebuttable presumption are not relevant to this rule. We also do not agree that today's rule results in a permit being required in every circumstance in which the activities listed occur. Today's rule continues to expressly provide that incidental fallback is not a regulable discharge, and also provides for project-specific consideration of whether only incidental fallback results from the activities addressed by the rule. We believe that the modified regulatory language provides a measure of regulatory certainty as to the types of activities that are likely to result in a regulable discharge, while preserving necessary flexibility to address the specific circumstances of a given project.

We also believe that allowing for project-specific information that the activity is conducted in a manner that results in only incidental fallback is indicative of that flexibility, rather than undercutting the validity of our general view. With respect to consistency with legal precedent and the CWA, we have addressed such issues elsewhere in the preamble, primarily in sections II C and III A.

Today's regulation is based on the nature of earth-moving equipment (*i.e.*, machines that move the earth). Contrary to the assertion that no technical analysis was provided, the preamble to the proposed rule, as well as materials in the rule's record, do provide technical information supporting the reasonableness of the final rule. We also believe the rule is reasonable in that it helps ensure that activities resulting in discharges meant to be addressed by the CWA are in fact regulated. Moreover, the rule's explicit opportunity to consider project-specific evidence to the contrary, and express recognition that it does not shift any burden in any administrative or judicial proceeding under the CWA, ensures that activities outside our jurisdiction are not regulated.

One commenter contended that excavation activities result in environmental benefits, providing an example that the size of certain unnamed drainages underwent a net expansion as the result of excavation at mine sites. Another comment asserted that the presumption was not reasonable because during the interval between the court decision and the publication of the proposed rule, the Corps, according to the commenter, had implicitly or explicitly acknowledged circumstances where excavation activities could be undertaken without a discharge requiring a section 404 permit.

Whether or not one agrees that certain excavation activities result in a net expansion of waters or net benefit to the aquatic environment does not bear upon the issue of whether such activities produce regulable discharges. Many restoration activities and other environmentally beneficial efforts necessitate discharges into waters of the U.S., a number of which are provided authorization under Nationwide General Permits.

A number of commenters requested clarification of, or objected to, the rebuttal process due to vagueness. These commenters sought further specifics as to the type of information that could be used to rebut the presumption and the standard of proof. In addition, they expressed concern that it would be difficult or impractical to rebut the presumption contained in the proposed rule. These commenters were concerned that the proposal placed an unfair burden on the landowner by requiring the applicant to prove a standardless proposition or not rebut the presumption and risk enforcement. These commenters believed it would be difficult to present a valid case because the proposal did not establish a set of clearly defined criteria for rebutting the presumption of discharge; some said that the rule seemed to require that a party undertake the activity with its inherent enforcement risks in order to provide evidence to rebut the presumption; others argued that the description of a regulable discharge is so broad that the presumption can not be rebutted. Others expressed concern that any effort to rebut the presumption would be extremely time-consuming, confusing, technically challenging and cost prohibitive. Other commenters expressed the view that the rule unfairly placed the burden of determining jurisdiction on the regulated community, a burden that should be borne by the government instead.

As noted in the proposed rule preamble, the proposal expressed:

> * * * our expectation that, absent a demonstration to the contrary, the activities addressed in the proposed rule typically will result in more than incidental fallback and thus result in regulable redeposits of dredged material. It would not, however, establish a new formal process or new record keeping requirements, and Section 404 permitting and application requirements would continue to apply only to regulable discharges and not to incidental fallback.

65 FR 50113.

The proposal would not have required project proponents or landowners to "prove a negative" or shift the burden of proof as to CWA jurisdiction from the government to the regulated community and the final rule clarifies our intent in this regard. As we have discussed in section II C of today's preamble, in light of comments received, we have revised the rule to make clear that it does not shift the burden of showing that a regulable discharge has occurred under the CWA, and also have included a descriptive definition of non-regulable incidental fallback in order to help provide a standard against which to judge regulable versus non-regulable redeposits. As a result, we do not believe the final rule somehow establishes or requires a time-consuming or expensive rebuttal process. Instead, it provides clarification to those who have unwittingly misread the *NMA* case to preclude regulation of all removal activities in waters of the United States. Issues related to the types of relevant information we will consider in determining if a regulable discharge has occurred are addressed in section II C of today's preamble.

Other commenters felt the proposed rule's presumption was unreasonable in light of the exclusion provided for "normal dredging operations." As in the original August 25, 1993, Tulloch Rule, several commenters suggested that all discharges of dredged material should be regulated, stating that it does not seem reasonable or consistent to exclude discharges incidental to "normal dredging operations" for navigation, while regulating excavation for non-navigation purposes.

In response we note that today's rule does not modify in any respect the provisions of the 1993 rule related to normal dredging operations, and we have not reopened any of these provisions in this rulemaking. The rationale for the normal dredging operation provisions was explained in the August 25, 1993 rulemaking (58 FR 45025–45026), and interested readers are referred to that discussion for further details.

C. Reasonableness of rule as to specific activities

Commenters cited a number of circumstances or scenarios that may or may not result in a regulable discharge. As a general matter, there was not sufficient information provided in the comments to provide a case-specific response. The discussion below is not intended to be definitive, as an actual decision about whether a particular activity results in a discharge needs to be made on a case-by-case basis considering actual evidence of the particular activity in question. Literature citations and other information that such commenters provided have been added to the record for the rule.

We received several comments regarding mining practices. One stated that for mining-related activities, they were unable to name examples of any equipment used that was not included on the proposed rule's referenced list as falling within the rebuttable presumption. Therefore, according to the commenter, the presumption had the effect of precluding "per se" all mining related activities performed with mechanized equipment in jurisdictional areas in contravention of the *AMC* and *NMA* decisions. Another asserted that under the proposed definition, most placer mines, suction dredges, and exploration trenches would be required to obtain an individual section 404 permit. As discussed in section II C of today's preamble, the final rule does not establish a rebuttable presumption, and provides for consideration of project-specific information to determine if a discharge results. We thus do not believe that today's rule has the effect of "per se" precluding or regulating all activities conducted with mining equipment in waters of the U.S. For example, as noted in section III A 1 a of today's preamble, some suction dredging can be conducted in such a way as not to produce a regulable discharge.

Several commenters raised scenarios involving in-stream mining or other mechanized activities in dry, intermittent streambeds, particularly of the kind that may occur in arid regions of the country. One stated that excavation activities in arid regions would not result in the "parade of horribles" that the agencies presume result from excavation. One commenter put forward two specific scenarios of in-stream mining activities that he believed were not covered as regulated discharges. They were the use of a front-end loader to scoop out material from a dry, intermittent stream up against the stream bank or other face, and the use of a scraper to move material out of the dry stream. Some commenters contended that such activities are conducted with little or no sediment redeposition, stating they do not involve the uprooting of vegetation and are undertaken when the stream bed is completely dry after winter flow ends and before the threat of the first flow in the next winter. Other comments stated that it was necessary to recognize that the southwest is different from the east where "real wetlands" exist, contending that, in the west, wetlands for the most part are only wetlands because the government says they are. The commenters believed that one rule should not apply to all, and that the vast majority of the drainages located in the southwest are in arid climates, which in many instances involve nothing more than isolated ephemeral streams, or dry washes with very little if any aquatic resources and with flows that occur only in response to infrequent rains and effluent from stormwater discharge. Still other comments focused on flood control maintenance activities where they asserted the disturbances are minimal and include only minor water quality impacts such as deposit and removal of sediments to maintain flow conveyance. They stated their activities are typically performed in a dry riverbed or channel, where there are no aquatic resources, the material in the channel is primarily sand and gravel, and the potential for downstream impacts are minimal.

We acknowledge that the presence or absence of water in a jurisdictional stream or other jurisdictional area is a project-specific fact that would need to be considered in deciding whether an activity results in only incidental fallback or a regulable discharge. While we agree that the presence or absence of water is relevant to determining whether a discharge has occurred due to suspension and transport of material to a new location, regulable discharges can still occur in a dry streambed when mechanized equipment is used to push materials from one area of jurisdictional water to another. Discharges can also occur when material is deposited in such a way as to cause materials to slide back into the jurisdictional area.

Several commenters contended that by establishing a rebuttable presumption that mechanized landclearing produces more than incidental fallback, the proposed rule would have resulted in undue hardship by subjecting them to environmental review. They believe that the stated rationale for the agencies' proposed presumption with respect to mechanized landclearing fails to consider the clearly "incidental" nature of any soil movement associated with such activity. Another commenter maintained that landclearing activities, such as grubbing and raking with a small D–7 Caterpillar bulldozer, along with a K–G blade and a root rake, can be conducted so that the only soil displaced during a landclearing would be that which would "stick to and sometimes fall off the tracks of the bulldozer," or would be "scraped off the blade," or would be "pushed up by [a] stump or stuck to [a] stump or its root mass as it was knocked over and pulled from the ground." This commenter also maintained that the agencies were well aware of such landclearing techniques and should acknowledge that they do not produce regulable discharges.

In response, we first note that the final rule has eliminated the use of a rebuttable presumption. As stated elsewhere in today's preamble, the use of mechanized earth-moving equipment to conduct landclearing, because it typically involves movement of soils around a site, would typically involve more than incidental fallback. It is difficult to give generalized conclusions regarding specific subcategories of activities or practices, particularly where the description of the activities lacks detail. Whether a particular activity results in a discharge, or only incidental fallback, necessarily depends upon the particular circumstances of how that activity is conducted, and as a result, today's final rule allows for project-specific considerations. We also note that in the NAHB Motion Decision, the Court declined to decide, on a general level, that the displacing of soils, sediments, debris, or vegetation incidental to the use of root rakes and excavating root systems or knocking down or uplifting trees and stumps to be non-regulable under section 404. NAHB Motion Decision at 15. Whether or not these types of activities are conducted so as to avoid a regulable discharge depends upon project-specific considerations, which today's final rule provides for. See also section III A 1 of today's preamble for further discussion of certain activities, such as use of K–G blades.

Numerous commenters suggested that a backhoe was the classic example of how digging could be done with no more than incidental fallback. They believed that one-motion excavation, such as excavation with a conventional hydraulic-armed bucket (*e.g.*, trackhoe or backhoe), can be easily accomplished with only incidental fallback resulting. They contended that the small amount of material that falls from the bucket is,

by definition, incidental to the operation of the bucket and the excavation and that no dredged material is introduced into the jurisdictional area, meaning a regulable discharge has not occurred. In summary, they believed that the proposed rule was too inclusive and should explicitly exclude certain types of excavation from the presumption of discharge.

The preamble to today's rule clearly recognizes that there are situations where, due to the nature of the equipment used and its method of operation, a redeposit may be limited to "incidental fallback." As emphasized repeatedly, today's rule would continue to exclude incidental fallback from regulation under section 404. We note, however, that backhoes by their nature (i.e., the size of the excavation machinery) are typically used to move more than small volumes of material in the course of excavation, and are thus likely to result in redeposits that exceed the definition of incidental fallback (*i.e.*, "*small volumes* of dredged material * * * [that] * * * falls back to *substantially the same place* as the initial removal.") However, the rule allows for project-specific evaluation of whether only incidental fallback occurs, and the definition of incidental fallback includes as an example "the back-spill that comes off a bucket when such small volume of soil or dirt falls into substantially the same place from which it was initially removed."

One commenter suggested that discing is not excavation, since there is no removal, but merely minor displacement. They believed that the proposed rulemaking suggests that disking results in more than incidental fallback, and they question how there can be any fallback of any nature where there is no excavation. Another commenter challenged the reasonableness of the presumption, because not all mechanized activities first "remove" material from waters of the U.S. and therefore such activities could not result in material being redeposited.

We acknowledge that there are mechanized activities that do not first excavate or remove material and therefore redepositional discharges do not occur (*e.g.*, the driving of piles in many circumstances). However, we also note that by pushing or redistributing soil, activities other than excavation can result in the addition of dredged material to a new location, and hence produce a regulable discharge.

Several commenters discussed the routine operation and maintenance of numerous existing flood control channels, levees and detention basins. They stated that existing facilities are vital to tax-paying citizens since they are critically needed to protect their health and safety. They also stated the intent of a flood control excavation project is to maintain hydraulic capacity and entirely remove accumulated sediment and debris from the facility, restoring it to its original lines and grades. They contended that the implementation of existing maintenance-related Best Management Practices addresses negative impacts of this work. Additionally they asserted that, under current regulation, no permit is required for excavation, the work can proceed in a timely manner, and costly submittals are not needed. They also contended that their "finished products" enhance, protect and maintain water quality. The commenters were concerned that all of their excavation projects under the proposed rule would be presumed to include an "addition" of pollutants.

One commenter, on behalf of a water authority, stated that they frequently engage in a number of activities subject to section 404 of the CWA, and which typically fall under the Nationwide permit program. Such activities include the construction of erosion control structures, channelization for temporary water diversions during construction of facilities, and building pipelines that infrequently occur in waters of the U.S. They stated that their efforts to enhance and restore wetlands often require mechanized landclearing to remove non-native, invasive vegetation. They asserted that, if implemented, the proposed revision would inappropriately deem these activities regulable discharges, when in fact they do not involve discharges beyond incidental fallback. Another commenter stated that they have restored several lakes, ponds, and sediment in streams with the one-step removal process under the Tulloch Rule. They utilize specialized low ground pressure equipment, to provide one step removal of accumulated sediments in a low impact manner to restore lakes, ponds, and streams. They also assert that they are very conscientious to prevent any fall back or otherwise discharges of materials into any waters of the U.S. and that they have very successfully restored many acres of U.S. waters, restoring aquatic habitat and navigability, and property values throughout their particular region of the U.S. They believed a distinction needs to be made between restoration activities to remove sediment from smothered aquatic habitats and draining jurisdictional areas to convert waters of the U.S. to upland uses.

In response, we note that some of the routine discharges from operation and maintenance of existing flood control channels, levees and detention basins are exempt from regulation under CWA section 404(f), and the exemption is not affected by this rule. Also, Corps Nationwide and Regional General Permits authorize some of the routine operation and maintenance work. We also note today's rule does not establish new requirements or procedures, and thus does not necessitate costly new submittals. Additionally, today's rule no longer establishes a rebuttable presumption, and project-specific information will be considered in determining whether an activity results in more than incidental fallback. If, as some of these commenters assert, their activities do not result in more than incidental fallback, then they would not be regulated under the CWA, nor are they currently regulated. We also note that because the determination of jurisdiction rests on the presence of a discharge of dredged material, which is not dependent upon either the effects of the activity or the intent of the person, the fact that an activity may or may not be beneficial, or is undertaken with the intent to remove material, does not form the basis for determining jurisdiction.

One commenter was concerned that the proposed rule's presumption would seriously impede the ability of water users to maintain their diversion structures, irrigation ditches, retaining ponds and reservoirs. In light of the fact that the term "waters of the U.S." determines the extent of the Corps jurisdiction under the CWA, they believed that the proposed rule would subject even the most routine maintenance of ditches, headgates and off-channel storage facilities to the permitting process and that resulting delays would hamper the efficient operation of water delivery systems, and jeopardize safety as well.

Today's final rule does not establish a rebuttable presumption, and as discussed in section II C and III A of today's preamble, would not result in the regulation of incidental fallback. We also note that because the determination of jurisdiction rests on the presence of a discharge of dredged material, which is not dependent upon the effects of the activity, the fact that an activity may or may not be beneficial does not form the basis for determining jurisdiction.

D. Regulation on Basis of Toxics/ Pollutant Releases

A number of commenters from the science profession provided extensive

discussion regarding the discharge of pollutants. These scientists contended that mechanized excavation and drainage activities in wetlands, rivers and streams almost always cause the discharge of pollutants into waters of the U.S., and frequently result in severely harmful environmental effects. They noted that it is well-established in the peer-reviewed scientific literature that wetlands and many parts of river and stream beds act as natural sinks, collecting sediment, nutrients, heavy metals (*e.g.* lead, mercury, cadmium, zinc) toxic organic compounds (*e.g.*, polycyclic aromatic hydrocarbons-PAHs, polychlorinated biphenyls-PCBs) and other pollutants which enter wetlands through polluted runoff, direct discharges, and atmospheric deposition. Moreover, they provided citations which describe other characteristics of wetlands and water bottoms that also play an important role in storing precipitated metals and other pollutants. For instance, over time, fresh layers of sediment added to wetland and river and stream beds can gradually bury and sequester trace metals and toxics. Vegetation also helps soils immobilize toxins and heavy metals by attenuating flow of surface waters and stabilizing the substrate, allowing metal-contaminated suspended particles to settle into sediment.

Furthermore, these commenters cited scientific literature which illustrates that wetland soils and river and stream beds immobilize toxins and heavy metals and other pollutants. Briefly summarized, these indicate that anaerobic conditions occur when wetland, river, and stream soils are saturated by water for a sufficient length of time; microbial decomposition of organic matter in the sediment produces anaerobic conditions. The anaerobic soil environment, with the accompanying neutral pH levels and presence of organic matter in the sediment, triggers different chemical and microbial processes in the soils. These characteristic conditions of wetland, river, and stream soils result in the precipitation of trace and toxic metals as inorganic compounds, or complexed with large molecular-weight organic material—effectively immobilizing these compounds.

These commenters maintained, and provided citations illustrating, that when a wetland is ditched or drained, or a riverbed excavated, channelized or dredged, mechanized activities dislodge some of the sediments and resuspend them in the water column from both the bottom and the sides of the ditch or other waterbody. Water draining from ditched or excavated wetlands carries suspended sediments down ditches to receiving waters; similar resuspension and downstream movement occur when river and stream bottoms are channelized. They furthermore provided supporting literature from scientific journals documenting that when wetlands are ditched or drained or rivers and streams excavated, some pollutants move into the water column. As described, when wetlands soils are exposed to air, the anaerobic, neutral pH conditions that promoted toxins and heavy metals to precipitate-out can shift to aerobic conditions, and the soil chemistry is transformed by the oxidizing environment and possible shift in pH. The mobility of metals bound in sediment is generally determined by pH, oxidation-reduction conditions, and organic complexation—thus, precipitates may begin to dissolve and become available for transport when soils are exposed to air. Contaminated sediment resuspension does not usually result in a pH change in rivers; but there, as in wetlands, microbial action can release such pollutants as trace elements during the reoxidation of anoxic sediments that subsequently flow into drainage ditches and into receiving waters.

Finally, commenters from the science community pointed out that turbulence prolongs the suspension of sediment and contaminants in the water column, so moving water (*e.g.*, drainage ditches) retains suspended materials longer than standing water. In general, organic chemicals and toxic metals are more likely to be attached to smaller, lighter particles, which also are more likely to remain suspended in the water column. The commenters noted that smaller particles may also give up organic chemicals more efficiently than larger particles. Thus, they assert, exposing contaminated sediment to the water column causes some dissolution of pollutants, while the direct discharge of sediment into the water during dredging accelerates the release of contaminants.

The agencies thank these commenters for their detailed discussion of current scientific literature, which we have included in the administrative record. We agree that the evidence presented points to the harmful environmental effects that can be associated with redeposits of dredged material incidental to excavation activity within a particular water of the United States, even those redposits occurring in close proximity the point of initial removal. To the extent commenters believe that we should determine the scope of our jurisdiction based on such environmental effects, however, we decline to do so. As stated previously, today's rule does not adopt an effect-based test to determining whether a redeposit is regulated, but instead defines jurisdiction based on the definition of "discharge of a pollutant" in the Act and relevant caselaw. We have chosen to define our jurisdiction based not on the effects of the discharge, but on its physical characteristics—*i.e.*, whether the amount and location of the redeposit renders it incidental fallback or a regulated discharge. Nonetheless, the evidence reviewed in these comments points to serious environmental concerns that can be associated with redeposits other than incidental fallback (which are regulated under today's rule), and support the agencies' view that it would not be appropriate, as suggested by some commenters, to establish quantitative volume or other "significance" thresholds before asserting jurisdiction over such redeposits.

One technical commenter contended that the likelihood of toxicant release and mobility is many times greater for navigational dredging than it is for most other excavation activities, especially in wetlands. This commenter asserted that the primary reason for this is that the vast majority of excavation projects that would be subject to the proposed rule do not have toxic substances in toxic amounts present in the natural soils, but many navigational dredging projects in commercial ports do. The commenter stated that while it is true that some contaminants may be more mobile in an oxidized than reduced state, the conclusion that contaminants will be released from normal excavation project activities is without technical merit. The commenter further recommended that since the effects of navigational dredging were determined to be acceptable, the results of those same studies should be used to establish what is more than incidental fallback. As noted in today's preamble, the potential for release and distribution of pollutants contained in dredged material is a factor that would be considered in determining if a regulable discharge of dredged material beyond the place of initial removal results. We do not agree with the apparent suggestion that wetlands soils are necessarily in a pristine or natural state. As discussed in the proposed rule's preamble, wetlands can act as sinks for pollutants, and sequester contaminants. In addition, we note that the 404 program applies to waters of the U.S., which include not just wetlands, but rivers, lakes, harbors and the like as well. Finally, we do not agree that the environmental effects of harbor dredging should somehow be

used to establish what is more than incidental fallback. As previously noted in section III A 1 d of today's preamble and also discussed below, we do not believe that use of an effects-based test for jurisdiction is appropriate in light of the *AMC* and *NMA* decisions.

Other commenters strongly opposed the idea that the transport of dredged material downstream or the release of pollutants as a result of excavation activities should be treated as a discharge. Some of these commenters asserted that consideration of impacts on water quality resulted in the use of an "effects-based test" to establish jurisdiction, which they indicated was not allowable under the *NMA* decision. Others expressed the view that such an interpretation would result in regulation of incidental fallback and thus not be allowable.

These comments refer to the discussion in the proposed rule's preamble regarding the information that we would use to evaluate whether a regulable discharge has occurred. Among other things, that preamble stated:

> In evaluating [whether regulable discharges have occurred], the permitting authority will consider the nature of the equipment and its method of operation and whether redeposited material is suspended in the water column so as to release contaminants or increase turbidity, as well as whether downstream transportation and relocation of redeposited dredged material results.

65 Fed. Reg. at 50113.

The agencies continue to believe that when determining whether a discharge has occurred, it is relevant and appropriate to consider whether an activity results in the release and distribution of sequestered pollutants into the water column or in suspended material being carried away from the place of removal before settling out. In such cases, a pollutant is being added to a new location. This is not the use of an "effects-based test" to establish the existence of a discharge, but rather recognizes that when pollutants are released or relocated as a result of the use of earth-moving equipment, this can result in the "addition" of a "pollutant" from a "point source" to "waters of the U.S.," and thus constitute a regulable discharge. In *Deaton,* the Fourth Circuit recognized that one of the reasons sidecasting should be treated as a regulable discharge is that: "When a wetland is dredged, however, and the dredged spoil is redeposited in the water or wetland, pollutants that had been trapped may be suddenly released." *Deaton,* 209 F.3d at 336. The *NMA* court indicated that resuspension should not be used to regulate excavation and dredging activities that result only in incidental fallback. 145 F.3d at 1407. We would consider the nature and amount of any resuspension and transport in determining whether a regulable discharge occurred.

We also do not agree that allowing for consideration of the release of pollutants contained in the dredged material into the water column and the transport of suspended material downstream would necessarily result in the regulation of incidental fallback. These are relevant factors in determining if material has been moved to a new location, and consequently resulted in the addition of a pollutant to a new area. However, in evaluating these considerations, we would take into account the volume and location of redeposited material so as not to regulate incidental fallback.

A number of other commenters requested that the proposed rule be strengthened so as to require a permit for excavation and channelization activities which release even small amounts of pollutants (such as heavy metals or PCBs) into the water column or which would result in their transport down stream. Under today's rule, such pollutants (which constitute dredged material by virtue of having been dredged or excavated from waters of the U.S.) (see *e.g.,* 40 CFR 232.2 (defining dredged material as "material that is dredged or excavated from waters of the U.S.)) would be regulated if resuspended and transported to a location beyond the place of initial removal in such volume so as to constitute other than incidental fallback. We believe that is the appropriate test for evaluating any redeposit of dredged material, for reasons stated previously. As explained elsewhere in today's preamble, we expect that the use of mechanized earth-moving equipment in waters of the U.S. will generally result in a regulable discharge. However, we do not believe that it is appropriate to *per se* treat the redeposits described by these comments as a discharge of dredged material, as consideration needs to be given to the factors of each particular case in making a regulatory decision.

E. Need for Brightline Test

Many commenters expressed concern that the proposal did not provide a clear definition of what constitutes a regulable discharge or incidental fallback. Many of these commenters were concerned that without clear standards that the regulated community or the regulators can use in order to determine when an activity is subject to federal jurisdiction, the proposal would have resulted in a system that was arbitrary and uncertain and was too vague in light of the CWA's civil and criminal penalty scheme. Some of these commenters expressed the view that without clear standards the rule would be void for vagueness, not meet the due process standard of providing fair warning of what activities are regulated, or violate the Constitution's non-delegation doctrine as construed in *American Trucking Association* v. *Browner,* 175 F.3d 1027 (D.C. Cir. 1999). Commenters also expressed concern that this would result in uncertainty and the need for subjective case-by-case determinations. Many of those concerned with the lack of a definition requested the proposal be withdrawn and re-proposed to include such a provision; some of these also indicated that guidance on what constitutes a regulable discharge versus incidental fallback needs to take the form of a rule, and should not be attempted through informal guidance.

Our May 10, 1999, rulemaking amended the substantive aspects of the definition of "discharge of dredged material" to provide that we no longer would regulate "any" redeposit, and that "incidental fallback" was not subject to regulation. That continues to be the case under today's final rule. As noted in section II B of today's preamble, the May 10 rulemaking was considered by the *NMA* court in its September 13, 2000, opinion and found to be in compliance with the *AMC* and *NMA* opinions and associated injunction. NAHB Motion Decision at 10. Today's rule does not alter the substantive regulatory definition of what constitutes a discharge. Rather than create arbitrary or unclear standards as some commenters have claimed, today's rule provides additional clarification for both industry and the regulatory agencies as to what types of activities are likely to result in regulable discharges.

In addition, the preamble to the proposed rule did provide guidance as to the agencies' views on what constitutes a regulable redeposit versus incidental fallback. For example, that preamble explained that as the *NMA* court and other judicial decisions recognize, the redeposit of dredged material "some distance" from the point of removal (see *NMA,* 145 F.3d at 1407) can be a regulable discharge. Similarly, the preamble noted the language from the *NMA* opinion describing what constitutes incidental fallback: involving the return of ". . . dredged material virtually to the spot from which it came" (145 F.3d at 1403), as well as occurring "when redeposit takes

place in substantially the same spot as the initial removal." 145 F.3d at 1401). Moreover, as explained in section II C of today's preamble, in response to comments on the need for a definition of incidental fallback, we have modified the final rule to include a descriptive definition consistent with relevant case law. Since the definition of incidental fallback reflects discussion in the *AMC* and *NMA* opinions of incidental fallback, and those cases were discussed in the preamble to the proposed rule, we do not believe that this revision to our proposal necessitates reproposal.

A number of commenters requested that the agencies adopt a "brightline test" to distinguish between incidental fallback on the one hand and regulable discharges on the other. Some of the commenters opposed to the proposed rule expressed the view that the proposal was contrary to the *NMA* decision and the preamble to the agencies' earlier May 10, 1999, rulemaking, in that it did not provide a sufficiently reasoned or clear attempt to draw a line between incidental fallback and regulable redeposits. We believe that the descriptive definition of incidental fallback in today's rule will provide greater certainty, but do not agree that the court in *NMA* mandated that we take any particular approach to defining our regulatory jurisdiction. *NMA* only stated that "a reasoned attempt by the agencies to draw such a line would merit considerable deference." 145 F.2d at 1405 (footnote omitted). As discussed previously, a descriptive definition of incidental fallback has been added to today's final rule. We do not believe that a more detailed definition is appropriate at this time.

Some comments suggested drawing a bright line on the basis of measurable criteria such as cubic yards of dredged material, total acres of land disturbed, gallons of water removed, tons of sediment disposed, or similar measures. Although consideration of factors such as the volume and amount of the material and nature and distance of relocation are relevant in determining whether incidental fallback or a regulable discharge occurs, these factors are inter-twined with one another, and do not lend themselves to a segregable hard and fast quantification of each specific factor (or combination of factors) so as to give rise to a hard and fast test. Moreover, we are not aware of, nor have commenters suggested, a sound technical or legal basis on which to establish brightline quantifiable limits on such factors. For example, we do not believe it is technically sound or feasible to simply establish universally applicable cut-off points for amount or distance.

Another commenter requested a brightline test be established by having the rule state a presumption *against* discharge for incidental soil movement associated with mechanized landclearing and excavation activities. More specifically, this commenter recommended that the rule provide that no discharge results from incidental soil movement associated with mechanized landclearing, ditching, channelization, draining, in-stream mining, or other mechanized excavation activity such as when (1) excavated soils and sediments fall from a bucket, blade or other implement back to the same general area from which it was removed; (2) surface soils, sediments, debris or vegetation are scraped, displaced or penetrated incidental to the use of machinery; (3) excavation machinery is dragged through soils or sediments; or (4) vegetative root systems are exposed, or trees and stumps are knocked down or uplifted, incidental to the use of machinery. The commenter's recommendation went on to provide that otherwise the Agency may demonstrate on a case by case basis that mechanized excavation activity in waters of the U.S. results in the discharge of dredged material.

We do not agree with this suggestion for a number of reasons. First, we believe a test of the "same general area from which it was removed" for determining whether incidental fallback has occurred could create the impression that material redeposited in virtually any part of the work area would not be a discharge, which we believe would be too broad of a test. As both *NMA* and *Deaton* recognize, for example, placement of dredged material in as close a proximity to the excavation point as the side of a ditch can result in a regulable redeposit. We thus believe a formulation based upon use of a "same general area test" to be too expansive to properly convey that short-distance relocations can result in regulable discharges. As discussed in section II C of today's preamble, we do believe a fair and objective reading of the *AMC* and *NMA* cases and the NAHB Motion Decision, as well as other relevant redeposit cases discussed in that section of the preamble, is that incidental fallback occurs when redeposit takes place in "substantially" the same place as the initial removal, and have so provided in today's final rule.

Moreover, the examples provided by the commenter (*e.g.*, dragging of equipment, scraping or displacement of soil or vegetation, uplifting of tree roots) often can result in the relocation and redeposit in waters of the U.S. of substantial volumes of material over considerable distances so as to constitute more than incidental fallback under the *AMC* and *NMA* opinions. The approach suggested by this commenter reflects perhaps a different conception of what constitutes incidental fallback than is contained in today's rule. If incidental fallback were to include any material incidentally redeposited in the course of mechanized activity, the establishment of a presumption of exclusion of the activities listed by the commenter might follow as reasonable. As discussed immediately above in this section, however, we believe that this formulation is not warranted and would be too broad. We believe that we have properly described incidental fallback in today's rule, and that it would not be reasonable to assume the activities listed by the commenter only cause incidental fallback. In fact, as today's rule clarifies, we regard such activities as typically resulting in more than incidental fallback, absent project-specific information to the contrary. However, there is substantial flexibility under today's rule to consider the types of activities listed by the commenter and determine on a case-by-case basis whether a specific project is subject to regulation.

Other commenters recommended that while the term "discharge" should not encompass the fallback of material precisely to the same spot during excavation activities, when the movement of the dredged material raises new environmental concerns (such as release of pollutants into the water column or more ready erosion of the material and movement downstream), this relocation should be treated as a discharge. These and other commenters also requested that the rule make clear that a permit is required for excavation and channelization activities which release even small amounts of pollutants (such as heavy metals or PCBs) into the water column or which would result in their transport downstream. For reasons stated previously, we do not agree that whether an activity results in new environmental concerns should be used as the basis for establishing jurisdiction. As discussed in both the proposed rule's and today's preamble, the nature and amount of transport and resettling of excavated material downstream from the area of removal, or release of pollutants previously bound up in sediment beyond the place of initial removal, are relevant factors to consider in determining if movement and relocation other than incidental fallback

has occurred. Thus, these factors are relevant to determining whether a redeposit other than incidental fallback occurs, and are not used to assert jurisdiction on the basis of environmental effects.

Other comments urged that the rule identify certain activities as always requiring a permit or consisting of a regulable discharge. Examples mentioned in such comments included sidecasting, backfilling, and stockpiling; those supporting strengthening of the proposal also included bulldozing, grading, and leveling as always requiring a section 404 permit. As previously discussed in section II C of today's preamble and the preamble to the proposed rule, case law has found a number of activities (*e.g.*, sidecasting, backfilling of trenches) to be regulable discharges under section 404. We believe the preamble discussion on these points to be sufficiently clear and that inclusion of such specific examples in the regulation itself is unnecessary. To the extent grading and leveling involve redistribution of soils in waters of the U.S. around a site to create a level area, such activities would appear to typically involve not only a discharge of dredged material (through the pushing of dredged material from one location to another) but also possibly fill material (by filling low areas). *See Avoyelles* (movement of soils to depressed areas as discharge of fill material). In any event, case law on redeposit issues continues to evolve over time. Accordingly, we do not believe the listing of specific examples of discharges in the regulation itself to be appropriate.

F. Clarity of Proposal and Implementation Issues

1. Clarity

A number of commenters sought clarification with regard to section 404(f), as they were concerned or confused by the references to section 404(f) in the preamble to the proposed rule. Most of these commenters interpreted the preamble language to indicate that the rule would establish that certain silviculture or farming activities described in section 404(f) as being exempt from permit requirements would now be subject to regulation, particularly because these activities may involve the types of machinery and actions referenced in the proposal.

We regret that the references to section 404(f) in the preamble may have caused confusion regarding the relationship of section 404(f) to the rulemaking and emphasize that today's rule does not change the interpretation or use of the exemptions in any manner. Today's rule concerns the fundamental issue of what activities result in a discharge that is regulated under section 404. The section 404(f) exemptions describe those activities that, although resulting in a discharge, do not require a permit if they are conducted consistent with that provision. Activities covered by section 404(f), including silviculture, ranching, and agriculture, involving the use of equipment and methods such as those described in the rulemaking remain exempt, subject to the provisions of section 404(f), and are not altered by today's rule.

2. Comment Period

Two commenters requested an extension of the public comment period in order to better gauge the effects of the rule on their membership. One of these requested additional time to assess the potential impacts of the proposal on their industry and also requested a public hearing on the proposal. The other commenter expressed the view that the proposal was fundamentally different from previous iterations of the Tulloch Rule, and sought additional time in order to obtain more information on the physical settings and the use of many types of equipment by its membership. We believe that a 60-day comment period was adequate time to obtain widespread and effective public comment and that extending the public comment period or holding a public hearing is unnecessary. In general, it appears the public understood the proposal and was able to provide comments in a timely fashion. Of the approximately 9,650 comments that were received, only two sought an extension of the comment period, and only one of those requested a hearing. In addition, those two commenters did file specific and substantive comments within the 60-day comment period.

3. Implementation

A number of commenters raised issues associated with the implementation of the rule, including the ability of the agencies to effectively enforce, monitor, and budget for it, as well as the appropriate exercise of discretion on behalf of the agencies. Several commenters indicated that the agencies need to dedicate enough staff and other resources necessary to effectively enforce the rule. One commenter specifically recommended that the agencies request the necessary funding from Congress to allow effective implementation. Another commenter specifically mentioned the need for the agencies (or States or local governments) to monitor activities not requiring a permit, to determine if they were in fact not resulting in a discharge. One of these commenters supported review and documentation of completed projects determined a priori to not result in a discharge, to ensure that in fact no discharge resulted. One commenter who supported the objective of the proposed rule nonetheless recommended that we streamline the permitting process associated with activities that may involve incidental fallback. Another commenter specifically cited concern that the Corps would not be able to efficiently process permits and asserted that the processing of Nationwide General Permits is not as efficient as the agencies contend.

We concur with the commenters who stated that it was important for us to have adequate resources to effectively enforce, monitor, and otherwise implement the proposed rule. Consistent with agency priorities for aquatic resource protection and our overall missions, we do propose budgets to adequately accomplish our CWA statutory objectives. Effective enforcement and monitoring is an important part of the section 404 regulatory program. We will coordinate with State and local partners to ensure that today's rule, as well as wetlands regulations, in general, have effective compliance. Over the last two years, unreported Tulloch activities presented a challenge to us in obtaining information on the extent and nature of wetlands destruction that has occurred following the *NMA* decision. While many of these challenges remain, we believe that satisfactory monitoring, in cooperation with others, can be accomplished to adequately track the results of today's rule. We agree that pre-project information alone should not necessarily be the basis for concluding that an activity results only in incidental fallback and that other measures, such as field investigation or site visits, may be needed to assess whether an activity has actually resulted in any regulable discharges.

The agencies' goal is to work cooperatively with the public to ensure that their activities in the Nation's waters are fully consistent with the requirements of the Act and its implementing regulations, including today's rule. The Corps of Engineers is the principal contact for the public both in the context of responding to questions that arise prior to conducting any proposed activity in waters of the U.S., as well as monitoring permitted and unpermitted activities as they proceed in waters to verify compliance with permit conditions or, in the case of unpermitted activities, to ensure that no

regulable discharge takes place. Consistent with its statutory responsibilities and relevant Memoranda of Agreement between EPA and the Corps, EPA also may serve as the lead agency in determining whether a regulable discharge has occurred.

It is a more effective use of agency resources and more efficient for project proponents to coordinate with the Corps before an activity in waters of the U.S. occurs to determine whether or not the project triggers the need for a CWA permit. We strongly recommend that anyone proposing projects which, for example, involve earth-moving activities using mechanized equipment such as bulldozers or backhoes contact the Corps well in advance of the project to determine whether or not a regulable discharge will occur. As appropriate, the Corps will also be involved in working with the public on a project-specific basis to monitor ongoing or completed projects which proceed without a section 404 permit through site visits, remote sensing, field investigations and so forth to verify that no regulable discharges have occurred.

With respect to streamlining the permit process for discharges that may involve incidental fallback, we note that neither the proposal nor today's rule establishes new procedural or informational requirements. In addition, we have provided additional discussion in today's preamble (see section II C) as well as a descriptive definition of incidental fallback in order to clarify the factors and information relevant to making the determination of incidental fallback versus regulable discharge. Given that case-specific evidence regarding whether an activity results only in incidental fallback will be considered, general authorizations based on a common set of circumstances would be inappropriate.

We have undertaken a number of successful efforts to ensure that activities regulated under the section 404 program are evaluated in an efficient manner, while ensuring environmental protection. In particular, with regard to the comment on the development and use of Nationwide General permits, such permits have provided an efficient process for allowing discharges with truly minimal impacts to move forward with little regulatory review, consistent with conditions that provide for aquatic resource protection. Despite successive annual increases in the use of general permits over the last ten years, processing times have remained low. Some 63,780 general permits required a priori action on the part of the Corps in Fiscal Year 2000 (as compared with approximately 4,313 individual permits), and these were evaluated in an average time of only 19 days.

A number of commenters addressed the issue of discretion by the agencies in implementing today's rule. The majority of these commenters advocated that discretion on the part of Corps Districts should be minimized. Several commenters stressed the need for consistent interpretation and application of the rule, citing the fact that several State and local jurisdictions have multiple Corps Districts. Other commenters noted that national guidance or consultation with the Headquarters offices of the agencies should be required, particularly if any local operating procedures for the rule are developed. One commenter recommended that Corps field staff document all communications with potential dischargers and submit such information to Corps and EPA Headquarters for periodic review. One commenter indicated that if any determination is a "close call" with regard to whether or not a discharge constitutes incidental fallback, it should be considered regulated in order to err on the side of protecting wetlands. One commenter asked for clarification that previous understandings with Corps Districts regarding certain "Tulloch" activities would remain in effect, specifically mentioning the preamble text in the proposed rule regarding the cutting of vegetation, as well as the use of vehicles and other "landclearing and excavation practices that have been deemed to fall within the exclusions . . . under the *Tulloch* Rule." Another commenter provided a specific example of guidance provided by a District that the commenter asserted ran counter to the agencies interpretation of the *NMA* decision: that entities "may engage in instream mining and dredging if the intent of the work is to create a discharge of dredged material that results only in incidental fallback."

We concur with those commenters that advocate consistent implementation of today's rule across Corps Districts, but also recognize that the case-specific nature of incidental fallback determinations necessitates some element of discretion. We have developed guidance on program implementation in light of the *AMC* and *NMA* decisions (issued on April 11, 1997, and updated on July 10, 1998), as well as provided further guidance in the May 10, 1999, rulemaking and today's rulemaking action. As additional issues are raised in the application of today's rule that lend themselves to additional guidance, we will provide such guidance. Moreover, to the extent that regional circumstances allow regional guidance to be provided on circumstances common to a particular part of the country, we will provide that as well. In the preparation of any regional guidance and in the consideration of "close calls," our headquarters will provide oversight and review to assist our field staff in reaching determinations that are consistent with governing law.

With respect to previous understandings with Corps Districts regarding the regulation of certain "Tulloch" activities, today's rule describes how potential discharges will be addressed. While the lack of specific details in many of the specific comments prevents us from making a determination here, we can clarify that the cutting of vegetation above the roots is not regulated as a discharge of dredged material under section 404. 33 CFR 323.2(d)(2)(ii) and 40 CFR 232.2. Likewise, driving vehicles such as cars, off-road vehicles, or farm tractors through a wetland in a manner in which such vehicle is designed to be used generally is not subject to regulation under CWA section 404. See our August 4, 1995, guidance entitled "Applicability of Clean Water Act Section 404 to Vehicle Use in Waters of the U.S." Landclearing and excavation practices are discussed above in section III C of today's preamble. With respect to the comment on guidance said to have been provided by a District that entities "may engage in instream mining and dredging if the intent of the work is to create a discharge of dredged material that results only in incidental fallback," the proper consideration is not the intent of the discharger, but whether, in fact, the activity results in only incidental fallback.

G. Need to Amend CWA

One commenter, while disagreeing with the *NMA* decision and its reasoning, indicated that besides rulemaking, the agencies also should seek action by Congress to amend the CWA so as to clarify agency authority to fulfill their duty under the CWA to protect the Nation's waters. Other commenters who were opposed to the proposed rulemaking expressed the view that it was necessary to obtain an amendment to the CWA before, or instead of, proceeding with rulemaking. Many of these commenters believed that the proposed rule exceeded the agencies' authority under the CWA (see discussion in section III A of today's preamble) and thus could not be undertaken without an amendment to the Act. In fact, one such commenter suggested that language in EPA

Administrator Carol Browner's Press Release announcing the August 16, 2000, proposal reflected a recognition that the agencies do not have the authority to undertake the action reflected in this rule because it called on "Congress to strengthen the Clean Water Act to fully protect and restore America's wetlands." Others felt that in light of the uncertainties and importance of the issue it was appropriate or even necessary to wait for Congressional action before proceeding. We do not agree. We believe today's rule is entirely consistent with the current CWA and relevant case law, and helps to clarify for the regulated community and the agencies what activities are likely to result in regulable discharges. In keeping with the *AMC* and *NMA* cases and the NAHB Motion Decision, today's rule does not provide for regulation of "incidental fallback," and a descriptive definition of that term has been provided in today's rule language. The language in the press release calling on Congress to strengthen the Act was a recognition that the statute, as interpreted in *AMC* and *NMA*, does not extend to regulating incidental fallback. Since today's rule does not regulate incidental fallback, but rather articulates an approach to determining whether redeposits of dredged material come within our existing statutory authority, today's rule is consistent with both the press release and the CWA as interpreted by the courts.

H. Other Issues

1. Loss Data

As noted in the proposed rule, available information indicated that more than 20,000 acres of wetlands were subject to ditching and more than 150 miles of stream channelized since the *NMA* decision. The activities causing such "Tulloch" losses typically take place without a CWA section 404 permit, and therefore are not systematically reported to either EPA or the Corps of Engineers. As a result, the numbers are believed to likely underestimate actual Tulloch losses. The proposed rule invited the public to submit further relevant information on Tulloch losses.

One commenter suggested that this invitation to submit data on Tulloch losses was an attempt to establish a *post hoc* rationalization for today's rule. We disagree. The CWA section 404 establishes a regulatory program for discharges of dredged material into waters of the U.S. The Act does not establish a threshold of impacts after which an activity will be regulated, nor as explained in sections III A 4 and III D of today's preamble, does today's rule use an effects-based test to establish jurisdiction. As a result, we do not need aggregate data showing extensive Tulloch losses or impacts to justify today's rulemaking. Such information is nonetheless helpful in answering inquiries from the public about the impacts of Tulloch activities, as well as in helping focus our limited resources on important environmental problems.

Many commenters emphasized that the uncertainty created by the *NMA* decision has led to a surge in wetlands drainage, resulting in deposits into wetlands of both unregulated "incidental fallback" and regulable redeposit of dredged material. Commenters expressed concern that project proponents may decide that a section 404 permit is not necessary and not contact the Corps for verification. One commenter described a philosophy of "if you don't ask, you don't have to worry about being told no." Several commenters suggested that Tulloch losses will continue to increase until the regulatory definition of "discharge of dredged material" is clarified and legislation closes the Tulloch "loophole." We appreciate these concerns and believe that by setting forth our expectation as to activities that are likely to result in regulable discharges, today's rule will help enhance protection of the Nation's aquatic resources.

Several commenters asserted that the proposal's estimates of Tulloch losses were conservative, and do not include impacts from numerous activities occurring throughout the U.S. For example, one commenter noted that its State data underestimated total wetland acres drained because estimates were based on less than 80% of identified sites on which unauthorized drainage had occurred. Other commenters emphasized that comprehensive data on Tulloch losses is difficult because developers are not contacting the Corps of Engineers or EPA about many of their projects. We agree that because Tulloch losses are not systematically reported, we have likely underestimated the magnitude of these losses.

Numerous commenters submitted information about wetlands and stream losses since the decision in *NMA*, and emphasized that impacts are national in scope. One commenter noted that Tulloch losses have been reported in some of the six ecoregions in the U.S. that have been targeted for special investment due to their biological diversity, and expressed concern that future losses in these key regions could have serious impacts on tourism, fishing, and other industries reliant on ecological resources. Many commenters highlighted Tulloch losses in their areas, or described aquatic resources that could be destroyed by future projects unregulated due to the "Tulloch loophole." These examples illustrate the nationwide implications of the NMA decision. Descriptions were received of losses in Arkansas, California, Connecticut, Georgia, Iowa, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, New York, North Carolina, Ohio, Oregon, Tennessee, Wisconsin, and Virginia, among others. Public comments providing these examples are included in the record for today's rule.

Many commenters discussed the environmental effects of Tulloch losses. Some commenters noted that extensive ditching and drainage of wetlands had resulted in siltation, sedimentation, and turbidity violations in designated shellfish waters, primary and secondary fishery nursery areas, and other sensitive coastal and estuarine waters. Commenters described potential adverse effects of instream mining on anadromous fish habitat in the Pacific Northwest and other regions. Several commenters expressed concern about the potential impacts on prairie potholes and other wetlands that provide important habitat for migratory waterfowl. Several commenters expressed concern about impacts on neighbors of unregulated wetlands drainage. Other adverse environmental effects from Tulloch losses described by commenters included: flooding of neighboring businesses, homes and farms; degradation of receiving waters; shellfish bed closures; degradation of drinking water supplies; loss of critical habitat; loss of aesthetics; loss of recreational activities such as bird watching; and increased toxics loadings from disturbed sediments.

Several commenters discussed the environmental impacts of the discharge of dredged material. One commenter quoted the court decision in *Deaton*, noting that the environmental impacts from the discharge of dredged material "[a]re no less harmful when the dredged spoil is redeposited in the same wetland from which it was excavated. The effects of hydrology and the environment are the same." The adverse environmental impacts of discharge described by commenters included such effects as: increased turbidity; reduced light penetration; mortality of aquatic plants and animals; depletion of dissolved oxygen; resuspension of contaminants; release of pollutants (heavy metals, nutrients, and other chemicals) from suspended material;

biological uptake of pollutants; sedimentation and smothering of benthic organisms; algal population explosions; fish kills; nuisance odors; and a decline in biodiversity. As we noted in our discussion of the comments concerning the use of an effects based test to establish jurisdiction (see section III A 1 d of today's preamble), today's rule does not attempt to regulate activities beyond the scope of the CWA or base our jurisdiction on effects.

Some commenters characterized as unsubstantiated the preamble's estimates of wetland acres lost and stream miles channelized after the Tulloch Rule's invalidation. One commenter also suggested that data on Tulloch losses should be grouped by industry category. We agree that precise comprehensive data on Tulloch impacts is difficult to collect. The estimates discussed in the proposal reflect projects that have come to the attention of agencies' field offices, through field observations, individual reports, and/or newspapers and other information sources. We believe that the preamble estimates of Tulloch losses are conservative, because persons undertaking such activities often proceed under the assumption that no authorization from the Corps is required. The proposal's request for information on Tulloch losses is intended to help ensure available data is as complete as possible. We do not agree, however, that the collection and categorization of data by industry is necessary, because today's rule does not regulate by industry category but on the basis of discharges to waters of the U.S.

One commenter asserted that Tulloch losses have been more than offset by mitigation required for permitted losses, because the preamble to the proposal cites estimates of over 20,000 acres of unregulated wetlands loss after invalidation of the Tulloch Rule, plus an estimated 21,500 acres of wetlands lost through authorized activities in 1999, with 46,000 acres of compensatory mitigation obtained in 1999. However, only permitted losses resulted in obtaining compensatory mitigation. Compensatory mitigation ratios for permitted losses are typically higher than 1:1 to address a variety of factors considered during permit evaluation, such as the expected likelihood of success; the percentage of restoration, enhancement, and/or preservation intended; the temporal loss of functions and values before the mitigation is fully functioning; and other relevant considerations. Tulloch losses, on the other hand, involve activities which are not subject to environmental review or compensatory mitigation. Thus, the compensatory mitigation figures reported in the proposed rule's preamble were designed to offset permitted losses only, not Tulloch losses.

One commenter disagreed about implications of wetlands losses, expressing doubt about whether wetlands losses might result in a potential for increased flooding, and characterizing the link between the two as an unsupported assumption. We note, however, that an extensive body of scientific literature indicates that wetlands typically store water at least temporarily, keeping it from flowing further downhill and downstream, thereby helping reduce the frequency and severity of flooding. For example, the U.S. Geological Survey's National Water Summary on Wetlands Resources (1996) notes that "[i]n drainage basins with flat terrain that contains many depressions (for example, the prairie potholes and playa lake regions), lakes and wetlands store large volumes of snowmelt and (or) runoff. These wetlands have no natural outlets, and therefore this water is retained and does not contribute to local or regional flooding." Other studies, such as the 1994 report by the Interagency Floodplain Management Review Committee, similarly have found links between wetlands losses and flooding. Sharing the Challenge: Floodplain Management Into the 21st Century, at Vol. 1, pg. ix; Vol. V at pp 79–88.

2. Miscellaneous Issues

One commenter raised an issue with respect to whether or not snow plowed into headwater creeks would be regulated by today's rule. Although we recognize that other Federal or State requirements may govern such an activity, we do not regulate snow plowing into waters of the U.S. under section 404. Today's rule addresses discharges of dredged material, which snow is not. However, if during a snow removal operation, snowplows, front loaders, bulldozers, or similar equipment discharge gravel, sand, or other material into waters of the U.S. or move sediment or soil to new locations within a water of the U.S., then such activities would be regulated under section 404.

Some commenters raised concerns about the definition of "waters of the U.S.," expressing the view that the term is very broad and may be overly inclusive. Today's rule clarifies the definition of the term "discharge of dredged material" regulated under CWA section 404. It does not address the definition or scope of "waters of the U.S." We are contemplating initiating rulemaking to clarify the definition of "waters of the U.S." (see the Unified Regulatory Agenda, 65 FR 23574 (April 24, 2000)), and would encourage public comments on a proposed definition at that time. We also note issues related to the scope of "waters of the U.S." are currently pending before the Supreme Court in *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers* (No. 99–1178) (*SWANCC*).

One commenter indicated support for the deletion of the "grandfather" provision that was a part of the previous definition of dredged material. We agree, and today's final rule deletes that provision as being out of date and no longer necessary.

A number of commenters raised issues that, while related to wetlands regulation, were not germane to the proposed rule. Examples include comments regarding delineation methodology or geographic jurisdiction of the section 404 program, fill material regulation or the agencies proposed rulemaking regarding the definition of fill material, and general statements about section 404 regulation. These comments have been made available to other relevant dockets or addressed, as appropriate, in the record for today's rule.

3. Economic Issues

Many commenters opposed to the rule expressed concern over its economic effects. Some of the commenters raising economic concerns believed that the proposal would have regulated "incidental fallback" or was a return to the Tulloch Rule invalidated by the court in *AMC* and *NMA*. Many of the comments raising economic issues questioned the discussion in the proposed rule's preamble that it did not alter or enlarge section 404 program jurisdiction or create information requirements. Other commenters expressed concern with the expense and difficulty of rebutting the presumption contained in the proposed rule, especially when, in their view, this was a standardless proposition. Another asserted their belief that the reference in the proposed rule preamble to "potentially" regulated entities was misleading, as all persons engaging in excavation activities listed in the rule would be regulated. Some of the commenters believed the proposal would have an annual economic effect of more than $100 million dollars, and that issuance of the proposal without a detailed economic analysis or consulting with affected entities violated the requirements of the

Regulatory Flexibility Act (RFA) as Amended by the Small Business Regulatory Enforcement Fairness Act or the Unfunded Mandates Reform Act (UMRA). Some of the commenters expressed concern that, coupled with the changes made in the Corps Nationwide Permit Program, the proposal would result in increased delays in obtaining authorizations; one commenter believed the proposal somehow superceded existing Nationwide Permits. Others questioned how the proposed rule could be deemed to have small economic effects when the preamble to the proposal noted upwards of 20,000 acres of wetlands were subject to ditching and more than 150 miles of streams channelized. Others questioned why, if the rule was not economically significant, it was deemed a "significant regulatory action" for purposes of Executive Order 12866. One commenter expressed concern over the absence of a grandfather provision.

We continue to believe that the economic impacts of the rule will be insignificant. While some of the commenters expressing concern with economic impacts believed they would have to consult in advance with the Corps or that all excavation activities would be subject to regulation, this is not the case. Nothing in today's rule alters the current regulatory provisions that exclude incidental fallback from regulation as a discharge, provisions which were found to comply with the *AMC* and *NMA* decisions by the court in its NAHB Motion Decision. Today's rule does not alter that *status quo*, and we thus do not agree with commenters whose economic concerns were premised on the proposal somehow enlarging program jurisdiction or reinstating the invalidated Tulloch Rule. See also section III A of today's preamble for further discussion.

Moreover, as noted in section II C of today's preamble, the final rule has been clarified in a number of respects to make clear it is not creating or imposing new process or information requirements and will not result in substantially increased workloads. First, it no longer uses a rebuttable presumption. Second, the final rule has been clarified to expressly provide that it does not alter any burden in any administrative or judicial proceeding under the CWA. Finally, we have provided a descriptive definition of incidental fallback which helps to clarify for both the regulated community and regulatory staff the type of redeposits which are not subject to regulation. In this respect, it may actually reduce costs for the potentially regulated entities conscientiously attempting to comply with the existing regulations. Moreover, as noted and discussed numerous times in today's preamble, the final rule continues to provide for project-specific considerations in determining if more than incidental fallback results. In this regard, the proposed rule's preamble reference to "potentially" regulated entities was intended to convey this case-by-case nature, and the final rule preamble thus continues to use that formulation. For all of these reasons, we continue to believe that today's rule does not have substantial economic effects, and does not trigger the requirements of the RFA as amended or UMRA.

Today's rule does not affect section 404 Nationwide permits for dredged material discharges. Rather, it clarifies the types of activities which we regard as being likely to result in regulable discharges. Where only incidental fallback results, a regulable discharge of dredged material does not occur, and there is no obligation to obtain coverage under either an individual or a Nationwide permit. Some of the commenters expressed concern over lengthy permit review times under Nationwide and individual permits; we do not believe that the facts warrant these concerns and have included the most recent available statistics on permit review time in the administrative record for informational purposes, although, as just noted, the rule does not alter existing requirements for permit coverage. With regard to commenters raising concerns over the economic effects of changes that have been made in the Nationwide permit program (see 65 FR 12818), although outside the scope of today's rule, we note that the Corps has prepared and is continuing to work on economic documentation related to that program.

We do not believe there is any inconsistency in the discussion of Tulloch losses in the proposed rule's preamble and the conclusion that the rule will not have significant economic effects. As evidenced by photos from field visits, some of those losses were accompanied by substantial relocation and movement of dredged material, and thus seem to reflect the mistaken belief that any excavation or drainage activity is exempt from regulation under CWA section 404, regardless of the presence of a discharge. Activities resulting in a discharge of dredged material already are subject to regulation under CWA section 404 and today's rule does not alter this jurisdictional prerequisite.

With regard to questions concerning consistency of our conclusion that the rule does not have significant economic impacts even though it was submitted for review under Executive Order 12866, we have clarified in today's preamble (see section IV B below) that this submittal is not made on the basis of economic effects, but rather on the portion of that Executive Order addressing, among other things, rules which involve legal or policy issues arising out of legal mandates or the President's priorities. In light of past litigation challenging the 1993 Tulloch Rule and the importance of effectively protecting our Nation's aquatic resources, the proposed and final rules were submitted for review under Executive Order 12866. Finally, with regard to the commenter expressing concern over the absence of a grandfather provision, we have not included one as today's rule still provides for consideration of project-specific information, and does not create new substantive or procedural requirements. We thus do not believe a grandfather provision is appropriate.

4. Tribal and Federalism Issues

Several commenters raised concerns that the proposed rule would have substantial direct effects on States, and so is subject to the "Federalism" Executive Order 13132 (64 FR 43255 (August 10, 1999)). One commenter additionally noted that the proposed rule imposes significant compliance costs on Tribal governments, and therefore must comply with the consultation requirements of Executive Order 13084. Some commenters were concerned specifically about the potential information burden of rebutting the presumption. We disagree that today's rule will have a substantial direct impact on States or impose significant compliance costs on Tribes. Today's rule does not change CWA section 404 program jurisdiction, nor affect a discharger's obligation to obtain a section 404 permit for discharges of dredged material into waters of the U.S. Section 404 always has regulated the "discharge of dredged material." Today's rule simply clarifies program expectations of what activities are likely to result in a regulable discharge. In addition, today's rule does not use the proposal's rebuttable presumption formulation, and has been clarified to expressly state it does not shift any burden in any administrative or judicial proceeding under the CWA.

Two commenters suggested that the CWA section 404 program itself was inconsistent with federalism principles, because it imposed on the traditional State area of regulating land use or is only weakly connected to a Federal responsibility. Such comments are

beyond the scope of today's rulemaking. However, we do not agree that the section 404 program is inconsistent with federalism principles. Controlling the impacts of pollution and protecting natural resources has long been a matter of joint Federal and State concern, and the Federal government long has legislated in the field of environmental pollution control and resource protection. Section 404 does not constitute conventional land use planning or zoning, but instead is a form of environmental protection and pollution control that leaves the ultimate determination of land use to State and local authorities consistent with Federal pollution control requirements. In a case involving impacts of mining on Federal lands, the U.S. Supreme Court expressed the distinction this way: "Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits." (*California Coastal Commission* v. *Granite Rock Co.*, 480 U.S. 572, 587 (1987)). Section 404 does not dictate the particular use for a parcel of property; it regulates the manner in which the proposed use can be accomplished by avoiding and/or mitigating the environmental impacts of a discharge of dredged or fill material into waters of the U.S.

One commenter argued that the proposed rule unlawfully expanded Constitutional limits to the Corps' ability to protect biological resources, by including protection of habitat with significant biological value but little or no commercial value. The commenter stated that such habitat does not involve interstate commerce, and as a result is beyond Federal powers and should be protected by State and local governments. This issue is not within the scope of today's rulemaking and raises questions about the definition of "waters of the U.S." which are currently pending before the U.S. Supreme Court in *SWANNC*. In addition, nothing in today's rule limits a State or local government's ability to protect habitat and other resources.

One commenter suggested that Federal regulation is not necessary because ample State and local authority exists to protect wetlands. Again, this issue is beyond the scope of today's rulemaking. We disagree about the lack of a need for a Federal presence in wetlands regulation. The Federal wetlands program both addresses interstate issues arising from wetlands protection, and helps support the States' own environmental objectives. For example, the section 404 program helps protect States from the effects that filling of wetlands in one State may have on water quality, flood control, and wildlife in another State. States with wetlands programs might coordinate closely with the Federal program, as a means of avoiding duplication and reducing any administrative burden. For example, States might choose to coordinate their environmental studies with Federal initiatives or to use Federal expertise in identification and mapping of wetlands. We also note that in the *SWANCC* case, eight states filed an *amicus* brief explaining the benefits of 404 regulation to the states and expressing their support for such regulation (CA, IA, ME, NJ, OK, OR, VT, and WA).

One commenter argued that no Federal reason has been demonstrated for regulating activities such as ditching and channelization, and the proposal should not be finalized until an economic analysis is completed that supports a valid Federal reason to "expand" the Corps' authority. Another commenter noted that the *NMA* decision has forced a number of States to incur significant financial costs by acting to stem further wetlands destruction, and that limited funding has prevented some States from stepping into the post-*NMA* loophole. We note that today's rule does not regulate on the basis of ditching and drainage activities, but instead on the presence of a discharge of dredged material into waters of the U.S., as called for under the CWA. Today's rule does not expand the scope of CWA section 404 program jurisdiction, nor establish a new program or new required processes affecting the regulated community. For these reasons, we do not agree that today's rule requires an economic analysis such as that called for by the commenter.

We note that many Federal environmental programs, including CWA section 404, were designed by Congress to be administered at the State or Tribal level whenever possible. The clear intent of this design is to use the strengths of the Federal and State and Tribal governments in a partnership to protect public health and the Nation's resources. EPA has issued regulations governing State and Tribal assumption of the section 404 program (40 CFR part 233). The relationship between EPA and the States and Tribes under assumption of the section 404 Program is intended to be a partnership. With assumption, States and Tribes assume primary responsibility for day-to-day program operations. EPA is to provide consistent environmental leadership at the national level, develop general program frameworks, establish standards as required by the CWA, provide technical support to States and Tribes in maintaining high quality programs, and ensure national compliance with environmental quality standards. Currently two States (New Jersey and Michigan) have assumed the section 404 program.

One Tribal commenter felt that the proposed rule impinges on Tribal sovereignty, in that it does not allow Tribal decisions to undertake ditching activities for flood control without Federal review. This commenter also contended that the agencies did not comply with Executive Order 13084 which would have required that the agencies consult with the Tribes on the proposed rule under certain circumstances. The commenter stated that the agencies' conclusion that the proposed rule will not significantly effect Indian communities nor impose significant compliance costs on Indian Tribal governments is erroneous. As mentioned above, today's rule does not change program jurisdiction. In addition, it does not create any new formal process. In fact, unlike the proposal, the final rule does not employ a rebuttable presumption, and also has been clarified to expressly provide that it does not shift any burden in any administrative or judicial proceeding under the CWA. We thus believe the rule does not create an impingement to Tribal sovereignty or significantly affect Tribal communities.

IV. Administrative Requirements

A. Paperwork Reduction Act

This action does not impose any new information collection burden or alter or establish new record keeping or reporting requirements. Thus, this action is not subject to the Paperwork Reduction Act.

B. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), we must determine whether the regulatory action is "significant" and therefore subject to review by the Office of Management and Budget (OMB) and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or

State, local, or Tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a "significant regulatory action" in light of the provisions of paragraph (4) above. As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations are documented in the public record.

C. Executive Order 13132 (Federalism).

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires us to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

This rule does not have federalism implications. As explained in sections II and III of today's preamble, the rule does not alter or enlarge section 404 program jurisdiction and therefore does not affect a discharger's (including State dischargers) obligation to obtain a section 404 permit for any discharge of dredged material into waters of the U.S. Rather, the rule identifies what types of activities are likely to give rise to an obligation to obtain such a permit under the definition of "discharge of dredged material" contained in our existing regulations. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Thus, Executive Order 13132 does not apply to this rule.

D. Regulatory Flexibility Act (RFA) as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 et seq.

The RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, a small entity is defined as: (1) A small business based on SBA size standards; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's rule on small entities, we certify that this action will not have a significant economic impact on a substantial number of small entities. As explained in sections II and III of today's preamble, the rule does not alter or enlarge section 404 program jurisdiction and therefore does not change any discharger's obligation to obtain a section 404 permit for any discharge of dredged material into waters of the U.S. Rather, the rule identifies what types of activities are likely to give rise to an obligation to obtain such a permit under the existing regulatory program. Moreover, we also do not anticipate that provision of project-specific information that a regulable discharge does not occur would result in significant costs.

E. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

We have determined that this rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any one year. As explained in sections II and III of today's preamble, the rule does not alter or enlarge section 404 program jurisdiction and therefore does not affect a discharger's obligation to obtain a section 404 permit for any discharge of dredged material into waters of the U.S. Rather, the rule identifies what types of activities are likely to give rise to an obligation to obtain such a permit under the definition of "discharge of dredged material" contained in our existing regulations. Thus, today's rule is not subject to the requirements of sections 202 and 205 of the UMRA. For the same reasons, we have determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. Thus, today's rule is not subject to the requirements of section 203 of UMRA.

F. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (the NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note), directs us to use voluntary consensus standards in our regulatory activities unless to do so would be

inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs us to provide Congress, through OMB, explanations when we decide not to use available and applicable voluntary consensus standards.

This rule does not involve technical standards. Therefore, we did not considering the use of any voluntary consensus standards.

G. Executive Order 13045

Executive Order 13045, entitled Protection of Children From Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) Was initiated after April 21, 1997, or for which a notice of proposed rulemaking was published after April 21, 1998; (2) is determined to be "economically significant" as defined under Executive Order 12866, and (3) concerns an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children. If the regulatory action meets all three criteria, we must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives that we considered.

This final rule is not subject to Executive Order 13045 because it is not an economically significant regulatory action as defined by Executive Order 12866. As explained in sections II and III of today's preamble, the rule does not alter or enlarge section 404 program jurisdiction and therefore does not affect a discharger's obligation to obtain a section 404 permit for any discharge of dredged material into waters of the U.S. Rather, the rule identifies what types of activities are likely to give rise to an obligation to obtain such a permit under the definition of "discharge of dredged material" contained in our existing regulations. Furthermore, it does not concern an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children.

H. Executive Order 13084

Under Executive Order 13084, we may not issue a regulation that is not required by statute, if it significantly or uniquely affects the communities of Indian Tribal governments and imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance cost incurred by the Tribal governments, or we consult with those governments. If we comply by consulting, Executive Order 13084 requires us to provide the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of our prior consultation with representatives of affected Tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires us to develop an effective process permitting elected officials and other representatives of Indian Tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

Today's rule does not significantly or uniquely affect the communities of Indian Tribal governments, nor does it impose significant compliance costs on them. As explained in sections II and III of today's preamble, the rule does not alter or enlarge section 404 program jurisdiction and therefore does not affect a discharger's obligation to obtain a section 404 permit for any discharge of dredged material into waters of the U.S. Rather, the rule identifies what types of activities are likely to give rise to an obligation to obtain such a permit under the definition of "discharge of dredged material" contained in our existing regulations. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

I. Environmental Documentation

As required by the National Environmental Policy Act (NEPA), the Corps prepares appropriate environmental documentation for its activities affecting the quality of the human environment. The Corps has made a determination that today's rule does not constitute a major Federal action significantly affecting the quality of the human environment, and thus does not require the preparation of an Environmental Impact Statement (EIS). One commenter expressed the view that an Environmental Impact Statement (EIS) was necessary for the rule. However, as we noted in the proposed rule's preamble, the Corps prepares appropriate NEPA documents, when required, covering specific permit situations. The implementation of today's rule would not authorize anyone (*e.g.*, any landowner or permit applicant) to perform any work involving regulated activities in waters of the U.S. without first seeking and obtaining an appropriate permit authorization from the Corps. As explained in sections II and III of today's preamble, the rule does not alter or enlarge section 404 program jurisdiction and therefore does not affect a discharger's obligation to obtain a section 404 permit for any discharge of dredged material into waters of the U.S. Rather, the rule identifies what types of activities are likely to give rise to an obligation to obtain such a permit under the definition of "discharge of dredged material" contained in our existing regulations. Accordingly, the Corps continues to believe an EIS is not warranted and has prepared an environmental assessment (EA) for the rule.

J. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. We will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective February 16, 2001.

List of Subjects

33 CFR Part 323

Water pollution control, Waterways.

40 CFR Part 232

Environmental protection, Intergovernmental relations, Water pollution control.

Corps of Engineers

33 CFR Chapter II

Accordingly, as set forth in the preamble 33 CFR part 323 is amended as set forth below:

PART 323—[AMENDED]

1. The authority citation for part 323 continues to read as follows:

Authority: 33 U.S.C. 1344.

2. Amend section 323.2 as follows:

a. In paragraph (d)(1) introductory text, remove the words "paragraph

(d)(2)" and add, in their place, the words "paragraph (d)(3)".

b. Redesignate paragraphs (d)(2) through (d)(5) as paragraphs (d)(3) through (d)(6), respectively.

c. Add new paragraph (d)(2).

d. In newly redesignated paragraph (d)(4), in the first sentence of paragraph (d)(4)(i) remove each time they appear the words "paragraphs (d)(4) and (d)(5)" and add, in their place, the words "paragraphs (d)(5) and (d)(6)", remove paragraph (d)(4)(iii), and redesignate paragraph (d)(4)(iv) as new paragraph (d)(4)(iii).

The addition reads as follows:

§ 323.2 Definitions.

* * * * *

(d) * * *

(2)(i) The Corps and EPA regard the use of mechanized earth-moving equipment to conduct landclearing, ditching, channelization, in-stream mining or other earth-moving activity in waters of the United States as resulting in a discharge of dredged material unless project-specific evidence shows that the activity results in only incidental fallback. This paragraph (i) does not and is not intended to shift any burden in any administrative or judicial proceeding under the CWA.

(ii) *Incidental fallback* is the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal. Examples of incidental fallback include soil that is disturbed when dirt is shoveled and the back-spill that comes off a bucket when such small volume of soil or dirt falls into substantially the same place from which it was initially removed.

* * * * *

Dated: January 8, 2001.

Joseph W. Westphal,

Assistant Secretary of the Army (Civil Works), Department of the Army.

Environmental Protection Agency

40 CFR Chapter I

Accordingly, as set forth in the preamble 40 CFR part 232 is amended as set forth below:

PART 232—[AMENDED]

1. The authority citation for part 232 continues to read as follows:

Authority: 33 U.S.C. 1344.

2. Amend section 232.2 as follows:

a. In paragraph (1) introductory text of the definition of "Discharge of dredged material", remove the words "paragraph (2)" and add, in their place, the words "paragraph (3)".

b. In the definition of "Discharge of dredged material", redesignate paragraphs (2) through (5) as paragraphs (3) through (6), respectively.

c. In the definition of "Discharge of dredged material", add new paragraph (2).

d. In the first sentence of newly redesignated paragraph (4)(i) remove each time they appear the words "paragraphs (4) and (5)" and add, in their place, the words "paragraphs (5) and (6)", remove paragraph (4)(iii), and redesignate paragraph (4)(iv) as new paragraph (4)(iii).

The addition reads as follows:

§ 232.2 Definitions.

* * * * *

Discharge of dredged material * * *

(2)(i) The Corps and EPA regard the use of mechanized earth-moving equipment to conduct landclearing, ditching, channelization, in-stream mining or other earth-moving activity in waters of the United States as resulting in a discharge of dredged material unless project-specific evidence shows that the activity results in only incidental fallback. This paragraph (i) does not and is not intended to shift any burden in any administrative or judicial proceeding under the CWA.

(ii) *Incidental fallback* is the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal. Examples of incidental fallback include soil that is disturbed when dirt is shoveled and the back-spill that comes off a bucket when such small volume of soil or dirt falls into substantially the same place from which it was initially removed.

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Dated: January 9, 2001.

Carol M. Browner,

Administrator, Environmental Protection Agency.

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