

Nos. 98-2256, 98-2370

In the
United States Court of Appeals for the Fourth Circuit

UNITED STATES OF AMERICA,

Plaintiff/Appellant/Cross-Appellee,

v.

JAMES S. DEATON & REBECCA DEATON,

Defendants/Appellees/Cross-Appellants.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

**BRIEF OF THE AMERICAN FARM BUREAU FEDERATION
AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE**

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RULE 26.1 STATEMENT

Amicus American Farm Bureau Federation is a not-for-profit organization that has no parent corporation. No publicly held corporation owns 10% or more of its stock.

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INTEREST OF THE *AMICUS CURIAE* AND SUMMARY OF ARGUMENT

The American Farm Bureau Federation (“AFBF”) is a voluntary general farm organization established in 1920 under the laws of the State of Illinois. AFBF was founded to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. AFBF has member organizations in all 50 states and Puerto Rico, representing more than 4.8 million member families. AFBF has participated as an *amicus curiae* in many cases involving issues of importance to its members in the U.S. Supreme Court and the courts of appeals, including issues arising under the Clean Water Act. All parties have consented to AFBF’s participation as an *amicus* in this case, and AFBF has lodged their letters of consent with the clerk.

American farmers and ranchers have a direct stake in the outcome of this appeal. The U.S. Corps of Engineers’ unlawful assertion of jurisdiction over isolated wetlands, based on an improperly expansive interpretation of its own “adjacency” regulations, threatens to bring much agricultural and ranch land within the Corps’ regulatory sphere. The last thing that farmers and ranchers need, at what is already a time of economic crisis in the industry, is another layer of regulation to drive up their costs of doing business, entangle them in endless red tape, and prevent them from

using their land in the most productive way possible. In addition, the question whether “sidecasting” is prohibited by the Clean Water Act is an issue that directly affects AFBF’s members. Although the Corps may not treat “normal” farming activities (such as ploughing) as violations of the Act, activities that the Corps may not regard as “normal”—though farmers deem them essential to the efficient and productive use of their land—potentially involve “sidecasting.” It is of critical importance to this Nation’s farmers and ranchers (and to the consumers they supply with food and other basic necessities) that the prohibitions in the Clean Water Act not be expanded by regulatory fiat to encompass ordinary practices that Congress never contemplated would be subject to micro-management by bureaucratic federal agencies.

Amicus AFBF thus has a vital interest in ensuring that the Clean Water Act is interpreted in accordance with Congress’ intentions and that the Corps does not assert authority over farm and ranch practices that Congress never meant the Act to reach. We demonstrate below that the district court properly held that sidecasting is not prohibited by the Act. We show that the district court’s decision should also be affirmed on the alternative ground that, under the correct interpretation of the “adjacent wetland” rule, the Corps lacked jurisdiction over respondents’ land.

ARGUMENT

I. THE DEATONS' PROPERTY IS NOT AN "ADJACENT WETLAND" SUBJECT TO THE JURISDICTION OF THE CORPS

The regulatory authority of the Army Corps of Engineers ("Corps") over the discharge of pollutants, conferred by the Clean Water Act ("CWA"), is limited to discharges into "navigable waters," defined as "waters of the United States." 33 U.S.C. § 1344. Those waters include, according to the Corps' regulations, wetlands "adjacent" to interstate waters, with "adjacent" defined as "bordering, contiguous, or neighboring." 33 C.F.R. § 328.3. Any wetlands on the Deatons' property are not "adjacent wetlands." They manifestly do not "border" or "neighbor"—nor are they "contiguous" with—any waters of the United States. The district court's ruling that wetlands on the Deatons' property are contiguous with the Chesapeake Bay cannot be reconciled with the plain meaning of "contiguous," the plain language of the Corps' regulations, and the record in this proceeding.

Webster's defines "contiguous" as "touching along boundaries often for considerable distances." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 492, 1514 (1971). This definition does not fit the attenuated link between the Deatons' property and the Chesapeake Bay or its tributaries. For a few months during the winter, water drains from an area on the Deatons' property into a man-made drainage

ditch some 220 feet away. That water in turn drains into a culvert that is connected to another ditch, which then intersects the “Klein Prong” and drains into the “Perdue Creek Prong.” The latter intersects with Beaverdam Creek some 7300 feet to the west, which discharges into the Wicomico River, a tributary of the Chesapeake Bay. Given the long, convoluted, and protracted journey that moisture on the Deatons’ property must traverse to reach the Wicomico River, making any connection between the Deatons’ property and the Chesapeake Bay highly attenuated at best, the Deatons’ property could be deemed an “adjacent wetland” only by wrenching “adjacency” from its plain meaning.

Moreover, even this attenuated connection depends on linking the Deatons’ property to outlying waters by an artificial drainage ditch. Such a connection does not make the Deatons’ property contiguous with jurisdictional waters. The district court’s reliance on *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), and *United States v. Eidson*, 108 F.3d 1336 (11th Cir. 1997), for its position to the contrary was misplaced. Neither of those decisions addressed whether a constructed surface water connection is sufficient by itself to make a wetland “adjacent” and thus subject to the Corps’ jurisdiction.

Courts that *have* addressed this issue have concluded that such a connection is *not* sufficient. In *United States v. Sargent County Water Resource Dist.*, 876 F.

Supp. 1081 (D.N.D. 1992), the government argued that wetlands draining into a river seven miles away were “contiguous” to the river “due to their surface water connection with the river via [a drain].” The court held that it “strain[ed] logic to define contiguous in that manner” and held that the wetlands at issue did not fit the regulatory definition of “adjacent wetlands.” *Id.* at 1086 & n.10. In *Sierra Club v. United States Army Corps of Engineers*, 935 F. Supp. 1556, 1583 n.39 (S.D. Ala. 1996), the court similarly held that wetlands draining into constructed drainage ditches that in turn flowed into creeks that eventually fed into a river were not “adjacent wetlands.” The court reasoned that “[s]uch attenuated connections between the wetlands and a tributary system cannot possibly have been contemplated as ‘adjacent’ by the drafters.” *Ibid.* Here, the purported connection between the Deaton’s property and waters of the United States is every bit as attenuated as in *Sargent* and *Sierra Club*.

Moreover, the district court’s view that a mere surface water connection is sufficient to establish wetland adjacency is inconsistent with the Corps’ regulations and the case law. If a mere surface water connection were enough to satisfy the adjacency requirement, the regulations should have said so. They do not, and thus the Corps’ regulations do not authorize treating the Deatons’ property as an adjacent wetland. See *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994) (“Neither the Clean Water Act nor the EPA’s definition [has]

authority over ground waters, just because these may be hydrologically connected with surface waters”).^{1/}

II. THE DEATONS’ SIDECASTING WAS NOT THE DISCHARGE OF A POLLUTANT

A. Sidecasting Is Not The Addition Of A Pollutant To Navigable Waters

All parties acknowledge that the Deatons did not need a permit merely to excavate a drainage ditch. The government contends, however, that by placing (or “sidecasting”) the excavated soil alongside the ditch without obtaining a permit, the Deatons discharged a pollutant in violation of 33 U.S.C. §§ 1311(a) and 1344. The government’s position is wrong because the CWA plainly defines “discharge of a pollutant” as an “*addition* of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12)(A) (emphasis added). Just as digging a hole to plant a rose bush does not *add* soil to one’s garden, the Deatons did not *add* any excavated soil to the area of the ditch. The government’s position can be sustained only by refusing to give effect to the plain meaning of “addition” in § 1362(12)(A).

^{1/} The Corps’ extension of “adjacent wetlands” to comprise “[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like” (33 C.F.R. § 328.3) says nothing about man-made ditches and has no application here.

Judge Niemeyer’s opinion in *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997), gives effect to the plain meaning of “addition.” He explained that an addition “requires the introduction of a *new* material into the area, or an *increase* in the amount of a type of material which is already present.” *Id.* at 259 (emphasis added). Sidecasting does not represent an addition of a pollutant because it neither introduces new material nor increases the amount of existing material into a wetland. “[T]he movement of native soil a few feet within a wetland does not constitute the discharge of that soil into that wetland.” *Ibid.* Judge Niemeyer properly noted that the government’s attempt to make the word “addition” synonymous with “move” would “criminaliz[e] every artificial disturbance of the bottom of any polluted harbor because the disturbance moved polluted material about.” *Id.* at 260. Thus, he concluded, “[s]idecasting from ditch-digging in itself effects no addition of a pollutant.” *Ibid.*

In our view, the statute unambiguously mandates Judge Niemeyer’s conclusion. Congress’ use of the word “addition” would be rendered a nullity if a violation could be based on a minimal *movement* of excavated soil. Congress could have forbidden the “movement” or “placement” or “relocation” or “dropping” or “transfer” of such soil. Instead, Congress carefully employed the more restrictive term “addition” to define the proscribed activity. As the Sixth Circuit has put it, if Congress wanted to

require a CWA permit to regulate all sources of pollution, “‘it would easily have chosen suitable language, *e.g.*, all pollution released through a point source.’ Instead, Congress chose the word ‘addition.’” *National Wildlife Fed’n v. Consumers Power Co.*, 862 F.2d 580, 586 (6th Cir. 1988), quoting *National Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 176 (D.C. Cir. 1982). By doing so, Congress effectively immunized sidcasting from the Section 404 permit requirement.

The Deatons’ placement of the excavated soil next to their drainage ditch did not “add” any pollutant to the site. In *National Mining Ass’n v. United States Army Corps of Engineers*, 145 F.3d 1399, 1404 (D.C. Cir. 1998), the D.C. Circuit rejected the Corps’ position that “incidental fallback” of dredged material is the “discharge” of a pollutant, explaining that such fallback “represents a net withdrawal, not an addition, of material” and thus “cannot be a discharge.” In words that apply precisely here, the court reasoned: “we fail to see how there can be an addition of dredged material when there is no addition of material.” *Id.* at 1404. See also *North Carolina v. FERC*, 112 F.3d 1175, 1187 (D.C. Cir. 1997) (“the word ‘discharge’ contemplates the addition, not the withdrawal, of a substance or substances”). By the same reasoning, because the amount and character of the soil in the area of the Deatons’ ditch did not change as a result of their sidcasting, there was no net addition of material that would constitute a discharge within the meaning of the CWA.

This Court has recognized that pollutants passing through a power plant and returning to waterways are not “an addition” to navigable waters and so are not a prohibited “discharge.” *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1377 (4th Cir. 1976). Other courts, too, have recognized that the mere shifting of materials does not constitute an “addition” for purposes of the CWA. As the Sixth Circuit held in *Consumers Power*, 862 F.2d at 584, a dam’s movement of pollutants already in the water could not be an “addition” of pollutants to navigable waters requiring a § 404 permit. To the contrary, the court explained, “addition” reasonably means “the introduction of a pollutant to water from the outside world.” Here, the ditch next to the Deatons’ sidecasted soil was not “the outside world.” See also *Gorsuch*, 693 F.2d at 176 (dissolved minerals and sediment created by storage dam were not “added” by water released into surrounding water).

In this case, an examination of the site of the Deatons’ ditch before and after it was excavated would have revealed that the same amount of soil—indeed, precisely the *same* soil—was present. Such a “zero sum game” is far removed from the “addition” of pollutants that concerned Congress when it enacted the CWA. Like the incidental fallback at issue in *National Mining*, sidecasted soil is not “an addition of anything”—it merely “returns dredged material virtually to the spot from which it came.” 145 F.3d at 1403.

B. The Government's Arguments Are Meritless

Unable to erase the word “addition” from the statute, the Government tries to argue around it. All its arguments fail.

First, the government contends (at 35) that if Congress wanted to limit the definition of discharge, “it would have said so.” But Congress *did* say so by using the word “addition.” As noted above, Congress could have used a broader term like “deposit” of any pollutant, but it chose to use the significantly more restrictive term “addition.” See *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (noting, in construction of statute, that “covering” is a more restrictive term than “relating to”).

Second, the government contends (at 36-37) that a restrictive reading of “addition” cannot be reconciled with Congress’ use of the terms “dredged” and “fill material” in the CWA. But “fill material” does *not* appear in the exclusive list of pollutants in 33 U.S.C. § 1362(6), and the issue here is not whether dredged soil may be a pollutant but whether moving it a few feet from the dredged ditch constitutes an “addition” to navigable waters. As demonstrated above, the government’s reading does violence to the plain language of the statute by equating “addition” with such a *de minimis* movement.

Third, the government points to an exemption from the permit requirement in 33 U.S.C. § 1344(f) for “the discharge of dredged or fill material” associated with the

construction or maintenance of irrigation or drainage ditches. The government contends (at 39-40) that this exemption makes sense only if Congress believed that such construction or maintenance would result in a “discharge.” But the exemption by its terms applies only to discharges that otherwise violate the Act, not to slight shifts of soils that, like sidecasting, do not constitute an “addition” of a pollutant. Thus, as the D.C. Circuit rejoined to the government’s similar argument in *National Mining*, the import of the exemptions in § 404(f) is “far less telling” than the government would like. 145 F.3d at 1405.

Finally, the government argues (at 32) that placement of the removed soil next to the ditch “can harm the aquatic environment.” But, as the Sixth Circuit has explained, such a factor, even if true, “is irrelevant under the statute” because a “harmful character” does not transform activity that is not an “addition” into the discharge of a pollutant. *Consumers Power*, 862 F.2d at 586.^{2/}

C. The Corps’ Unreasonable Reading of “Addition” Warrants No Deference

The government’s argument (at 43-48) that its views on sidecasting are entitled to deference represents a misunderstanding of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* deference is

^{2/} The government’s imaginative speculation (at 38) about converting “marsh into uplands” is counterfactual and has no bearing on this sidecasting case.

appropriate only where a statutory provision is ambiguous and the government's construction is reasonable. See *Bell Arthur Water Corp. v. Greenville Utils. Comm'n*, 1999 WL 198706, at *7 (4th Cir. Apr. 9, 1999) (“under the *Chevron* doctrine, deference to an agency's interpretation of a statute is not proper if the language of the statute is plain”); *Presley v. Etowah County Comm'n*, 502 U.S. 491, 508 (1992) (*Chevron* deference applies “only if the administrative interpretation is reasonable”). As demonstrated above, the statute is not ambiguous and the Corps' construction is not reasonable. The statute clearly requires a permit only for an “addition” of a pollutant to navigable waters, and the Corps' construction of “addition” to encompass incidental sidecasting is not reasonable. As the D.C. Circuit held in *National Mining*, the government's unreasonable reading of “addition” is entitled to no deference. 145 F.3d at 1406 n.8.

Even if the meaning of “addition” were open to debate, the Corps' construction is not reasonable because, like the incidental fallback in *National Mining*, sidecasting is “a practically inescapable by-product” of lawful activities. 145 F.3d at 1403. There is no practicable means of dredging a ditch without depositing the dredged soil nearby, at least temporarily. One might theoretically be able to dig the ditch and cart off the material before it hits the ground. But requiring property owners to contort their way through such costly and unrealistic hoops is precisely the sort of unreasonable

overreaching on the part of government officialdom that led the D.C. Circuit to invalidate the Tulloch Rule in *National Mining*.

It is important to recognize the government's real agenda. Its focus on sidecasting is really a means to a larger end—the proscription of digging drainage ditches without a Section 404 permit. Because sidecasting is for all practical purposes part and parcel of dredging a ditch, requiring a permit for sidecasting effectively requires a permit for the mere act of dredging.

Yet, the Clean Water Act has no application to the act of dredging. Dredging is subject to a “completely independent” statutory scheme, namely, Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, which makes it illegal to “excavate” in navigable waters of the United States without a Corps permit. *National Mining*, 145 F.3d at 1404. As the D.C. Circuit observed, the Corps wants to disregard this statutory division of labor because the Corps’ “geographic jurisdiction is narrower under the Rivers and Harbors Act than under the Clean Water Act.” *Ibid.* But Congress has determined which statute applies to which activity, and only Congress—not the Corps—has the authority to modify that statutory set-up. “[T]he agencies can[not] do it simply by declaring that incomplete removal constitutes addition.” *Id.* at 1404-1405. Accordingly, the Corps’ attempt to assert regulatory

control over dredging by requiring a permit for incidental sidecasting is beyond its authority and should be rejected.

This case is a perfect illustration of Corps discretion run amok. The Deatons' deposit of soil alongside the ditch from whence they lawfully excavated it is not what Congress had in mind by water pollution. The issue here is not whether the Corps properly may regulate *some* redeposits of pollutants on wetlands. Clearly, it may. But, as the court in *National Mining* explained, it is the responsibility of the Corps to articulate a reasonable "bright line" between what constitutes an "addition" and what does not. 145 F.3d at 1405. People like the Deatons depend on bright-line legal rules when purchasing, selling, and developing property, just as farmers and ranchers depend on such rules when making productive use of their land. Under any reasonable standard, the Deatons' incidental and necessary movement of soil from their drainage ditch cannot be deemed to have crossed the line and become an "addition" and thus a "discharge" of pollution. The Corps' we-know-it-when-we-see-it approach to enforcement of the CWA destabilizes property rights and overthrows the regime of measured environmental protection established by Congress.

Farmers and ranchers are not hostile to environmental protection—our livelihoods depend on it. We simply would like to see a little clean air—the fresh air of common sense—blow through Washington, D.C. Common sense dictates that

moving soil a few feet by human hands is equivalent to (and no more harmful than) the natural soil erosion caused by wind and rain. See *Missouri ex rel. Ashcroft v. Department of the Army*, 672 F.2d 1297, 1304 (8th Cir. 1982) (“soil erosion” is not “an ‘addition’ of a pollutant”). The goal of fighting water pollution is not furthered by misfocusing limited resources on hunting down people like the Deatons and hounding them through the courts. This case represents the ideal vehicle for reining in overzealous regulators and ensuring that the purity of our waters is preserved by purely lawful and reasonable enforcement.

CONCLUSION

For the foregoing reasons, and those set forth in the brief of respondents, the judgment of the district court should be affirmed.

Respectfully submitted.

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