Incidental Fallback

"Incidental Fallback" represents a net withdrawal, not an addition of material. Incidental Fallback cannot be a discharge within the meaning of the Clean Water Acts (CWA) as the CWA only permits and regulates additions. All gold mining suction dredges are designed to withdraw heavy metal (based on their specific gravity) from gravels and soils, it cannot be said that suction dredges add anything within the meaning of the CWA. It is simple math, the difference between addition and subtraction. Those activities that add can require a 401, 402, or 404 permit, those that subtract do not require a permit at all. That is the intent of Congress. The EPA and the Army Corp has for the past 30 years tried to redefine "Incidental Fallback" under a regulated and permitted "redeposit" category, but the courts have found this agency practice invalid on numerous occasions and instructed the EPA and Army Corp to remove their offending regulatory expansion.

To illustrate this point originally in *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1404 (D.C.Cir.1998). The court explained that, *"[b]ecause incidental fallback represents a net withdrawal, not an addition, of material**, it cannot be a discharge**" and questioned "how there can be an addition of dredged material when there is no addition of material."* Emphasis added.
And
"*This understanding of "discharge" excludes the small-volume incidental discharge that accompanies excavation and landclearing activities. Senator Muskie explained that "the bill tries to free from the threat of regulation those kinds of manmade activities which are sufficiently de minimis as to merit general attention at the State and local level and little or no attention at the State and local level and little or no attention at the national level." Senate Report on S. 1952, 95th Cong., reprinted in 1977 Legis.Hist. at 645. Senator Domenici stated that "we never intended under section 404 that the Corps of Engineers be involved in the daily lives of our farmers, realtors, people involved in forestry, anyone that is moving a little bit of earth anywhere in this country that might have an impact on navigable streams." Senate Debate, id. at 924.*

This holding stands today and is reflected from the *National Association of Homebuilders v. Corps* decision (D.D.C. 2007) invalidating the January 17, 2001, amendments to the Clean Water Act Section 404 regulatory definition of "discharge of dredged material" (referred to as the "Tulloch II" rule). The U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) have promulgated a joint final rule to amend this definition by conforming the Corps' and EPA's regulations to the language of the court's opinion by deleting language from the regulation that was invalidated.

The State, as mandated by the CWA and funded by federal law, cannot carry out an objective when it conflicts or is inconsistent with express Congressional intent, exemptions, and purpose. See *CA Coastal Commission v. Granite Rock 480 U.S. 572*. State law is preempted if Congress has evidenced intent to occupy entirely given field (as is the case here) or, where Congress has not entirely displaced state regulation, if state law actually conflicts with federal law. If the State thinks otherwise, the clear legislative history of Congress demonstrates that the state law is federally pre-empted on this matter of "Incidental Fallback"as illustrated previously by Senator Muskie