No. 01-1243

IN THE
Supreme Court of the United States

BORDEN RANCH PARTNERSHIP, *et al.*,
Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN FOREST & PAPER ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

This brief addresses only the second of three questions presented by Petitioners:

Whether deep plowing ranchland that is farmable in its natural state to plant deep-rooted crops is statutorily exempt from regulation under Clean Water Act section 404(f)'s exemption for any discharge from "normal farming … activities such as plowing…."

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INTEREST OF *AMICUS CURIAE*

American Forest & Paper Association ("AF&PA") is the national trade association for the forest, pulp, paper, and wood products industry.[1] AF&PA represents approximately 130 member companies that grow, harvest, and process wood and wood fiber; manufacture pulp, paper, and paperboard products from both virgin and recovered fiber; produce solid wood products; and import and export unmanufactured wood products. AF&PA is also the umbrella for more than 60 affiliate member associations that provide outreach to more than 10,000 companies.

The Clean Water Act ("CWA") section 404(f) permitting exemption for "normal farming, silviculture, and ranching activities" – and the "recapture" provision that eliminates that exemption for certain activities – are of vital interest to AF&PA's members. Normal silvicultural activities such as timber harvesting, minor drainage, plowing, seeding, and cultivating are essential management practices in many wetland forests. Such activities often *necessarily* involve the minor or temporary modification of wetland hydrology and yet are fully compatible with long-term operations that maintain the wetland's status and function.

These activities are essential to ongoing forestry operations on millions of acres of privately owned forested

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[1] Letters indicating the parties' consent to the filing of this *amicus curiae* brief have been filed with the Clerk of the Court. Pursuant to this Court's Rule 37.6, AF&PA states that counsel for a party did not author this brief in whole or in part and that no person other than AF&PA made a monetary contribution to the preparation or submission of this brief.

wetlands across the United States. Moreover, although forestry is fully compatible with the wetland characteristics of these areas, these normal forestry activities sometimes fall within the expansive definition of a "discharge of dredged or fill material" into "navigable waters" under the CWA (particularly as interpreted by the court below). Thus, many U.S. forestry operations rely on the CWA section 404(f) exemption to conduct their operations without the delay, expense, and red tape of seeking CWA permits for these activities.

AF&PA's interest is not in the particular outcome of this case in terms of whether the "deep plowing" activity at issue is viewed as exempt or not exempt. Instead, AF&PA's interest is in the Court's analysis of CWA section 404(f)'s normal farming, forestry, and ranching exemption and recapture provision, in the event that the Court reaches those issues. AF&PA wishes to ensure that these provisions are interpreted in a manner that preserves the exempt status of normal forestry activities that are consistent with maintaining ongoing operations in a wetland setting.

SUMMARY OF ARGUMENT

AF&PA endorses – and will not repeat – the view of Circuit Judge Gould and the Petitioners that the mere disturbance of soils by plowing cannot constitute the "addition" of dredged or fill material (or any other pollutant) and therefore cannot trigger regulation under CWA section 404. This brief concerns only the questions that arise if the Court finds that Petitioners' deep plowing activity *did* cause a "discharge" of dredged or fill material under the CWA. In that event, two questions must be addressed to determine whether the discharge is nevertheless exempt from regulation. Those questions are: (1) did the discharge result from a "normal" farming, silviculture, or ranching activity

within the meaning of CWA section 404(f)(1)? and (2) if so, is the discharge "recaptured" for CWA regulation by virtue of section 404(f)(2)? AF&PA does not discuss these questions with reference to the "deep plowing" activity at issue in this case. Instead, AF&PA provides additional views to assist in the Court's analysis of section 404 in a manner that achieves the purposes of the statute with respect to a broader universe of activities and a larger community of operations that rely on the exemption. Specifically, AF&PA urges the Court to consider the following points when interpreting the section 404(f) exemption:

1. Consistent with the language and purpose of the section 404(f) exemption, "normal" farming and forestry activities may encompass a wide range of practices, some of which *necessarily* involve minor or temporary changes to wetland hydrology. Several of the forestry activities expressly identified as "normal" in section 404(f), for example – including minor drainage, harvesting, and seeding – invariably cause temporary changes to wetland hydrology and yet are fully compatible with maintaining a wetland's status and function over the long term. The exemption of such activities from CWA regulation – despite their incidental impact on wetlands – is precisely the purpose of section 404(f).

2. "Normal" activities also encompass changes in management practices and technology over time. Because the purpose of section 404(f) is to facilitate long-term farming and forestry operations in wetland environments, the exemption for "normal" activities must accommodate improvements in technologies and practices. Thus, activities may be "normal" even if they are not accomplished through "traditional" techniques.

3. If an activity is "normal" within the farming, forestry, or ranching community as a general matter, discharges incidental to that activity at any particular location nevertheless may be subject to CWA regulation pursuant to the "recapture" provision. Under the plain language of CWA section 404(f)(2), however, "recapture" occurs only where *two* elements are present: (1) the purpose of the activity is to bring an area of the "navigable waters" into a use to which it has not previously been subject; *and* (2) the activity may impair the flow or reduce the reach of such navigable waters. These two elements work together to avoid CWA permitting requirements for farming and forestry operations that are compatible with wetland environments. Any interpretation of section 404(f) that allows regulation of normal farming and forestry activities on the basis of either element alone would defeat Congress's purpose of exempting such operations. In particular, a one-part recapture test based solely on the second element of the statutory test (impairing the flow or reducing the reach of waters) would jeopardize the exemption for innumerable on-going wetland farming and forestry operations that necessarily cause minor or temporary wetland impacts (see 1. above).

ARGUMENT

I. EXEMPT "NORMAL" FARMING, FORESTRY, AND RANCHING ACTIVITIES MAY AFFECT WETLAND HYDROLOGY.

Section 404 of the 1972 CWA established a federal permitting program for any "discharge" of "dredged or fill material" into "navigable waters." *See* Pub. L. No. 92-500, § 404, 86 Stat. 816, 884 (1972) (codified at 33 U.S.C. § 1344). After courts interpreted the term "navigable waters" to include certain wetlands, section 404 permitting

became the primary CWA program affecting activities in wetlands, although the word "wetlands" appears nowhere in that section. Responding to wide-spread public concern over federal regulation of routine land use activities that often occur in wetland areas, such as farming and forestry, in 1977 Congress enacted section 404(f) as a qualified exemption for certain discharges for which federal permitting was deemed unnecessary and unduly burdensome. *See* Pub. L. No. 95-217, § 67, 91 Stat. 1566, 1600-01 (1977) (codified at 33 U.S.C. § 1344(f)).[2]

Section 404(f)(1)(A) exempts any discharge of dredged or fill material that results from:

> normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting …, or upland soil and water conservation practices

33 U.S.C. § 1344(f)(1)(A). The remainder of section 404(f)(1) identifies other activities whose discharges are exempt, including maintenance of dikes, dams, and levees; maintenance of drainage ditches; and construction or maintenance of farm or forest roads where those activities meet specified "best management practices" to minimize adverse effects on the aquatic environment. *Id.* § 1344(f)(1)(B)-(F). The exemption of these activities is limited by section 404(f)(2) (the "recapture" provision), which provides for regulation if the discharge-generating activity is for the purpose of "bringing an area of the

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[2] Section 404(f) exempts specified discharges from permitting requirements under both CWA section 404 (dredge and fill permitting) and section 402 (permits for "discharges" of "pollutants" other than dredged or fill material). *See* 33 U.S.C. § 1344(f)(1).

navigable waters into a use to which it was not previously subject," where the water's flow or circulation may be impaired or its reach may be reduced. *Id.* § 1344(f)(2).

The statute does not define "normal" farming or forestry activities, other than by providing a list of such activities. The phrase "such as," however, makes clear that the list is illustrative, rather than exclusive. The term "normal" for purposes of section 404(f)(1) thus should be interpreted in accordance with its ordinary meaning, illuminated by the examples provided. *See Asgrow Seed Co. v. Denny Winterboer, et al.*, 513 U.S. 179, 187 (1995) (statutory terms that are not defined are given their ordinary meaning); *Norfolk & Western Ry. Co. v. Train Dispatchers*, 499 U.S. 117, 129 (1991) (general term should be construed as referring to items similar to specifically enumerated items).

The language of the exemption and the list of examples reveal that "normal" activities encompass a wide variety of earth-disturbing practices – some of which necessarily cause minor or temporary changes to wetland hydrology. "Minor drainage," for example – which is expressly identified as "normal" in section 404(f)(1) – by its terms involves *drainage*, *i.e.*, a reduction in water levels. "Harvesting" of trees in wetland forests, on the other hand, can cause temporary but significant *increases* in water levels, due to the loss of the removed trees' capacity for transpiration of water into the atmosphere. After harvest, "seeding" in wetland areas typically involves the placement of elevated soil beds to improve seedling survival and growth, which incidentally alters surface water flow in the area of the beds.

Although each of these activities causes temporary changes to wetlands, each is also fully compatible with maintaining the wetland's overall status and long term functioning. The exemption of discharges associated with

these activities thus precludes federal regulation *notwithstanding* the activities' incidental impacts on wetlands. *See* 123 Cong. Rec. 39,188 (1977) (Senator Muskie's comment that "it is understood that some of these activities may necessarily result in incidental filling and minor harm to aquatic resources"), *reprinted at* 3 A Legislative History of the Clean Water Act of 1977, A Continuation of the Legislative History of the Federal Water Pollution Control Act (1978) ("1977 Leg. Hist.") at 474. This is consistent with the balance struck by Congress to prevent the destruction of wetlands, while minimizing regulation of operations capable of using wetlands productively. *See* 123 Cong. Rec. 39,192 (1977) (Senator Stafford's comment that exemptions were adopted "to prevent over-regulation of activities that have little or no effect on the aquatic environment" but that regulation would continue for activities that convert water to dry land), *reprinted at* 3 1977 Leg. Hist. at 485; 123 Cong. Rec. 39,210 (1977) (Senator Wallop's remarks that the section 404 amendments were "carefully worded to provide protection from harmful activities, while reducing unnecessary government interference"), *reprinted at* 3 1977 Leg. Hist. at 528-29.

This careful balance is wise indeed, as the exemption of these wetland uses may well contribute more to wetland protection than would regulation. With tens of millions of wetland acres in private ownership, laws that facilitate the compatible productive use of these areas (*e.g.*, farming and forestry) can only diminish economic incentives to sell them into other uses that may be less compatible with their wetland character (*e.g.*, suburbs and shopping malls). For the exemption to function as intended, however, any interpretation must recognize that it exempts "normal" farming and forestry activities *regardless* of their incidental

impacts on wetlands, subject only to the limited "recapture" provision (discussed in Section III below).

II. EXEMPT "NORMAL" FARMING, FORESTRY, AND RANCHING ACTIVITIES NEED NOT USE TRADITIONAL TECHNIQUES.

Petitioners point out that this case concerns "traditional" plowing activity. *See, e.g.*, Pet. Br. at 2, 17, and 19. Farming, forestry, and ranching activities may be "normal," however, even if they are not accomplished through "traditional" means. Farming and forestry practices are not static, but evolve continually to reflect technological advancements, more efficient and productive management methods, and improvements in environmental practices. Because the purpose of the section 404(f) exemption is to facilitate *continued* farming and forestry in wetland environments, any judicial interpretation of the exemption must accommodate new practices consistent with modern operations.

In this context, normal *activities* – such as plowing, seeding, cultivating, and harvesting – connote the *function* being served, as opposed to the *technique* employed. Raising crops, timber, and livestock normally involves such *functions* as preparing and improving soils, establishing and protecting desired vegetation, controlling undesired or competing vegetation, harvesting crops, herding animals, and so on. New *techniques* continually evolve to better accomplish these fundamental objectives, and no operation's regulatory status under section 404 should hinge on its willingness to resist innovation. Thus, the relevant question in determining whether an activity is "normal" is not whether timber is fertilized from the ground or from the air, whether animals are herded on horseback or on all-terrain vehicles, or whether plows are pulled by mules or by tractor. Instead, the

relevant question is whether the activity performs a fundamental function associated with keeping lands in farming, forestry, or ranching use.

III. THE TWO ELEMENTS OF THE "RECAPTURE" PROVISION WORK TOGETHER TO MINIMIZE UNNECESSARY FEDERAL REGULATION OF FARMING, FORESTRY, AND RANCHING.

If an activity is "normal" within the farming, ranching, or forestry community as a general matter, discharges of dredged or fill material incidental to that activity at any particular location nevertheless may be subject to CWA regulation pursuant to the "recapture" provision. Under the plain language of CWA section 404(f)(2), however, "recapture" occurs only where *two* elements are present: (1) the purpose of the activity is to bring an area of the "navigable waters" into a use to which it has not previously been subject; *and* (2) the discharge may impair the flow or circulation, or reduce the reach, of such navigable waters. *See* 33 U.S.C. § 1344(f)(2). The United States Environmental Protection Agency ("EPA") and the United States Army Corps of Engineers ("the Corps") have explicitly recognized the two-part test for recapture, explaining that:

> [The recapture provision] involves a two-part test that results in an activity being considered *not* exempt when both parties [sic] are met: 1) does the activity represent a "new use" of the wetland and, 2) would the activity result in a "reduction in reach/impairment of the flow or circulation" of waters of the United States?

United States Environmental Protection Agency and United States Department of the Army, Memorandum for the Field,

"Clean Water Act Section 404 Regulatory Program and Agricultural Activities" (May 1990) at 2.[3] *See also*, United States Environmental Protection Agency, Memorandum from Gerald H. Yamada, EPA Acting General Counsel to Josephine S. Cooper, EPA Assistant Administrator for External Affairs (Feb. 8, 1985) ("EPA General Counsel Mem."), 1985 WL 71787 (E.P.A.G.C.), at 6 ("section 404(f)(2) has two requirements: the 'new use' requirement, and the 'reduction in reach/impairment of flow … [B]oth requirements must be met ….).

The Ninth Circuit's opinion in this case suggests that the panel majority found both elements satisfied. *See* 261 F.3d at 815 ("Converting ranch land to orchards and vineyards is clearly bringing the land 'into a use to which it was not previously subject,' and there is a clear basis in this record to conclude that the destruction of the soil layer at issue here constitutes an impairment of the flow of the nearby navigable waters."). Other aspects of the opinion, however, articulate an overbroad standard for recapture by essentially reading the "change in use" requirement out of the statute. Observing that Congress intended to "prevent the conversion of wetlands to dry lands," the court declares that activities are non-exempt where they "*change a wetland's hydrological regime*." *Id*. at 816. In this respect, the opinion suggests – wrongly – that a "change in a wetland's hydrological regime" *alone* will result in "recapture" and regulation, *regardless* of whether the wetland is being brought into a new use.

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[3] This Memorandum is available through EPA's internet web site at <http://www.epa.gov/owow/wetlands/cwaag.html> and <http://www.epa.gov/egi-bin/epaprintonly.cgi>.

This *one-step* recapture test based solely on a "change [in] a wetland's hydrological regime" contradicts the plain language of section 404(f)(2) as discussed above. Moreover, it would defeat the purpose of the exemption by sweeping innumerable normal wetland farming and forestry activities into the mire of CWA permitting. As noted in Section I, many existing forestry operations in wetland areas engage in essential activities that cause changes – sometimes substantial, albeit temporary, changes – to wetland hydrology. Such on-going operations are unquestionably intended to benefit from the section 404 exemption *notwithstanding* their recognized incidental impacts on wetlands. *See supra* pp. 6-7. Yet they would lose their exempt status if they were subject to regulation by virtue of their potential to "change a wetland's hydrological regime." The Ninth Circuit's one-step recapture test thus violates both the plain language and the clear purpose of section 404(f).

In establishing a one-part recapture test based solely on potential impacts to wetland hydrology, the panel appears to have misconstrued a particular recapture analysis established by regulation for activities that permanently *convert* wetlands to dry land. Based on the same legislative purpose mentioned by the panel – the desire to prevent the conversion of wetlands to dry land – EPA and the Corps promulgated regulations providing that the *conversion* of wetlands to dry land is a *presumptive* "change in use." *See* 40 C.F.R. § 232.3(b) (2001) ("A conversion of section 404 wetland to a non-wetland is a change in use of an area of waters of the U.S."); 33 C.F.R. § 323.4(c) (2001) (Corps regulation containing identical statement). Therefore, by regulation, any activity that permanently changes a wetland to dry land automatically satisfies *both* elements of the two-part "recapture" test: (1) the activity is deemed to effect a "change in use" (*i.e.,* a change from wetland use to non-

wetland use), and (2) because it converts wetland to dry land, the activity necessarily involves a reduction in the reach of the wetland. Discharges associated with otherwise "normal" farming or forestry activities that are used to permanently convert wetlands to non-wetlands thus are always "recaptured" under this regulatory interpretation.[4]

This special regulatory application of the recapture test essentially prevents the abuse of the exemption to destroy wetlands under the guise of on-going wetland farming, forestry, or ranching operations. It does not, however, alter the fundamental two-part recapture test that requires *both* a "change in use" *and* an impairment in flow or reduction in reach of a navigable water. Thus, discharges in connection with the activities of established farming or forestry operations (*i.e.*, where the first part of the test is not met) remain exempt even if they incidentally impair a wetland's flow or reduce its reach (*i.e.*, even if the second part of the test is met). A 1985 EPA General Counsel Memorandum explains in detail how the two-part test recaptures discharges associated with activities that *destroy* wetlands, while preserving the exemption for established wetland operations that *affect* wetlands without destroying them:

> The legislative history … leaves no doubt that the *destruction of the wetland character of an area (i.e.,*

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[4] It bears emphasis that even if an activity converts a wetland to dry land, CWA permitting requirements apply only if there is also a "discharge" (*i.e.*, an "addition") of dredged or fill material. *See* 33 U.S.C. § 1344(a). The CWA regulates *discharges*, not *activities* with particular environmental effects. As noted in Judge Gould's dissent below: "Congress prohibited the discharge or addition of any pollutant to navigable waters from any point source. It did not literally prohibit any conduct by farmers or ranchers that changes the hydrological character of their land." 261 F.3d at 821.

> *its conversion to uplands) is a change in use of the waters of the United States, and by definition also a reduction in their reach*, within the meaning of section 404(f)(2). The fact that some farming operations may have previously been conducted in the wetland without altering its wetland status, or that some new operation could theoretically be conducted without a discharge, does not mean that discharges associated with an operation which does convert the wetland are exempt. *Conversely, if there is already an established farming operation in a wetland, any discharges resulting from farming activities listed in the regulation which do not convert the wetland to upland are exempt, whether or not there is an intensification of farming, change in crops, etc.* Similarly, discharges from the construction of an irrigation ditch are exempt, even if they affect a wetland, as long as they do not convert the wetland to upland, bring it into an initial farming use, or otherwise bring a water of the United States into a new use, and reduce or impair its reach, flow, or circulation.

EPA General Counsel Mem. at 6-7.[5]

Although the Ninth Circuit seems to have concluded that the deep plowing at issue both: (1) brought navigable waters into a use to which they had not been subject (by plowing ranchland to prepare it for planting orchards and crops), and (2) *impaired the flow* of those waters, its opinion wrongly

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[5] The quoted portion of the EPA General Counsel Memorandum cross references CWA legislative history discussed several pages before, including statements by Senators Muskie (3 1977 Leg. Hist. at 474), Stafford (*id.* at 485), and Baker (*id*. at 523).

indicates that such a *change in wetland hydrology alone* is sufficient to negate the section 404(f) exemption. To the contrary, even under EPA's broad regulatory interpretation of the two-part statutory recapture test, the only wetland impact that presumptively satisfies both elements of the test is the permanent conversion of a wetland to a non-wetland. Under section 404(f)(2), any "normal" farming, forestry, or ranching activity that has lesser wetland impacts (*i.e.*, that impairs a wetland's flow or reduces its reach without changing its overall wetland status) remains exempt unless the purpose of the activity is to bring the wetland into a use to which it has not previously been subject.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed on the grounds that the disturbance of wetland soils by plowing is not the "addition" of dredged or fill material to navigable waters. However, to the extent that the Court addresses the CWA section 404(f) exemption and "recapture" provision for "normal" farming, forestry, and ranching activities, AF&PA respectfully asks that the Court correct the Ninth Circuit's flawed analysis of those provisions. The section 404(f) exemption can serve its purpose of protecting compatible wetland farming and forestry operations from the unnecessary burdens of CWA regulation only if the normal activities of established wetland farming and forestry operations are recognized as exempt, regardless of minor or temporary changes to wetland hydrology.

Respectfully submitted,

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