No. 01-1243

In The
Supreme Court of the United States

BORDEN RANCH PARTNERSHIP;
ANGELO K. TSAKOPOULOS,

Petitioners,

v.

UNITED STATES ARMY CORPS
OF ENGINEERS; UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

AMICUS BRIEF OF ASSOCIATION OF STATE WETLANDS MANAGERS IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

The Association of State Wetland Managers ("ASWM") submits this brief amicus curiae in support of Respondent United States.[1]

ASWM is a nonprofit federal 501(c)(3) membership organization dedicated to the protection and management of the Nation's wetland resources. The goals of the Association include the following: translate wetland science into fair and reasonable government policies; help states develop and implement wetland regulatory and management programs; improve the coordination of wetland programs and policies at all levels of government; facilitate the integration of wetlands into water resources and watershed management; and build conservation and restoration partnerships among states, tribes, local governments, not-for-profits, and other interested parties.

The primary purpose of this brief is to underscore the importance of the section 404 program of the Clean Water Act ("CWA") to the conservation of the nation's remaining wetlands, and to urge that Congress' careful balance of federal and state responsibilities under the CWA be preserved. Over the past 30 years, an effective federal-state partnership has been forged under the 404 program that has led to dramatic reductions in wetlands destruction nationwide. The success of this program depends upon the comprehensive regulation of activities that destroy wetland functions and values by dredging and filling. As will be shown, the conversion of wetlands and other waters of the United States to drylands through the

[1] Counsel for the parties have consented to the filing of this brief. No counsel for a party in this case authored any part of this brief, and no person other than amici or its counsel made a monetary contribution to the preparation or submission of this brief. See Sup. Ct. Rule 37.

process of "deep-ripping" is exactly the type of activity Congress sought to control through the 404 permit program.[2]

SUMMARY OF ARGUMENT

This case is not about the routine "plowing" of agricultural fields. It is about the use of bulldozers, tractors and specialized earthmoving equipment to convert aquatic areas to non-aquatic areas resulting, as the trial court found, in the "obliteration" of the nation's waters.

Petitioners' "deep-ripping" of the streams and wetlands on their property involves the "discharge [of] dredge and fill material" to "waters of the United States" from a "point source," thereby triggering the permit requirements of sections 301 and 404 of the CWA. The point sources are bulldozers and tractors equipped with specialized implements designed to break up compacted soil, including the impervious subsoil layers that maintain the hydrological integrity of the wetlands, disgorge large amounts of soil, rock, sand, clay, and biological materials, and redistribute (i.e., "add") these transformed materials (i.e., "pollutants") from uplands to wetlands, as well as from within the wetlands themselves, thereby filling and permanently destroying them. This is precisely the kind of activity Congress sought to regulate under section 404 of the CWA, as emphatically demonstrated in the 1977 CWA Amendments.

The type of activity undertaken here is not a "normal farming or ranching practice," and does not qualify for the "agricultural exemption" under section 404(f). To qualify

[2] ASWM has elected to brief only the first two questions certified by the Court and takes no position on the penalty calculation issue.

for this exemption, Petitioners must demonstrate, first, that their activity meets the strict requirements of section 404(f)(1); and, second, that the activity is not "recaptured" under section 404(f)(2). Petitioners cannot meet either test.

First, to qualify as a "normal" farming or ranching practice the activity must be part of an ongoing, established farming or ranching operation. Prior to Petitioners' acquisition in 1993, Borden Ranch was a working cattle ranch. Petitioners bought it to convert the rangeland to orchards and vineyards before subdividing it and selling it off. Deep-ripping had never been used on the land. Rather, deep-ripping was employed to physically change the land and its hydrological regime so that the property could be put to new and different horticultural and developmental uses.

Second, deep-ripping wetlands does not qualify as "plowing" under Army Corps of Engineer ("Corps") and Environmental Protection Agency ("EPA") regulations because it involves "the redistribution of soil, rock, sand or other materials in a manner which changes [an] area of the waters of the United States to dry land." The District Court's factual findings describe in detail how deep-ripping tears apart compacted soils and impervious layers, and redistributes the disgorged materials both horizontally and vertically, resulting in the filling of wetlands and streams.

Finally, even if deep-ripping could, in some situations, be considered a "normal farming practice," the conditional (f)(1) exemption does not apply where the discharge of dredge or fill material is "incidental to an activity whose purpose is to convert an area of waters of the United States into a use to which it was not previously subject, where the flow or circulation of waters of the United States may be impaired or the reach of such waters

reduced." Petitioners' deep-ripping was clearly designed to convert the streams and wetlands into a use to which they were not previously subject, to change the bottom elevation, and to alter the flow and circulation of such waters, in plain contravention of section 404(f)(2).

ARGUMENT

I. WETLAND CONSERVATION IS IN THE NATIONAL INTEREST

It was no accident that Congress included a special provision, section 404, to protect the nation's wetlands. The rich diversity of wetlands that dot the American landscape – swamps, marshes, bogs, fens, sloughs, prairie potholes, playa lakes, vernal pools, swales – are the primary pollution control systems of the nation's waters. See Office of Technology Assessment, U.S. Congress, *Wetlands: Their Use and Regulation* 48-52 (1983). They remove heavy metals at efficiencies ranging from twenty to one hundred percent. *Id.* at 49. They remove up to ninety-five percent of phosphorous, nutrients and conventional pollutants, the equivalent of a multi-million dollar treatment system. See Houck and Rolland, "Federalism in Wetlands Regulation: A Consideration Of Delegation Of Clean Water Act Section 404 and Related Programs To The States," 54 Md. L. Rev. 1242, 1248 (1995) (hereafter, *Houck & Rolland*). They purify and recharge groundwater, providing safe drinking water supplies for thousands of towns and cities and across the nation. *Id.* They provide critical spawning and nursery habitat for commercial and recreational fish and shellfish worth over $3 billion a year. See USEPA, Economic Benefits of Wetlands, www.epa.gov/owow/wetlands/facts/fact4.html. They are the last refuge of some 43% of federally-listed threatened and endangered species. See Niering, W.A., Endangered, Threatened And Rare Wetland Plants And Animals Of The Continental United States, in *The Ecology and Management of*

Wetlands, Vol. 1, *Ecology of Wetlands,* edited by D. D. Hook (1988).

Perhaps the most dramatic of the many "ecosystem services" that wetlands provide is flood control. In 1993, for example, the Mississippi River experienced the most devastating flood in the nation's history.[3] Over 50 people lost their lives; damages were between $12 and $16 billion.[4] A special task force assembled to study the cause of this disaster concluded that wetland loss throughout the Upper Basin was a significant contributing factor. See Scientific Assessment and Strategy Team, "Science for Floodplain Management into the 21st Century," Chapter 3 (June 1994). Noting that over 80% of the wetlands along the river have been drained since the 1940's, the report recommended greater emphasis on "non-structural" measures, including restoration of wetland and flood-plain functions to prevent a recurrence. *Id.*, Chapter 5; see also, Hey, D.L. and Philippi, N.S., "1995 Flood Reduction through Wetland Restoration: The Upper Mississippi River Basin as a Case History," Restoration Ecology 3: 4-17 (2000).

Congress has long known about the vital role that wetlands play in achieving water quality and flood control. In the Senate Report on the 1977 Amendments to the CWA, Congress stated:

> The wetlands and bays, estuaries and deltas are the nation's most biologically active areas. They represent a principal source of food supply. They are the spawning grounds for much of the fish

[3] See generally, U.S. Army Corps of Engineers, Welcome to the Corps of Engr's 1993 Flood Data, Feb. 19, 1998 at http://www.wes.army.mil/EL/flood/fl93home.html.

[4] *Id.*

> and shellfish which populates [sic] the oceans, and they are passages for numerous inland gamefish. They also provide nesting areas for a myriad of species of birds and wildlife. There is no question that the systematic destruction of the nation's wetlands is causing serious, permanent ecological damage.

S. Rep. No. 370, 95th Cong. 1st Sess. at 10 (1977).

The 95th Congress clearly intended the 404 program to halt this "systematic destruction" of wetlands. As Senator Edmund Muskie, the principal sponsor in the Senate of the 1977 Amendments, remarked: "The unregulated destruction of these areas is a matter which needs to be corrected and which implementation of section 404 has attempted to achieve." 123 Cong. Rec. S26697 (daily ed. Aug. 4, 1977). Senator Robert Stafford, another key sponsor of the 1977 Amendments, underscored this intent: "[T]he section 404 program as outlined in the committee bill will be a successful and reasonable process for protecting inland and coastal waters, including wetlands from adverse environmental effects resulting from the discharge of dredged or fill material." *Id.* at S26701.

Similar sentiments were expressed on the House side. Representative Newton Steers of Maryland, the floor manager of the House bill, stated:

> "The lasting benefits that society derives from coastal and inland wetlands often far exceed the immediate advantage their owners might get from draining or filling them. * * * The Committee recognizes the need for a program which regulated (sic) the discharge of dredged or fill material into our waters and wetlands."

123 Cong. Rec. H30994-5 (daily ed. Sept. 26, 1977).

II. THE CLEAN WATER ACT REFLECTS A THOUGHTFUL CONGRESSIONAL BALANCING OF FEDERAL AND STATE RESPONSIBILITIES TO ACHIEVE THE NATION'S WATER QUALITY GOALS

As this Court has recognized, the CWA is a "complex statutory and regulatory scheme that governs our Nation's waters, a scheme that implicates both federal and state administrative responsibilities." *PUD No.1 of Jefferson County v. Washington Dep't of Ecology,* 114 S.Ct. 1900, 1904 (1994) (*PUD No.1*). The central objective of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). The Act also seeks to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife." 33 U.S.C. §1251(a)(2). To achieve these ambitious goals, the CWA establishes distinct roles for the federal and state governments. Under the Act, the Administrator of the Environmental Protection Agency (EPA) is required, among other things, to establish and enforce technology-based limitations on individual discharges into the country's navigable waters from point sources. See 33 U.S.C. §§1311, 1314. Section 303 of the Act also requires each State, subject to federal approval, to institute comprehensive water quality standards establishing water quality goals for all intrastate waters. 33 U.S.C. §1313(b)(1)(C).

In recognition of the important role that states and tribes have to play in achieving the objectives of the CWA and the 404 program, Congress incorporated a number of opportunities for them to take an active part in conserving the nation's wetlands. For example, under section 404(g), a state or approved Indian Tribe may apply to EPA to administer its own permit program for the regulation of dredge and fill activities in lieu of the federal program

administered by the Corps, except in "traditionally navigable waters," such as tidal waters and the Great Lakes. 33 U.S.C. §1344(g). Under section 404(e), the Corps has created a category of general permit called a "state programmatic general permit" (SPGP). See 33 C.F.R. §325.5(c). The Corps defines SPGP's as "a type of general permit founded on an existing state, local, or other Federal agency program and designed to avoid duplication with that program." 33 C.F.R. §325.5(c)(3).

One of the most important provisions of the CWA is section 401. This section requires applicants for federal permits that involve any discharge of a pollutant to navigable waters to obtain certification from the state in which the discharge originates. 33 U.S.C. §1341(a). States may either "veto" federal permits or licenses by withholding certification, or impose conditions upon federal permits requiring compliance with state water quality laws. *PUD No.1*, 114 S.Ct. at 1904-05. This Court has held that section 401 certification applies to dredge-and-fill activities in wetlands and other waters that require permits from the Corps under section 404 of the CWA. *Id.* at 1914.

Approximately two-thirds of the states have no laws regulating destruction or degradation of freshwater wetlands.[5] *Houck & Rolland*, at 1283-84. For these states, the section 401 certification is the sole mechanism for controlling federally permitted activities that impact wetlands. Section 401 represents a critical tool to protect the chemical, physical and biological integrity of the waters within these states. See generally, Congressional

[5] Freshwater wetlands comprise 85% of the wetlands in the country. U.S. Dep't of Interior, Paper on Wetlands Loss in the United States, available at http://wetlands.fws.gov/sandT/download/SandT paper.pdf.

Research Service, "*Clean Water Act §401: Background and Issues*" (Oct. 4, 1998), available at http://cnie.org/NLE/CRS reports/water/h20-3.cfm.

A. Reducing Federal Jurisdiction Under the Clean Water Act Disrupts State Programs and Frustrates the Federalism Goals of the Clean Water Act.

Over the 30 year history of the CWA, state and federal wetlands programs have become increasingly interdependent and complementary. States look to the federal government to "level the playing field" so that states that regulate wetland impacts are not placed at an economic disadvantage when others do not, the so-called race-to-the-bottom problem. See Engels, "State Environmental Standard-Setting: Is There a "Race" and Is It to the "Bottom?" 48 Hastings L.J. 271, 351 (1997) (concluding that the empirical evidence confirms the existence of "sub-optimal standards" resulting from interstate competition for development, i.e., a race to the bottom). The federal government looks to the states to provide better constituent service and to integrate wetland conservation with broader land and water management programs. The states rely on the federal government for technical and financial assistance; the federal government relies on the states for more detailed knowledge of local conditions and compliance monitoring. Working together as partners, state and federal agencies have made steady progress towards the goal of reducing wetland losses.

The *Newdunn* case in Virginia provides an example of how interwoven federal and state programs have become, and how court rulings on federal jurisdiction can have negative effects on state programs. In *United States v. Newdunn Associates,* 195 F.Supp.2d 751, 767-8 (E.D. Va. 2002) the District Court ruled that certain wetlands were

not subject to federal jurisdiction because they lacked the requisite hydrological connection to "navigable waters." However, the District Court went further, ruling that the State of Virginia also lacked jurisdiction because "the term 'wetlands' is defined identically by the state statute as by the Corps regulations." *Id.* at 769. The court elaborated:

> The language in the state statute defining wetlands as land so delineated by the Corps and over which the Corps has jurisdiction under the CWA [citations omitted] and establishing the permitting process as coextensive with the permit required under the CWA [citations omitted] makes it clear that the state statute is coextensive with the CWA. *Id.*

A ruling that exempts deep-ripping and similar wetland-destroying activities from the 404 program would have several negative consequences for the states and the nation. First, it would deprive two-thirds of the states of the one tool they now have – section 401 water quality certification authority – to insure that federally permitted activities do not violate water quality standards and degrade wetlands. Second, it would undercut the third of the states that have wetland programs by placing them at a competitive disadvantage with states that do not. Third, it would undermine the principal objective of the CWA to restore and maintain the chemical, physical and biological integrity of the nation's waters.

B. The 404 Permit Program Has Proven an Effective Tool for Accomplishing the National Goal of "No Net Loss" of Wetlands.

The United States has lost 53% of its wetlands to draining and filling for agricultural and developmental activities. See Dahl, T.E. "Wetland Losses in the United States 1780's to 1980's," U.S. Department of Interior, Fish

and Wildlife Service, 3 (1990). Out of an original inventory of 224 million acres, approximately 105 million remain. *Id.* Prior to the mid-70's, the nation was losing between 300,000 and 400,000 acres of wetlands each year. See National Research Council, National Academy of Sciences, *Compensating Wetland Losses Under the Clean Water Act*, Table1-1 (2002). With the implementation of the section 404 program and other federal wetland conservation programs starting in the late 1970's, the rate began to decline.

In 1989, former President George Bush announced a national goal of "no net loss" of wetlands, and directed all federal agencies to use their authorities to achieve this goal. This policy is credited with bringing about a dramatic reduction in wetland losses. Currently the rate of loss is down to 58,000 acres a year.[6] See U.S. Department of Interior, "*Status and Trends of Wetlands in the Coterminous United States 1986 to 1987*," (January 9, 2001) available at ftp://wetlands.fws.gov/status-trends/SandT2000Report_loures.pdf. This report observes:

> In recent years, the Army Corps of Engineers and the U.S. Environmental Protection Agency have improved the effectiveness of wetlands regulation under Section 404 of the Clean Water Act. This has been accomplished by reducing losses from the use of general permits, addressing discharges of dredged material to the extent permissible under current law, and improving forestry practices in wetlands. These agencies

[6] Notably, agriculture continues to account for the largest loss of wetlands in the western United States. See USDA, Natural Resources Conservation Service, 1997 Natural Resources Inventory (revised December 2000), at 10, available at http://www.nrcs.usda.gov/technical/NRI/1997/summary_report/report.pdf.

> have also developed innovative ways to compensate for unavoidable damages to wetlands, and have worked more closely with State, Tribal and local government toward fair, flexible, and effective protection.

Id. at 3.

Future progress depends on maintaining the effective federal-state partnership Congress created under the 404 program.

III. DEEP-RIPPING IN JURISDICTIONAL WETLANDS IS A REGULATED ACTIVITY UNDER CWA SECTION 404

Section 301(a) of the CWA prohibits any discharge of dredge or fill material from a point source into "waters of the United States" unless authorized by a permit issued by the Corps pursuant to section 404 of the CWA. 33 U.S.C. §1311(a); *United States v. Riverside Bayview Homes,* 106 S.Ct. 455, 463 (1985) (*Riverside*). It is undisputed that the swales and streams involved here are "waters of the United States," or jurisdictional waters.[7] Nor do Petitioners dispute the fact that the hydrology of the affected waters "has been altered significantly" and that several of the waters were "completely obliterated." Pet. App. 106. The only issue is whether this "obliteration" of jurisdictional waters involved the discharge of dredge or fill material from a point source. Based on the facts as found

[7] The District Court found that the wetlands and streams are hydrologically connected to two interstate rivers, the Columnes River and the Mokelumne River in Northern California. See *Borden Ranch Partnership v. U.S. Army Corps of Engineers*, No. CIV. S97-0858 GEBJFM, 1999WL 1797329, *2 (Nov. 8, 1999) (*Borden I).*

by the trial court, and the clear weight of judicial authority, deep-ripping meets the statutory definition of a discharge of dredge or fill material.

A. Bulldozers and Tractors Equipped with Mechanical Devices That Break Apart and Redistribute Soil, Rock, Sand, Clay and Biological Materials Are "Point Sources."

The CWA defines a point source as "any defined, discrete conveyance including but not limited to any * * * rolling stock * * * from which pollutants are or may be discharged." 33 U.S.C. §1362(14). Congress deliberately chose a broad definition of this keystone term in order to encompass the widest number of sources of pollution discharges within the permit programs of the CWA. See *Kennecott Copper Corp. v. EPA,* 612 F.2d 1232, 1243 (10th Cir. 1979) (statutory list of point sources meant to be illustrative, not exclusive). The lower courts have found that a wide variety of vehicles, machinery and equipment similar to that used in deep-ripping are point sources. See *Avoyelles Sportsman's League v. Marsh,* 715 F.2d 897 (5th Cir. 1983) (*Avoyelles*) (bulldozers, backhoes and discs); *United States v. Weisman,* 489 F.Supp. 1331 (M.D. Fla. 1980) (dump trucks); *United States v. Sinclair Oil Co.,* 767 F.Supp. 200, 204 (D Mt. 1990) (bulldozers); *United States v. Holland,* 373 F.Supp. 665 (M.D. Fla. 1974) (draglines); *United States v. MCC of Florida,* 772 F.2d 1501 (11th Cir. 1985), *cert. granted, vacated on other grounds*, 107 S.Ct. 1968 (1987) (boat propellers); *United States v. Fleming Plantation,* 12 ERC 1705 (E.D. La. 1978) (marsh buggies); *Rybacheck v. U.S. EPA,* 904 F.2d 1276, 1285 (9th Cir. 1990) (placer mining dredge) (*Rybacheck*); *United States v. Huebner,* 725 F.2d 1235, 1241 (7th Cir. 1985), *cert. denied*, 106 S.Ct. 62 (1986) (marsh plow).

As the District Court found, the "plows" in question here are actually "D-10 and D-11 Caterpillars pulling

seven-foot long metal prongs, discs and rollers" through the jurisdictional waters. E.R. 464 ¶'s 5,6; ¶ 8; 467-68. This is heavy equipment, designed to disgorge rock, sand, soil and biological material, break up clods, and move this material across large areas of the landscape, filling wetlands and streams in the process. See ER, 519 (Amended Order granting Summary Judgment, Aug. 3, 1998).

This case is very similar to the situation presented in *Avoyelles* where bulldozers fitted with shearing blades and rakes were used to cut trees, move soil and vegetation, and redistribute the resulting debris to fill low-lying areas. The Fifth Circuit held that this type of equipment constituted point sources:

> Further, we agree with the district court that the bulldozers and backhoes were "point sources," since they collected into windrows and piles material that may ultimately have found its way back into the waters.

715 F.2d at 922. Similarly, in *United States v. Brace,* 41 F.3d 117, 127 (3d Cir. 1994), *cert. denied*, 115 S.Ct. 2610 (1995) (*Brace*) the Third Circuit held that a farmer who had "cleared, mulched, churned, leveled, and drained" a wetland without a permit violated section 404.

B. Redistribution of Soil, Rock, Clay and Biological Material Constitutes the "Addition of Fill Material" to Waters of the United States.

The crux of Petitioners' argument is that deep-ripping does not involve the "addition" of any "pollutant." Pet. Br. at 20-21. Petitioners do not deny that deep-ripping destroys wetlands; it simply claims that Congress never intended to regulate this kind of wetland destruction under section 404. However, Petitioners fail to explain why Congress would create such an odd loophole.

By its terms, section 404 regulates the "discharge of dredge or fill material" into waters of the United States. 33 U.S.C. §1344(a). "Dredge spoil" is a subset of the term "pollutant." 33 U.S.C. §1362(16). "Fill material" is defined by Corps regulations to mean "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody." 33 C.F.R. §323.2(e). The term "discharge of fill material" is defined to mean "the addition of fill material into waters of the United States." 33 C.F.R. §323.2(f).

According to the government's expert at trial, Dr. Lyndon Lee, whom the District Court found to be the "most authoritative" witness,[8] this is exactly what deep-ripping does:

> The bulldozers and tractors and attached rippers, discs, and rollers carry and drag along large clods of dirt and biological material such as plant stems and roots from surrounding upland areas into vernal pools, swales, and intermittent streams, causing them to fill with dirt as well as to lose their ability to hold and convey water. This movement of soil results in a conversion of aquatic areas to dry land. The bulldozers and tractors and attached rippers, discs and rollers also break up, mix, and turn over the soil and biological material already in the pools, swales, and streams and redeposits them in those waters. This replaces aquatic areas with dry land, raises the bottom elevation, alters the pattern of flow and circulation of the water, and reduces the reach of such waters.

Affidavit of Lyndon Lee (May 1998), Supplemental Record Excerpts PDF file at 123.

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[8] See *Borden I*, 1999 WL at * 9.

Based on Dr. Lee's report and other evidence adduced at trial, the District Court found that "deep-ripping on Borden Ranch caused fill material to be discharged into 35 hydrological features."[9] Petitioners attack this finding on the ground that "nothing is added that was not already there." Pet. Br. at 24. However, this argument has been squarely rejected in a number of cases. For example, in *United States v. Deaton,* 209 F.3d 331, 335-36 (4th Cir. 2000), the Fourth Circuit held that the practice of "side-casting" excavated material back into the wetland constituted the addition of a pollutant:

> [The Deatons] argue that the "ordinary and natural meaning of 'addition' means something *added,* i.e., the addition of something not previously present." Contrary to what the Deatons suggest, the statute does not prohibit the addition of material; it prohibits "the addition of any pollutant." The 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, as occurred here. In the course of digging a ditch across the Deaton property, the contractor removed earth and vegetable matter from the wetland. Once it was removed, that material became "dredged spoil," a statutory pollutant and a *type* of material that up until then was not present on the Deaton property. It 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. What is important is that once that material was excavated

[9] *Id.*

> from the wetland, its redeposit in that same wetland *added* a pollutant where none had been before.

Similarly, in *Rybacheck*, the Ninth Circuit held that material dredged from a streambed for the purpose of extracting gold became a pollutant when reintroduced to the stream. 904 F.2d at 1285. In *Avoyelles*, the Fifth Circuit held that mechanized land-clearing which redistributed soil and biological material into wetlands is subject to section 404. The Court stated, "The word 'addition,' as used in the definition of the term 'discharge,' may reasonably be understood to include 'redeposit.' " 715 F.2d at 924. In *Brace*, as mentioned, the Third Circuit held that use of farm equipment to clear, mulch, level and drain a wetland involved the addition of fill material requiring a 404 permit. 41 F.3d at 127-28. In *MCC Florida*, the 11th Circuit held that "prop wash" from boat propellers constituted the addition of pollutants as a result of resuspension of sediments. ("We . . . conclude that M.C.C. did violate the Act by redepositing the vegetation and sediment on the adjacent sea grass beds.") 772 F.2d at 1506.

In short, virtually every court to have considered the question has held that redeposit of material dredged, excavated or otherwise mechanically removed from wetlands and water bodies is an addition of a pollutant triggering 404 permit requirements.

C. The Agencies' Interpretation That "Discharge" Includes "Redeposit" Is Entitled to *Chevron* Deference.

To the extent there is any doubt about whether the statutory definition of "discharge" should be read to include the filling of wetlands with soil and other materials taken from both the wetlands and surrounding uplands, the Court should defer to EPA and the Corps' expert

judgment that regulation of such activity is both reasonable and necessary to achieve statutory goals. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778 (1984) (*Chevron*). As recently construed by the Court in *United States v. Mead,* 533 U.S. 218, 227 (2001) (*Mead*). *Chevron* deference is due "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority"; see also, *Barnhart v. Walton,* 122 S.Ct. 1265, 1272 (2002) (*Barnhart*) ("[T]he interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue."). The *Mead* Court stated:

> [A] reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise [citation omitted] but is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable.

Mead, 533 U.S. at 227-28.

Mead establishes three tests for according *Chevron* deference to an agency's interpretation: (1) whether Congress delegated rulemaking authority to the agency, (2) whether the agency interpretation was promulgated in the exercise of that authority, and (3) whether the agency interpretation was reasonable. The agency interpretation at issue here meets these tests.

First, Congress has delegated broad rulemaking authority to EPA[10] under section 501 of the CWA: "The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter." 33 U.S.C. §1361. The *Mead* Court noted the importance of such substantive rulemaking authority: "We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed." 533 U.S. at 228. Further, the *Chevron* Court stated: "[W]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. . . . " 104 S.Ct. 2778. Finally, this Court has previously recognized that EPA's rules under the CWA are entitled to considerable deference. *Arkansas v. Oklahoma,* 503 U.S. 91, 99 (1992).

The *Mead* Court also recognized the need to defer to agency interpretations where the "[r]egulatory scheme is highly detailed and the agency can bring the benefit of specialized experience to bear on the subtle questions" that may arise. 104 S.Ct. at 229. As the Ninth Circuit stated in *Pronsolino v. Marcus,* 291 F.3d 1123, 1133 (9th Cir. 2002), the CWA is comprised of "interwoven components that together make up an intricate statutory scheme addressing technically complex environmental issues." The need for uniformity in administration of a comprehensive, complex national law like the CWA argues strongly for deference to agency judgment.

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[10] The fact that the statute does not expressly mention the Corps is not material because EPA and Corps have jointly promulgated the regulations at issue here. See 40 C.F.R. §232.2(g) and 33 C.F.R. §323.2(c).

Second, EPA and the Corps have consistently interpreted section 404 to regulate the discharge of dredge and fill material regardless of the source of the material. See 58 FR 45008, 4510-12 (Aug. 13, 1993). In promulgating the "Tulloch Rule"[11] in 1993, the agencies responded as follows to comments that regulation of "redeposited material" represented a departure from earlier rules:

> Since regulations were first promulgated implementing Section 404, the Corps has interpreted the term "dredged material" to mean any material excavated from waters subject to the full jurisdictional reach of the CWA (see 39 FR 12119, April 3, 1974), and the current language in the agencies' definition has been in existence since 1977 (see 42 FR 37145, July 19, 1977). This longstanding definition of the term "dredged material" is a straightforward and reasonable reading of the statutory language used by Congress.

Id. at 45010.

In *National Mining Ass'n v. U.S. Army Corps of Engineers,* 145 F.3d 1399, 1405 (D.C. Cir. 1998) (*NMA*) the D.C. Circuit struck down the Tulloch Rule on the ground that the Corps had "outrun" its statutory authority by attempting to regulate "incidental fallback" from dredging operations. However, the D.C. Circuit also made it clear that the CWA does not completely outlaw regulation of redeposited material. The court drew a distinction

[11] The Tulloch Rule was adopted in 1993 to close a loophole in the 404 regulations which had excluded "de minimis" discharges of dredge spoil from regulation. As a result of this exception, the discharge of some small volumes of material associated with landclearing, ditching, channelization, or other excavation activities were not consistently being regulated under 404, even though waters of the U.S., including wetlands, were being destroyed or degraded. See 58 FR 45008. (Aug. 13, 1993)

between incidental fallback and "regulable redeposit," stating: "Since the Act sets out no bright line between incidental fallback on the one hand and regulable redeposits on the other, a reasoned attempt by the agencies to draw such a line would merit considerable deference." *Id.*

EPA and the Corps accepted the D.C. Circuit's invitation and promulgated a revised Tulloch Rule regulating discharges from "mechanized land-clearing that redeposits dredged material in a manner and amount that is different from, or greater than, incidental fallback." See 66 FR 4550, 4565 (Jan. 17, 2001).

Finally, the agencies' interpretation is reasonable in light of Congress' clear intent that the section 404 program be a primary tool to control dredging and filling in wetlands. As Senator Muskie put it, "The unregulated destruction of [wetlands] is a matter which needs to be corrected and which implementation of section 404 has attempted to achieve." 123 Cong. Rec. S26697 (daily ed. Aug. 4, 1977). There is no evidence, or any logic, to support the argument that Congress meant to distinguish between wetlands filled with material that came from outside the wetland and material dredged from the wetland itself. Indeed, by definition, dredge spoil is material taken from a water body. It makes no sense to exclude the redeposit of dredge material from regulation simply because it happens to come from the same water body.

IV. ACTIVITIES THAT CONVERT WETLANDS TO DRYLANDS DO NOT QUALIFY FOR THE "NORMAL FARMING" EXEMPTION UNDER SECTION 404(f)

Petitioners boldly assert that "Congress intentionally excluded agriculture from section 404 regulation." Pet. Br. at 27. This completely misreads the scope of jurisdiction

under the CWA,[12] as well as what motivated Congress to amend the CWA in 1977.

The impetus for the 1977 Amendments was a "firestorm of criticism" that erupted after the Corps proposed regulations in 1976 to implement a court-ordered[13] expansion of its jurisdiction under 404, accompanied by an inflammatory press release threatening to regulate "every rancher who wants to enlarge his stock pond and every farmer who wants to deepen an irrigation ditch." See *Houck & Rolland*, at 1263. To quell the uproar from farming communities, Congress clarified the scope of the 404 program by defining a *narrow* exception for certain "normal farming, ranching and silvicultural practices" that have only minor impact on aquatic resources. As Senator Muskie, one of the chief sponsors of the 1977 Amendments, explained it:

> New subsection 404(f) provides that federal permits will not be required for those narrowly

[12] Contrary to Petitioners' assertion, Congress did not exempt "agriculture" from the permit requirements of the CWA. Indeed the 1972 Act expressly defined the term point source to include "concentrated animal feeding operations," now known as "CAFO's." 33 U.S.C. §1362(14). Moreover, as early as 1973, EPA took the position that "there is little doubt that conveyances meeting the definitional requirements of §506(14) [502(14)] are point sources, whether such conveyances appear on farms or elsewhere." Opinion of the EPA General Counsel (August 3, 1973) 1973 WL 21951. Finally, even non-CAFO farming operations have been held to constitute point sources where they collect and channel wastes into navigable waters. See *CARE v. Southview Farms, Inc.,* 34 F.3d 114, 119 (2d Cir. 1994)

[13] In *NRDC v. Callaway,* 392 F.Supp. 685 (D.D.C. 1975) the court had ruled that the Corps had adopted an unlawfully narrow scope of jurisdiction under section 404 that excluded most wetlands. The court ordered the Corps to issue new rules based on regulation of all "waters of the United States" to the fullest extent allowed by the Commerce Clause. *Id.* at 686.

> defined activities that cause little or no adverse effects either individually or cumulatively. While it is understood that some of these activities may necessarily result in incidental filling and minor harm to aquatic resources, the exemptions do not apply to discharges that convert extensive areas of water to dry land or impede circulation or reduce the reach or size of the water body."

1977 U.S. Code Cong. & Admin. News (95 Stat.) 4326.

Petitioners suggest that this passage, and others like it, indicate an intent to broadly exempt "agricultural discharges" notwithstanding Senator Muskie's very clear statement that only a "narrowly defined" category of activities having "little or no adverse effects," even when measured "cumulatively," was intended. All of the passages quoted by Petitioners contain the same qualification that the exemption was meant for routine, well-established activities that would have minimal impact on wetlands and other aquatic resources.

A. Deep-Ripping Is Not a "Normal" Farming or Ranching Practice Within the Meaning of Section 404(f)(1).

Section 404(f)(1) provides that, "except as provided in paragraph (2)" no permit will be required for "the discharge of dredged or fill material from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices." 33 U.S.C. §1344(f)(1)(A). Thus, to be exempt from the permit requirement, Petitioners must demonstrate that deep-ripping will satisfy the requirements of (f)(1) *and* avoid being "recaptured" under (f)(2). *Avoyelles*, 715 F.2d at 926; *United States v. Akers,* 785 F.2d 814, 819 (9th Cir. 1986) (*Akers*).

To satisfy the (f)(1) requirements, Corps and EPA regulations provide that "the activities specified in paragraph (a)(1)(i) of this section must be part of an established (i.e., ongoing) farming, silviculture, or ranching operation and must be in accordance with definitions in 323.4(a)(1)(iii) [relating to cultivating and harvesting]." 33 C.F.R. §323.4(a)(1)(ii); see also, 40 C.F.R. §232.3(c)(1)(ii)(A). The lower courts have consistently held that this exemption must be narrowly construed and is only available for activities that are part of an established, ongoing farming or ranching operation, and that have only minimal impact on wetlands. *Avoyelles*, 715 F.2d at 925 (upholding District Court ruling that "*normal* connotes an established and continuing farming activity"); *Huebner*, 752 F.2d at 1240-41 ("Congress intended that section 1344(f)(1) exempt from the permit process only "narrowly defined activities . . . that cause little or no adverse effects either individually or cumulatively"); *United States v. Larkins,* 852 F.2d 814 (6th Cir. 1986), *cert. denied*, 109 S.Ct. 107 (1986) (silviculture exemption does not apply where activity converts wetland to cropland); *Akers*, 785 F.2d at 819 (no exemption for conversion of wetland crops to upland crops); *Brace*, 41 F.3d at 224 ("a farming operation is *not* 'ongoing' where modifications to the hydrological regime are necessary to resume operations").

Petitioners argue that the "[Corps] regulations defining 'plowing' expressly exclude *all* plowing from CWA regulation." Pet. Br. at 42 (emphasis in original). However, Petitioners ignore this important qualifying statement in the regulations:

> The term plowing does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dry land. For example, the redistribution of surface materials by

> blading, grading, or other means to fill in wetland areas is not plowing.[14]

As the District Court found, this is exactly what Petitioners' activity accomplished:

> Deep ripping alters the movement of surface and subsurface water in the ripped areas by moving earth, rock, sand, and biological materials both horizontally and vertically. This limits or destroys the ability of jurisdictional waters to retain water.

Borden I, 1999 WL 1797329, at * 2.

Significantly, the Corps drew a regulatory distinction between deep-ripping on the upland portions of Petitioners' land and deep-ripping through the streams and wetlands. *Borden Ranch Partnership v. U.S. Army Corps of Engineers,* 261 F.3d 810, 812-13 (9th Cir. 2001) (*Borden II*). There may be many situations where deep-ripping could qualify as normal plowing, but not where it destroys waters of the United States. Merely labeling an activity "plowing" does not immunize it from regulation where it in fact alters the flow, circulation and reach of waters of the United States.

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[14] Petitioners attempt to explain away this qualification by arguing that it is only intended to distinguish "blading and grading" from "pure plowing." Pet. Br., at 43 n. 24. However, the point is that it is the substantive effect of the activity on the waters that is important, not what one calls the piece of equipment used. In any case, an agency interpreting its own regulations is entitled to *Chevron* deference unless the interpretation is clearly unreasonable. As the *Barnhart* Court stated, the agency interpretation is permissible "because it makes considerable sense in terms of the statute's basic objectives." 122 S.Ct. at 1270.

B. The Conversion of Wetlands to Drylands Is Subject to the "Recapture" Provision of Section 404(f)(2).

If there was any doubt that Congress did not intend a blanket exemption for "plowing," the section 404(f)(2) recapture provision resolves it. Section 404(f)(2) provides:

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

33 U.S.C. §1344(f)(2).

It is undisputed that Petitioners' deep-ripping resulted in the conversion of wetlands to drylands. The Ninth Circuit held:

> We conclude that the deep-ripping at issue in this case is governed by the recapture provision. Converting ranchland to orchards and vineyards is clearly bringing the land "into a use which it was not previously subject," and there is a clear basis to conclude that the destruction of the soil layer at issue here constitutes an impairment of the flow of nearby navigable waters.

Borden II, 261 F.3d at 815.

Petitioners, however, argue that the recapture provision "does not address a change from one agricultural crop to another, like the change here from pasture and forage crop to orchard/vineyard crop." Pet. Br. at 33. If all that was involved here was "a change from one agricultural crop to another," Petitioners might have a point. However, a good deal more than that occurred here: a ranch was subdivided for development; rangeland was converted to orchards and vineyards; and wetlands and streams were

converted to drylands. Virtually every court to consider the question has held that such changes in land use and hydrology are subject to the recapture provision. *Akers*, 785 F.2d at 822-23 (wetland crops to dryland farming); *Avoyelles*, 715 F.2d at 925 (bottomland forestry to soybean production); *Huebner*, 752 F.2d at 1240 (cranberries to barley and other dryland crops); *Larkins*, 852 F.2d at 192 (conversion of forested wetlands to dryland crop production); *United States v. Cumberland Farms of Conn.,* 647 F.Supp.166, 176, *aff'd,* 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 108 S.Ct. 1016 (1988) (conversion of wetland to dryland crop production); *Bayou Marcus Livestock v. USEPA,* 20 Envt'l L. Rep. 20445, 20446 (N.D. Fla. 1989) (conversion of forested swamp to dryland tree farm).

In the face of this overwhelming body of caselaw, Petitioners cite a Bankruptcy Court decision, *In Re Carsten,* 211 B.R. 719, 735-36 (Bkrtcy. D. Mt. 1997), which stated, in dicta,[15] that the recapture provision was only meant to apply to the conversion of wetlands "on a significant scale," not to minor conversions of small areas of marginal waters to uplands. This view of section 404(f) is directly contradicted by the words of its author, Senator Muskie, who said the farming exemption is meant to apply to "narrowly defined activities that cause little or no adverse effects either individually or *cumulatively*." (Emphasis added). The history of wetland destruction in this country is that they have been lost an acre at a time, not all at once. Congress included the recapture provision

[15] The holding in the case was: "Thus, the dredging did not impair the flow or circulation of the waters of the slough, or reduce the reach of the waters. Consequently, the first prong of the recapture provisions does not apply, and their application is precluded." 211 B.R. at 235. Here, by contrast, the deep-ripping did alter the flow, circulation and reach of the waters.

to make sure the farming exemption did not lead to the further incremental destruction of wetlands, an acre at a time.

C. The Agencies' Interpretation Limiting the Section 404(f) Exemption to Established Farming Practices That Do Not Convert Wetlands to Drylands Is Entitled to *Chevron* Deference.

Congress has spoken directly to the scope of section 404(f) and made it plain that it is to be applied narrowly. Thus under the "first prong" of *Chevron*, the Court must enforce the will of Congress. *Chevron*, 467 U.S. at 854. However, even if there was some ambiguity in the scope of the farming exemption, the agencies' consistent interpretation that the farming exemption be narrowly confined to circumstances where there is only minor impact on aquatic resources and no outright conversion of wetlands to drylands, is entitled to deference under *Chevron* step two. *Id.*

As mentioned, Congress vested the EPA and the Corps with broad rulemaking authority under 33 U.S.C. §1361. With respect to the scope and effect of the 404(f) exemption, the agencies have exercised that authority in a consistent and reasonable fashion, which the lower courts have consistently upheld.

Petitioners attempt to discredit the Joint Memorandum to the Field Regarding the Applicability of Exemptions under section 404(f) to Deep-Ripping Activities in Wetlands. Dec. 12, 1996 (re-issued as Regulatory Guidance Letter (RGL) No. 96-02) (*Field Memo*) Pet. Br., at 43-44. While it may be true that this guidance was issued in response to the Borden Ranch situation, that does not make it any less persuasive or entitled to less respect. *Barnhart*, 112 S.Ct. at 1270. This guidance is based on the

agencies' long-standing position, embodied in every regulation and guidance issued under section 404(f), that plowing in wetlands is exempt from regulation only where three conditions are met: (1) it is conducted as part of an ongoing, established agricultural, silvicultural or ranching operation; (2) the activity is consistent with the definition of plowing in EPA and Corps regulations; and (3) the plowing is not incidental to an activity that results in the immediate or gradual conversion of wetlands to non-waters. *Field Memo*, at 3. Contrary to Petitioners' assertion, this guidance does not represent a reversal of the agencies' previous position on plowing. Pet. Br., at 44. Petitioners selectively cite this passage from an earlier guidance document:

> Plowing for the purpose of producing food, fiber, and forest products and meeting the definition in Section 323.4 will never involve a discharge of dredge or fill material. Such plowing is not subject to any of the provisions of Section 404 including the Section 404(f) exemption limitations. Section 404(f) is applicable to those activities that do involve a discharge but are statutorily exempted from the need to obtain a 404 permit.

See RGL No. 86-01 (February 11, 1986).

What Petitioners neglected to include is this later passage from the same guidance document:

> Not all activities involving the use of a plow, disc, or similar equipment will satisfy the definition of plowing. For example, using a plow to dry the surface of a peat bog to facilitate mining is not plowing since it is not for the purpose of producing food, fiber or forest products. Also, the use of a plow to divert a braided stream feeding a wetland is not plowing *because the purpose is to change a water of the United States to dry land*.

> Thus these activities are regulated under section 404 if they occur in a water of the United States.

Id. at ¶ 4 (emphasis added).

In sum, the agencies have always taken the position that it is the *purpose* of the activity, not what those seeking the exemption choose to call it, that determines whether an activity is exempt. This longstanding interpretation is entitled to respect. *North Haven Bd. of Ed. v. Bell,* 456 U.S. 512, 522 n. 12 (1982). Where the activity converts "waters of the U.S." to non-waters, the exemption cannot apply. Any other reading of the statute would nullify Congressional intent.

CONCLUSION

For the foregoing reasons, amicus urges the Court to affirm the judgment of the Court of Appeals.

Respectfully submitted,

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