

No. _____

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 Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

— ♦ —

PETITION FOR A WRIT OF CERTIORARI

— ♦ —

TIMOTHY S. BISHOP
MAYER, BROWN, ROWE &
MAW
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

EDMUND L. REGALIA
MILLER, STARR &
REGALIA
A Professional Law
Corporation
1331 N. California Blvd.
Fifth Floor
Post Office Box 8177
Walnut Creek, CA 94596
(925) 935-9400

ARTHUR F. COON
Counsel of Record
MILLER, STARR &
REGALIA
A Professional Law
Corporation
1331 N. California Blvd.
Fifth Floor
Post Office Box 8177
Walnut Creek, CA 94596
(925) 935-9400
Counsel for Petitioner

QUESTIONS PRESENTED

The issue presented by this case is whether a farmer needs a federal permit to plow his agriculturally-zoned ranchland to plant new crops. Section 404 of the Clean Water Act authorizes the Army Corps of Engineers to require permits only for those activities that "discharge" or "add" a "pollutant" from a "point source" into waters of the United States, and further expressly exempts "normal farming and ranching activities, such as plowing," which do not convert the body of water "into a use to which it was not previously subject." Petitioners acquired the Borden Ranch, an 8,400 acre property in California's Central Valley that is zoned for agricultural use, and sought to enhance portions of the land that previously had been used to grow forage crops for higher value vineyards and orchards. Petitioners did this by deep plowing to prepare the soil for these deep-rooted crops. The Army Corps asserted jurisdiction under Section 404 of the Clean Water Act over these plowing activities, claiming petitioners were discharging pollutants into seasonal wetlands. The Ninth Circuit upheld this assertion of federal jurisdiction, over Judge Gould's dissent and in conflict with the D.C. Circuit's *National Mining* decision.

The questions presented are:

1. Does a rancher's deep plowing to enhance the soil's agricultural viability "add" a "pollutant" to a wetland so as to constitute a regulated point-source "discharge" within the meaning of Section 404 of the Clean Water Act?

QUESTIONS PRESENTED – Continued

2. Is deep plowing of ranchland, which is used to grow forage crops and is farmable in its natural state, in order to plant crops with deeper root systems, statutorily exempt from regulation under Section 404 as a “normal farming activity” that does not bring a water of the United States “into a use to which it was not previously subject”?
3. Does the Clean Water Act’s civil penalty section, authorizing penalties “not to exceed \$25,000 per day for each violation,” authorize assessing the maximum daily penalty for each time a plow crosses a jurisdictional drainage feature, without regard to the number of days when such activity occurred?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT	2
A. The Statutory and Regulatory Scheme	5
1. Basic Elements of Section 404 Jurisdiction ...	5
2. The CWA’s Farmer Exemptions	7
3. The Penalty Provision	8
B. Petitioners’ Plowing Activities On Borden Ranch and the Corps’ Assertion of Jurisdiction	9
C. Petitioners’ Challenge To The Corps’ Jurisdiction Over Plowing And The District Court’s Ruling ...	11
D. The Ninth Circuit’s Decision	13
REASONS FOR GRANTING THE PETITION	15
I. THE CIRCUITS ARE SPLIT OVER THE CORPS’ AUTHORITY TO REGULATE “INCIDENTAL FALLBACK” AS A POINT SOURCE DISCHARGE OF POLLUTANTS UNDER THE CWA	16
II. THE NINTH CIRCUIT ERRED IN HOLDING PLOWS ARE “POINT SOURCES”	20

TABLE OF CONTENTS - Continued

	Page
III. THE NINTH CIRCUIT ERRED IN HOLDING THAT PLOWING RANCHLAND TO PLANT CROPS IS A "CHANGED IN USE" NEGATING THE CWA'S INTENDED BROAD EXEMPTION OF PLOWING AS A "NORMAL FARMING ACTIVITY"	21
IV. THE NINTH CIRCUIT ERRED IN CALCULATING THE CIVIL PENALTY BY CALCULATING EACH PASS OF THE PLOW THROUGH WATERS, RATHER THAN EACH DAY OF PLOWING, AS A SEPARATE VIOLATION UNIT	27
CONCLUSION	30

TABLE OF AUTHORITIES

CASES	Page
<i>Angelo K. Tsakopoulos v. American Manufacturers Mutual Insurance Co., et al.</i> (U.S. Dist. Ct. E.D. Cal.), Civ. No. S-99-0853 GEB JFM.....	1
<i>Atlantic States Legal Foundation v. Tyson Foods</i> , 897 F.2d 1128 (11th Cir. 1990).....	28, 29
<i>Avoyelles Sportsmen's League, Inc. v. Marsh</i> , 715 F.2d 897 (5th Cir. 1983).....	14, 21, 22, 23, 24
<i>Chesapeake Bay Foundation v. Gwaltney of Smithfield</i> , 791 F.2d 304 (4th Cir. 1986).....	28, 29
<i>Chevron U.S.A., Inc. v. Natural Resources Defense Council</i> , 467 U.S. 837 (1984)	27
<i>Downer v. U.S. By And Through Dept. of Agriculture</i> , 894 F.Supp. 1348 (D.S.D. 1995)	23
<i>Harrison v. Northern Trust Co.</i> , 317 U.S. 476 (1943)	7
<i>Hawaii's Thousand Friends v. City and County of Honolulu</i> , 821 F.Supp. 1368 (D. Haw. 1993)	28, 29
<i>Hess v. Port Auth. Trans-Hudson Corp.</i> , 513 U.S. 30 (1994)	26
<i>In re Carsten</i> , 211 B.R. 719 (Bkrcty. D. Mont. 1997)	7, 22

TABLE OF AUTHORITIES – Continued

Page

<i>National Mining Ass'n. v. U.S. Army Corps of Eng'rs.</i> , 145 F.3d 1399 (D.C. Cir. 1998).....	<i>passim</i>
<i>Resource Invs. v. U.S. Army Corps of Eng'rs.</i> , 151 F.3d 1162 (9th Cir. 1998).....	6, 19
<i>Rybacek v. United States EPA</i> , 904 F.2d 1276 (9th Cir. 1990).....	3, 13, 14, 17, 18
<i>Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs.</i> ("SWANCC"), 531 U.S. 159 (2001)	6, 16, 26, 27
<i>Tidewater Oil Co. v. United States</i> , 409 U.S. 151 (1972)	8
<i>United States v. Akers</i> , 785 F.2d 814 (9th Cir. 1986)	23, 25, 26
<i>United States v. Amoco Oil Co.</i> , 580 F.Supp. 1042 (W.D. Mo. 1984)	29
<i>United States v. Bass</i> , 404 U.S. 336 (1971)	27
<i>United States v. Deaton</i> , 209 F.3d 331 (4th Cir. 2000)	3, 13, 14
<i>U.S. v. Riverside Bayview Homes, Inc.</i> , 474 U.S. 121 (1985)	6
<i>United States v. Wilson</i> , 133 F.3d 251 (4th Cir. 1997)	7
FEDERAL STATUTES AND REGULATIONS	
<i>Clean Water Act</i> Section 404 (33 U.S.C. § 1344)	<i>passim</i>

TABLE OF AUTHORITIES – Continued

Page

1985 Food Security Act	23
28 U.S.C. § 1254(1)	1
33 U.S.C. § 1288	5, 20, 26
33 U.S.C. § 1311(a)	1, 5
33 U.S.C. § 1319(d)	1, 8, 9, 28
33 U.S.C. § 1329	5, 26
33 U.S.C. § 1344(a)	<i>passim</i>
33 U.S.C. § 1344(f)(1),(2)	<i>passim</i>
33 U.S.C. § 1362(6), (12), (14), and (16)	<i>passim</i>
33 C.F.R. Section 323.2(d)(1), (iii), (2)(i),(ii), (3)(iii), (4)(iii)	2
Section 323.2(f)	25
Section 323.4(a)(1)(i), (ii), (iii)(D)	2
40 C.F.R. Section 232.3(c)(1)(i),(ii) and (d)(4)	2
Section 232.4(4)(iii)	1

OTHER AUTHORITIES

Vol. 3, A LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977 (1978) (hereafter "1977 LEG. HIST.") at 645 (Senate Report on S. 1952, 95th Cong.)	24
4 1977 LEG. HIST. at pp. 919-920	25
4 1977 LEG. HIST. at pp. 924, 181, 289, 351, 524	24

TABLE OF AUTHORITIES – Continued

	Page
AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, NEW COLLEGE ED. (1975), p. 665.....	23
BLACK’S LAW DICTIONARY (5th ed. 1979), p. 711.....	23
S. Rep. No. 95-370, at 76 (1977), reprinted in 1977 U.S.C.C.A.N. 4326, 4401	2, 20
WEBSTER’S DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (Encycl. ed. 1977)	5

PETITION FOR A WRIT OF CERTIORARI

Petitioners Borden Ranch Partnership and Angelo K. Tsakopoulos respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The court of appeals’ opinion (App., *infra*, 1-22) is reported at 261 F.3d 810. The district court’s opinion on summary judgment (App., *infra*, 28-56) is unreported. Its decision after the counterclaim trial (App., *infra*, 67-121) is unofficially reported at 1999 WL 1797329. The district court’s summary judgment opinion in a related action, *Angelo K. Tsakopoulos v. American Manufacturers Mutual Insurance Co., et al.* (U.S. Dist. Ct. E.D. Cal.), Civ. No. S-99-0853 GEB JFM (Hon. Garland E. Burrell, Jr.) (App., *infra*, 135-164) is unreported. The U.S. Army Corps of Engineers’ (“Corps”) December 12, 1996 Regulatory Guidance Letter setting forth the basis for its regulation of petitioners’ deep plowing is set out at App., *infra*, 199-207.

JURISDICTION

The court of appeals’ opinion was filed August 15, 2001. On November 28, 2001, the court of appeals issued its Order denying petitioners’ petition for rehearing *en banc*. On December 18, 2001, the court of appeals issued its Order granting petitioners’ motion to stay the mandate pending filing of this petition. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Clean Water Act, 33 U.S.C. Sections 1311(a), 1319(d), 1344(a), (f), 1362(6), (12), (14), and (16), are reproduced at App., *infra*, 209-213. The relevant regulations, 40 C.F.R. Section 232.4(4)(iii), 40

C.F.R. Section 232.3(c)(1)(i),(ii) and (d)(4), and 33 C.F.R. Section 323.2(d)(1), (iii), (2)(i),(ii), (3)(iii), (4)(iii) and 33 U.S.C. Section 323.4(a)(1)(i), (ii), (iii)(D), are reproduced at App., *infra*, 213-218.

STATEMENT

The fundamental issue in this case is whether a farmer and rancher may deeply plow his agriculturally-zoned ranchland to plant higher value crops without need of a federal permit or, conversely, whether the Corps has jurisdiction to regulate such traditional plowing activity under the Federal Clean Water Act ("CWA" or "Act"). The Corps asserts such jurisdiction in this case and others, contending that the traditional farming activity of *plowing alone* of dry ground in areas of seasonal wetlands constitutes the "discharge" of "pollutants" (native soil) from a "point source" (the plow) which is regulated under CWA Section 404.

The Corps' expansive claim of federal permitting jurisdiction over traditionally local activities - such as farming and plowing - under CWA Section 404¹ has resulted in conflict among the courts of appeals as to the statute's reach. The D.C. Circuit has held "incidental fallback" of native materials from a dredge bucket during aquatic dredging operations is not an "addition" of pollutants and thus not a "discharge" of dredged or fill material regulated under Section 404, because no materials are added and the disturbed native materials fall back to their same general location. *National Mining Ass'n. v. U.S. Army Corps of Eng'rs.*, 145 F.3d 1399, 1404 (D.C. Cir. 1998).

¹ 33 U.S.C. § 1344, see App., *infra*, 210-211. Congress did not intend CWA Section 404 to extend to normal farming activities, which it contemplated would be "controlled by State and local agencies under [the Act's non-point source provisions]." S. Rep. No. 95-370, at 76 (1977), reprinted in 1977 U.S.C.A.N. 4326, 4401.

It further held the CWA farmer exemptions for plowing and other normal farming activities evince that Congress "emphatically did not want the law to impede these bucolic pursuits." *Id.* at 1405.

The Ninth Circuit, by contrast in its 2-1 decision here (Judge Gould, dissenting), holds deep plowing - which also adds no materials and results in plowed native soil falling back to its same general location - produces a "regulable redeposit" of the plowed soil "pollutant" because it "constitutes environmental damage sufficient to constitute a regulable redeposit." App., *infra*, 8. Over the strong dissent of Judge Gould, who would have followed *National Mining* and held "the return of soil in place after deep plowing is not a 'discharge of a pollutant[.]'" App., *infra*, 18, the panel majority relied on the Ninth Circuit's prior decision holding redeposits of extracted and processed materials from in stream placer mining operations are regulated, and a Fourth Circuit decision (citing the same Ninth Circuit decision) holding "sidcasting" from backhoe dredging to drain wetlands for residential subdivision construction was regulated. *Rybacek v. United States EPA*, 904 F.2d 1276, 1285 (9th Cir. 1990); *United States v. Deaton*, 209 F.3d 331, 333-336 (4th Cir. 2000). App., *infra*, 6-8.

Despite the express statutory exemption for any "discharges" from "normal farming . . . and ranching activities such as plowing . . . for the production of food, fiber . . .," App., *infra*, 210, the Ninth Circuit also holds the "recapture" exception to the exemption applies because "[c]onverting ranch land to orchards and vineyards is clearly bringing the land 'into a use to which it was not previously subject[.]'" App., *infra*, 10; see App., *infra*, 211.

The Ninth Circuit's decision is legally erroneous and inconsistent with the CWA's plain language and legislative history, as well as *authorized* implementing regulations. Plowing alone does not "add" pollutants or soil

and does not produce regulated point source "discharges." No statute or regulation states plowing is a CWA-regulated activity. Moreover, the relevant statutes and regulations expressly exempt *all forms of plowing* from Section 404 regulation as required by Section 404(f)(1)'s "farmer exemptions." App., *infra*, 210; see App., *infra*, 212 (exempting agricultural runoff from point source program). No other case has ever invoked the facially-narrow "recapture provision" to hold plowing *alone* – as opposed to plowing conducted incidental to and as a minor part of other activities primarily intended to fill and dry out waters or wetlands – is a CWA-regulated activity. No other case has held plows used only for normal farming purposes are "point sources." Dissenting from the Ninth Circuit panel majority's complete evisceration of the Act's fundamental jurisdictional requirements and farmer exemptions, Judge Gould would have held return of soil in place after deep plowing is not a "discharge," because "deep ripping" does not involve any significant removal or "addition" of material to the site, and plows are not "point sources." App., *infra*, 19-22. He observed the majority was making new law in upholding federal regulation under Section 404's point source program of a traditional farming activity without any clear or express Congressional authorization of that result. App., *infra*, 22.

Given (1) the split among circuits on whether "incidental fallback" is a regulated "discharge," (2) the statutorily untenable basis of the Corps' position that it may regulate any form of mere plowing of agricultural land as a point-source discharge, (3) the nationwide importance of agriculture and (4) the nationwide importance of effectuating Congress' intent to meaningfully exempt farming activities from Section 404, this Court's review of the legality of the Corps's assertion of federal permitting jurisdiction over normal farming activities in this case is appropriate and necessary at this time. Congress did not

intend to federalize regulation of traditionally local land use matters when it adopted the CWA. It did not intend or envision when it enacted the CWA and its "farmer exemptions" that a farmer plowing dry, agriculturally-zoned rangeland to plant higher value crops – a normal activity farmers have engaged in since colonial times, App., *infra*, 18 – would require a federal permit for the "discharge" of "pollutants" from a "point source" to do so.

A. The Statutory and Regulatory Scheme

1. Basic Elements of Section 404 Jurisdiction

CWA Section 404 authorizes the Corps to directly regulate and issue federal permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a); App., *infra*, 210. Section 301(a) provides that the "discharge of any pollutant by any person" is unlawful unless in compliance with the Act's permit requirements. § 1311(a); App., *infra*, 209. "Discharge" is defined as "any addition of any pollutant to navigable waters from any point source." § 1362(16), (12); App., *infra*, 212; *National Mining, supra*, 145 F.3d at 1401.² As a prerequisite to the existence of a regulated point source "discharge," the statute's plain text requires an "addition" of a "pollutant." To "add" is "to join or unite (to) so as to increase the number, size, quantity, etc." WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (Encycl. ed. 1977).

The courts below treated plowed native soil as both a "pollutant" and "fill material," and plows themselves as

² CWA Sections 208 and 319 direct the States to take certain steps to address *non-point source* pollution, but the States determine the nature of those steps. See 33 U.S.C. §§ 1288, 1329. Farming and ranching activities are explicitly contemplated to fall within the non-point source area subject to State and local control. E.g., 33 U.S.C. §§ 1288(b)(2)(F), 1362(14).

regulated "point sources." "Pollutants" within the Act include, *inter alia*, "dredged spoil, . . . rock, sand, cellar dirt . . . and agricultural waste discharged into water." § 1362(6); App., *infra*, 211. "Fill material" has been held to mean material used for the "primary purpose" of replacing an aquatic area with dry land or changing the bottom elevation of a water body. *Resource Invs. v. U.S. Army Corps of Eng'rs.*, 151 F.3d 1162, 1168 (9th Cir. 1998); *National Mining, supra*, at 145 F.3d at 1402, fn. 1. A "point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. . . ." § 1362(14); App., *infra*, 212, *emph. added*.

The relevant "navigable waters" or "waters of the United States" on the semi-arid Borden Ranch are widely dispersed seasonal drainage swales and intermittent drainages – shallow linear features ranging from several inches to several feet wide, and up to several hundred feet long – which exist and carry stormwater runoff for brief periods only during and after seasonal rains, and which ultimately drain to intermittent streams, which themselves ultimately flow to tributaries of navigable waters. App., *infra*, 2; ER1011-12.³ "Navigable waters" under the Act include wetlands adjacent to rivers, streams and more conventionally identifiable "waters", *National Mining, supra*, 145 F.3d at 1401, citing *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131-32 & n. 8 (1985), but not isolated intrastate waters. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs.*

³ As cited herein, "ER" is the "Excerpts of Record" from the Ninth Circuit's proceedings, "CR" is the Court Record, taken from the district court's Docketing Sheet, and "TE" is a district court Trial Exhibit.

("SWANCC"), 531 U.S. 159, 167-174 (2001); *United States v. Wilson*, 133 F.3d 251, 257 (4th Cir. 1997). The Corps defines wetlands as areas "inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." *National Mining, supra*, 145 F.3d at 1401-1402.

2. The CWA's Farmer Exemptions

In 1977, Congress amended Section 404, adding "farmer exemptions" to clarify "that certain discharges, such as those associated with farming, silviculture, and ranching activities, are not prohibited or otherwise subject to regulation under § 404." *In re Carsten*, 211 B.R. 719, 731 (Bkrtcy. D. Mont. 1997). As amended, Section 404 exempts any "discharge":

(A) 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); App., *infra*, 210, *emph. added*.

Section 1344(f)(2)'s textually narrow "recapture" exception to these "farmer exemptions" requires a permit for:

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. . . .

§ 1344(f)(2); App., *infra*, 211, *emph. added*.

The legislative history of the 1977 CWA "farmer exemptions" must be used to determine Congress' intent and provide context. *Harrison v. Northern Trust Co.*, 317

U.S. 476, 479 (1943); *Tidewater Oil Co. v. United States*, 409 U.S. 151, 157 (1972). The CWA farmer exemptions evince Congress "emphatically did not want the law to impede these bucolic pursuits." *National Mining, supra*, 145 F.3d at 1405.

The EPA and Army Corps expressly interpret the CWA to exempt plowing ranchland to plant crops in their regulations defining "plowing" as:

... all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, disking, harrowing, and similar physical means utilized on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. . . . *Plowing, as described above, will never involve a discharge of dredged or fill material.*

App., *infra*, 216; see *id.* at 218.

3. The Penalty Provision

As applied here, 33 U.S.C. Section 1319(d), App., *infra*, 209, authorizes civil penalties "not to exceed \$25,000 per day for each violation" for discharging pollutants without a permit.

*

*

*

Petitioners challenge the Corps' assertion of federal permitting jurisdiction over the plowing of ranchland to plant crops in this case as in violation of CWA Section 404's jurisdictional limitations requiring a "discharge" of "pollutants" from a "point source," as well as its express exemption for "normal farming . . . and ranching activities such as plowing." Should this Court determine the Corps has Section 404 jurisdiction over plowing ranchland which is farmable in its natural state to plant crops, Petitioners challenge the lower courts' imposition of the maximum \$25,000 penalty for each time a plow crossed a seasonal drainage feature, without regard to the number

of days on which such activity occurred, as violating Section 1319(d).

1

B. Petitioners' Plowing Activities On Borden Ranch and the Corps' Assertion of Jurisdiction

The 8,400-acre Borden Ranch is all agriculturally-zoned, Central Valley land, in both Sacramento and San Joaquin Counties, and is bisected by Dry Creek, the County Line. Presently owned by Borden Ranch Partnership ("BRP") (Tsakopoulos is managing partner and title holder) and its vendees, the Ranch has historically been used for cattle grazing, irrigated pasture, and growing wheat, hay, alfalfa, and row crops. Since late 1993, portions have been deep plowed and planted to vineyards and orchards. The Ranch contains seasonal hydrological features such as vernal pools, and swales and intermittent drainages (both hereinafter "drainages"). ER1011-12; App., *infra*, 2-3.

The Corps asserted CWA jurisdiction over the Ranch's drainages and vernal pools as "navigable waters" and contended that deep plowing, also known as "deep ripping" or "deep slip plowing," rangeland in delineated "waters" discharges *dredged or fill material* and requires a Section 404 permit. CR189, ER1013-1015; App., *infra*, 3.

Despite the Act and regulations, which exempt all forms of plowing, the Corps and EPA first distinguished deep plowing from shallower plowing. The Corps contended plowing in seasonal wetlands to "root zone depth," including disking, is not regulated but that deep plowing is. The Corps and EPA contended deep plowing would adversely affect "navigable waters" by puncturing restrictive subsurface soil layers believed integral to their inundation and functioning. TE30, ER13-15, 20-21, TE31, App. *infra*, 2-3. Relying on the Corps' oral and written advice, Tsakopoulos tried to plow in ways the Corps told him would not require CWA permits. CR204, ER921:8-16.

The Corps sought guidance from EPA in 1994 as to whether the CWA's farmer exemptions applied to Tsakopoulos' deep plowing. TE21, ER7. EPA confirmed the Corps' jurisdiction, and the Corps in late 1994 again distinguished deep plowing (prohibited without a permit) from shallow plowing at root zone depth, which it conceded was authorized under the exemptions without a permit and which one Corps regulator testified was 18 to 24 inches into the soil. TE30, ER13, CR204, ER910:18 - 911:2. Tsakopoulos authorized further plowing under the Corps' guidance until the winter rainy season, when it is not possible to plow once the ground becomes wet. CR204, ER909:3-6, CR226, ER981-983.

In 1995, Corps and Federal Natural Resources Conservation Service ("NRCS") officials met at the Ranch to discuss Tsakopoulos' plowing plans. NRCS advised deep-ripping through drainages had no hydrological impact and was a good farm management practice. CR204, ER915:11-20. The Corps continued to assert jurisdiction over deep plowing, but told Tsakopoulos orally and in writing he could deep rip uplands and cross areas delineated as "waters/wetlands" with the deep plow provided he raised the shank as high as possible even though it would still drag across and cut into the ground to some extent. TE31, ER20, TE558, ER16; see App., *infra*, 3. Tsakopoulos attempted to comply in authorizing additional 1995 plowing in Sacramento County. CR204, ER921:8-16. The Corps and EPA later claimed noncompliance and issued a November 1995 cease and desist order. App., *infra*, 3; TE50, ER30. Without conceding wrongdoing, Tsakopoulos settled the alleged 1995 plowing violations by dedicating a 1418-acre seasonal wetlands preserve (with 1368 contiguous acres) in May 1996. App., *infra*, 3-4, 165, 176; TE66, ER33, TE592, ER65.

In September 1996, Corps and EPA officials provided guidance for 1996 plowing on the Ranch's San Joaquin side, and reconfirmed that without a permit Tsakopoulos

could "deep plow" uplands and cross drainages with the plow shank raised. CR204, ER922-926. Tsakopoulos again attempted to comply in 1996 plowing. TE617, ER96, TE615, ER88, CR227, ER994-995, CR226, ER984-987, which plowing ended before December 1996. TE78, 80, 83, 85, 88, ER90, 97, 133, 148, 158.

The Corps' first official public guidance distinguishing "deep ripping" from other plowing was a December 12, 1996 Regulatory Guidance Letter ("RGL"). App., *infra*, 4, 199-207. The RGL came only after dedication of the preserve and after all plowing operations later found to be CWA violations had already occurred. App., *infra*, 103; CR189, ER1043:12-15; TE78, 80, 83, 85, 88; ER90, 97, 133, 148, 158, see CR204, ER909.

After the 1996-1997 rainy season, BRP resumed plowing (disking) in San Joaquin, and almost immediately EPA representatives unaware of the September 1996 guidance descended on the site, saw shallow furrows through some drainages (from raised deep plow shanks in 1996 plowing), and claimed some vernal pools were "clipped." CR226, ER970:17-973:23; App., *infra*, 4. Ignoring concerns expressed by EPA's Washington headquarters that deep plowing might not produce jurisdictional discharges in light of the D.C. district court's then-recent *American Mining* decision (affirmed on appeal in 1998 as *National Mining*), TE630, ER309, EPA Region 9 took an aggressive enforcement position and issued an April 1997 cease and desist order stopping all Ranch activity involving machinery crossing drainages. TE103, ER313; App., *infra*, 4.

C. Petitioners' Challenge To The Corps' Jurisdiction Over Plowing And The District Court's Ruling

Petitioners filed their Complaint May 6, 1997, for declaratory relief and to challenge Government regulations and the RGL. CR1, ER328. On August 6, the Government answered and counterclaimed alleging CWA

violations by "filling waters of the United States" on four Borden Ranch San Joaquin County parcels. CR7, ER385; App., *infra*, 4. By August 3, 1998 order, App., *infra*, 28-56, the district court denied Tsakopoulos' summary judgment motion, and partially granted and denied the Government's motion, leaving for trial the Counterclaim issues concerning alleged CWA violations. CR74, ER500-526; App., *infra*, 4-5. At the bench trial, from August 24 through September 16, 1999, App., *infra*, 5, the U.S. claimed Tsakopoulos' deep plowing in San Joaquin deposited "fill" into jurisdictional "waters" including drainages and pools.

Tsakopoulos disputed these claims and contended he had followed the Government's guidance by lifting the ripper shank to uppermost position when crossing drainages, resulting only in concededly unregulated shallow plowing. He also contended the six tiny pools allegedly filled were not jurisdictional "waters" within the Government's Commerce Clause power to regulate, since they were wholly isolated and not hydrologically connected to navigable waters, and were not actual migratory bird or endangered species habitat.

On November 8, 1999, the district court entered its 50-page Findings of Fact and Conclusions of Law, App., *infra*, 67-121, finding 348 separate deep plowing violations in 29 widely dispersed drainages (aggregating "about 2 acres" in total area) and 10 violations in a single 150 square foot vernal pool – the only one of six pools it found to be a jurisdictional water. App., *infra*, 5, 91, 98, 103, 105, 109; ER1030-1032. Despite Tsakopoulos' acknowledged efforts to follow the Corps' guidance, App., *infra*, 143-144, and the tiny area of alleged violations in comparison to the size of the Ranch area plowed and the area of wetlands/waters wholly avoided, App., *infra*, 105, 109, the court imposed a \$1.5 million civil penalty. App., *infra*, 5, 118. On February 10, 2000, the court denied without hearing Tsakopoulos' Motion for

More Specific Findings as to the actual depth of the plowing violations it had found. App., *infra*, 5, 122-126. On March 3, 2000, final judgment was entered. App., *infra*, 127-134. Petitioners timely appealed on March 28, 2000. App., *infra*, 5; CR220, ER1092.

D. The Ninth Circuit's Decision

The Ninth Circuit affirmed the district court's decision in most respects in a 2-1 panel decision, the majority holding, over Judge Gould's dissent, that Petitioners' deep plowing of historical ranchland is regulated under CWA Section 404, App., *infra*, 210, which governs "discharges" of "pollutants," including "dredged or fill material," from "point sources" into "navigable waters." App., *infra*, 6-8.

The panel majority reasoned this case was like *Rybacek v. United States EPA*, 904 F.2d 1276 (9th Cir. 1990), which held *placer mining*, i.e., extracting raw materials from a stream, processing them to remove gold, and later returning the mining overburden to the stream at a distance from the original location, constituted "addition" of a "pollutant" and hence a Section 404 "discharge." It also relied on *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000), which held "sidecasting" materials from the digging with a backhoe of a 1240-foot drainage ditch to drain wetlands for the purpose of *residential subdivision construction* produced a regulated "discharge." App., *infra*, 6-8. It rejected Petitioners' argument that purely deep plowing to prepare land for new crops is wholly unlike those unrelated activities and even less like an "addition" of pollutants than the "incidental fallback" the D.C. Circuit in *National Mining*, *supra*, 145 F.3d 1399 held unregulated under Section 404. It distinguished *National Mining* in cursory fashion in a footnote, stating that deep plowing "does not involve mere incidental fallback, but constitutes environmental damage sufficient to constitute a regulable redeposit." App., *infra*, 8, fn. 2.

Rejecting Petitioners' argument that plows are not "discernible, confined and discrete conveyance[s]" so as to constitute "point sources" under 33 U.S.C. Section 1326(14), the Ninth Circuit relied on a Fifth Circuit case holding "bulldozers and backhoes" can constitute "point sources" where they are not merely plowing to plant crops but performing *earthmoving, excavation and ditching activities* with engaged blades and shovels to dry out water bodies. App., *infra*, 8-9; see *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 901, 920-921, 926-927 (5th Cir. 1983). The court reached this conclusion notwithstanding the undisputed fact that the bulldozers and tractors (not backhoes) pulling deep plows on Borden Ranch were not engaged in any such grading, excavation or ditching, and were simply performing a normal farming operation by using their motive power to drag normal farming implements – deep plow shanks – through soil to prepare it for the planting of deeper rooted crops. App., *infra*, 2-3.

The Ninth Circuit also rejected Petitioners' argument that even if deep plowing could somehow constitute a "point source" "discharge" it was exempt from regulation (and not recaptured) under the CWA's farmer exemptions for "normal farming . . . and ranching activities such as plowing[.]" App., *infra*, 210; *National Mining*, *supra*, 145 F.3d at 1405; see App., *infra*, 9-10.

Finally, in affirming the \$1.5 million civil penalty, the Ninth Circuit panel majority ignored conflicting authority from the Fourth and Eleventh Circuit courts, and a published Ninth Circuit district court decision, in interpreting 33 U.S.C. Section 1319, App., *infra*, 209, to allow assessment of the maximum daily penalty for each time a plow shank crossed a drainage without regard to the number of days on which the activity occurred. App., *infra*, 13-16.

Dissenting Judge Gould found *Rybacek* and *Deaton* readily distinguishable and would have held plows are

not "point sources," App., *infra*, 22, and "that the return of soil in place after deep plowing" does not produce a regulated "discharge" under *National Mining*, *supra*, 145 F.3d 1399, App., *infra*, 18, because "deep ripping does not involve any significant removal or 'addition' of material to the site." App., *infra*, 19; see App., *infra*, 18-22. He would have held the "farmer exemptions" applicable to "deep plowing" even assuming, arguendo, that it produced regulated "discharges." App., *infra*, 21. Judge Gould stated the "crux of this case is that a farmer has plowed deeply to improve his farm property to permit farming of fruit crops . . . more profitable than grazing" and that farmers have engaged in such agricultural pursuits "from the beginning of our nation, and indeed in colonial times." App., *infra*, 18. In Judge Gould's view, the majority acted without clear or express Congressional direction, and beyond Congress' intent under the CWA, in prohibiting "a traditional form of farming activity." App., *infra*, 20, 22. Judge Gould states the majority opinion "makes new law by concluding that a plow is a point source and that deep ripping includes discharge of pollutants into protected waters," and concludes that "the judicial determination that a deep plowing technique constitutes a pollution of navigable waters, with no prior adequate guidance from Congress, goes beyond mere statutory interpretation." According to Judge Gould, the majority's holding rests on "an agency power too unbounded or judicial law making, which is worse." App., *infra*, 22.

REASONS FOR GRANTING THE PETITION

This Court should grant review because the circuits are split over the fundamental jurisdictional reach of CWA Section 404 as it pertains to "incidental fallback," and because the Ninth Circuit's decision erroneously interprets several key elements of the statute resulting in expansive, intrusive and overreaching Federal regulatory

jurisdiction over normal farming activities, such as plowing, which Congress emphatically never intended to regulate at all under the CWA. *National Mining*, *supra*, 145 F.3d at 1405. As underscored by Judge Gould's dissent, App., *infra*, 18-22, the majority's decision ignores Congressional intent, eviscerates the Act's jurisdictional requirements and farmer exemptions, and substantially alters "the federal-state framework by permitting federal encroachment upon a traditional state power" SWANCC, *supra*, 531 U.S. at 173-174, namely, the traditional state and local government authority to regulate the use of land for farming and agricultural activities.

I. THE CIRCUITS ARE SPLIT OVER THE CORPS' AUTHORITY TO REGULATE "INCIDENTAL FALLBACK" AS A POINT SOURCE DISCHARGE OF POLLUTANTS UNDER THE CWA

"Section 404(a) grants the Corps authority to issue permits for the discharge of dredged or fill material into the navigable waters at specified disposal sites." SWANCC, *supra*, 531 U.S. at 163; App., *infra*, 210. "Discharge" is defined as "any addition of any pollutant to navigable waters from any point source." *National Mining*, *supra*, 145 F.3d at 1401; App., *infra*, 212. The issue whether "redeposit" of native materials removed from and then returned to jurisdictional waters in "substantially the same spot" - referred to as "fallback" or "incidental fallback", *National Mining*, *supra*, 145 F.3d at 1401, 1403 - is a regulated "discharge" has produced disagreements among the courts of appeals.

The Fourth Circuit in *National Mining* invalidated the Corps' and EPA's so-called "Tulloch Rule," purporting to regulate any redeposit from any excavation activities, and held: (1) "the straightforward statutory term 'addition' cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back,"

National Mining, *supra*, 145 F.3d at 1404; and (2) such "incidental fallback" (which occurs when material is dredged from a water, and some of it falls back off the dredge bucket into the same general location) is not an "addition" and thus not a regulated "discharge." *Id.* at 1403. *National Mining* distinguished *Rybachek v. EPA*, 904 F.2d 1276 (9th Cir. 1990) - which it found was "the strongest authority for the agencies' position," *National Mining*, *supra*, 145 F.3d at 1406 - as involving a regulable discharge which was the "discrete act of dumping leftover material into the stream after it had been processed" rather than the "incidental fallback of dirt and gravel" to its original location. *Id.*, at 1406. The statute's use of the word "addition," as well as the phrase "specified disposal sites," shows "that Congress had in mind either a temporal or geographic separation between excavation and disposal which simply does not fit incidental fallback." *Id.*, at 1410, Silberman, J., concurring.

The Ninth Circuit gave short shrift to *National Mining*, rejecting it in a three-sentence footnote and following *Rybachek*, *supra*, 904 F.2d 1276 (9th Cir. 1990), which held *placer mining* operations extracting, processing and redepositing raw materials in a stream at considerable distance from the original location, constituted "addition" of a "pollutant." App., *infra*, 6. While *Rybachek* held return of extracted, processed mining overburden was addition of pollutants even though the overburden originated from the riverbed, the regulable "discharge" or "addition" was the discrete act of dumping the leftover material into the stream after it had been extracted, collected and processed. App., *infra*, 6; *Rybachek*, *supra*, 904 F.2d at 1285. The majority purports to follow *Rybachek* in holding the instantaneous turning in place by a plow of unextracted, uncollected and unprocessed native soil constitutes "addition" of a pollutant. App., *infra*, 8. This is, as Judge Gould stated in dissent, "incremental judicial reasoning" by which the majority extends *Rybachek* - and

Section 404 – to an entirely different context where it is simply inapposite. App., *infra*, 22.

The Ninth Circuit's rejection of *National Mining* was mistaken. Contrary to the majority's reasoning in its footnote attempting to distinguish *National Mining*, the distinction between "regulable redeposit" and unregulated "incidental fallback" depends on the existence of the jurisdictional prerequisite of an addition of material, not upon whether the involved activity supposedly "constitutes environmental damage sufficient to constitute a regulable redeposit." Compare App., *infra*, 8, fn. 2 with *National Mining*, *supra*, 145 F.3d at 1402-1403. Nowhere does the Ninth Circuit cite CWA or other authority for a standard it apparently created of whole cloth.

Unlike regulated "point source" discharges, plowing does not extract, hold, collect or remove native materials such that "redeposit" could occur. Even "incidental fallback" could not occur from any significant distance. Plows cut through, break up and turn soil in place while adding nothing and redepositing nothing from any collecting bucket, container, shovel, blade or other "confined" or "discrete conveyance" designed to hold or redistribute material. As Judge Gould stated, "[b]ecause deep ripping does not move any material to a substantially different geographic location and does not process such material for any period of time, Rybachek is not controlling." App., *infra*, 20. Judge Gould recognized *National Mining* could not be distinguished and should control because plowing produces, at most, "incidental fallback" of native soil which cannot be held to be a "discharge." He also recognized plows are not "point sources." App., *infra*, 22.

It is supremely ironic and significant that the Corps and EPA themselves argued in *National Mining* that plowing, among other exempt farming activities, produced nothing more than "incidental fallback" in an effort to convince the D.C. Court of Appeals in that case that such fallback was regulated; the agencies reasoned that Congress must

have considered the "incidental fallback" from these activities to be a regulated "discharge" or it would not have needed to include an exemption in the Act. *National Mining*, *supra*, 145 F.3d at 1405. In response to this argument, the *National Mining* Court stated:

We find the exemptions far less telling. Some of the named activities – plowing, ditch maintenance, and the like – may produce fallback, but they may also produce actual discharges, i.e., addition of pollutants, so that § 404(f) accomplishes a useful purpose simply by exempting them insofar as they produce the latter. . . . [W]e are reluctant to draw any inference other than that Congress emphatically did not want the law to impede these bucolic pursuits.

National Mining, *supra*, 145 F.3d at 1405.

The Ninth Circuit's decision also conflicts with applicable Corps regulations, as interpreted by *National Mining* and its own previous decision, in holding native soil turned in place by a plow constitutes "fill" material, because the "primary purpose" of plowing is to enhance and revitalize farming soil, "not to replace an aquatic area with dry land or to change the bottom elevation of a water body[.]" See *Resource Invs.*, *supra*, 151 F.3d at 1168 (9th Cir. 1998) (holding solid waste landfill leak detection and collection system placed in wetlands were not "fill material" under "primary purpose" test); *National Mining*, *supra*, 145 F.3d at 1401, fn. 1 (noting "primary purpose" requirement for defining "fill material").

Had petitioners' plowing occurred in the D.C. Circuit, the result in this case would have been different – under *National Mining* deep plowing would not be held a "discharge" subject to Section 404's permit requirements. In the Ninth Circuit, under *Borden Ranch*, it is. These issues are of national significance and fundamental importance to the farming, ranching and mining industries, as underscored by amici briefs and participation of

California Farm Bureau Federation, California Cattle-men's Association, California Mining Association and Pacific Legal Foundation, in support of Petitioners below and on appeal. The existence of Federal CWA Section 404 jurisdiction over "incidental fallback" from normal farming activities, such as plowing, should not depend on the happenstance of a farm's or ranch's location. Farmers and ranchers throughout the nation are entitled to equal treatment under the CWA, and the need for national uniformity is particularly great because farming activity completely unregulated in one jurisdiction could result in a multi-million dollar fines - or even criminal liability - if conducted in another. This case's exceptional importance warrants the granting of certiorari.

II. THE NINTH CIRCUIT ERRED IN HOLDING PLOWS ARE "POINT SOURCES"

An essential element of CWA Section 404 permitting jurisdiction is that the "pollutant" be "discharged" or "added" by a "point source," defined as "any discernible, confined and discrete conveyance." App., *infra*, 212. Regulation of potential sources of non-point source pollution is generally left to the States. E.g., 33 U.S.C. § 1288(h)(2)(F); see S. Rep. No. 95-370, at 76 (1977), reprinted in 1977 U.S.C.C.A.N. 4326, 4401 (normal farming activities to be regulated as non-point sources by State and local agencies). A plow is not a "point source," i.e., a "confined and discrete conveyance," since it is neither "confined" nor a "container," nor does it function as a "conveyance" of pollutants/materials from one location to another. No prior case has ever held a plow is a "point source."

The Ninth Circuit's reliance on a Fifth Circuit case finding "bulldozers and backhoes" can constitute "point sources" is misplaced since there the bulldozers and backhoes were not used for merely plowing (by pulling plow shanks) but for entirely different purposes and

activities including performing earthmoving, excavation and ditching functions with engaged blades and shovels. *Avoyelles Sportsmen's League, Inc. v. Marsh*, supra, 715 F.2d at 901, 920-921, 926-927. In *Avoyelles*, the owner of a 20,000-acre tract leveled the property, cut down timber and vegetation with bulldozers with shearing blades, pushed, burned, raked and disked all these materials into the land's low spots to raise and level it, and further dug a drainage ditch, for the express purpose of filling and drying out a swampy Louisiana flood plain so that it could thereafter be farmed for soybeans. *Id.*, at passim, 926. The bulldozers and tractors (not backhoes) pulling deep plows on the semi-arid Borden Ranch were indisputably not engaged in any such grading, excavation or ditching, and were simply using their motive power to drag normal farming implements - deep plow shanks - through the soil to break it up, and turn it in place, i.e., to plow. Neither *Avoyelles* nor any other reported decision, until *Borden Ranch*, holds that plowing alone produces a "point source" discharge.

The issue is critical to the nation's farmers and not limited to deep plowing, as the agencies are now going beyond even their own unauthorized December 12, 1996 RGL and attempting to regulate even the shallowest forms of plowing - including disking - under the authority of the *Borden Ranch* decision. See, e.g., App., *infra*, 41, 48 (district court summary judgment order finds both deep ripping and disking are regulated).

III. THE NINTH CIRCUIT ERRED IN HOLDING THAT PLOWING RANCHLAND TO PLANT CROPS IS A "CHANGED IN USE" NEGATING THE CWA'S INTENDED BROAD EXEMPTION OF PLOWING AS A "NORMAL FARMING ACTIVITY"

It is wholly unnecessary to reach the issue of interpretation of the CWA's farmer exemptions if the Court

concludes that deep plowing produces no regulated point source "discharge" so as to fall under the Corps' CWA Section 404 permitting jurisdiction. Congress' 1977 CWA amendments were intended to prevent regulatory overreaching and make clear that no permit is required in any event for any alleged "discharge," i.e., "addition" of a pollutant:

(A) 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; . . .

App., *infra*, 210.

Congress provided a narrow "recapture" provision removing from the exemption:

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.

App., *infra*, 211, *emph. added*. This exception is not concerned with any "discharges" from the isolated activity of plowing productive farm or ranchland in its natural state, or with changes in agricultural use, such as from pasture and forage crop to orchard/vineyard crop. Rather, it addresses intentional conversion of unproductive wetlands to drylands on a significant scale to enable normal farming activities which could not otherwise occur. *In re Carsten*, *supra*, 211 B.R. at 735.

Thus, where activities are done for the primary purpose of draining and drying out significant water bodies to convert them to farmable uplands – i.e., the *Avoyelles* situation – the exemption cannot be claimed on the grounds that otherwise unregulated farming activities,

such as plowing, are later performed "incidental to," i.e., as a "minor concomitant," AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, NEW COLLEGE ED. (1975), p. 665, of the primary conversion project. This reasonable interpretation is compelled by the plain language of the "farmer exemptions", Congress' clear intent to meaningfully exempt normal farming activities from onerous federal regulation under the CWA's "point source" program, the lawful agency regulations expressly exempting all forms of plowing, and related statutes.⁴

The Ninth Circuit relied on the "recapture" provision as interpreted by *Avoyelles*, *supra*, 715 F.2d at 925, and another Ninth Circuit decision, *United States v. Akers*, 785 F.2d 814, 820 (9th Cir. 1986), to hold petitioners' deep plowing to plant vineyards and orchards was not exempt and was "recaptured" because it supposedly "radically altered the hydrological regime of protected wetlands." App., *infra*, 10. The Ninth Circuit confused the normal activity of converting from one agricultural crop to another with that of converting waters to uplands, and erroneously reasoned that "[c]onverting ranch land to

⁴ For example, Congress subsequently enacted "Swampbuster" in the 1985 Food Security Act ("FSA"). Under the FSA "there will be liability for conversion of a wetland if it is manipulated for the purpose or to have the effect of making the land farmable." *Downer v. U.S. By And Through Dept. of Agriculture*, 894 F.Supp. 1348, 1356 (D.S.D. 1995), *emph. added*, *aff'd* 97 F.3d 999 (8th Cir.). Statutes in *pari materia* are construed together. BLACK'S LAW DICTIONARY (5th ed. 1979), p. 711. "Wetlands" subject to being farmed by use of "normal cropping or ranching practices" (i.e., plowing) as a result of their "natural condition" (e.g., drought or, as here, regular dryness in a semi-arid region throughout the long growing season) are not deemed converted (i.e., brought into a use to which they were not already subject) when so farmed. Merely plowing (without more) thus triggers neither FSA farm subsidy ineligibility under "Swampbuster" nor CWA Section 404's recapture provision.

orchards and vineyards is clearly bringing the land into a use to which it was not previously subject . . . " *Id.* at 815. If this were true, then any change in agricultural crop or practice could subject plowing to federal regulation, and CWA Section 404's exemption for plowing ranchland to plant crops, App., *infra*, 218, would be rendered meaningless. Indeed, under the Ninth Circuit's interpretation, Section 404(f)(1) is a mere "grandfather" clause which would not apply at all to plowing historically ranchland for the first time either to improve the forage or to plant non-forage crops. The CWA's legislative history refutes this crabbed interpretation of the "farmer exemptions" and shows Congress never intended to regulate mere plowing at all under the CWA.

Senator Muskie, a primary CWA sponsor, *Aboyelles, supra*, 715 F.2d at 915, explained "the bill [adding farmer exemptions] tries to free from the threat of regulation those kinds of man made activities which are sufficiently de minimis as to merit general attention at the state and local level and little or no attention at the national level." Vol. 3, A LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977 (1978) (hereafter "1977 LEG. HIST.") at 645 (CR36, ER489) (Senate Report on S. 1952, 95th Cong.); *see also id.* (Vol. 4) at 924 (ER 492) (Domenici comments); 181 (ER482) (President's comments); 289, 351, 524 (ER481, 483, 487) (Stafford comments). Where, as here, plowing is a permitted farming activity under locally-enacted agricultural zoning and other State and local regulations, Congress intended the federal government to have no role under the CWA.

During the December 15, 1977 Senate debate, Senator Muskie recognized the 1972 CWA's basic objective was "to eliminate toxic pollutants in toxic amounts" *id.*, 426, ER484, and stated of the "farmer exemptions":

The conferees agree to adopt the Senate amendment that legislatively clarifies the exclusion of certain activities that do not typically involve point source discharges of dredged or fill material . . . plowing, seeding, cultivating, harvesting, minor

drainage, and soil and water conservation practices performed on uplands were not intended to require section 404 permits. . . . [¶] . . . 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 into dry land or impede circulation or reduce the reach or size of the water body.

ER485, *emph. added*; *see also* 4 1977 LEG. HIST. at pp. 919-920 (ER490-491) (Chafee comments); *see* ER495, 493, 494. The legislative history shows Congress never intended to regulate pure plowing under the CWA and never even considered it to produce "discharges."

The implementing agency regulations accordingly exclude *all* plowing from CWA regulation. 33 CFR Section 323.2(f), for example, provides "fill" is addition of material and never includes plowing. EPA's regulations provide:

Plowing means all forms of primary tillage, including moldboard, chisel, or wide-blade, disking, harrowing, and similar physical means used on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. . . .

Plowing, as described above, will never involve a discharge of dredged or fill material.

App., *infra*, 218, *emph. added*.

Nor does the case law support the Ninth Circuit's unwarranted extension of Section 404 jurisdiction to purely farming activities. In *Akers*, the farmer purchased a 9,600 acre property which contained 2,889 acres of wetlands - known as the "Big Swamp" - on which he planned to "carry out extensive grading, leveling, drainage and water diversion to convert the wetlands to farmlands suitable for growing upland crops." *Akers, supra*, 785 F.2d at 816-817. Toward this end, he constructed a 3-mile long dike and 50-foot wide ditch to drain the

wetlands. *Id.* Based on Akers' extensive dike building, grading, leveling and water diversion activities, which were specifically designed to convert the marshy Big Swamp from non-farmable land into farmable land, the Ninth Circuit "affirm[ed] the injunction [against Akers] as a reasonable response to the peculiar facts before [it]." *Id.* at 820, *emph. added*. It did not endorse the Government's more extreme arguments, including arguments that "mere discing of soil" constituted a point source discharge of pollutants and that farmers required CWA permits to change from one wetland crop to another. *Id.* at 820; see *id.* at 819 (holding farmer exemptions inapplicable because court "cannot view Akers' plowing, discing and seeding in isolation" from other activities). Akers never held mere plowing of *already-farmable* land alone was regulated. Petitioners' plowing here *must* be viewed in isolation, because that is undisputedly how it occurred, on semi-arid ranchland already dry enough to plow and plant in its natural state. No case has ever held the Corps' CWA Section 404 jurisdiction extends to regulating *mere* plowing on land dry enough to farm in its natural state *without first undertaking extraordinary conversion activities*.

To the extent the Ninth Circuit unduly deferred to EPA's unauthorized application and interpretation of the CWA and its own regulations, its decision conflicts with this Court's SWANCC decision, which makes clear that the States retain traditional and primary power to regulate land and water use. SWANCC, *supra*, 531 U.S. at 174, citing *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994). As recognized by the CWA, farmers' and ranchers' agricultural land uses, including activities like plowing, are traditional matters of state and local, not federal, control. 33 U.S.C. §§ 1288, 1329; App., *infra*, 210, 212. Where administrative statutory interpretation is not only clearly erroneous but alters the federal-state framework by permitting federal encroachment on traditional state powers, courts do not apply the deferential standard

of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). SWANCC, *supra*, 531 U.S. at 173. Rather, in such cases, Congress must "convey its purpose clearly" or courts will deem it not to "have significantly changed the federal state balance." *Id.*, quoting *United States v. Bass*, 404 U.S. 336, 349 (1971).

The Ninth Circuit's expansive definition of the terms "discharge," "addition," "point source" and "pollutant", and narrow interpretation of the farmer exemptions, so as to include the pure plowing done in this case within the Corps' CWA Section 404 jurisdiction, substantially expands federal power to an unprecedented extent at the expense of State and local authority. SWANCC forbids this absent Congress' clearly-expressed intent. As Judge Gould stated, "If Congress intends to prohibit so natural a farm activity as plowing, and even the deep plowing that occurred here, Congress can and should be explicit. Although we interpret the prohibition of the [CWA] to effectuate Congressional intent, it is an undue stretch for us absent a more clear directive from Congress, to reach and prohibit the plowing done here, which seems to be a traditional form of farming activity." App., *infra*, 19-20.

IV. THE NINTH CIRCUIT ERRED IN CALCULATING THE CIVIL PENALTY BY CALCULATING EACH PASS OF THE PLOW THROUGH WATERS, RATHER THAN EACH DAY OF PLOWING, AS A SEPARATE VIOLATION UNIT

If one assumes, solely *arguendo*, that plowing alone is a regulable activity under CWA Section 404, the Ninth Circuit nevertheless erred as a matter of law when it held the maximum CWA penalty was properly calculated by multiplying the number of passes the district court found were made by the plow, App., *infra*, 12-16, through each jurisdictional feature by the statutory dollar amount rather than multiplying the number of days during which

plowing "discharges" occurred in particular "waters" by the statutory dollar amount.

33 U.S.C. Section 1319(d), App., *infra*, 209, authorizes civil penalties "not to exceed \$25,000 per day for each violation" against persons violating Section 1311(a) by discharging pollutants without a permit. This statute contemplates maximum penalties will be calculated not in terms of the total number of individual violations of the same type, but, rather, in terms of *daily violation units*. The "top-down" method of penalty assessment (employed here) involves calculating the maximum statutory penalty by first finding how many distinct categories of CWA violations occurred, and then finding the number of *days* during which each category occurred and multiplying the number of days by \$25,000. *Chesapeake Bay Foundation v. Gwaltney of Smithfield*, 791 F.2d 304, 314 (4th Cir. 1986) vacated and remanded on other grounds, 484 U.S. 49 ("each distinct violation is subject to a separate *daily* penalty assessment of up to \$25,000 . . ."); *Hawaii's Thousand Friends v. City and County of Honolulu*, 821 F.Supp. 1368, 1395 (D. Haw. 1993) (discussing top-down method of calculating number of categories and "*daily violations*" to arrive at maximum penalty).

The *Gwaltney* court rejected defendant's interpretation there as untenable because it impermissibly calculated the statutory maximum penalty "*per violation*," rather than "*per day* of violation." *Gwaltney*, *supra*, 791 F.2d at 314. The Ninth Circuit and district courts here, too, read the words "*per day*" out of the statute and impermissibly divided daily soil discharges within a single category of violation into hundreds of separate violations. App., *infra*, 12-16. Under *Gwaltney*, Tsakopoulos' maximum penalty should have been limited to, at most, the number of *days* during which the same type of "point

source discharges" of soil actually occurred in particular waters. Counting as separate violation units the number of times a single point source (i.e., a plow shank) crossed a single jurisdictional feature during a single day impermissibly converts a single *daily* violation unit of the same activity into numerous sub-daily violation units and illegally establishes the maximum penalty "*per violation*," rather than *per day* of violation" – a result "inconsistent with the language of § 1319(d)." *Gwaltney*, *supra*, 791 F.2d at 314.

Where the "violation unit" is measured by less than a single day's period of time – for example, an "hourly maximum violation" occurring multiple times during the same day – the CWA limits the maximum penalty to *one day* for all such violations *if they are of the same type*. *United States v. Amoco Oil Co.*, 580 F.Supp. 1042, 1046, n. 1 (W.D. Mo. 1984), cited with approval by *Tyson Foods*, *supra*, 897 F.2d at 1138, 1138-1139 (holding Congress amended § 1319(d)'s language to its current "*per day* for each violation" to clarify the statute in accordance with *Amoco's* interpretation).

Tsakopoulos' alleged violations *all* fell within the *single distinct category* of alleged discharge of a single "pollutant" – "fill" from native soil turned in place – from a "point source" without a permit. App., *infra*, 15. In performing its "top-down" analysis, the court should have added the number of *daily* violations of this category and multiplied that total by \$25,000. *Hawaii's Thousand Friends*, *supra*, 821 F.Supp. at 1395. Despite extensive evidence introduced by the Government in the form of daily time records of the deep plow operators, the lower courts failed to engage in *any* analysis of the number of *days* on which such plowing occurred in either fall 1995 or fall 1996 on the Ranch's San Joaquin side, and never even *estimated* the number of daily violation units. CR189, ER1042-1043.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

TIMOTHY S. BISHOP
MAYER, BROWN ROWE &
MAW
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

EDMUND L. REGALIA
MILLER, STARR & REGALIA
A Professional Law
Corporation
1331 N. California Blvd.,
5th Floor
Post Office Box 8177
Walnut Creek, CA 94596
(925) 935-9400

ARTHUR F. COON
Counsel of Record
MILLER, STARR & REGALIA
A Professional Law
Corporation
1331 N. California Blvd.,
5th Floor
Post Office Box 8177
Walnut Creek, CA 94596
(925) 935-9400

Counsel for Petitioner

February 2002

APPENDIX TABLE OF CONTENTS

	Page
United States Court of Appeals for the Ninth Circuit Panel Opinion (08/15/01).....	App. 1
United States District Court for the Eastern Dis- trict of California Proceedings Joint Stipulation and Preliminary Injunction Order (10/20/97).....	App. 23
Amended Order on cross-motions for summary judgment (8/3/98).....	App. 28
Order denying AKT's motion for entry of final judgment and certification of order on sum- mary judgment (8/10/98).....	App. 57
Findings of Fact and Conclusions of Law (11/8/99).....	App. 67
Order Denying Borden Ranch's motion to amend findings of fact and conclusions of law (2/10/00).....	App. 122
Final Order directing entry of Judgment with one change from jointly submitted proposed final judgment (3/3/00).....	App. 127
Judgment (3/3/00).....	App. 134
Relevant Administrative Orders and Companion Case	
Angelo K. Tsakopoulos v. American Manufac- turer's Mutual Insurance et al.: Order on cross- motions for summary judgment (8-9-00).....	App. 135
May 1996 Administrative Order On Consent (USEPA).....	App. 165