Borden Ranch Partnership v. U.S. Army Corps of Engineers: A Barge in a Bucket - May Isolated Wetlands Be Considered Navigable Waters under the CWA

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GERBER: BORDEN RANCH PARTNERSHIP v. U.S. ARMY CORPS OF ENGINEERS: A BARGE IN A BUCKET? MAY ISOLATED WETLANDS BE CONSIDERED "NAVIGABLE WATERS" UNDER THE CWA?

I. Introduction

The quality of our nation’s oceans, rivers and streams is regulated by the Federal Clean Water Act (CWA). Currently, there are approximately 1.9 million farms in the United States that provide food sources for the United States and large parts of the world. Approximately eighty-six percent of these farms are owned and operated by individuals or single families. The interests of these small farmers recently came into conflict with the CWA in Borden Ranch Partnership v. U.S. Army Corps of Engineers (Borden).

The Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) are the regulatory agencies responsible for implementing the CWA. These agencies have traditionally enjoyed a broad range of powers to enforce the CWA in the nation’s "navigable" waters. These powers were recently challenged in Borden Ranch Partnership v. United States Army Corps of Engineers, 261 F.3d 810 (9th Cir. 2001). For a complete discussion of the facts and holdings of Borden see infra, notes 20-44 and 92-122 and accompanying text.

1. Clean Water Act § 101(a), 33 U.S.C. § 1251(a) (2001) (stating CWA’s goals and policies). Congress passed the CWA in 1972 to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters.” Id.


4. Borden Ranch P’ship v. United States Army Corps of Eng’rs, 261 F.3d 810 (9th Cir. 2001). For a complete discussion of the facts and holdings of Borden see infra, notes 20-44 and 92-122 and accompanying text.


6. See generally Arthur F. Coon, Is Plowing a Point Source Discharge?, 18 NAT. RESOURCES & ENV’T, 6 (Summer 2003) (explaining that Borden was attempt by farmers to defend their rights against regulation by Corps and EPA). See 33 U.S.C. § 1344(a) (granting secretary authority to regulate “discharge of dredged or fill material into the navigable waters at specified disposal sites”). Section 1344(d) defines Secretary as “the secretary of the Army, acting through the Chief of Engineers,” Id. at § 1344(d).

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den. At issue in *Borden* was the authority of the Corps and EPA to regulate a plowing technique called "deep ripping." Deep ripping is a process in which a tractor or bulldozer drags long metal prongs through the ground, penetrating layers of soil in order to drain the land and allow certain crops to grow. *Borden* rose to prominence within the agricultural community because of its implications for regulating deep ripping and other plowing techniques employed by farmers across the country.

In *Borden*, the Ninth Circuit dealt with two important issues: (1) whether "deep ripping" is within the regulatory authority of the Corps and EPA; and (2) whether isolated wetlands are "navigable waters" under the CWA. The Ninth Circuit held that the Corps and EPA had the power to regulate deep ripping, but concluded that the Corps' and EPA's jurisdiction did not extend to certain isolated pools. An equally divided United States Supreme Court later affirmed this decision without a written opinion.

This Note examines the extent to which the Corps and EPA may regulate deep ripping and the limits of the federal government's jurisdiction under the CWA. Section II presents the facts and procedural history of *Borden*. Section III examines the origins of the power of the Corps and EPA to regulate farmers' actions in

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7. See *Borden*, 261 F.3d at 812 (providing background facts of case).
8. See id. at 812 (explaining agricultural activity in controversy).
9. See id. (describing deep ripping process). For a more complete discussion of the facts of *Borden*, see infra notes 20-44 and accompanying text.
10. See *Coon*, supra note 6, at 6 (noting farmers and ranchers nationwide are "now on notice that the Corps claims the right to regulate their most basic agricultural activities").
11. See *Borden*, 261 F.3d at 812 (setting forth issues examined in case). For a more complete discussion of the holding and reasoning in *Borden*, see infra notes 92-122 and accompanying text.
12. See id. at 816, 819 (holding Corps' authority did not extend to certain non-navigable pools).
14. For a more complete discussion, see infra notes 123-56 and accompanying text.
15. For a discussion of the facts of *Borden*, see infra notes 20-44 and accompanying text.
wetlands. Section IV reviews the Ninth Circuit’s holding and reasoning in Borden. Section V offers a critical analysis of the Ninth Circuit’s decision to extend authority to the Corps and EPA to regulate deep ripping. Finally, Section VI discusses Borden’s potential impact on the farming community.

II. FACTS

The controversy in Borden arose from a long-standing dispute between the Corps, EPA and real estate developer Angelo Tsakopoulos. In June of 1993, Tsakopoulos purchased Borden Ranch, an 8,400 acre ranch located in California’s Central Valley, with the intent of turning the ranchland into a vineyard and orchard. To develop the land, Tsakopoulos needed to penetrate the ranchland’s shallow surface to allow the deep root systems of the vineyard and orchard to grow. To accomplish this goal, he deep ripped the soil.

Tsakopoulos first began deep ripping the land without a permit in the fall of 1993. The Corps later discovered the deep ripping on what they perceived to be protected “wetlands.” The Corps issued Tsakopoulos a retrospective permit in 1994 subject to certain damage-mitigating requirements. When Tsakopoulos be-

16. For a discussion of the origins and authority of the Corps’ power under the CWA, see infra notes 45-91 and accompanying text.
17. For further discussion of the holding and reasoning in Borden, see infra notes 92-122 and accompanying text.
18. For a critical analysis of the boundaries of the government’s commerce powers, see infra notes 144-56 and accompanying text.
19. For a discussion of the effects of the Ninth Circuit’s holding in Borden, see infra notes 157-66 and accompanying text.
20. See Borden, 261 F.3d at 812-13 (discussing origins of dispute in Borden). By the time this case reached the Supreme Court, the underlying dispute in Borden had been developing for nearly a decade. Id.
21. See id. at 812 (noting developer’s intent to convert land into vineyard and sell it in smaller parcels).
23. See Borden, 261 F.3d at 812 (describing deep ripping process employed by Tsakopoulos).
24. See id. (providing background facts of case).
25. See id. (noting Corps’ first attempt at regulating deep ripping activity).
26. See id. (detailing Corps’ first action against Tsakopoulos).
gan to deep rip again in 1995, the Corps issued a cease-and-desist order. Over the next year, Tsakopoulos repeatedly defied the Corps' attempts to stop his deep ripping activities. Finally, in 1996, the Corps, EPA and Tsakopoulos entered into an Administrative Consent Order. The Order required Tsakopoulos to reserve 1368 acres of the land for an environmental preserve and to "refrain from further violations." In December of 1996, the Corps also issued a regulatory guidance letter that distinguished deep ripping from normal plowing and stated that deep ripping required a permit under the CWA.

In the spring of 1997, EPA investigators visited the ranch because they suspected that Tsakopoulos was still deep ripping the soil. Upon their arrival, the inspectors witnessed "fully engaged deep rippers passing over the jurisdictional wetlands." Consequently, EPA issued an Administrative Order, compelling Tsakopoulos to cease his activities. Tsakopoulos responded by initiating a lawsuit against the Corps.

Tsakopoulos directly challenged the jurisdiction of the Corps and EPA to regulate deep ripping on his land. In response, the United States filed a counterclaim for injunctive relief and civil pen-

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27. See id. at 813. The Corps concluded that Tsakopoulos had been conducting further deep ripping on protected wetlands. See id. The specific features deemed to be part of the "wetland" were vernal pools, swales and intermittent drainages. Id. at 812. The Ninth Circuit defined vernal pools as "pools that form during the rainy season, but are often dry in the summer." Id. It defined swales as "sloped wetlands that allow for the movement of aquatic plant and animal life and that filter water flows and minimizes erosion." Id. Finally, it defined intermittent drainages as "streams that transport water during and after rains." Id.

28. See Borden, 261 F.3d at 813 (noting Tsakopoulos's continuation of deep ripping). The Corps initiated a number of actions against Tsakopoulos, all to no avail. See id.

29. See id. (giving history of violations).
30. See id. (providing background facts of case).
31. See id. (noting issuance of regulatory guidance letter). The Corps' guidance letter was "in conflict with . . . two decades of regulations and guidance." See Coon, supra note 6, at 39.
32. Borden, 261 F.3d at 813 (noting EPA's involvement in case). The investigators accused Tsakopoulos of over 300 separate violations. See id.
33. Id. (noting investigators' observations of repeated violations of their guidance letter).
34. See id. (explaining EPA's actions after observing Tsakopoulos's violations).
35. See id. (noting Tsakopoulos's challenge to Corps' Administrative Order).
36. See id. (noting Tsakopoulos's main argument). Tsakopoulos also argued that the Corps' guidance letter was invalid because it was a "substantive rule that required notice-and-comment rule making." Id. at 815 n.1. The Ninth Circuit, however, did not consider this argument because it was not made in the district court. Id.
altities based on Tsakopoulos's alleged CWA violations. The District Court for the Eastern District of California determined that the Corps had jurisdiction over deep ripping. The district court then held a bench trial to resolve whether Tsakopoulos had engaged in deep ripping. In the fall of 1999, the district court concluded that Tsakopoulos had engaged in deep ripping on 348 separate occasions, violating the CWA.

In response, Tsakopoulos appealed the district court’s decision to the Ninth Circuit Court of Appeals. The Ninth Circuit upheld the district court’s decision, agreeing that the Corps and EPA had jurisdictional authority over deep ripping. The Ninth Circuit, however, reversed the district court’s ruling that a particular isolated vernal pool on the Borden Ranch land was a “wetland” under the CWA. In December of 2002, the Supreme Court, in an equally divided decision, affirmed the Ninth Circuit’s ruling.

III. BACKGROUND

A. The Clean Water Act

Section 404(a) of the CWA empowers the Army Corps of Engineers to issue permits pursuant to section 301(a) of the CWA for regulating discharge of pollutants into the “navigable waters” of the United States. The CWA defines “navigable waters” as waters that

37. Borden, 261 F.3d at 813 (explaining government’s response to Tsakopoulos’s lawsuit). Both parties filed for summary judgment in the case. Id.

38. See generally Borden Ranch P’ship v. United States Army Corps of Eng’rs, No. CIV. S97-0858 GEBJFM, WL 1797329, at *1 (E.D. Cal. Nov. 8, 1999) (holding that Tsakopoulos’s deep ripping violated CWA). The district court concluded that a civil trial was necessary to determine whether and where deep ripping occurred. See Borden, 261 F.3d at 813 (giving procedural history of case).

39. Borden, 261 F.3d at 813. (detailing findings of evidence of repeated violations).

40. See id. (detailing findings of deep ripping violations). The district court offered Tsakopoulos the option of paying the corresponding $1.5 million penalty or paying $500,000 if he mitigated damages by restoring four acres of wetland. Id.

41. See id. (discussing process by which case reached Ninth Circuit).

42. See id. (affirming that Corps had jurisdiction in wetlands of Borden Ranch).

43. Id. at 810 (affirming in part and reversing in part). For a discussion of the court’s complete holding, see infra notes 92-122 and accompanying text.


are in some way related to use in interstate or foreign commerce, including interstate wetlands.46 “Wetlands” are defined as lands covered by enough water that, under normal circumstances, would support vegetation typically found in saturated soil conditions.47

1. Navigable Waters

Courts generally take an expansive view of the term “navigable waters.”48 The Supreme Court extended the definition of navigable waters and waterways to include certain wetlands adjacent to navigable waters in United States v. Riverside Bayview Homes, Inc.49 Recently however, the Supreme Court limited the expansion of the Corps’ authority over wetlands in Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)50. In SWANCC, the Supreme Court held that the Corps exceeded its authority when it defined intrastate waters used as habitats for migratory birds as “navigable waters” under the CWA.51 Furthermore, the Court distinguished its earlier holding in Riverside because the waters at issue in that case actually abutted a navigable waterway, whereas in SWANCC, they did not.52

46. Navigation and National Waters, 33 C.F.R. 328.3(a)(1)-(2) (2002). Navigable waters are defined as “waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce including . . . interstate wetlands.” Id.; see also Solid Waste Agency of N. Cook County v. United States Army Corps of Eng’rs, 531 U.S. 159 (2000) (limiting scope of “navigable waters”).

47. 33 C.F.R. 328.3(b). The Code of Federal Regulations defines “wetlands” as “those areas that are 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.” Id.


49. 474 U.S. 121, 133-35 (1985) (holding that expanding definition of “navigable waters” to particular wetlands adjacent to navigable waterways is “a permissible interpretation of the Act”).

50. 551 U.S. 159, 165-68 (2001) (refusing to expand Corps’ 404 jurisdiction to wetlands not connected to open water).

51. Id. at 167 (holding that Congress did not intend to extend Corps’ authority to non-navigable waters not adjacent to any actually navigable waters).

52. Id. at 167-68 (distinguishing its earlier holding in Riverside because waterway in SWANCC did not abut any navigable waterway); see also Riverside, 474 U.S. at 133. The Court in SWANCC further limited Riverside by recognizing that Riverside interpreted the term “navigable” beyond its classical understanding. SWANCC, 551 U.S. at 171.
2. Discharge of a Pollutant

Under the CWA, discharging pollutants into wetlands without a permit is illegal. The CWA defines “discharge” as “any addition of any pollutant to navigable waters from any point source.” Courts have experienced difficulty in determining whether land that is stirred and then returned to approximately the same area may be considered an “addition of a pollutant” under the CWA.

Courts frequently disagree over what activities cause the “discharge of a pollutant.” For example, in Rybachek v. United States Environmental Protection Agency, the Ninth Circuit held that discharge from mining constituted an “addition of a pollutant.” Rybachek involved soil that miners dug up, processed to remove valuable deposits and later returned to the wetland from which it was taken. In contrast, in National Mining Association v. United States Army Corps of Engineers, the D.C. Circuit ruled that “discharge of a pollutant” did not include material that incidentally fell back into the wetlands in the course of dredging operations. Further, the D.C. Circuit determined that the Corps exceeded its authority by regulating this conduct.

53. Clean Water Act § 301(a), (d), 33 U.S.C. § 1311(a), (d); Clean Water Act § 404(a), 33 U.S.C. § 1344(a) (2001). For a further discussion of what may be considered discharge of a pollutant, see infra notes 54-67 and accompanying text.


55. Borden Ranch P'ship v. United States Army Corps of Eng'rs, 261 F.3d 810, 814-15 (9th Cir. 2001) (comparing deep ripp ing to mining and dredging activities). This controversy is discussed at greater length at notes 56-67 and 132-39 and accompanying text.

56. See generally Nat'l. Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399 (D.C. Cir. 1998) (refusing to extend Corp's authority to incidental fallback from dredging); United States v. Wilson, 133 F.3d 251 (4th Cir. 1997) (holding that Corps does not have authority to regulate sidecasting); Rybachek v. United States Env'tl. Prot. Agency, 904 F.2d 1276 (9th Cir. 1990) (holding that mining caused discharge of pollutant).

57. 904 F.2d 1276 (9th Cir. 1990) (considering whether mining activity constituted discharge of pollutant).

58. See id. at 1285 (holding that sifting through soil from riverbed for gold and returning soil to riverbed qualifies as “addition of a pollutant”).

59. See id. (discussing process by which soil was mined, processed and then returned to same area).

60. 145 F.3d 1399 (D.C. Cir. 1998) (holding that Corps exceeded its authority by regulating incidental fallback from dredging activities).

61. See id. at 1404 (noting that “addition” could not mean instance where small portion of excavated material fell back from where it was taken).

62. Id. (finding that Corps had no authority to regulate such incidental fallback).
There is also evidence of internal dispute in the Fourth Circuit over what activities cause the "addition of a pollutant." According to United States v. Wilson, the Fourth Circuit Court of Appeals reasoned that "sidecasting," a process whereby material is removed from a ditch and placed by the side of the ditch, was not a "discharge of a pollutant" under the CWA. Three years later, the Fourth Circuit held that the deposit of dredged or excavated material from a wetland back into that same wetland "added a pollutant where none had been before" in United States v. Deaton. The court reasoned that "Congress determined that plain dirt, once excavated from waters of the United States, could not be redeposited into those waters without causing harm to the environment."

3. Point Source

A "point source" under the CWA is "any discernable, confined and discrete conveyance . . . from which pollutants are or may be discharged." Although many courts have held that bulldozers and backhoes are point sources, there is still some debate over whether a plow is a point source. In Avoyelles Sportsmen's League, Inc. v. Marsh, the Fifth Circuit held that bulldozers and backhoes were

63. See generally United States v. Deaton, 209 F.3d 331, 335-36 (4th Cir. 2000) (holding dredging technique called sidecasting constituted addition of pollutant); Cf. United States v. Wilson, 135 F.3d 251 (4th Cir. 1997) (finding that Corps does not have authority to regulate sidecasting).

64. 133 F.3d 251 (4th Cir. 1997) (refusing to hold that sidecasting constituted discharge of pollutant).

65. See id. at 253-54 (arguing that such holding was overextension of powers of CWA).

66. 209 F.3d 331, 335-36 (4th Cir. 2000) (holding that dredging technique called sidecasting constituted addition of pollutant). Sidecasting involves dredging soil from a location and immediately placing the same, unprocessed soil nearby. Id.

67. Id. at 336 (reasoning that Congress had mandated that once soil was removed from wetland it could not be returned to wetland without adding pollutant). The Fourth Circuit Court of Appeals later reaffirmed that the Corps had power to regulate sidecasting in a later incarnation of the Deaton case. See generally Deaton v. Chesapeake Bay Found., Inc., 332 F.3d 698, 702 (4th Cir. 2003) (affirming district court's order requiring Deaton to fill in ditch and restore wetlands to pre-violation condition).


69. Borden Ranch P'ship v. United States Army Corps of Eng'rs, 261 F.3d 810, 815 (9th Cir. 2001) (noting controversy in Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 922 (5th Cir. 1983)).

70. 715 F.2d 897 (5th Cir. 1983) (finding that deforesting land constituted discharge of pollutant).
considered point sources capable of discharging pollutants. In *Avoyelles*, the court determined that deforesting a large area of land with bulldozers and backhoes for the purpose of growing soybeans constituted the discharge of a pollutant from a point source. Until *Borden*, no court had held a plow to be a point source.

### 4. The Normal Farming Exception

The CWA excludes discharges "from normal farming . . . and ranching activities, such as plowing," from its regulation. This farming exception is very narrow and cannot be applied to any use not already in existence. The exemption is specifically limited by a "recapture provision," which significantly restricts application of the exemption because it requires a permit for any discharge resulting from a change in the land’s use.

The "recapture provision" seemingly allows the Corps and EPA to regulate even normal plowing activities if the plowing changes the use of the land. A broader concern in this area is whether normal plowing of a field could be deemed to bring the land into another use "to which it was not previously subject" under the statute. As the Ninth Circuit held in *United States v. Akers*, the Corps does not have authority to regulate a farmer who desires only to change the use of his land from growing one wetland crop to another. The Corps may, however, regulate activities that require substantial hydrological alterations. According to the Ninth Cir-

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71. *Id.* at 922 (holding that bulldozer could be considered point source under CWA).

72. *See id.* at 900-01 (holding that deforesting land created pollutant and, therefore, required permit).

73. *See generally Borden*, 261 F.3d at 815 (acknowledging Tsakopoulous’s contention that no court has held plow to be point source).


76. 33 U.S.C. § 1344(f)(2) (stating that permit is required when discharge of pollutant is “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”).

77. *Id.* (providing that plowing may be regulated where “flow of circulation of navigable waters may be impaired”).

78. *See Borden*, 261 F.3d at 815-16 (attempting to resolve whether normal plowing may fall under “recapture provision”).

79. 785 F.2d 814 (9th Cir. 1986) (addressing scope of normal farming exception).

80. *See id.* at 820 (reasoning that Congress did not intend such result).

81. *See id.* at 822-23 (holding that major conversion from wetlands to dry lands requires Corps permit).
cuit in Akers, Congress intended to enact the CWA to “prevent conversion of wetlands to dry lands.”

B. The Commerce Clause

1. The Scope of Regulatory Authority Under the Commerce Clause

The United States Supreme Court has long acknowledged the regulatory power given by Congress to administrative agencies such as the Corps and EPA. The source of these agencies' authority arises from the Commerce Clause, through which Congress delegates powers to the agencies. Courts have traditionally construed the term "navigable waters" very broadly. Under the Commerce Clause, the federal government has power to regulate in three areas. As set forth in United States v. Morrison, the three areas of permissible regulation are: (1) "channels" of interstate commerce; (2) "instrumentalities" of interstate commerce; and (3) those activities "having a substantial relation to interstate commerce."

2. The Scope of Agency Authority After SWANCC

The Supreme Court's decision in SWANCC significantly narrowed the traditionally broad definition of the term "navigable waters." In SWANCC, the Supreme Court held that the Corps had exceeded its authority by regulating in non-navigable waters that were home to migratory birds. The Court in SWANCC also held

82. See id. at 822 (interpreting Congressional intent in enacting CWA).
83. See generally Brief of Amici Curiae Pacific Legal Foundation, et al. at *17, Borden Ranch P'ship v. Army Corps of Eng'rs, 261 F.3d 810 (9th Cir. 2001)(No. 00-15700) (outlining traditional scope of administrative agencies' authority under Commerce Clause).
84. U.S. CONST. Art. I, § 8, cl. 3 (granting power to regulate commerce among "the several states").
85. Environmental Crimes, supra note 48, at 431 (noting that courts have "broadly construed the term 'navigable waters' to include all bodies of water that could be regulated by Congress under the Commerce Clause").
87. 529 U.S. at 608-09 (outlining test for Commerce Clause authority).
89. Environmental Crimes, supra note 48, at 431 (noting that "courts have broadly construed the term 'navigable waters' to include all bodies of water that could be regulated by Congress under the Commerce Clause"); see also SWANCC, 531 U.S. 159, 170-74 (2000) (dealing with split in circuits as to extent of Commerce power of Corps and outlining federal authority to regulate in non-navigable waters).
90. See SWANCC, 531 U.S. at 172 (holding that Corps' authority did not extend to isolated pond solely because it was habitat for migratory birds).
that federal jurisdiction did not extend to either seasonal ponds or wetlands that lie entirely within the borders of one state and are not adjacent to any navigable waters.91

IV. NARRATIVE ANALYSIS

A. The Majority

1. Jurisdiction

The majority began its analysis by examining whether the Corps had jurisdiction over deep ripping.92 The court generally deferred to the Corps' findings that the swales and drainages on the former ranchland were wetlands.93 Following Riverside, the court reasoned that the definition of navigable waters extended to waters adjacent to navigable waters.94 The court found, however, that one of the ranchland's isolated vernal pools was not a wetland; therefore, the Corps had no jurisdiction there.95

2. Discharge of a Pollutant

Next, the Ninth Circuit examined what constituted the discharge of a pollutant.96 Tsakopoulos argued that merely turning

91. See id. at 171-72 (narrowing Corps' regulatory authority). Prior to this decision, the Fourth Circuit, in United States v. Wilson, questioned whether "waters of the United States" included non-navigable waters. See United States v. Wilson, 133 F.3d 251, 256-57 (4th Cir. 1997) (suggesting that power to regulate non-navigable waters might arise from instrumentalities of interstate commerce).

92. See Borden Ranch P'Ship v. United States Army Corps' of Eng'rs, 261 F.3d at 813-16 (9th Cir. 2001) (addressing whether Corps' authority extended to deep ripping process).

93. See id. at 813-14 (agreeing with Corps that Borden Ranch contained significant areas of wetland). Interestingly, the Ninth Circuit did not offer any further proof of the findings of "wetlands" and made no reference to the "Chevron Doctrine", which is commonly understood to justify deference of the court to agency findings in certain situations. Id. at 813-15; see generally Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (delineating two-part test for determining when deference to administrative agencies is appropriate). As the Fourth Circuit Court of Appeals noted in Deaton v. Chesapeake Bay Found., Inc., "when 'an administrative interpretation of a statute invokes the outer limits of Congress' power,' the interpretation is not entitled to deference under Chevron ... unless Congress gave 'a clear indication that [it] intended that result.'" 332 F.3d 698, 705 (quoting SWANCC, 531 U.S. at 172).

94. Borden, 261 F.3d at 814 (holding that "the nation's waters . . . include wetlands adjacent to navigable waters") (citing United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133-35 (1985)).

95. Id. at 816 (holding that one isolated pool could not be considered wetland).

96. See id. at 814-15 (examining past court holdings as to what constitutes pollutant).
over soil with a plow was not an "addition of a pollutant." The Court of Appeals disagreed and held that the CWA governed any activity damaging the ecology of wetlands. The court likened Tsakopoulos’s practice of deep ripping to the mining activities that the Ninth Circuit held to be a discharge of a pollutant in *Rybachek*. Analogizing deep ripping to sidecasting, the Ninth Circuit relied heavily on the Fourth Circuit’s reasoning in *Deaton*. Consequently, the Ninth Circuit concluded that the deep ripping on Borden Ranch was a discharge of a pollutant.

3. **Point Source**

Tsakopoulos further defended his position by arguing that no court had ever considered a plow to be a point source; therefore, the court could not hold his deep ripping activities to be a point source. The Ninth Circuit disagreed. The court concluded that, because bulldozers and backhoes were considered point sources in *Avoyelles*, deep ripping (which uses a tractor or bulldozer to pull metal prongs through the soil) was also a point source.

4. **The Normal Farming Exception**

The court then considered whether Tsakopoulos’s activities at Borden Ranch were exempt under the CWA’s normal farming exception. In holding that deep ripping should not fall under

97. *See id.* at 814 (arguing that plow was not point source). Although he did not make the following argument to the court, Mr. Tsakopoulos is quoted elsewhere as saying it is a "sin to call God’s gift, soil, a pollutant." *See* David Kravets, *Nation’s High Court to Consider Oversight of Farm Plowing*, *Earthbound Farms News*, at http://www.earthboundfarm.com/news-world/PlowFine.html (Dec. 7, 2002) (discussing facts of *Borden*).

98. *Borden*, 261 F.3d at 814-15 (reasoning that "activities that destroy the ecology of a wetland are not immune from the Clean Water Act" simply because those activities do not introduce foreign materials).

99. *See id.* (holding that deep ripping violated CWA in same fashion as mining activities).

100. *See id.*. Sidecasting, the technique held to cause an addition of a pollutant in *Deaton*, is a technique in which dredged materials from a wetland are deposited back into the same wetland. *Id.*

101. *See id.* at 815 (holding that "deep ripping, when undertaken in the context at issue here, can constitute a discharge of a pollutant under the Clean Water Act").

102. *See id.* (arguing that prohibited discharge must come from point source).

103. *Borden*, 261 F.3d at 815 (rejecting argument that deep ripping could not be point source).

104. *Id.* (relying on *Avoyelles*, 715 F.2d at 922). The court argued that it could "think of no reason" why using bulldozers and tractors to pull large metal prongs through the soil "would not satisfy the definition of a ‘point source.’" *Id.*

105. *See id.* at 815-16 (examining normal farming exception of CWA).
the normal farming exception, the court closely examined the statutory language and relied on the exemption's "recapture provision." The Ninth Circuit reasoned that, because "even normal plowing can be regulated" under the CWA's recapture provision, the Corps had jurisdiction to regulate a more invasive process such as deep ripping. Further, the court held that changing the use of the land from ranchland to orchards and vineyards sufficiently changed the land's purpose.

B. The Dissent

In his dissent, Judge Ronald Gould argued that the majority's holding was an "undue stretch" of Congressional intent because it overextended the powers of the Corps and EPA by allowing them to regulate normal farming activities. Judge Gould asserted that Congress never intended for normal farming activities, such as plowing, to fall within the CWA's authority. He stated, "the crux of this case is that a farmer has plowed deeply to improve his farm property." Further, he noted that he would have followed the holding of National Mining and ruled that deep ripping did not constitute a discharge of a pollutant. In Judge Gould's view, deep ripping did not "involve any significant removal or 'addition' of material to the site," and therefore, the majority should not have considered it to be an addition of a pollutant.

Judge Gould further contended that the majority incorrectly focused on the changes in the land's hydrological structure. He

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106. See id. (reasoning that deep ripping impaired flow of nearby navigable waters and thereby altered hydrological state of land).
107. Id. (expanding Corps' jurisdiction to regulate even normal farming activities that fall under recapture provision).
108. Borden, 261 F.3d at 815 (citing 33 U.S.C. § 1344(f)(2) (2001)). The court reasoned that "[c]onverting ranch land into orchards and vineyards is clearly bringing the land 'into a use to which it was not previously subject.'" Id.
109. See id. at 819-20 (Gould, J., dissenting) (arguing that such extension of power was never intended by Congress).
110. See id. (Gould, J., dissenting) (arguing that Congress could have explicitly extended jurisdiction of Corps to normal farming activities had it so desired).
111. Id. at 819 (Gould, J., dissenting) (arguing that majority's holding intrudes directly into traditional farming activities).
112. Id. (Gould, J., dissenting) (referring to National Mining, which rejected Corps' contention that incidental fallback is "addition of a pollutant"). For a more complete discussion of National Mining, see supra notes 60-62 and accompanying text.
113. See Borden, 261 F.3d at 820 (Gould, J., dissenting) (arguing that ground is plowed and transformed, but no soil is added or removed).
114. Id. (Gould, J., dissenting) (contending that addition of pollutants was focus of CWA, not hydrological nature of soil).
argued that the majority improperly justified its holding on the basis of the hydrological alteration of the soil because Congress did not intend this to be the focus of the CWA. Judge Gould argued that Congress spoke “in terms of discharge or addition of pollutants, not in terms of change of the hydrological nature of the soil,” and that it was, therefore, improper to decide the case on the issue of a hydrological change in the soil.

Next, Judge Gould distinguished the precedent on which the majority relied. Judge Gould distinguished Rybachek on factual grounds and noted that the disputed “pollutant” in that case was first processed and then added back into the soil; whereas, in Borden, the soil was merely turned over. He distinguished Deaton by arguing the sidecasting activities in that case were not analogous to the deep ripping process at issue in Borden, which merely turned over the soil and did not dredge or excavate any material.

Judge Gould additionally maintained that the court should consider all plowing, including deep ripping, to be a normal farming activity under the CWA and should not require a permit. He further criticized the majority’s holding because he believed it qualified as judicial law-making. Finally, Judge Gould asserted that policy decisions, such as how far the normal farming exception extends, should be left to the judgment of the legislature.

115. Id. at 819-20 (Gould, J., dissenting) (arguing that Congress’s focus was purely on addition of pollutants).
116. Id. (Gould, J., dissenting) (arguing that change in hydrological nature of soil was not intended focus of CWA).
117. See id. at 820-21 (Gould, J., dissenting) (distinguishing Rybachek and Deaton).
118. Borden, 261 F.3d at 820 (Gould, J., dissenting) (distinguishing Rybachek on grounds that soil was altered by mining process before being returned to wetlands).
119. Id. (Gould, J., dissenting) (distinguishing Deaton on grounds that plowing is less involved process than dredging).
120. See id. at 820 (Gould, J., dissenting) (arguing that Congress intended all forms of plowing to fall within normal farming exception).
121. See id. at 821 (Gould, J., dissenting) (arguing that majority’s holding “goes beyond mere statutory interpretation”).
122. Id. (Gould, J., dissenting) (arguing that majority extends itself too far by making policy decisions).
V. CRITICAL ANALYSIS

A. The Expansion of the Corps' Authority

1. The Court's Inconsistent Expansion of "Navigable Waters"

The Ninth Circuit’s broad definition of “navigable waterways” is inconsistent with recent Supreme Court precedent that has prohibited such expansion.\(^{123}\) The Borden court appeared to completely defer to the finding of the Corps and the trial court that large portions of the land at issue were “wetlands” within the definition of navigable waters, and, therefore, within the Corps’ jurisdiction.\(^{124}\) One commentator noted that “[t]he Corps and EPA have gone a step further and defined waters to include even isolated wetlands . . . like vernal pools and drainage swales.”\(^{125}\) The court’s finding in Borden, that one vernal pool was too isolated to be considered “navigable water,” raises the question of whether the rest of the “wetlands,” such as the drainage swales, were in any significant way connected to the nation’s “navigable waters.”\(^{126}\)

The Ninth Circuit’s reliance on Riverside was unwarranted because that case did not extend the CWA’s jurisdiction to isolated wetlands not adjacent to navigable waterways.\(^{127}\) As the Supreme Court subsequently noted, Riverside “did not ‘express any opinion’ on the ‘question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water.’”\(^{128}\) Further, in SWANCC, the Supreme Court held that the CWA did not extend to waters that are “not adjacent to open water.”\(^{129}\) The Ninth Circuit seemingly ignored the holding of SWANCC, which determined that extending federal jurisdiction to non-navigable waters not adjacent to navigable waters exceeded

\(^{123}\) See generally SWANCC, 531 U.S. 159 (2000) (holding that Corps’ jurisdiction did not extend to pools in gravel pits).

\(^{124}\) See Borden, 261 F.3d at 816 (holding that only one isolated vernal pool on all ranch property could not be considered wetlands).

\(^{125}\) Brief of Pacific Legal Foundation, supra note 83, at *8 (arguing for limitation of Corps’ authority).

\(^{126}\) Borden, 261 F.3d at 816 (finding that only one pool on all ranchland could not be considered navigable waters). The other areas of water that the court found to be “navigable waters” included “widely dispersed seasonal drainage swales and intermittent drainages ubiquitous on farms and ranches of any size” which “exist ephemerally and carry stormwater run-off for brief periods only during and after California’s seasonal winter rains.” Coon, supra note 6, at 6.

\(^{127}\) See generally SWANCC, 531 U.S. at 170-72 (limiting holding in Riverside by requiring that waters must be adjacent to navigable waters).

\(^{128}\) Id. at 167-68 (quoting Riverside, 474 U.S. at 131-32 n.8).

\(^{129}\) Id. at 168 (“In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water. But we conclude that the text of the [CWA] will not allow this.”).
the Corps' authority. While the Borden court cursorily addressed SWANCC in its discussion, it nevertheless held that the certain isolated waters on the Borden Ranch should be considered navigable waters under the Corps' jurisdiction.

2. The Court's Analogy to Mining and Dredging

In holding that the mining techniques at issue in Rybacheck were comparable to deep ripping, the court used a strained analogy. The Borden court reasoned that deep ripping, where soil is merely turned over, was an "addition of a pollutant" comparable to mining activities in which soil is removed from a stream bed, sifted through for valuable deposits and then returned to the stream bed.

There are also some shortcomings in the court's argument that sidecasting and plowing are essentially the same. The Ninth Circuit in Borden compared deep ripping to sidecasting, which, according to Deaton, was an addition of a pollutant. In sidecasting, dredged or excavated material is redeposited in or near the wetland from which it was extracted. Courts have held that sidecasting adds a pollutant because it dredges up material and deposits it in a nearby location, thereby adding a pollutant to that location. Other courts, such as the Fourth Circuit in Wilson, have challenged whether sidecasting can be considered an "addition" at all because no new material is added. Furthermore, as Judge Gould argued in his dissent, plowing, in which the ground is merely turned over and left in nearly the identical spot from which it was taken, bears

130. Id. at 172-74. For a more complete discussion of SWANCC, see supra notes 50-52 and accompanying text.

131. See generally Borden, 261 F.3d at 812-19 (holding that lands should be considered wetlands under CWA).

132. Id. at 814. For a more complete discussion of the holdings of Rybacheck, see supra notes 57-59 and accompanying text.

133. See Borden, 261 F.3d at 814 (relying on Rybacheck v. United States, 904 F.2d 1276 (9th Cir. 1990)).

134. Id. at 820 (Gould, J., dissenting) (arguing that sidecasting is not comparable to plowing technique such as deep ripping).


136. Id. at 335-37 (describing practice of sidecasting and holding it to constitute "addition of a pollutant").

137. See id. at 335-36 (determining that redepositing dredged material into same wetland constitutes "addition of a pollutant").

138. See United States v. Wilson, 193 F.3d 251, 259-60 (holding that because no new material was added when soil was merely turned aside, that sidecasting could not constitute "addition" of pollutant). Cf. Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 923 (5th Cir. 1983) (holding that "addition," as included in definition of "discharge," could include "redeposit" of dredged material, which need not come from outside source).
only a slight resemblance to sidecasting, in which the soil is dredged and actually removed and placed somewhere else in the wetland. 139

3. Transformation of the Land

The majority also held that deep ripping converted the land to a use to which it was not previously subject. 140 In doing so, the majority may have focused too heavily on the transformation of the use of the land from ranchlands to vineyards as a conversion from wetlands to dry lands. 141 As Judge Gould suggested, the court should have focused on whether a pollutant is added to the land, which was more in accord with the legislative intent behind the CWA. 142 Therefore, the court should not regard plowing as a substantial hydrological alteration. 143

B. The Overextension of the Commerce Clause

The Corps and EPA have long enjoyed extensive regulatory power over certain activities in the nation’s waterways. 144 Nevertheless, the question arises whether the government has power under the Commerce Clause to control the plowing of completely isolated wetlands. 145 In its Amicus Brief filed on behalf of Tsakopoulos, the Pacific Legal Foundation heavily criticized this extension of authority as an abuse of the already broad latitude regulatory agencies possess under the Commerce Clause. 146 As the Pacific Legal Foundation argued, the government failed to show an actual connection or substantial effect on interstate commerce that would give them the underlying authority to regulate the land on Borden Ranch. 147

139. See Borden, 261 F.3d at 820 (Gould, J., dissenting) (arguing that plowing should never be considered “addition of a pollutant”).
140. See id. at 815-16 (relying on United States v. Akers, 785 F.2d 814, 820 (9th Cir. 1986)).
141. See id. (holding that because deep ripping had effect of converting land from wetlands to drylands, activity could not fall within normal farming exception).
142. Id. at 820 (Gould, J., dissenting) (noting that deep ripping “does not involve any significant removal or ‘addition’ of material to the site”).
143. See id. (Gould, J., dissenting) (arguing that all forms of plowing should fall within normal farming exception).
144. For a more complete discussion of the Corps’ and EPA’s regulatory power in the nation’s waterways, see supra notes 45-52 and accompanying text.
145. See Brief of Pacific Legal Foundation, supra note 83, at *15-18 (questioning limits of authority of Corps under Commerce Clause).
146. See id. (remarking that Commerce Clause cannot extend to isolated, intrastate waterways).
147. Id. at *17-18 (arguing that Commerce Clause does not grant Corps authority over completely isolated wetlands).
In its analysis in *Borden*, the Ninth Circuit failed to fully consider whether the Corps’ regulatory actions were justified under the Commerce Clause test outlined in *Morrison*.148 Applying the three-prong *Morrison* test to *Borden*, it does not appear that the Commerce Clause extends to plowing activities.149 First, the Ninth Circuit offered no proof that the waters in *Borden* had any substantial connection to the nation’s waterways.150 Therefore, the waterways cannot be considered one of the “channels” of interstate commerce.151 Second, the waterways are not “instrumentalities” of interstate commerce because they serve no function in interstate commerce.152 Finally, Tsakopoulos’s deep ripping was never shown to have any “substantial relation to interstate commerce.”153

The Fourth Circuit Court of Appeals in *Wilson* similarly concluded that extending the CWA’s power to isolated wetlands not adjacent to navigable waters was an overextension of the Commerce Clause.154 The court in *Wilson* held that the Corps exceeded its authority under the Commerce Clause by enacting regulations that defined navigable waters as any waters that “could affect” interstate commerce.155 Therefore, plowing has no effect on interstate commerce, especially in isolated, intrastate wetlands, and should not be regulated under the CWA.156


149. See id. (outlining Commerce Clause analysis). See also Brief of Pacific Legal Foundation, supra note 83, at *16-18 (arguing that Commerce Clause cannot extend to plowing activities).

150. See Brief of Pacific Legal Foundation, supra note 83, at *15-16 (arguing that Corps’ authority under section 404(a) of CWA should not extend to wetlands completely isolated from any navigable waters).

151. Id. (maintaining that waters of Borden Ranch cannot be considered channels of interstate commerce). But see Deaton v. *Chesapeake Bay Found., Inc.*, 332 F.3d 698, 706 (4th Cir. 2003) (“The power over navigable waters is an aspect of the authority to regulate the channels of interstate commerce.”).

152. See Brief of Pacific Legal Foundation, supra note 83, at *15-16 (arguing that waters of Borden Ranch are not instrumentalities).

153. Id. (arguing there is no substantial connection to interstate commerce in deep plowing).

154. *Wilson*, 133 F.3d at 255-56 (holding that waters must be adjacent to navigable waters to allow regulation under CWA).

155. Id. at 256-57 (holding that 33 C.F.R. § 328.3(a)(3) (1993), which defined waters of the United States to include those waters whose degradation “could affect” interstate commerce was unauthorized by CWA as limited by Commerce Clause and was therefore invalid).

156. See Brief of Pacific Legal Foundation, supra note 83, at *15-16 (arguing that court could not reasonably interpret intrastate wetlands to be related to interstate commerce).
VI. Impact

The significance of the Supreme Court's affirmation of the Ninth Circuit's decision in *Borden* lies in the extension of power it could possibly grant to EPA and the Corps over the normal plowing activities of the nation's farmers.\(^{157}\) Although the Supreme Court's decision has precedential effect only in the Ninth Circuit where the case arose, if the Court continues to affirm decisions that expand the power of the Corps and EPA, it could impose severe regulatory burdens on the average farmer.\(^{158}\)

By extending the definition of "navigable waters" under the CWA to include completely isolated wetlands, the Ninth Circuit greatly expands the Corps' power and brings entirely new areas of regulation within the purview of the Corps' jurisdiction to regulate.\(^{159}\) The majority of the Ninth Circuit in *Borden* largely ignored the traditional limits of the Commerce Clause and the possible ramifications of its holding on "normal" farmers.\(^{160}\) In his dissent, Judge Gould strongly argued against such a broad grant of power, contending that Congress did not mean to absolutely prohibit all activities by farmers that could possibly change the hydrological make-up of their land.\(^{161}\) Moreover, as Judge Gould noted, the majority opinion has the effect of making the new law that a plow may be considered a point source.\(^{162}\) Such a holding is tantamount to judicial legislating and should not be permitted.\(^{163}\)

Finally, because the implications of the Ninth Circuit's holding are so broad, the court should have exercised more caution in expanding the jurisdiction of the Corps and EPA.\(^{164}\) As Judge Gould remarked, had Congress intended to concern itself with the normal

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\(^{157}\) See Coon, *supra* note 6, at 6 (discussing possible ramifications of Court's holding).

\(^{158}\) See generally *id.* at 43 (noting regulatory nightmare that could result if CWA is extended to proscribe activities of normal farmers).

\(^{159}\) See *id.* at 6-7 (remarking on ramifications of new expansive reading of "navigable waters").

\(^{160}\) *Borden*, 261 F.3d at 819 (Gould, J., dissenting) (arguing that "crux" of matter was that "a farmer has plowed deeply to improve his farm").

\(^{161}\) *Id.* at 821 (Gould, J., dissenting) (arguing that Congress "did not literally prohibit any conduct by farmers or ranchers that changes the hydrological character of their land").

\(^{162}\) *Id.* (Gould, J., dissenting) (arguing that "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").

\(^{163}\) *Id.* at 819-21 (Gould, J., dissenting) (arguing that majority exceeded its authority).

\(^{164}\) See generally *id.* at 820-21 (Gould, J., dissenting) (arguing that court should have exercised more caution in considering extent of its holding).
plowing activities of farmers, it could have explicitly regulated such activity.\textsuperscript{165} The power to regulate small farmers should be left to the legislature and not to the courts.\textsuperscript{166}

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\textsuperscript{165} \textit{Borden}, 261 F.3d at 820 (Gould, J., dissenting) (arguing that plowing of any sort should be considered normal farming activity and should not be regulated by CWA).

\textsuperscript{166} \textit{See generally id.} at 821 (Gould, J., dissenting) (arguing that policy decision should be made by Congress and that alternative would allow either “an agency power too unbounded” or, worse, “judicial law-making”).