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Borden Ranch Partnership V. U.S. Army Corps of Engineers: Getting Ripped—Destroying Wetlands for Wine

by

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BORDEN RANCH PARTNERSHIP V. U.S. ARMY CORPS OF ENGINEERS: GETTING RIPPED—DESTROYING WETLANDS FOR WINE

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I. INTRODUCTION

Borden Ranch Partnership v. U.S. Army Corps of Engineers[1] (*Borden*) decided the question of whether the U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) possessed authority over deep ripping of wetlands under the Clean Water Act (CWA).[2] Specifically, the court held that the deep ripping activity at Borden Ranch brought the area into a new use and therefore came under the recapture provision of CWA's farming exceptions.[3]

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1. Borden Ranch P'ship v. United States Army Corps of Eng'rs, 261 F.3d 810 (9th Cir.Cal. 2001), *petition for cert. filed*, 70 U.S.L.W. 3562 (U.S. February 22, 2002) (NO. 01.1243).

2. *See generally* Clean Water Act, 33 U.S.C. §§ 1251-1387 (2002). The CWA is a comprehensive statute enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Id.* § 1251(a).

3. *Borden Ranch P'ship*, 261 F.3d at 815; *see generally* 33 U.S.C. § 1344 (2002) (referring to section title "Permits for dredged or fill material"). This section provides that "[t]he Secretary may issue permits, ... for the discharge of dredged or fill material into the navigable waters...." *Id.* § 1344(a). However, some discharges are non-prohibited (commonly referred to as the farming exception): "normal farming, silviculture, and ranching activities such as

Deep ripping is a process of dragging long blades attached to a bulldozer or tractor through compacted soil layers.[4] The depth of ripping into the earth ranges from sixteen inches up to eight feet.[5] Enabling growth of deep roots and improving drainage of a site highlight the purposes of deep ripping.[6] Often, when wetlands are deep ripped, the characteristics required to be a wetland are impaired or destroyed.[7]

Borden Ranch is 8,348 noncontiguous acres located southeast of Sacramento, California.[8] The acreage spreads over two counties; Dry Creek forms the boundary between them.[9] Goose Creek also runs through the ranch.[10] There are intermittent streams that are tributaries to both creeks; and the creeks are tributaries to the Mokelumne and Cosumnes Rivers.[11]

California's Great Central Valley, where Borden Ranch is located, has been the target of development for vineyards and suburban housing.[12] In April

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plowing, seeding, cultivating, minor drainage . . . ." *Id.* § 1344(f)(1)(A). The prior section (farming exceptions) must be read with the following section (commonly referred to as the recapture provision) that provides: "Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section." *Id.* § 1344(f)(2). *See* 33 U.S.C.A. § 1344, annotation to subchapter IV, Permits and licenses, section II: Federal Permits—Failure to apply for permit—farming and silviculture activities; Notes on Decisions. This note refers to *Borden* as an example of the recapture provision of the CWA being used to disqualify the deep ripping activities as normal farming activities under the farming exceptions of the CWA. *Id.*

4. United States Army Corps of Engineers, Regulatory Guidance Letter 96-262, 62 Fed. Reg. 2139, (Jan. 15, 1997). "The purpose of this letter is to notify the public of the issuance of the . . . [Corps'] Regulatory Guidance Letter (RGL) regarding the joint U.S. [EPA] and Corps memorandum to the field clarifying the applicability of exemptions under Section 404(f) of the [CWA] to 'deep ripping' activities in wetlands." *Id.* at 2140-41.

5. *Id.* at 2141.

6. *Id.* at 2140. The RGL distinguishes "plowing" from "deep ripping." *Id.* "Deep ripping is defined as the mechanical manipulation of the soil to break up or pierce highly compacted, impermeable or slowly permeable subsurface soil layers, or other similar kinds of restrictive soil layers." *Id.* "These practices are typically used . . . as part of the initial preparation of the soil to establish an agricultural or silvicultural operation . . . . [T]he activity is typically not an annual practice." *Id.* In contrast, plowing is defined as "all forms of primary tillage . . . used . . . for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops." 40 C.F.R. § 232.3 (d)(4) (2002); 33 C.F.R. § 320 (2002). This definition is the same for both the EPA and Corps. *Id.*; 40 C.F.R. § 232.3 (d)(4). Furthermore, "normal plowing activities involve annual, or at least regular, preparation of soil prior to seeding or other planting activities." 62 Fed. Reg. at 2141.

7. *Id.* at 2141(b); *see also* 40 C.F.R. § 232.2 (2002). The Corps' and EPA's definition of wetland is "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.*

8. Borden Ranch P'ship v. United States Army Corps of Eng'rs, 1999 WL 1797329, at *2 (E.D.Cal. Nov. 8, 1999) (hereinafter *Borden I*).

9. *Id.* The counties are Sacramento County (North) and San Joaquin County (South). *Id.*

10. *Id.*

11. *Id.* See definition of intermittent stream *infra* note 34.

12. Mark Kemp-Rye, *The Odd Couple: EPA's Clean Water State Revolving Fund and The Nature Conservancy*, ON TAP MAGAZINE, http://www.nesc.wvu.edu/ndwc/ndwc_ot_online11.html (last visited 4/4/02); *see also* U.S. Department of Justice, United States Attorney Northern District of California, *Press Release*, Nov. 9, 2001, http://www.usdoj.gov/usao/can/press/html/2001_11_09_gallo.html (last visited 4/4/02) (announcing a consent decree agreed to by Gallo Glass Company). Gallo had deep ripped wetlands for vineyard expansion in Sonoma County, California. *Id.* Gallo's civil penalty for the violations was $95,000 and mitigation restoration

1999, The Nature Conservancy of California purchased Howard Ranch also located in the Valley.[13] The main impetus for that purchase was to protect the area's natural wetlands from being destroyed by development.[14] The primary development is vineyards.[15] Because of the biodiversity, water formations, and natural beauty of the area, protecting it from further haphazard development was essential.[16]

The problems at issue in *Borden* specifically, and California's Great Central Valley generally are related to the Great Plains in two ways.[17] First, much of the Great Plains is also known as the Corn Belt.[18] This region accounts for approximately 65 percent of the U.S. cropland harvest.[19] As Great Plains' landowners expand their farming activities to areas not previously farmed, or change the kind of farming they engage in, they may be required to secure a permit. Second, establishing vineyards has become a trend across the U.S. including the Great Plains.[20] From 1987 to 1997, grapes were the highest valued crop in the U.S.[21] For this reason, states implemented

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requirements which required "either a performance bond or irrevocable letter of credit to the United States in the amount of $600,000 for a period of five years . . . ." *Id.*

13. Kemp-Rye, *supra* note 12.

14. *Id.*

15. The Nature Conservancy, *California Newsletter*, http://www.tnccalifornia.org/news/news_su_1999.htm (last visited Apr. 4, 2002).

16. Kemp-Rye, *supra* note 12. Mike Eaton, The Nature Conservancy's Cosumnes River Project director, stated "'[t]his is really a unique area. . . . Preserving these important watershed lands is absolutely essential to the environmental health of the river and this region.'" *Id.*

17. Joseph G. Theis, *Wetlands Loss and Agriculture: The Failed Federal Regulation of Farming Activities Under Section 404 of the Clean Water Act*, 9 PACE ENVTL. L. REV. 1 (1991). The article states:

> [s]ome of the largest losses of wetlands to agricultural conversion have taken place in the prairie pothole region of the Midwest. . . . Extensive drainage in Iowa has destroyed an estimated ninety-nine percent of that state's wetlands, and ninety percent of the pothole wetlands in Minnesota have been drained. Four million of the original seven million acres of prairie potholes in the Dakotas have been dewatered, destroying almost sixty percent of the wetlands in those states. Drainage in Nebraska's Rainwater Basin has also been extensive . . . largely as the result of agricultural conversions. *Id.* at 8-9.

18. USGS Fact Sheet 076-98: *Herbicides in Ground Water of the Midwest: A Regional Study of Shallow Aquifers, 1991-94* (July 1998), http://ks.water.usgs.gov/Kansas/pubs/fact-sheets/fs.076-98.html (last visited Apr. 4, 2002). The study stated that Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota are included in the twelve states considered the Corn Belt. *Id.*

19. *Id.*

20. For example, Colorado's wine grape harvest was 560 tons in 1995 (a record harvest); in 1997, wine grape harvest had increased to 752 tons. History of Colorado Wine, http://www.coloradowine.com/historytext.html (last visited Apr. 4, 2002). In Missouri, "vineyards have nearly doubled production from only ten years ago." Missouri Wine, Tradition 3, http://www.missouriwine.org/frame_tradition.html (last visited Apr. 4, 2002). Texas is the U.S. fifth-leading wine producing state. Susan Combs, *Texas Department of Agriculture: Texas Wine Grape Guide,* http://www.agr.state.tx.us/wine/docs/grapeguide.htm (last visited Apr. 5, 2002). South Dakota has two wineries, one in Rapid City, the other in Vermillion. South Dakota Winery & Vineyard Locator & Directory, http://www.allamericanwineries.com/AAWMain/ResultsSD.htm (last visited Apr. 5, 2002).

21. *Grape Consumption Strong*, AGRICULTURAL OUTLOOK, June 1997, http://www.ers.usda.gov/publications/AgOutlook/Archives/ (last visited Apr. 5, 2002). The article stated that "the U.S. grape industry for the last 10 years has logged the highest farm value of all harvested fruits, nuts, and vegetables." *Id.*

incentives to encourage new vineyards and wineries.[22]

This note will lay out the relevant facts and procedures of *Borden*. The background information will discuss the CWA in general and the applicable sections, the farming exception and the recapture provisions specifically. In addition, the precedent cases for the farming exception and recapture provisions will be presented. The analysis will discuss the parties' arguments that support their respective interpretations of the farming exception and recapture provisions. Also, the court's reasoning in finding that the activities at issue are not exempt from a permit will be discussed. The process is intended to validate the court's conclusions and resolution of this case.

II. FACTS AND PROCEDURE

A. PARTIES

The Plantiff, Tsakopoulos (Developer) bought Borden Ranch in June 1993.[23] Developer's plan entailed cultivating orchards and vineyards and then subdividing and selling parcels.[24] Orchards and vineyards require the ability to form deep roots.[25] Because of their soil composition, the various hydrological features of Borden Ranch represented an obstacle; the restrictive layer

22. Combs, *supra* note 20, at 3. Becoming effective September 1, 2001, Texas implemented a new state law to "encourage winery construction and grape planting over the next five years." *Id.* See History of Colorado Wine, *supra* note 20. In 1990, Colorado enacted the Colorado Wine Industry Development Act, creating the Colorado Wine Industry Development Board. *Id.* The Missouri Wine Advisory Board was created in 1980 and its wine industry continues to grow. They also placed a tax on wine to facilitate programs and research on grapes and sine. Missouri Wine, *supra* note 20.

23. *Borden I* at *1. Tsakopoulos' made the purchase on behalf of Borden Ranch Partnership, but the property's title is in Tsakopoulos' name only. *Id* at n.1. As a teenager, Tsakopoulos immigrated to the U.S. from Greece; he has "built a fortune" developing land in California's Central Valley. Mary Lynne Vellinga and Stuart Leavenworth, *Stakes high as developers pressure growth boundaries,* THE SACRAMENTO BEE, Apr. 9, 2000, http://classic.sacbee.com/news/projects/growing_pains/ 20000409developers.html (last visited Apr. 5, 2002). As a developer, his forte is "buying 'undevelopable' land . . . and then obtaining government entitlements that often make the land quite valuable to build on." Howard Blume, *The Gray Hawk*, LA WEEKLY, Aug. 17, 2000, http://www.laweekly.com/daily/printme.php3?&eid=17496 (last visited Apr. 5, 2002). Tsakopoulos "is one of the most influential donors in the entire Democratic Party." Peter Byrne, *Political Economy*, SF WEEKLY, Aug. 25, 1999, http://www.sfweekly.com/issues/199-08-25/feature.html/page1.html (last visited Apr. 5, 2002). For example, in the presidential election of 1997 he "donated $185,000 to the Democratic National Committee." *Id.* Tsakopoulos has been referred to as the "King of the Sacramento Sprawl." *Id.*

24. *Borden Ranch P'ship*, 261 F.3d at 812; *see also Borden I* at *17 (discussing the parcels Tsakopoulos had sold prior to the bench trial and the profit derived therefrom).

25. Alfred Cass & Associates, *Using Vineguards: Gypsum application and deep ripping for vineyard development*, http://www.groguard.com.au/gypsum.html (last visited Apr. 4, 2002). This article describes the necessity of deep ripping for vineyards: "Deep ripping of vineyard soils is necessary if there is . . . a physical . . . impediment within a depth of up to 1 m (40 inches)." *Id.* "Ripping will disrupt the physical barrier, soften the soil, and allow roots to exploit the full depth to the limit of deep ripping . . . [It] also . . . creates improved drainage for removal of salinity, sodium, or excess water." *Id.* As to what soils should be deep ripped for vineyards, the article states, "waterlogged soil where a drainage barrier can be identified within a depth of 800 mm (32 inches) from the surface." *Id.*

prevented the deep penetration necessary for vineyard and orchard roots.[26] To remedy this problem, Developer engaged in deep ripping, destroying or impairing many of the natural hydrological features of the ranch.[27]

The Defendants were the Corps and the EPA.[28] In cooperation with the EPA, the Corps is responsible for administering the section 404 permitting program of the CWA.[29] Initially, Developer contacted the Corps about developing Borden in 1993.[30] After the initial contact and up until he filed suit mid 1997, the Corps and Developer had numerous interactions.[31] The EPA became directly involved in early 1996.[32]

B. EVENTS

Prior to 1993, Borden Ranch was used primarily for grazing cattle.[33] In addition to the rangeland, the ranch comprised hydrological features such as swales, vernal pools, and intermittent drainages.[34] Most of these features at the ranch share in common the characteristic of a "clay pan" which served as a restrictive layer preventing significant penetration of surface water into the soil.[35]

Wetlands that meet regulatory criteria are protected under the CWA.[36] Prior to filling protected wetlands, a permit must be obtained from the Corps.[37]

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26. *Borden Ranch P'ship*, 261 F.3d at 812.

27. *Borden I* at *4. The EPA's expert documented his findings: Parcel 10—intermittent drain, completely filled; intermittent drain, nearly completely obliterated; 6 swales, completely filled. *Id.* at *9. Parcel 8—4 intermittent drains, partially filled. *Id.* at *10. Parcel 9—swale/intermittent drain, partially filled; intermittent drain, nearly completely obliterated. *Id.* Parcel 6—swale/intermittent drain, one end completely filled; swale/intermittent drain, partially filled; intermittent drain, "completely filled and soil is mounded along where the water in this part of the feature had flowed." *Id* at *11.

28. *Borden Ranch P'ship*, 261 F.3d at 813.

29. ROBERT V. PERCIVAL ET. AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 735 (3d ed. 2000); *see also* EPA Fact Sheet, *Section 404 of the Clean Water Act: An Overview*, http://www.epa.gov/ OWOW/wetlands/contents.html (last visited Apr. 5, 2002) (This fact sheet outlines the Corps' and the EPA's responsibilities in administering the § 404 program).

30. *Borden I* at *2.

31. *Id.* at *2-8.

32. *Id* at *5. During this initial contact, the EPA and Tsakopoulos discussed an Administrative Order on Consent. *Id.*

33. *Borden Ranch P'ship*, 261 F.3d at 812.

34. *Id.* Each of these hydrological features had unique physical qualities and served distinct purposes. Specifically, "swales are sloped wetlands that allow for the movement of aquatic plant and animal life, and that filter water flows and minimize erosion." *Id.* Vernal pools are low areas or depressions where rainwater collects due to restrictive layers in the soil. Bill Trayler, *Vernal Pools Hide Busy Critters*, http://www.sierrafoothill.org/vernal.htm (last visited Apr. 5, 2002); *see also* Center for Biological Diversity, *Groups File Endangered Species Act Listing Petition of Central Valley Vernal Pool Crustacean: Midvalley Fairy Shrimp*, http://www.biological diversity.org/swcbd/press/mvfshrimp.html (visited Apr. 5, 2002). This press release states "vernal pools are one of the most threatened habitat types in the world. Over 97% of California's original vernal pool habitat has already been lost due to urban sprawl, agribusiness, offroad vehicles, livestock grazing, and wetlands draining." *Id.* Streams with defined banks and beds transporting "water during and after" rainfall are intermittent drainages. Defendant-Appellee's Brief at 9 [hereinafter Defendant-Appellee's Brief]; *Borden Ranch P'ship*, 261 F.3d 810, 812.

35. *Borden Ranch P'ship*, 261 F.3d at 812.

36. 33 U.S.C.A. § 1344 (f)(2). *See supra* note 7, definition of wetland.

37. 33 U.S.C.A. § 1344 (f)(2).

Developer began deep ripping the ranch in 1993 without a permit.[38] The Corps intervened and agreeing to mitigation requirements, Developer received a retrospective permit in the spring of 1994.[39] Developer continued deep ripping protected wetlands after agreeing not to; upon the Corps' discovery a cease and desist order was issued in the spring of 1995.[40]

Developer continued deep ripping from July to November 1995, destroying additional protected wetlands.[41] He did not have a permit.[42] The Corps issued a second cease and desist order.[43] The following May, the Corps, the EPA, and Developer entered into an Administrative Order on Consent (Order).[44] The Corps intended that this agreement, if complied with, would resolve Developer's alleged CWA violations.[45]

Developer, however, continued deep ripping wetlands after he had agreed not to via the 1996 Order.[46] In April 1997, EPA investigators witnessed deep rippers, fully engaged, moving over wetlands at the ranch.[47] Developer was issued an Administrative Order by the EPA.[48] In response, Developer filed suit.[49] The EPA counterclaimed.[50]

C. THE DISTRICT COURT

Developer alleged constitutional and statutory claims and sought injunctive and declaratory relief.[51] The EPA counterclaimed alleging CWA violations, seeking civil penalties and injunctive relief.[52] The court granted summary adjudication in favor of the EPA on Developer's claims.[53] A bench trial ensued on the EPA's counterclaims.[54] The burden was on the EPA to prove violations by a preponderance of the evidence.[55] There were disputed

38. *Borden Ranch P'ship*, 261 F.3d at 812.
39. *Id.* The permit allowed Developer to "deep rip in uplands and . . . drive over swales with the deep ripper in its uppermost position, but . . . he could not conduct any deep ripping activity in vernal pools." *Id.*
40. *Id.* at 813.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* The Order was an agreement whereby Developer would place 1,368 acres of the ranch as a preserve and he would not further violate the CWA. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Borden I* at *1.
52. *Id.* at *13. The injunction included establishing similar features or restoring the damaged features. *Id.*
53. *Id.* at *1.
54. *Id.*
55. *Id.* at *12. Preponderance of the evidence "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" *Borden I* at *12 (quoting Concrete Pipe & Prods. v. Construction Laborers Pension Trust, 508 U.S. 602, 622 (1993) (quoting In re Winship, 397 U.S. 358, 371-372 (1970) (Harlan, J., concurring)) (internal quotes omitted)).

facts about the actual occurrence of deep ripping.[56] After testimony from over twenty witnesses and many documentary exhibits, the court found that there had been repeated violations of the CWA by Developer.[57] The court offered a choice of penalties to Developer: 1) pay $1.5 million, or 2) pay $500,000 and restore four acres of wetlands.[58] Developer chose to pay $500,000 and restore four acres.[59]

D. THE COURT OF APPEALS

Developer appealed to the United States Court of Appeals for the Ninth Circuit.[60] Developer contended that deep ripping fell under the "farming exceptions" of the CWA making it exempt from regulation.[61] Under the CWA, certain discharges are not prohibited.[62] Developer cited the language of non-prohibited discharges in the CWA.[63] The court likewise cited language from the CWA.[64] The court concluded "even normal plowing can be regulated under the [CWA] if it falls under this so-called 'recapture' provision."[65]

In the instant case, Developer planned to subdivide the ranch into parcels after converting it into orchards and vineyards.[66] The court found that such a

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56. *Borden Ranch P'ship*, 261 F.3d at 813.

57. *Id.* Specifically the violations included 348 acts of deep ripping within 29 drainages, and 10 acts of deep ripping in one vernal pool. *Id.*

58. *Id.* The court denied his motion "for more specific findings of fact" and entered a final order favoring the EPA. *Id.*

59. *Id.*

60. *Id.* The court had jurisdiction under 28 U.S.C. § 1291, which gives jurisdiction for courts of appeal over final decisions of district courts.

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1291. *See also* Plaintiff-Appellants' Brief at 3, *Borden Ranch P'ship*, 261 F.3d 810 [hereinafter Plaintiff-Appellants' Brief] (statement of jurisdiction); Defendant-Appellee's Brief at 1 (appellants' brief not in dispute except for its challenge to "Regulatory Guidance Letter . . . which the district court found unripe").

61. 33 U.S.C. § 1344(f), which states:

> (f) Non-prohibited discharge of dredged or fill material
> (1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material—
> (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; . . .

62. *Id.*

63. 33 U.S.C. § 1344(f)(1).

64. 33 U.S.C. § 1344(f)(2), which states:

> (2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

65. *Borden Ranch P'ship*, 261 F.3d at 815 (citing Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 925 (5th Cir. 1983)).

66. *Borden Ranch P'ship*, 261 F.3d at 812.

conversion was doing something different to the land from what had previously been done to it.[67] Based on this finding the court concluded the recapture provision of the CWA applied and therefore Developer's activities were not exempt.[68] In reaching this determination, the court believed there was a clear basis for concluding that the conversion constituted a new land use and that the destruction caused by the deep ripping "constitut[ed] an impairment of the flow of nearby navigable waters."[69] Strengthening its finding, the court cited *United States v. Akers*, which distinguished between planting different wetland crops from "activities which change a wetland's hydrological regime."[70] The *Borden* court again quoted the *Akers'* court, "'the intent of Congress in enacting the [CWA] was to prevent conversion of wetlands to dry lands.'"[71] The statutory language, coupled with case law and applied to the facts of the instant case, led the court to conclude that the Developer's deep ripping had "radically altered the hydrological regime" of the ranch; therefore the Corps and the EPA acted properly in exercising jurisdiction over Developer's deep ripping of wetlands.[72] The appeals court affirmed the district court.[73]

III. HISTORY AND BACKGROUND

A. CLEAN WATER ACT

The purpose of the CWA "is to restore and maintain the chemical, physical and biological integrity of the Nation's waters."[74] In order to meet this objective, the CWA prohibits "the discharge of any pollutant" into navigable waters of the United States.[75] "Discharge" is defined as "any addition of any pollutant to navigable waters from any point source."[76] "Pollutant" is defined as "dredged spoil, . . . biological materials, . . . heat, . . .

67. *Id.* at 815.
68. *Id.*
69. *Id. See also* 33 U.S.C. § 1344(f)(2).
70. *Borden Ranch P'ship*, 261 F.3d at 816, 823 (quoting United States v. Akers, 785 F.2d 814, 822 (9th Cir.Cal. 1986) (holding that "a major conversion from wetlands to dry lands . . . necessitat[es] a Corps permit.")).
71. *Id.* at 816 (quoting *Akers,* 785 F.2d at 822).
72. *Id.*
73. *Id.* The dissent believed that this case involved a farmer choosing more profitable fruit crops over prior farm uses. *Id.* Specifically, he did not think Developer's deep ripping was prohibited by the CWA. He would have followed the reasoning in National Mining Ass'n v. United States Army Corps of Eng'rs, 145 F.3d 1399, 1404 (1998) and hold that deep plowing is not a "'discharge of a pollutant,'" but is instead a "redeposit." He did not believe Congress intended the result of the majority. *Borden Ranch P'ship*, 261 F.3d at 819-821.
74. 33 U.S.C. § 1251.
75. 33 U.S.C. § 1311(a), which states:
(a) Illegality of pollutant discharges except in compliance with law except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.
76. 33 U.S.C. § 1362(12), which states:
The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source . . ..

rock, sand, cellar dirt . . . ."[77] "Point source" is defined as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged."[78] "Navigable waters" is defined as the waters of the United States.[79] In turn, waters of the United States has been given broad meaning.[80]

Pollutant is broadly defined by the CWA;[81] anything put into water can be a pollutant with few exceptions.[82] But the statute states that "the *discharge* of any pollutant . . . shall be unlawful."[83] What does discharge mean? The statute says that it means "any *addition* of any pollutant."[84] After much argument, various cases have held that a redeposit of material can amount to an addition in terms of being a pollutant.[85]

The CWA defines point source as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged."[86] This section of the CWA lists some specific point sources: "pipe, ditch, channel, tunnel . . ."; but the list is not exclusive.[87] While it is probably true that what constitutes a point source will continue to be litigated, precedent firmly establishes that tractors and deep rippers used in the instant case can be point sources.[88] Appellants' brief stated "*[n]o other reported case has ever held that a plow, used as such, is a 'point source.'*"[89] This assertion was problematic for

77. 33 U.S.C. § 1362(6), which states:
(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

78. 33 U.S.C. § 1362(14), which states:
(14) The term "point source" means 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.

79. 33 U.S.C. § 1362(7).

80. 33 C.F.R. § 328.3, which states:
For the purpose of this regulation these terms are defined as follows:
(a) The term "waters of the United States" means
(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
(2) All interstate waters including interstate wetlands;
(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce . . .

81. 33 U.S.C. § 1362(6).

82. Arkansas v. Oklahoma, 503 U.S. 91 (1992). The rule applied here was "if the discharge effected an 'actually detectable or measurable' change in water quality." *Id.* at 111.

83. 33 U.S.C. § 1311(a) (emphasis added).

84. 33 U.S.C. § 1362(12) (emphasis added).

85. *See* United States v. Deaton, 209 F.3d 331, 335 (9th Cir. 2000); Rybachek v. EPA, 904 F.2d 1276 (9th Cir. 1990); *Avoyelles*, 715 F.2d 897.

86. 33 U.S.C. § 1362(14).

87. *Id.*

88. *See Avoyelles*, 715 F.2d 897 (holding that bulldozers and backhoes can be point sources); In re Alameda County Assessor's Parcel Nos. 537-801-2-4 &537-850-9, 672 F. Supp. 1278, 1285 (N.D. Cal. 1987) (concluding that "the courts have consistently found that dump trucks, trailer trucks, bulldozers, and earth graders all qualify as 'point sources' for purposes of the CWA.").

89. Plaintiffs-Appellants' Brief at 28 (emphasis in original).

two reasons. First, *Avoyelles Sportsmen's League*[90] held a plow to be a point source; hence, the assertion is wrong. Second, Appellant cited *Avoyelles* in his brief but made no reference to its holding.[91]

B. NORMAL FARMING EXCEPTION & RECAPTURE PROVISIONS FOR §404 PERMITTING

The farming exception and recapture provisions of the CWA were added by Congress in 1977 to exempt from regulation routine land activities.[92] Basically, the amendments were adopted to allay fears that certain activities were subject to regulation.[93] Nevertheless, Congress also intended the 1977 amendments to reaffirm one of the CWA's original purposes which was to prevent placement of dredged or fill material into water.[94] What activities are exempt has prompted continuing debate.[95]

To understand the controversy over what activities are exempt, a deeper understanding of how the exemption and recapture sections work is necessary.[96] The provisions are read together and form a narrow exception to the § 404 permitting process.[97] First of all, the normal farming activities must be established or ongoing.[98] For this reason, if land was not currently being farmed a permit would be required if the activities to be performed would emit discharges into protected waters.[99] Furthermore, if a seemingly exempt activity represents a new use and would affect protected waters, then a permit would be necessary.[100] In other words, if the land had been used for grazing but the landowner would like to now engage in raising seed crops, a permit would be required if there were protected water that would be affected by such a change.[101] In summary, landowners who wish to escape § 404 regulation, read the exemption broadly, but the Corps and the EPA interpret the exemption, as qualified by the recapture provision, narrowly.[102]

In summary, the farming exception was added to the CWA to exempt landowners whose land had already been farmed prior to the Act from having to comply with certain provisions of the CWA. The farming exception,

90. *Avoyelles*, 715 F.2d at 929.

91. Plaintiffs-Appellants' Brief at 29-30. The brief did not discuss the substantive issues considered in *Avoyelles*, it merely quoted some general language from it.

92. Kenneth E. Varns, Note, *United States v. Larkins: Conflict Between Wetland Protection and Agriculture, Exploration of the Farming Exception to the Clean Water Act's Section 404 Permit Requirement.*, 35 S.D. L. REV. 272, 273 (1990).

93. S. Rep. No. 95-370, at 75 (1977); *see also* Theis, *supra* note 17, at 28-32.

94. S. Rep. No. 95-370, at 74-75 (1977).

95. Varns, *supra* note 92 at 286.

96. Theis, *supra* note 17, 28-32. The article states "[t]he Act clarifies those activities not covered by the Act, but does not definitively address which agricultural activities fall within the purview of section 404." *Id.* at 30.

97. Varns, *supra* note 92 at 294.

98. EPA Fact Sheet, *Exemptions to Section 404 Permit Requirements*, http://www.epa.gov/OWOW/wetlands/contents.html (last visited Apr. 11, 2002).

99. *Id.*

100. *Id.*

101. Varns, *supra* note 92, at 295-96.

102. *See generally*, Varns, supra note 92.

however, was not intended to exempt expansion of farming into non-farmed areas if it affected the waters thereon. It also was not intended to exempt new uses on previously farmed land when such new uses would affect protected waters. In order to ensure that the exemption was not understood to allow increased or new degradation or destruction of protected waters, Congress qualified the farming exception by also adding the recapture provision. It is the contention of this casenote that read together, §§ (f)(1) and (f)(2) only exempt farmland and activities thereon that were established at the time the CWA became effective.

C. FARMING EXCEPTION PRECEDENCE

In *Avoyelles* the court had to decide whether land-clearing activities were exempt as normal farming activities under § 404(f) of the CWA.[103] The landowners deforested a large tract of the Bayou Natchitoches basin; the trees and stumps were burned and the ashes were disced into the soil.[104] The intent was to grow soybeans.[105] The landowners claimed that their activities were normal farming practices.[106] However, the court found that the exemptions of § 404(f)(1)(A) were limited to ongoing farming activities and that there could not have been such activity before the land was cleared.[107] The court further noted that § 404(f)(2) would take away the exemption if it had applied because it brought the area into a new use.[108] The court supported its findings by citing the legislative history of § 404(f)(1)(A) and § 404(f)(2) of the CWA and held that the deforestation activity was not exempt from the § 404 permit requirements.[109]

A similar case is *United States v. Cumberland Farms* where a swamp was deforested and drained for the purpose of farming the area.[110] Cumberland claimed that the activities were exempt as normal farming activities.[111] The court rejected that assertion stating that the exemption turned on "whether such activities are 'established and continuing.'"[112] The court found no evidence of prior farming of the site.[113] The court then discussed the recapture provision stating that while "certain activities which on their face appear exempt" are brought back into regulation by § 404(f)(2).[114] The court ruled that the farming exemption did not apply.[115]

103. *Avoyelles*, 715 F.2d at 925.
104. *Id.* at 901.
105. *Id.*
106. *Id.* at 925.
107. *Id.*
108. *Id.*
109. *Id.* at 926.
110. United States v. Cumberland Farms of Connecticut, Inc., 647 F. Supp. 1166, 1170 (D. Mass. 1986).
111. *Id.* at 1175.
112. *Id.* (quoting *Avoyelles*, 715 F.2d at 925).
113. *Id.*
114. *Id.* at 1176.
115. *Id.*

Another case where a court had to consider the farming exemption and recapture provisions of the CWA is *United States v. Huebner*.[116] The landowners purchased a farm that had extensive wetlands.[117] The only crop grown on the farm for the twenty years prior to the purchase was cranberries.[118] The landowners plowed and ditched sections of the farm intending to add more cranberry beds and to grow other crops.[119] The landowners argued that their activities were normal farming activities exempt from regulation under the CWA.[120] The court reviewed the legislative history of the farming exemption and recapture provision of the CWA and found that the agricultural exemptions are limited and only apply to routine activities.[121] The court held that the landowner's activities were not routine and that the area was changed to a new use and therefore the activities were not exempt.[122]

Finally, in *United States v. Larkins*, the § 404(f) provisions were analyzed.[123] The Larkins' 550 acres included approximately a dozen acres that were under water.[124] The Larkins deforested the area, destroyed beaver dams, filled low areas, and dug drainage ditches.[125] They also built dikes and levees.[126] The Larkins argued that their activities were exempt under 33 U.S.C. § 1344(f).[127] The court concluded that the farming exception did not apply because the land had not previously been farmed.[128] The Larkins countered that the land had been used for silviculture and they had decided after harvesting the trees that it would be more profitable to grow soybeans.[129] The court reasoned that the exception does not apply to clearing timber in order for the land to be used for another purpose.[130] The court also cited 33 C.F.R. § 323.4(c) that specifically states that converting wetland from silviculture to agriculture requires a permit.[131] The court concluded that the farming

116. United States v. Huebner, 752 F.2d 1235 (7th Cir. Wis. 1985).
117. *Id.* at 1237.
118. *Id.* at 1237. The court stated that "[c]ranberry cultivation requires a constant supply of water to protect against frost, to flood the berries for harvesting, to mulch them in the winter and to irrigate them in the growing season." *Id.*
119. *Id.*
120. *Id.* at 1240.
121. *Id.* at 1241.
122. *Id.*
123. United States v. Larkins, 852 F.2d 189, 192 (6th Cir. 1988).
124. *Id.* at 190.
125. *Id.*
126. *Id.*
127. *Id.* at 192.
128. *Id.*
129. *Id.* Silviculture is specifically listed in the farming exception. 33 U.S.C. § 1334(f)(1)(A).
130. *Larkins*, 852 F.2d at 192 (quoting *Avoyelles*, 715 F.2d at 926 n. 46, where the court stated that the farming exception does not apply to activities that "permanently change the area from wetlands into nonwetland agricultural tract for row crop cultivation.").
131. *Larkins*, 852 F.2d at 192-93; 33 C.F.R. § 323.4(c), which states:

> c) Any discharge of dredged or fill material into waters of the United States incidental to any of the activities identified in paragraphs (a)(1)-(6) of this section must have a permit if it is part of an activity whose purpose is to convert an area of the waters of the United States into a use to which it was not previously subject, where the flow or circulation of waters of the United States nay be impaired or the reach of such waters reduced. Where the proposed discharge will result in significant discernible alterations to flow or circulation, the presumption is that flow

exception did not apply to the Larkins' activities.[132]

D. SYNTHESIS OF PRECEDENCE

In the precedent cases discussed *supra*, the courts read sections § 404(f)(1) and § 404(f)(2) together.[133] As a result, the farming exception has been narrowly construed.[134] The courts' general approach when analyzing the facts of a farming exception case is two-fold: courts consider the purpose and the effect of the landowner's activities; courts determine the prior use of the land.[135] That is, when the effect of the activity is the conversion of wetlands into dry land the courts have concluded that it is not normal farming activity exempted from the § 404 permit.[136] Furthermore, the recapture provision of section § 404 excludes farming activities that impair or reduce the circulation or flow of navigable waters.[137] Under this scheme, the farming exception provision only applies to activities that do not result in the conversion of wetlands to dry land.[138]

IV. ANALYSIS

In *Borden*, the evidence showed the soil layers of the hydrological features were disturbed resulting in complete or partial destruction of waterways and clay pans.[139] In other words, areas which channeled moving water or which held water on the upper layers of soil could no longer do so.[140] Although nothing new was added to the affected areas, the churned soil layers disturbed the ability of those areas to maintain their hydrological functions.[141] It is also important to keep in mind when evaluating CWA regulations that Congress has deemed wetlands to possess enormous value and that its

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or circulation may be impaired by such alteration. For example, a permit will be required for the conversion of a cypress swamp to some other use or the conversion of a wetland from silvicultural to agricultural use when there is a discharge of dredged or fill material into waters of the United States in conjunction with construction of dikes, drainage ditches or other works or structures used to effect such conversion. A conversion of a Section 404 wetland to a non-wetland is a change in use of an area of waters of the United States. A discharge which elevates the bottom of waters of the United States without converting it to dry land does not thereby reduce the reach of, but may alter the flow or circulation of, waters of the United States.

132. *Larkins*, 852 F.2d at 193.

133. Varns, supra note 92 at 294.

134. *Id.* at 294; *see also* Lawrence R. Liebesman, *The Clean Water Acts's Section 404 Dredged and Fill Material Discharge Permit Program—Recent Developments*, C266 ALI-ABA 349, 357 (Feb. 11, 1988).

135. Varns, *supra* note 92 at 296.

136. *Id.*

137. *Id.; see also* Jan Goldman-Carter, *Activities Regulated Under §404 of the Clean Water Act and the Farm Bill "Swampbuster" Provision*, SA83 ALI-ABA 87, 96 (May 29, 1996).

138. *Id.*; *see also* 33 C.F.R. § 323.4(c).

139. *Borden I* at *16.

140. *Id.*

141. *Id.*

awareness of the substantial decline of wetlands has motivated their protection.[142]

In *Borden*, the Developer used the normal farming exception as an alternative argument; that is, if the court concluded that his deep ripping violated the CWA's prohibition of discharging pollutants, the activities were nevertheless exempted under the § 404(f) exemptions.[143] The *Borden* court denied this assertion by first citing the § 404 recapture provision and reasoning that § 404(f)(2) "can preclude the normal farming exceptions."[144] The court concluded that the recapture provision governed the deep ripping engaged in by the Developer because it brought the area into a new use that changed the functioning of the effected waters.[145] The court further noted that the

142. 16 U.S.C. § 3901(a) (2002), which states:

(a) Findings

The Congress finds that—

(1) wetlands play an integral role in maintaining the quality of life through material contributions to our national economy, food supply, water supply and quality, flood control, and fish, wildlife, and plant resources, and thus to the health, safety, recreation, and economic well-being of all our citizens of the Nation;

(2) wetlands provide habitat essential for the breeding, spawning, nesting, migration, wintering and ultimate survival of a major portion of the migratory and resident fish and wildlife of the Nation; including migratory birds, endangered species, commercially and recreationally important finfish, shellfish and other aquatic organisms, and contain many unique species and communities of wild plants;

(3) the migratory bird treaty obligations of the Nation with Canada, Mexico, Japan, the Union of Soviet Socialist Republics, and with various countries in the Western Hemisphere require Federal protection of wetlands that are used by migratory birds for breeding, wintering or migration and needed to achieve and to maintain optimum population levels, distributions, and patterns of migration;

(4) wetlands, and the fish, wildlife, and plants dependent on wetlands, provide significant recreational and commercial benefits, including—

(A) contributions to a commercial marine harvest valued at over $10,000,000,000 annually;

(B) support for a major portion of the Nation's multi-million dollar annual fur and hide harvest; and

(C) fishing, hunting, birdwatching, nature observation and other wetland- related recreational activities that generate billions of dollars annually;

(5) wetlands enhance the water quality and water supply of the Nation by serving as groundwater recharge areas, nutrient traps, and chemical sinks;

(6) wetlands provide a natural means of flood and erosion control by retaining water during periods of high runoff, thereby protecting against loss of life and property;

(7) wetlands constitute only a small percentage of the land area of the United States, are estimated to have been reduced by half in the contiguous States since the founding of our Nation, and continue to disappear by hundreds of thousands of acres each year;

(8) certain activities of the Federal Government have inappropriately altered or assisted in the alteration of wetlands, thereby unnecessarily stimulating and accelerating the loss of these valuable resources and the environmental and economic benefits that they provide; and

(9) the existing Federal, State, and private cooperation in wetlands conservation should be strengthened in order to minimize further losses of these valuable areas and to assure their management in the public interest for this and future generations.

143. Plaintiff-Appellants' Brief at 4.

144. *Borden Ranch P'ship*, 261 F.3d at 815 (citing *Avoyelles* as standing for this proposition). *Avoyelles*, 715 F.2d at 925.

145. *Borden Ranch P'ship*, 261 F.3d at 816.

landowner's intent was not the substitution of a different wetland crop.[146] The court in fact concluded that the activities were intended to substantially alter the hydrological features of the ranch.[147]

As noted previously, courts look to a landowner's purpose for engaging in the particular activity, the effect of such activity and consider the land's prior use.[148] The *Borden* court addressed all of these factors.[149] What distinguishes the *Borden* court's holding from the prior cases is its specific holding that the recapture provision disqualified the activity.[150] In other words, the *Borden* court tacitly implied that deep ripping was not part of an ongoing farming practice but never specifically addressed it.[151] The precedent cases discussed both the exception and the recapture provisions.

For example, in *Avoyelles*, the court first reasoned that the activities the landowner engaged in could not be normal ongoing farming activities because the land could not have been farmed until after it was cleared.[152] The recapture provision was cited to strengthen the court's conclusion because the activities involved a change in how the land was used.[153]

Another case in point is *Akers*. The *Akers* court first rejected the landowner's argument that his activities were exempt from regulation because the land had previously been farmed; the court stated that the record supported the finding that the activities were a new operation and were not therefore established or ongoing activities.[154] It is not until after the court rejected the activities as coming under the normal farming exception that the recapture provision was discussed.[155] The *Akers* court concluded that the recapture provision would apply to the landowner's activities even if those activities had been found to be normal farming activities.[156] In contrast, the *Borden* court did not engage in a discussion about normal farming exceptions.[157] Instead, it immediately cited the recapture provision, noting that the exceptions were significantly qualified by it.[158]

The *Cumberland* court held that the landowner's activities were not exempted because there was not previously established farming of the area and the activities converted wetlands into agricultural lands.[159] The court's

146. *Id.*
147. *Id.; see also* Combs, *supra* note 20, at 10. Choosing a good vineyard site is critical: "Surface drainage is important. . . . Grapes like 'dry feet.'" *Id.*
148. *See* Varns, *supra* note 92.
149. *Borden Ranch P'ship*, 261 F.3d at 815-816.
150. *Id.* at 815.
151. *Id.* at 815-816.
152. *Avoyelles*, 715 F.2d at 925.
153. *Id.* at 925-927.
154. *Akers*, 785 F.2d at 819.
155. *Id.* at 822.
156. *Id.* at 822-23.
157. *Borden Ranch P'ship*, 261 F.3d at 815.
158. *Id.*
159. *Cumberland Farms*, 647 F. Supp. at 1175.

reasoning here was sparse but both the exception and recapture provisions were addressed.[160]

In *Huebner*, the court considered both provisions together.[161] It reviewed the legislative history of § 404(f) and then applied the § 404(f) provisions to the various activities engaged in by the landowners.[162] The court found that either the activity was not exempted under § 404(f)(1) or if it passed § 404(f)(1) it was nevertheless recaptured under § 404(f)(2).[163] The point is that the *Huebner* court assessed the applicability of § 404(f)(1) and then if necessary applied § 404(f)(2).

In *Borden*, Developer claimed that deep ripping was "normal farming" activity that was exempt from the requirement of a CWA permit.[164] In addition, he argued that the recapture provision of the CWA did not apply because "deep plowing ranchland to farm grapes or apples does not bring an area of 'waters' 'into a use to which it was not previously subject.'"[165] Furthermore, he argued that "[t]he CWA's 'recapture' provision cannot, consistent with Congress' intent to provide a meaningful farming exemption, apply to merely plowing land dry enough to plow in its natural state."[166] Sugar beets, tomatoes, and wheat had previously been planted at the Ranch, but the issues of the case did not include that area of the ranch.[167] The *Borden* court responded that under the CWA recapture provision "even normal plowing can be regulated."[168] The court then concluded that Developer's deep ripping was "governed by the recapture provision," because the conversion from ranchland to vineyards constituted a new use, and such conversion resulted in "destruction of the soil layer . . . that constitutes an impairment of the flow of nearby navigable waters."[169]

Tsakapoulos had been a developer for thirty years.[170] In particular, he had prior involvement with CWA permitting and the Corps.[171] Although the CWA does not differentiate between sophisticated and naïve violators here the court tacitly integrated his prior experience with regulated activities into its decision.[172] For example, when Developer asserted he demonstrated good will in trying to abide by the CWA, the court found no merit.[173] He challenged the

160. *Id.* at 1176.
161. *Huebner*, 752 F.2d at 1240.
162. *Id.* at 1241-1243.
163. *Id.* at 1242-1243.
164. *Borden Ranch P'ship*, 261 F.3d at 815.
165. Plaintiff-Appellants' Brief at 5 (quoting internally 33 U.S.C. § 1344(f)(2)).
166. Plaintiff-Appellants' Brief at 21.
167. Defendant-Appellees' Brief at 7 n.5.
168. *Borden Ranch P'ship*, 261 F.3d at 815 (*referring to* 33 U.S.C. §1344(f)(2)).
169. *Id.*
170. *Borden I* at *2.
171. *Id.*
172. 33 U.S.C. 1319(d). This section outlines the factors to be considered by the court in determining the amount of the penalty. The factors are: "the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require." *Id.*
173. *Borden I* at *19.

authority of the EPA and Corps to regulate his deep ripping activity.[174] In fact, the district court said that his motive to not apply for a permit from the Corps was economic and listed a number of ways in which not going through the permitting process had monetarily advantaged him.[175] Developer also had hired two consulting firms to help plan and implement his development scheme.[176] He was not an innocent actor blindly engaged in activities he believed lawful.[177] The court's use of Developer's experience as an underlying factor in its determinations becomes particularly evident in the dissenting opinion.[178] For example, the dissent disagreed with the majority's labeling of Tsakopoulos as a developer and would instead label him as a farmer/rancher.[179] The dissent correctly stated that no matter what label is placed on Tsakopoulos, "his rights as a citizen are the same."[180] However, the fact that he bought Borden Ranch to develop, subdivide, and sell individual parcels for profit played into the court's rationale relating to his good will and also in relation to converting the land to a use which it was not previously subject.[181] Being an experienced developer limited the influence of a number of his arguments.[182] The point is that a client's experience or lack thereof figures into the court's analysis.[183]

Adding to Developer's problems was the fact that he had numerous meetings about the orchard/vineyard development with the Corps and the EPA. The court found that he was given specific and consistent information about his activities and the need for a permit but engaged in the prohibited activity anyway.[184] He made agreements that were not kept.[185] He applied for

174. *Id.*

175. *Id.* at *20.

176. *Id.* at *8.

177. Vellinga, *supra* note 23. Tsakopoulos is the "undisputed king of local land investors." Some see him as wielding illegitimate power by "us[ing] his clout and campaign contributions to bypass the planning process, adding to the trend toward leapfrog development." *Id.*; *see also* Defendants-Appellees' Brief at 10. The brief states "Tsakopoulos was well-versed in the requirements of the CWA—he had dealt with the Corps and had sought CWA permits on several projects prior to his purchase of Borden Ranch. His experience with the CWA included at least one previous violation of the Act involving the discharge of fill material into a vernal pool. He knew when he bought Borden Ranch that discharges of dredged or fill material into the [hydrological features] would require a CWA permit from the Corps and mitigation for their destruction, if permitted." *Id.*

178. *Borden Ranch P'ship*, 261 F.3d at 821 (Gould, J., dissenting).

179. *Id.* at 819 n.1.

180. *Id.*

181. *Borden I* at *17. One factor in determining the penalty is the economic benefit the violator derived from deep ripping without a permit. The court found that Tsakopoulos had already made a substantial profit by selling several of the converted parcels quickly. *Id.*

182. *Id.* at *15-21. The court looked at Developer's history of CWA violations, his lack of good-faith efforts to comply, and the seriousness of the violations. Due to Tsakopoulos being an experienced developer, the court found that each of the factors used in determining the penalty weighed in favor of a more severe penalty. *Id.*

183. EPA Fact Sheet, *Wetlands Enforcement Fact Sheet*, http://www.epa.gov/OWOW/wetlands/contents.html (last visited Apr. 15, 2002). According to this fact sheet "the discharger's previous experience with Section 404 requirements, and the discharger's compliance history" are both factors considered by the Corps and EPA "when deciding whether to initiate an enforcement action." *Id.*

184. *Borden I* at *2-9. The various meetings, site visits, correspondence, and administrative actions were documented and cited by the court. *Id.*

and negotiated a permit and then crossed out objectionable items upon signing it, voiding the permit by doing so.[186] His so-called attempts to protect wetlands by flagging and fencing them were so ineffectual that they were bulldozed over.[187] He wrote to the Corps that he had decided to abandon his orchard/vineyard conversion and would use the property for ranching.[188] Yet, more deep ripping occurred.[189] Indeed, land that Tsakaloupos had agreed to set aside for a preservation as part of mitigation for a permit was deep ripped.[190] Among the more substantial propositions this case stands for is the obvious lessons in how not to interact with the EPA and the Corps if you are a developer.

The government's case represented some important processes of environmental regulation. For instance, the EPA and the Corps made on-site observations over the course of their interactions with Tsakopoulos' development.[191] The Corps evaluated a map Tsakaloupos provided, and then performed a field verification of the map.[192] The map was revised.[193] Upon visiting Borden Ranch in 1997, EPA investigators personally witnessed deep rippers treading over wetlands.[194] Most importantly, the EPA involved its wetland consultant.[195] The consultant and EPA representatives worked at the ranch daily and compiled "Documentation of Impacts" which detailed the damage done by deep rippers on the property.[196] The importance of this detailed analysis and this document cannot be overstated. The district court relied heavily on the report in its bench opinion.[197] Tsakaloupos did not present evidence that refuted the consultant's conclusions. Here, the point is that the EPA and Corps kept actively involved throughout the process. They had regular contact with Tsakaloupos and his representatives/ consultants, and they physically visited the ranch.

V. CONCLUSION

It is the responsibility of the Corps and the EPA to protect the Nation's waters under the CWA. In a situation such as *Borden*, destroying the hydrological features of the soil means damage and loss of wetlands.[198]

185. *Id.* at *4. Deep ripping occurred on a parcel that Tsakopoulos had agreed to set aside as a wetlands preserve. *Id.*

186. *Id.* at *3.

187. *Id.* at *19. In addition to the inadequate flagging and staking, deep ripping often continued throughout the night when the markers would be less visible. See also *Id.* at *8 n.6.

188. *Id.* at *3.

189. *Id.* at *4.

190. *Id.* at *4.

191. *Id.* at *2-9; *see also supra* note 184.

192. *Borden I* at *5.

193. *Id.*

194. *Id.* at *8.

195. *Id.*

196. *Id.* at *9-11.

197. *Id.*

198. *See* Combs, *supra* note 20. The guide states " '[c]ross-ripping' to a depth of 4 to 6 feet is the most beneficial single soil preparation, allowing grape roots to penetrate deeply. Cross-

The farming exception provision was added to the CWA to exempt land where areas of water had already been farmed. In other words, areas now protected under the CWA were exempt from permit requirements if, but only if, the area had already been farmed, and then, only if the farming practices now being engaged in do not represent a new farming venture. In *Borden*, the affected hydrological features had not previously been farmed; hence, cultivating vineyards, as Developer intended, is distinguishable from growing upland crops which was the only prior farming on the ranch. Both issues fall under the recapture provision resulting in the requirement of a permit.

Borden's holding turned on the question whether converting ranchland into orchards and vineyards constituted "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 . . .."[199] The purpose of deep ripping is to break the clay pan and cause surface waters to penetrate deeper layers of soil.[200] The swales and intermittent streams Tsakopoulos deep ripped either have been impaired or completely destroyed.[201] Such acts required a permit from the Corps under the CWA.[202]

ripping may require a 6-foot ripping shank that *disrupts physical barriers such as hardpan.*" *Id.* (emphasis added).

199. 33 U.S.C. § 1344(f)(2).

200. Combs, *supra* note 20.

201. *Borden I* at *16.

202. 33 U.S.C. § 1344(f)(2).