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Counting The Hands On Borden Ranch

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The federal permitting programs of the Clean Water Act, 33 U.S.C. § 1251 et seq. (CWA or Act) may be in for an overhaul, judging from a trio of CWA cases that has reached the United States Supreme Court in the past three years. The Court's attention to the CWA is welcome news to American farmers, developers, landowners, and state policymakers. During the lengthy hiatus following the Court's 1985 decision in *United States v. Riverside Bayview Homes*¹ (upholding § 404(a) regulation of wetlands "adjacent" to "navigable waters"), the U.S. Army Corps of Engineers and Environmental Protection Agency expanded federal powers by hazarding ever broader and less plausible readings of the Act. Environmental activists piled on with aggressive citizen suits in friendly judicial forums. The Clean Water Act began to look less like a law protecting the "navigable waters" by requiring permits for specified polluting activities and more like a general law regulating land and water use throughout the Nation. Escaping the Court's scrutiny, federal agencies managed to displace a broad array of traditional state and local powers. But the tide appears to have turned. The Supreme Court has granted in quick succession three certiorari petitions challenging broad interpretations of the scope of the CWA's permitting programs: *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("SWANCC"),² *Borden Ranch Partnership v. United States Army Corps of Engineers*,³ and *South Florida Water Management District v. Miccosukee Tribe of Indians* ("SFWMD").⁴ It seems the Court has recognized that the CWA implemented by regulators and activist judges is unfaithful to Congress's original vision.

In SWANCC, the Supreme Court rebuffed the Army Corps' attempt to enlarge its permitting authority "for the discharge of dredged or fill material into the navigable waters at specified disposal sites"⁵ pursuant to § 404(a). The Corps, through its "migratory bird rule," had asserted federal power over even isolated ponds that could or did provide habitat for migratory birds. Claiming that its power over water was as broad as the Commerce Clause, the Corps declared that even the slender connection between water and commerce supplied by migratory birds' use of a wetland triggered federal jurisdiction. In a 5-4 decision, the Court rejected that interpretation of § 404(a). The Act, the Court held, was based on one strand of the commerce power: Congress's traditional Commerce Clause powers over the "channels" of interstate commerce. Isolated ponds did not fall within that head of federal power, birds or no birds.

¹ 474 U.S. 121 (1985).

² 531 U.S. 159 (2001).

³ 537 U.S. 99 (2002).

⁴ No. 02-626, certiorari granted June 27, 2003.

⁵ 33 U.S.C. § 1344(a).

The Court was equally disturbed that the migratory bird rule displaced traditional state powers, despite Congress's specific intent in CWA § 101(b) "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan the development and use * * * of land and water resources."⁶ The Supreme Court refused to find that state authority over isolated ponds had been displaced by the CWA absent a clear statement to that effect from Congress, which it found lacking.

The scope of the Corps' Section 404 jurisdiction after *SWANCC* has led to conflict among the lower courts, uncertain guidance from the EPA⁷, and little less than chaos on the ground.⁸ There is no doubt the Court will have to wade into this area again soon.

Next up on the Court's CWA docket was the question of which activities are properly subject to federal Section 404 permitting authority. The Court granted certiorari in *Borden Ranch* to decide whether a farmer who "deep plows" a wetland in order to plant new types of crops has "discharged" a "pollutant" requiring a permit under CWA § 404(a).⁹ The case was fully briefed by both parties, but argued before an eight-member Court after Justice Kennedy recused himself.¹⁰ The result? A four-to-four deadlock and a summary affirmance without opinion of the Ninth Circuit's decision that the farmer needed a permit.¹¹ This outcome is not binding precedent for future cases—in effect, it is as if the *Borden Ranch* case never reached the Supreme Court at all.

The Court will hear the last of the CWA trio, *South Florida Water Management District*, in January 2004. *SFWMD* raises the question whether a State water management district needs a CWA permit to divert already polluted water across a levee into somewhat cleaner water, even when the process of diversion adds no pollutants.

The Petitioner District, which manages the Everglades and all other waters in soggy South Florida, pumps water from one side of a Corps-built levee to the other in order to control flooding, manage the region's water supply, and achieve environmental goals. The pumped water, which carries upstream agricultural and urban runoff, has slightly more phosphorus than the receiving water. Plaintiffs, an Indian Tribe and the environmental group Friends of the Everglades, persuaded the Eleventh Circuit that this diversion requires a § 402 National Pollution Discharge Elimination System (NPDES) permit. Public water managers responded that the Eleventh Circuit's rule would require permits for hundreds of thousands of water diversion facilities throughout the country—effectively crippling the allocation and management of water for residential, industrial, agricultural, and environmental use. Water managers argued in amicus

⁶ 33 U.S.C. § 1251(b).

⁷ Compare, e.g., *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001) (remote and indirect physical connection of intermittent, ephemeral waters to navigable waters does not suffice for jurisdiction), with *Treacy v. Newdunn Associates*, 2003 WL 22093616 (4th Cir. Sept. 10, 2003) (remote and indirect physical connection of intermittent, ephemeral waters to navigable waters suffices for jurisdiction).

⁸ Environmental Protection Agency, U.S. Army Corps of Engineers, *Guidance for Asserting Federal Jurisdiction Over Isolated Wetlands in Response to U.S. Supreme Court Decision in SWANCC Case*, Jan. 10, 2003.

⁹ 33 U.S.C. § 1311(a).

¹⁰ See Linda Greenhouse, *Tie Affirms Clean Water Act's Reach*, N.Y. Times, Dec. 17, 2002, at A32.

¹¹ See *Borden Ranch*, 537 U.S. at 99.

briefs supporting the District's certiorari petition that Congress never intended this result, pointing to the plain language, legislative history, and purposes of the Act.

The grant of certiorari and subsequent deadlock in *Borden Ranch* may offer clues into the likely outcome of *South Florida*. One thing is clear: while the 4-4 split in *Borden Ranch* did not relieve the farmer of a hefty fine (for a plowing technique approved by half of the Supreme Court), it was assuredly not a victory for the government. Rather, the case serves as an invitation for farmers, developers, and others chafing under an aggressive federal permitting regime to eschew compliance in favor of court challenges, any one of which may provide them with the fifth anti-permit vote missing in *Borden Ranch*. Since the issues the Court failed to address in *Borden Ranch* will surely be back before the Court as soon as the Justices spot a suitable vehicle to resolve them, we turn in the remainder of this paper to a close look at the *Borden Ranch* case.

The Clean Water Act Section 404 Permit Program

The CWA prohibits “the discharge of any pollutant by any person” into navigable waters “at specified disposal sites” without a permit.¹² The Act defines “discharge” as “any addition of any pollutant to navigable waters from any point source.”¹³ A “point source,” in turn, is “any discernible, confined and discrete conveyance * * * from which pollutants are or may be discharged.”¹⁴ And a “pollutant” includes “dredged spoil, * * * biological materials, * * * rock, sand, [and] cellar dirt.”¹⁵ Applying these definitions, the Corps of Engineers requires a § 404 permit for the addition of dredged or fill material from a point source.

In 1977, Congress amended § 404 to allow “normal farming * * * and ranching activities such as plowing, seeding, cultivating, minor drainage, [and] harvesting” without a permit.¹⁶ Permits were still required, however, under a “recapture” provision applying to “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.”¹⁷

The Corps' regulations define plowing as “all forms of primary tillage * * * utilized on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops.”¹⁸ Furthermore, the agency stresses that “[p]lowing as described * * * will never involve a discharge of dredged or fill material.”¹⁹

For two decades, the Corps hewed to this line in its regulations and public statements. But in a 1996 Field Memorandum, it abruptly reversed course, suddenly claiming permitting

¹² 33 U.S.C. §§ 1311(a), 1342, 1344(a), (d). *See also United States v. Riverside Bayview Homes*, 474 U.S. 121, 133-35 (1985) (interpreting “navigable waters” to include wetlands adjacent to such waters).

¹³ 33 U.S.C. § 1362(12).

¹⁴ *Id.* § 1362(14).

¹⁵ *Id.* § 1362(6).

¹⁶ *Id.* § 1344(f)(1)(A).

¹⁷ *Id.* § 1344(f)(2).

¹⁸ 33 C.F.R. § 323.2(f), § 323.4(a)(1)(iii)(D).

¹⁹ *Id.*

authority over a form of plowing that it termed “deep ripping.”²⁰ For the first time, the Corps asserted that a mere act of plowing could “add” a “pollutant” to a wetland and trigger the permit requirement of Section 404.

The Borden Ranch

Three years before the Corps issued the 1996 Field Memorandum—back when plowing still meant plowing—Angelo Tsakopoulos bought the 8,000-acre Borden Ranch property. Borden Ranch lies on the line separating Sacramento and San Joaquin Counties in California’s Central Valley.²¹ For many years, the ranch was used as rangeland for grazing cattle and for growing a few crops, such as alfalfa, wheat, and hay.²² The semi-arid ranch contains hydrological features known as vernal pools, swales, and intermittent drainages. Vernal pools are those that form during the rainy season, but are often dry in the summer. Swales are sloped wetlands. And intermittent drainages are stream beds that lie dry except when transporting water during and after rains.²³

Tsakopoulos wanted to convert the Borden Ranch property into vineyards and orchards. These thirsty crops require root systems that reach below the dense clay layer underlying the ranch’s topsoil. For these crops to flourish, the soil had to be plowed using implements that penetrated four to seven feet into the ground—a procedure known as “deep plowing” among the farming community, but termed “deep ripping” by the Army Corps and the Ninth Circuit Court of Appeals. Deep plowing broke up the clay underpan to permit root growth, but also allowed water to drain, at least until the clay later resealed.

The Corps took notice. The government eventually informed Tsakopoulos that he could deep plow in upland parts of the ranch and drive over swales with the plow shanks raised, but that he could not deep plow in wetland areas.²⁴ After several years of back and forth that culminated in an Administrative Order prohibiting deep plowing on Borden Ranch, Tsakopoulos filed a lawsuit challenging the authority of the Corps and the EPA to regulate plowing.²⁵ The government filed a counterclaim seeking injunctive relief and civil penalties for Tsakopoulos’s alleged violations of the CWA.

The District Court and Ninth Circuit opinions

The Eastern District of California dismissed Tsakopoulos’s complaint, mechanically adopting the rationale of the Army Corps’ Field Memorandum as federal law. The trial court held that a plow is a point source and that deep plowing in a wetland results in the “addition of a

²⁰ See Corps/EPA Memorandum to the Field, Applicability of Exemptions under Section 404(f) to “Deep Ripping” Activities in Wetlands (Dec. 12, 1996).

²¹ See *Borden Ranch P’ship v. United States Army Corps of Eng’rs*, 1999 U.S. Dist. LEXIS 21389, *2 (E.D. Cal. 1999).

²² See *Borden Ranch P’ship v. United States Army Corp of Eng’rs*, 261 F.3d 810, 812 (9th Cir. 2001).

²³ *Id.*

²⁴ 261 F.3d at 812-13.

²⁵ For background on the history of these negotiations, see *Borden Ranch*, 1999 U.S. Dist. LEXIS 21389, at *3-*28.

pollutant,” even though the activity consists of no more than breaking up existing soils and moving them, to a degree, vertically and horizontally within the wetland.²⁶

The Ninth Circuit affirmed. It concluded that deep plowing does “add” a “pollutant” into wetlands.²⁷ The court principally relied on cases holding that “redeposits of materials can constitute an ‘addition of a pollutant’ under the Clean Water Act.”²⁸ For instance, *Rybachek v. United States EPA*²⁹ held that a permit was required to “remov[e] material from a stream bed, sift[] out the gold, and return[] the material to the stream bed.”³⁰ Similarly, the Fourth Circuit’s decision in *United States v. Deaton*³¹ concerned “the deposit of dredged or excavated material from a wetland back into that same wetland.”³² The Ninth Circuit said that it could “see no meaningful distinction between [Tsakopoulos’s] activity and the activities at issue in *Rybachek* and *Deaton*,”³³ ignoring the fact that both of those cases produced a statutorily identified pollutant (“dredged spoil”) that was then put into the wetland.³⁴ The Ninth Circuit acknowledged that “it is true * * * no new *material* has been ‘added’” to the wetland, but maintained nevertheless that “a *pollutant*’ has certainly been ‘added.’”³⁵ The court also held that the statutory definition of “point source” includes a deep plow, though it did not explain how exactly a plow could “confine” or “convey” anything.³⁶

Finally, the Ninth Circuit held that Tsakopoulos’s plowing on Borden Ranch did not fall under the “normal farming” exception to the Section 404 permitting requirement, but instead fit within the “recapture” provision requiring permits. “Converting ranch land to orchards and vineyards is clearly bringing the land ‘into a use to which it was not previously subject,’” the court reasoned.³⁷ The court conceded that the Corps “cannot regulate a farmer who desires

²⁶ *Id.* at *38. See also *id.* at *38-*43.

²⁷ See *Borden Ranch*, 261 F.3d at 814-15.

²⁸ *Id.*

²⁹ 904 F.2d 1276 (9th Cir. 1990).

³⁰ *Borden Ranch*, 261 F.3d at 814 (citing *Rybachek*, 904 F.2d at 1285).

³¹ 209 F.3d 331 (4th Cir. 2000).

³² *Id.* at 335.

³³ *Borden Ranch*, 261 F.3d at 815.

³⁴ Indeed, the court of appeals quoted in full a passage from *Deaton*, but neglected to fully analyze the Fourth Circuit’s caveats:

The idea that there could be an addition of a pollutant without an addition of material seems to us entirely unremarkable, *at least when an activity transforms some material* from a nonpollutant into a pollutant . . . Once [earth and vegetable matter] was removed [from the wetland], that material became ‘dredged spoil,’ *a statutory pollutant*.

Id. at 814 (quoting *Deaton*, 209 F.3d at 335-36) (emphasis added). Nowhere in its opinion does the Ninth Circuit explain what Tsakopoulos “transformed,” or what statutory pollutant he produced.

³⁵ *Id.* at 815 (emphasis added).

³⁶ *Id.* at 815. The Ninth Circuit’s reliance on *Deaton* and *Rybachek* is misplaced for this reason as well. The redeposit in *Deaton* was lifted out of the wetland and then returned to it using an obvious “point source” (a bucket). The *Rybachek* court explicitly noted that the plaintiff had waived the argument that its activities did not involve a “point source.” See 904 F.2d at 1285 n.8 (“The AMA does not contend that placer mining does not involve a ‘point source.’”).

³⁷ *Id.* (quoting *United States v. Akers*, 785 F.2d 814, 820 (9th Cir. 1986)).

‘merely to change from one wetland crop to another,’” but it maintained that this case involved “substantial hydrological alterations” that amounted to a change in use requiring a permit.³⁸

Judge Gould, dissenting, observed that “[t]he crux of this case is that a farmer has plowed deeply to improve his farm property to permit farming of fruit crops that require deep root systems,” something that farmers have been doing “from the beginning of our nation.”³⁹ The dissent rejected the Ninth Circuit’s analogies to *Rybachek* and *Deaton*,⁴⁰ finding persuasive instead the D.C. Circuit’s decision in *National Mining Association v. United States Army Corps of Engineers*.⁴¹ In *National Mining*, the D.C. Circuit held that no “discharge of a pollutant” takes place when dredging merely causes an “incidental fallback” of soil into the wetland.⁴² Judge Gould also concluded that Tsakopoulos’s orchards and vineyards needed no permit because they fit within the “normal farming” exception to the CWA.⁴³

The Ninth Circuit stated its logic plainly: “activities that destroy the ecology of a wetland are not immune from the Clean Water Act merely because they do not involve the introduction of material brought in from somewhere else.”⁴⁴ While straightforward, this rationale is inconsistent with the words of the statute, and usurps Congress’s right to determine which land uses are subject to federal regulation.

Giving meaning to Section 404 of the Act

The Ninth Circuit and Army Corps’ position—that § 404 authorizes the federal regulation of deep plowing—is at odds with the CWA’s plain language. In drafting the Clean Water Act, Congress strived to place meaningful limits on federal authority over local land uses. The Army Corps and Ninth Circuit have effectively obliterated those limits by interpreting the key statutory terms so expansively. Thus, in their surreal lexicon, an “addition” occurs though nothing is added to the wetland; rich native soil turned by the plow becomes a “pollutant”; and a plow shank is a “point source” though it neither “confine[s]” nor “convey[s]” anything. The Corps has even gone so far as to state that “bicycling * * * through a wetland” can be a “discharge activity” for which a permit is required.⁴⁵

None of these “definitions” is tethered to the language of the CWA itself, or to principles of statutory interpretation.⁴⁶ Take the phrase “point source.” Under the Act, a “point source” is “any discernible, confined, and discrete conveyance.”⁴⁷ The critical statutory terms in the

³⁸ *Id.* at 815-16.

³⁹ *Id.* at 819 (Gould, J., dissenting).

⁴⁰ *Id.* at 819-20.

⁴¹ 145 F.3d 1399 (D.C. Cir. 1998).

⁴² *See id.* at 1404.

⁴³ *See Borden Ranch*, 261 F.3d at 820-21.

⁴⁴ *Id.* at 814-15 (majority opinion).

⁴⁵ 58 Fed. Reg. 45008, 45020-22 (1993).

⁴⁶ “[T]he starting point for interpreting a statute is the language of the statute itself.” *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). In analyzing statutory language, dictionary definitions are useful. *Williams v. Taylor*, 529 U.S. 420, 431-32 (2000).

⁴⁷ Congress supplies several examples of point sources in the statute: “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.” 33 U.S.C. § 1362(14). Since deep plows are not mentioned

definition of “point source” are the words “confined” and “conveyance.”⁴⁸ Webster’s dictionary defines the adjective “confined” as “kept in confines.”⁴⁹ “Confines” are “constricting limits (as of an area of activity or operation)” and “enclosed or otherwise limited space or area.”⁵⁰ The ordinary meaning of “confined” thus suggests that a point source is an enclosed spot from which pollutants are or may be discharged, such as a pipe. A deep plow shank is an implement pulled through the land to break up soil and turn it over. A plow shank does not enclose or confine anything, and is not itself enclosed or confined. Therefore, it cannot be a point source. The dictionary definition of “conveyance” is to the same effect. A conveyance is “a means or way of conveying,” “carrying, transporting,” and “serving as a means of transportation.”⁵¹ Plows, deep or otherwise, do none of those things.⁵²

Equally absurd is the Army Corps’ view that native soil loosened by a deep plough shank constitutes a “pollutant.” Rich native soil is not one of the examples of “pollutant” identified by Congress, nor does it bear any similarity to “incinerator residue, sewage, chemical wastes” or other pollutants on the list.⁵³ Nor does it come under the heading of “dredged or fill material,” another identified pollutant. Corps and EPA regulations define dredged material as that which is “excavated or dredged from waters of the United States.”⁵⁴ Webster’s tells us that “excavated” material is “d[ug] out and remove[d]” or created when a “cavity” is formed by “cutting, digging, or scooping.”⁵⁵ Dredged material is material “ca[ught], gather[ed], or pull[ed] out by a dredge,” which Webster’s defines as “a machine for scooping up or removing earth.”⁵⁶ Deep plowing does not dig, scoop, cut, or remove material from a wetland. According to the Corps’ regulation, “fill material” is “any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a water body.”⁵⁷ The soil affected by plowing is not used to fill or replace an aquatic area, but is broken up, turned, and aerated to prepare the soil for crops that need deep roots to reach an adequate moisture supply. Contrary to the position of the

(... cont’d)

in this list, the key issue is whether the words “discernible, confined and discrete conveyance” may be construed to encompass them. Still, it is worth noting that none of the listed examples resembles deep plowing equipment. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) (“[Under the maxim *eiusdem generis*,] where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.”).

⁴⁸ Of course, any tangible thing which could reasonably be described as a “conveyance” would have to be discernable and discrete, rendering these words relatively unimportant.

⁴⁹ WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED (1993) (“WEBSTER’S THIRD”).

⁵⁰ *Id. See, e.g.*, 29 C.F.R. § 1910.146(b) (2002) (OSHA regulation defining a “confined space” as an enclosed space with “limited or restricted means for entry or exit,” such as “tanks, vessels, silos, storage bins, hoppers, vaults, and pits”).

⁵¹ WEBSTER’S THIRD.

⁵² At oral argument, Justice Scalia, at least, found the not-a-conveyance argument more convincing than the not-confined argument, apparently on the ground that it is the point source that has to be “confined.” He seemed to believe that the tractor and plow attachment were “confined” sufficient to meet the statutory definition.

⁵³ The listed examples are: “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.” 33 U.S.C. § 1362(6).

⁵⁴ 33 C.F.R. § 323.2(c); 40 C.F.R. § 232.2.

⁵⁵ WEBSTER’S THIRD.

⁵⁶ *Id.*

⁵⁷ 33 C.F.R. § 323.2(e) (1994).

Army Corps, deep plowing does not add a “pollutant” to a wetland. In fact, it does not “add” anything at all. Plowing merely moves soil within the wetland, an activity which falls well outside Section 404(a).

Even if deep plowing were a “discharge,” it would be exempt from federal regulation as a “normal farming and ranching” activity under § 404(f)(1)(A). The term “normal farming and ranching activities” plainly describes those activities that are the “norm” or “rule” for farmers and ranchers and that “confor[m] to [the] type” or “standard” of farming and ranching activities.⁵⁸ Deep plowing rangeland to grow crops is not just a “normal” farming activity, it is a paradigmatic one. For hundreds of years, farmers and ranchers across the nation have worked their earth as needed to keep up with changing consumer demand, shifting commodity prices, government incentive programs, the availability of irrigation, and other factors. It is commonplace farm practice to shift from one crop to another (plowing as needed) to meet evolving business and agriculture conditions.⁵⁹ Furthermore, the “recapture” provision requiring permits when land is brought into a new use should not apply to the deep plowing of wetlands that have always been used for crop growth. A change from one use that is exempt as a normal farming activity (for example, the growing of crops such as alfalfa, wheat, hay, or grasses for fodder) to another (say, grapevines or apple trees) cannot reasonably be treated as bringing the land into “a use to which it was not previously subject.”

One of the most pernicious effects of the Army Corps’ deep plowing rule is to undermine Congress’s effort “to recognize, preserve, and protect the primary responsibilities and right of States to * * * eliminate pollution” and “plan the development and use * * * of land and water resources.”⁶⁰ Congress in the CWA tasks *states* with regulating nonpoint source activities.⁶¹ Against Congress’s manifest intention, the Corps has elbowed in on traditional subjects of state regulation, such as plowing, by expanding its definition of point source additions to navigable waters.

The Army Corps’ rule also deters farmers and ranchers from making efficient use of their land, for who would dare plow seasonally soggy soil at all when doing so could draw a massive fine?

The Supreme Court’s non-decision and its aftermath

On December 10, 2002, the Supreme Court heard oral argument in the *Borden Ranch* case, but found itself so deadlocked that it issued its summary affirmance without opinion less than a week later. Without Justice Kennedy’s vote, one may assume, the final tally was four votes in favor of granting the Army Corps broad authority to regulate plowing on wetlands, and four votes in favor of a stricter textual reading of the CWA.

⁵⁸ WEBSTER’S THIRD.

⁵⁹ The agency regulations stating otherwise, 33 C.F.R. § 323.4(a)(1)(ii) and 40 C.F.R. § 232.3(c)(1)(ii), are therefore unreasonable and not entitled to deference.

⁶⁰ 33 U.S.C. § 1251(b). *See also* SWANCC, 531 U.S. at 173-74.

⁶¹ *See* 33 U.S.C. § 1288.

In the aftermath of the Supreme Court’s decision, several commentators noted that the Army Corps’ interpretation of the statute might be shortlived. Linda Greenhouse, for example, writing in the *New York Times*, observed that the decision “resulted in a victory, although quite likely only a temporary one, for federal regulators.”⁶² Justice Kennedy’s vote clearly will determine the outcome in any case that the Court takes to clarify issues left open in *Borden Ranch*.

Although predicting the votes of Supreme Court Justices is a hazardous business, Justice Kennedy’s position in *SWANCC* is one indication that he might have added the fifth vote necessary to overturn the Ninth Circuit’s *Borden Ranch* decision. In *SWANCC*, Justice Kennedy joined the majority’s decision to give “navigable waters” a plain reading, rather than the boundless reading given to the term by the Army Corps of Engineers. The Court, with Kennedy in the majority, observed that “[t]he term ‘navigable’ has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.”⁶³ *Borden Ranch* presented much the same dynamic: an atextual and expansive Army Corps interpretation versus a landowner’s plain reading of the statute.

And the *Borden Ranch* case implicates the same cooperative federalism issues that the *SWANCC* Court found to be central to understanding the CWA. In *SWANCC*, the Court noted that “[p]ermitting [the Army Corps] to claim federal jurisdiction over ponds and mudflats falling within the ‘Migratory Bird Rule’ would result in a significant impingement of the States’ traditional and primary power over land and water use.”⁶⁴ The Court cited the CWA’s explicit statement that it is the purpose of the Act to “preserve, and protect” state authority.⁶⁵ These same issues were brought to the Court’s attention in *Borden Ranch* by ten States—including farm-rich Illinois, Kansas, Nebraska, Ohio, and Pennsylvania—which filed an amicus brief observing that the federal agencies’ “uniquely creative interpretation” of the CWA operates at the expense of state authority, destroying “the balance of powers between federal and state governments established by the Act.”⁶⁶

Conclusion

Angelo Tsakopoulos was reported to have quipped the day after the Supreme Court’s ruling in *Borden Ranch* that “it’s a pretty expensive friendship I have with Justice Kennedy.”⁶⁷ Indeed, Justice Kennedy’s previous stance in *SWANCC* suggests that, had he been able to vote, the outcome in *Borden Ranch* might very well have been different. In light of the 4-4 split in *Borden Ranch*, and the unsettled state of Army Corps’ “activities” jurisdiction under § 404 of the CWA, the Court is likely to look for another case in which to revisit the issue. The grant of

⁶² Greenhouse, *supra* note 10, at A32.

⁶³ *SWANCC*, 531 U.S. at 172.

⁶⁴ *Id.* at 174 (citing *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) (“[R]egulation of land use [is] a function traditionally performed by local governments.”)).

⁶⁵ *Id.* (citing 33 U.S.C. § 1251(b)).

⁶⁶ Brief of Amicus Curiae Alabama, *et al.* at 2, *Borden Ranch Partnership v. United States Army Corps of Eng’rs*, 537 U.S. 99 (2002).

⁶⁷ David Whitney, *Tsakopoulos loses battle in a tie vote*, *Sacramento Bee*, Dec. 17, 2002, at A1. Tsakopoulos attributed this line to a friend.

certiorari in *South Florida* shows that the Court is not yet through with the Act. Indeed, one argument made by petitioner in *South Florida* is that the historic Everglades, though now compartmentalized by artificial structures, is a single water body and that moving water around within a single water body cannot amount to an “addition” of a pollutant. That point parallels Tsakopoulos’s position in *Borden Ranch* that moving soil around within a wetland cannot be the “addition” of a pollutant because it adds nothing new to the wetland. It is possible, therefore, that the Court could revisit at least one of the issues left open by the tie in *Borden Ranch* later this Term.

Tim Bishop and Cristina Tilley are litigators with Mayer, Brown, Rowe & Maw LLP, specializing in Clean Water Act and other environmental litigation and appeals. Tim Bishop argued *SWANCC* and *Borden Ranch* for petitioners in the Supreme Court and will argue for petitioner in *SFWM* in January 2004, cases discussed in this paper. Aditya Bamzai is a student at the University of Chicago Law School.

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