

SUPREME COURT SPLITS ON WETLANDS ISSUE

In an appeal of a Ninth Circuit Court of Appeals (“Ninth Circuit”) decision, the U.S. Supreme Court has split 4-4 over the question of whether the “deep ripping” of regulated wetlands is a discharge that requires a permit under Section 404 of the Clean Water Act (“Section 404”). As a result, the Ninth Circuit’s decision—which held that “deep ripping” in regulated wetlands does require a permit—was allowed to stand.

Angelo Tsakopoulos purchased Borden Ranch, located in central California, in 1993. At the time, the property contained vernal pools, swales, and intermittent drainages, all of which are protected wetlands under Section 404. These wetlands were created by a dense layer of soil called a “clay pan,” which prevents surface water from seeping down into the underlying soil.

Tsakopoulos planned to convert the ranch into vineyards and orchards, both of which require deep root systems. To allow the roots to penetrate deep enough into the soil, however, the clay pan had to be breached. So Tsakopoulos began “deep ripping” the wetlands, dragging four- to seven-foot long metal prongs through the soil to gouge holes in the clay pan. In the process of deep ripping, soil is disgorged onto the surface.

The Clean Water Act prohibits the “discharge of any pollutant” into the waters of the United States (including certain wetlands). The term “pollutant” is defined to include dredged spoil, biological materials, rock, and sand. An exception to this prohibition arises under Section 404, which allows the United States Army Corps of Engineers (COE) to issue a permit for the discharge of dredged or fill material into regulated waters. In Tsakopoulos’s view, deep ripping was not an activity that was prohibited under the Clean Water Act, and therefore, it did not require a permit under Section 404. The COE disagreed and issued several cease and desist orders and administrative orders against Tsakopoulos, who finally responded by filing suit to

challenge the COE's jurisdiction over deep ripping. At trial, the court agreed with the COE, finding over 300 separate violations, and gave Tsakopoulos the choice of paying a \$1.5 million penalty or paying \$500,000 and restoring four acres of wetlands. Tsakopoulos appealed the ruling to the Ninth Circuit.

Tsakopoulos did not contest the issue of whether the wetlands on his property were regulated waters under the Clean Water Act. Instead, he claimed that deep ripping could not result in the discharge of a pollutant into those waters. Because deep ripping only stirs up what is already there (i.e., the soil), he argued, nothing had actually been discharged into the wetlands, and certainly no pollutant had been added. The Ninth Circuit disagreed, however, citing numerous cases for the proposition that "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." Therefore, the court held that by disrupting the clay pan and spreading it around, and allowing the wetlands to drain to subsurface soil in the process, Tsakopoulos had added a "pollutant" to the wetlands.

Tsakopoulos also argued that the Section 404 "farming exceptions" applied to his activities. Under these exceptions, a permit is not required for "normal farming...and ranching activities, such as plowing," or for the substitution of one wetland crop for another. However, the exceptions do not apply if the "recapture provision" is triggered, which occurs when the activity has the purpose of "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." The court observed that Tsakopoulos's activities changed the use of the property from ranching to orchards and vineyards, and in addition, substantially impacted the wetlands by allowing them to drain. Moreover, the court ruled that Tsakopoulos

was engaging in a radical alteration of the hydrological regime of the property, rather than merely substituting one crop for another. Therefore, the court held, the “recapture provision” applied, rendering the farming exceptions inapplicable.

Tsakopoulos appealed the Ninth Circuit’s decision to the United States Supreme Court. Justice Kennedy recused himself from the decision because of a connection to Tsakopoulos, which made an even 4-4 split possible. The split results in the Ninth Circuit decision being affirmed in a briefly one paragraph opinion without any substantive discussion by the Court; however, it should not be read as a tacit approval of the Ninth Circuit decision. Given the court’s recent decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, where the court rejected an expansive theory of Clean Water Act jurisdiction, many observers expect a similar limitation of jurisdiction the next time a Clean Water Act challenge comes before the full Supreme Court.

Borden Ranch Partnership v. United States Army Corps of Engineers, 123 S.Ct. 599 (2002).

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