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U.S. Supreme Court Clean Water Act Decision Provides Little Guidance

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On December 16, 2002, the United States Supreme Court upheld an appellate court which ruled that a person using a deep plowing technique (known as "deep ripping") in a wetland must obtain a Clean Water Act Section 404 permit from the U.S. Army Corps of Engineers.

The Clean Water Act requires a person to obtain a permit to discharge dredged or fill material from a point source into waters of the United States, including wetlands. Discharges of dredged or filled material from normal farming, silviculture and ranching activities generally do not require a permit. However, a permit is required if any of these activities will convert the wetlands to a new use (for example, filling wetlands to expand farming operations).

In the Supreme Court case, *Borden Ranch Partnership v. U.S. Army Corps of Engineers*, a California real estate developer used bulldozers and tractors to pull long metal prongs through wetlands to convert ranch land to vineyards and orchards. The United States Court of Appeals for the Ninth Circuit ruled that redepositing dredged material constituted a “discharge” even if no new material was added and that the bulldozers and tractors used to pull the prongs through soil constituted a point source. Thus, a permit was required because there was a discharge of dredged material from a point source and the ranch land was converted to a new use -- vineyards and orchards. The Supreme Court upheld the Ninth Circuit’s ruling.

The Ninth Circuit had also rejected the ranch owner’s argument that the work only involved the incidental fallback of dredged material (which normally does not trigger a permit requirement), finding that the deep ripping was more extensive than incidental fallback.

The ranch owner paid dearly in this case, because the Ninth Circuit agreed with the district court that each pass of the ripper was a separate Clean Water Act violation. The Ninth Circuit remanded to the district court to recalculate the penalty ($1.5 million or $500,000 plus restoring 4 acres of wetlands) in light of the Ninth Circuit’s finding that there were 348 (rather than 358) violations.

The Supreme Court did not identify the circumstances in which the farming, silviculture and ranching exceptions apply to work in wetlands, nor did it define

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the scope of the “incidental fallback” rule. Many interest groups would like the Supreme Court to clearly define wetlands and permitting requirements. Until it does, or changes are made legislatively, application of the Clean Water Act in wetland cases will remain uncertain. Because making the wrong decision could delay projects or result in lawsuits and penalties, parties undertaking activities in wetlands should seek expert guidance to help them sort through their options before starting work."

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