

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 BORDEN RANCH PARTNERSHIP :

4 AND ANGELO K. TSAKOPOULOS, :

5 Petitioners :

6 v. : No. 01-1243

7 UNITED STATES ARMY CORPS OF :

8 ENGINEERS, AND ENVIRONMENTAL :

9 PROTECTION AGENCY. :

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11 Washington, D.C.

12 Tuesday, December 10, 2002

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States at
15 11:09 a.m.

16 APPEARANCES:

17 TIMOTHY S. BISHOP, ESQ., Washington, D.C.; on behalf of
18 the Petitioners.

19 JEFFREY P. MINEAR, ESQ., Assistant to the Solicitor
20 General, Department of Justice, Washington, D.C.; on
21 behalf of the Respondents.

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1 P R O C E E D I N G S

2 (11:09 a.m.)

3 JUSTICE STEVENS: The Court will hear argument
4 in Borden Ranch against the Corps of Engineers, No. 1243.

5 Mr. Bishop, you may proceed.

6 ORAL ARGUMENT OF TIMOTHY S. BISHOP

7 ON BEHALF OF THE PETITIONERS

8 MR. BISHOP: Justice Stevens, and may it please
9 the Court:

10 The Army Corps of Engineers has a considerable
11 number of hurdles to clear before it may regulate activity
12 as a discharge under section 404. Congress specified in
13 section 404 that a permit is required for an activity that
14 is an addition of a pollutant to a navigable water. That
15 addition -- that added pollutant must be in the form of
16 fill material or dredged material. And the addition must
17 come from a point source.

18 Those statutory terms, we believe, have a core
19 of plain meaning that excludes a farmer and rancher, deep
20 plowing in a seasonal wetland, to prepare the soil for
21 deep-rooted crops. A deep plowing of that sort does not
22 add fill material or dredged material, and it doesn't
23 involve a point source. And so it --

24 QUESTION: Well, did -- did the district court
25 here find that the deep ripping tracked material into

1 wetland areas from the adjacent uplands?

2 MR. BISHOP: Only as to 3 of the 30-odd wetlands
3 that are involved.

4 QUESTION: And as to those three?

5 MR. BISHOP: And that -- that is not -- and that
6 was not the basis of the judgment below or of the penalty.

7 In the summary judgment ruling, the court found,
8 as a matter of law, that plowing that moved material that
9 was already in the wetland -- and this is page 36 of the
10 petition appendix -- was a violation. When it came to
11 hearing evidence, for that reason the court did not focus
12 on the question of whether material was added to the
13 wetland, as the Government says, from -- from outside.

14 The penalty in this case was based on 358 rips,
15 passes, of the plow across the wetlands. The court did
16 not distinguish, in any of those cases, as between passes
17 that brought outside material into the wetland and those
18 that didn't. It simply was not a focus.

19 This was not the basis of the Government's
20 argument below. This is entirely novel. It wasn't the
21 basis of the district court's decision in this case. It
22 wasn't the basis of the court of appeals decision, if you
23 look at page 6 of the court of appeals decision.

24 Furthermore, we believe that --

25 QUESTION: Even so, if we agreed that that's a

1 proper basis --

2 MR. BISHOP: That would not be a basis on which
3 you could affirm here because that was not --

4 QUESTION: But we'd have to -- we'd have to
5 remand for that to be considered?

6 MR. BISHOP: And we believe that a remand that
7 focused on that issue would show, first of all, that there
8 were on some occasions a minimal amount of material that
9 was moved into the edge of the wetland, just on some
10 occasions, a minimal amount that would be well below the
11 amount of fill that would have fitted at that time with on
12 the -- under the nationwide permit so that no individual
13 permit would be required in this case.

14 It would also show that the -- that the deep
15 plow was raised on many occasions before the -- it moved
16 from upland into wetland, and there's an example of that
17 described at page 71 of the petition appendix.

18 And finally, on page 3 of our reply brief, we
19 cite a California Ag Extension pamphlet which describes in
20 great detail the nature of the soils and the plowing in
21 this area, and what it -- what it describes is that when a
22 deep plow passes through this sort of clay soil and it
23 then rains, that the -- that the -- the clay pan seals up
24 again and that because of the -- the nature of the clay
25 pan, there really is no homogenization during the plowing

1 process between the soils above and below the pan.

2 QUESTION: What -- what is the relevance of
3 that? That is, I'm thinking of --

4 MR. BISHOP: Well, the Government is --

5 QUESTION: Let me explain how I'm thinking of
6 this case. Suppose that you went in the middle of Lake
7 Erie with a big punch, and you punched a hole in the
8 bottom and all the water ran out. Would that violate this
9 act?

10 MR. BISHOP: No.

11 QUESTION: No.

12 MR. BISHOP: That would regulated under the
13 rivers --

14 QUESTION: Okay, it wouldn't violate the act.
15 There's nothing. All right.

16 Now suppose you went to Lake Erie and you had
17 about 1,000 dump trucks or great big rakes and you filled
18 up Lake Erie. Would that violate the act?

19 MR. BISHOP: That would fall under section 404.

20 QUESTION: Absolutely, okay. So now what you
21 have is you punch a hole in the bottom and you bring some
22 dirt in. All right? So -- so --

23 MR. BISHOP: We bring no --

24 QUESTION: -- you brought in some dirt and you
25 punched the hole. Now --

1 MR. BISHOP: We bring -- we bring a little dirt
2 in at the margin.

3 QUESTION: So your argument is because you only
4 brought a little dirt and you were mostly interested in
5 punching the hole, you fall outside the act.

6 MR. BISHOP: That's right. And that --

7 QUESTION: That's it. Okay. Well, I don't know
8 if we're interested in the purpose of the act and you
9 violate it even a little bit, why don't you lose?

10 MR. BISHOP: No, no. Well, the purpose of the
11 -- no. The purpose of the act, Justice Breyer -- there
12 are multiple purposes of this act, but the purpose to
13 preserve the Nation's waterways is achieved through a -- a
14 dual or perhaps a tripartite process. There is a section
15 402 NPDES permit that is regulated by the Federal
16 Government. There is a section 404 fill and dredge
17 authority that is -- is -- that is handled by the U.S.
18 Army Corps of Engineers. But that is only part of the
19 picture.

20 The Government through -- the -- the Congress
21 through section 208 set up a process which is mainly
22 administered through the States, although with
23 considerable Federal assistance, for -- for regulating
24 nonpoint source pollution. If this activity, this plowing
25 activity, is not regulated under section 404, it is,

1 nevertheless, regulated by the States as nonpoint source
2 pollution.

3 And so the goal of the act to -- to protect the
4 Nation's waters is not one that depends on the Federal
5 Government, and in fact, we think here that to give a
6 broad reading to the powers of the Army Corps of Engineer
7 under section 404 by straining these very -- these --
8 these terms, these series of terms that Congress
9 predicated section 404 jurisdiction on, that that would
10 contravene Congress' other goal in section 101(b) which is
11 to preserve and protect the primary responsibilities and
12 rights of the States.

13 QUESTION: Mr. Bishop, will you explain
14 something to me? And -- and -- on a most basic level, if
15 what the concern was it was to preserve wetlands and not
16 have them converted into dry lands, what difference should
17 it make if the conversion comes about through redeposit,
18 shaking all the stuff up, turning it upside down, but what
19 you're ending up with is dry land rather than wetland, or
20 if you take a little sludge from someplace else and put it
21 there?

22 MR. BISHOP: We don't think it's permissible,
23 Justice Ginsburg, to protect wetlands by ignoring the
24 plain language of the statute because Congress, through
25 using the terms that it did, imposed limits on Federal

1 power that preserve and protect, as 101(b) says, the power
2 of the States to regulate nonpoint source pollution. And
3 so this --

4 QUESTION: So when you say --

5 MR. BISHOP: -- so it --

6 QUESTION: -- you say, well, nonpoint is --
7 that's another issue, whether this is a point source,
8 whether the --

9 MR. BISHOP: We don't believe this is a point
10 source. We don't believe it involves fill material --

11 QUESTION: But that's -- that's another issue --

12 MR. BISHOP: -- or dredged material.

13 QUESTION: -- than whether -- I thought you were
14 saying this is a redeposit of the same material.
15 Therefore, it can't come under the act.

16 MR. BISHOP: It's -- it's a redeposit of the
17 material. Therefore it is not an addition --

18 QUESTION: Yes.

19 MR. BISHOP: -- of material to the wetland.

20 QUESTION: Is there any redeposit that could be?

21 MR. BISHOP: Well, the -- the -- Judge Silberman
22 in the National Mining case said that the terms addition
23 in section 404 and also the concept that a 404 permit is
24 for the -- is for the deposit of material to a specified
25 disposal site, that read together, those show that

1 Congress intended that there be a geographic or temporal
2 separation between the dredging activity or where the
3 material comes from and where it is deposited. So, you
4 know, if a bulldozer digs up large quantities of material
5 from one side of a wetland and moves them to another, you
6 know, perhaps it is reasonable for the agency in a
7 circumstance like that to say that there has been an
8 addition.

9 Even in a case like Deaton, where you have
10 dredging, the dredging takes soil out of the wetland. At
11 that point it becomes a defined pollutant under section
12 404 which is dredged spoil, something that Congress said
13 was a pollutant. And if is that is sidecast, then, you
14 know, certainly there is far more movement of the soil and
15 far more disturbance of the soil in a situation like that.
16 It's lifted out of the wetland and it is moved elsewhere.

17 But what we're dealing with here is a plow, a
18 deep plow, that goes through the soil and that pushes it
19 to the side and -- and moves it, but it stays in contact
20 with the soil all around it and it's simply moved in small
21 degrees.

22 QUESTION: Is there a difference between deep
23 ripping and deep plowing?

24 MR. BISHOP: They're the same. They're the same
25 thing, Justice O'Connor. And -- and chiseling, which is

1 mentioned as a form of plowing in the regulations, is the
2 same thing too. It's just -- it's exactly the same
3 implement.

4 QUESTION: Well, what -- what is the effect of
5 section 1344 which says nonprohibited discharge of dredged
6 or fill materials, that the discharge from normal farming
7 and activities such as plowing are not considered, I
8 guess, as --

9 MR. BISHOP: Well, Justice O'Connor, our -- our
10 take on this case is that we never get to 404(f), that
11 this activity is not a discharge to begin with because it
12 doesn't satisfy the requirements set out in 404(a). It is
13 not -- it does not involve a point source. A plow is not
14 a point source. This is not fill material. It's not
15 dredged material. It is not an addition. Therefore, it
16 is not discharge.

17 QUESTION: So, you think we never get there.

18 MR. BISHOP: That's -- that's our argument.

19 QUESTION: But if we were to disagree with you,
20 because of this marginal shifting of soil from the uplands
21 to the wetland, then we'd have to look at that?

22 MR. BISHOP: If -- well, that would be -- that
23 would be an issue, but as I say, there's no finding as to
24 that sort of a -- that sort of an addition. And I don't
25 believe -- Justice O'Connor, let me be clear that that --

1 the -- the movement of material into the margins of the
2 waters here would not be a discharge. Even if it is an
3 addition, it still has to qualify as fill material and as
4 dredged material and as a point source. And a plow simply
5 is none of those things, and I hope I get a chance to
6 explain why I don't think it's a point source.

7 QUESTION: Why -- there's something called a
8 backhoe that has been labeled a point source and a
9 bulldozer that has been labeled.

10 MR. BISHOP: Right.

11 QUESTION: Why not a ripper?

12 MR. BISHOP: Well, let me explain. The language
13 of the statute is that a point source is a confined
14 conveyance, a confined, discrete conveyance. And we do
15 not believe -- and if you look at -- and then are examples
16 set -- set out in the statute. And this is at 5a of the
17 addendum to the Government's brief, which is a little
18 easier to handle than our petition appendix. A point
19 source is a discernible, confined, discrete conveyance.
20 And then there are a series of examples.

21 Now, the Government's regulations don't define
22 point source. In fact, they don't even use point source.
23 The -- the 404 regulations don't include the term, point
24 source, and they're not in the 1996 memorandum to the
25 field in which the -- the Government purported to explain

1 why deep plowing is covered by 404.

2 But we think that these terms and these examples
3 show one important characteristic of a -- of a point
4 source, that it confines the material that it conveys.

5 QUESTION: Why? It doesn't -- I mean, why is a
6 truck? Does a truck fall within it? I mean --

7 MR. BISHOP: A dump -- a dump --

8 QUESTION: -- what I do is I have my truck. I
9 fill it up with guck and I move the guck over to the lake
10 and I dump it in.

11 MR. BISHOP: A dump truck --

12 QUESTION: Now, is the truck a point source?

13 MR. BISHOP: A dump truck confines the material
14 and it conveys it.

15 QUESTION: Well, it doesn't say confined
16 anywhere in the statute.

17 MR. BISHOP: Yes, it does.

18 QUESTION: Which word --

19 MR. BISHOP: It says a discernible, confined,
20 and discrete --

21 QUESTION: Not confining. Not confining.

22 QUESTION: It's the conveyance that is confined,
23 not the material.

24 MR. BISHOP: Well, that's the Government's
25 theory, but --

1 QUESTION: Well, but isn't that what the plain
2 language says?

3 MR. BISHOP: No, no.

4 QUESTION: It says confined conveyance, not
5 confining conveyance.

6 MR. BISHOP: Well, I don't think that's right.
7 I mean, first of all, the Government has never adopted
8 that -- it's just come up with that -- that argument for
9 the purposes of this litigation. It's not in any
10 regulation.

11 QUESTION: Well, we're coming up with it now.

12 (Laughter.)

13 QUESTION: And it's a pretty darned good one
14 too.

15 (Laughter.)

16 MR. BISHOP: Well, I -- I don't think it is,
17 Justice Scalia, if you look at the examples that are --
18 are given because the characteristic of all of these
19 things is that they confine the material --

20 QUESTION: Well, what is rolling stock?

21 MR. BISHOP: It's defined in Webster's as -- as
22 the -- the trucks of a trucking company or --

23 QUESTION: Fine. So -- and it doesn't, however
24 -- suppose I have a brilliant idea. Instead of a truck, I
25 will take a giant rake, 17 feet across, and rake the

1 mountain into Lake Superior. All right. Now, is -- is --
2 that doesn't fall within this just because I thought of
3 this brain storm of using this giant rake instead of a
4 truck?

5 MR. BISHOP: No. I think the -- the common
6 sense question is, does this vehicle confine material.
7 There are some --

8 QUESTION: I would say the common sense question
9 is whether or not it's exactly the same for all intents
10 and purposes of this statute as a truck.

11 MR. BISHOP: Well, but -- the -- there is a list
12 of examples --

13 QUESTION: Well, isn't -- isn't your point
14 whether it's a conveyance?

15 MR. BISHOP: Well, that is another point.

16 QUESTION: The rake is a conveyance. It is
17 meant to move the dirt down, and I suppose your point is
18 that the -- the plow is not intended to convey the dirt
19 anywhere except up and down. Some of it may accidentally
20 go sideways, but that's not what the plow is for.

21 MR. BISHOP: Well, I think that that is a very
22 useful term for us, conveyance. Conveyance certainly
23 gives the idea of something that is intended to move
24 material from one place to another. And a plow is not. A
25 plow is intended --

1 QUESTION: Well, why -- why will not up and down
2 satisfy?

3 MR. BISHOP: The -- because we're not -- I mean,
4 we're not in this business to convey a material anywhere.
5 We're in this business --

6 QUESTION: No. That's not your purpose.

7 QUESTION: Isn't a plow a --

8 QUESTION: That's not your purpose. But that is
9 necessarily what you are doing by the activity that you
10 engage in, isn't it?

11 MR. BISHOP: Justice -- Justice Souter, I don't
12 think that in any normal use of the term conveyance that
13 you would include a rake or a plow that just pushes
14 material a short distance, perhaps a matter of inches or
15 feet.

16 QUESTION: Well, let's -- let's assume that I --
17 I'm accepting Justice Breyer's suggestion and the rake
18 would be a -- would -- would be a point source here
19 because it conveyed. If that is so, why should there be,
20 in effect, a -- a -- an excluding analysis for the -- for
21 the ripper that moves the stuff up and down?

22 MR. BISHOP: Well, I mean, that's my argument,
23 Justice Souter. I believe that the terms confined and
24 conveyance in the statute in their plain meaning and as
25 they are elucidated through all of these examples that are

1 given, that they all have characteristics in common. One
2 is that they confine the material. The other is that they
3 convey it. And I don't believe that that is an apt
4 description of a plow shank, a 5-inch wide plow shank,
5 pulled through the soil and -- and the movement that --

6 QUESTION: Well, you -- you could say that it
7 does convey. It -- it conveys mostly, almost entirely, up
8 and down and maybe a little bit sideways. But to the
9 extent that it does convey a lot up and down, which is its
10 purpose, it hasn't made any addition. That would be your
11 point for the up and down.

12 MR. BISHOP: Well --

13 QUESTION: But you're still stuck with the
14 sideways, it seems to me.

15 (Laughter.)

16 MR. BISHOP: Well, and we don't -- we don't
17 think that the -- the plowing here satisfies any of these
18 terms. So we don't think that it's a point source, but
19 even if it is a point source, we certainly don't think
20 that it's an addition because there is no addition to the
21 wetland unless something is added. And all we are doing
22 is moving soil, be it up or down or sideways, small -- to
23 small degrees. And that doesn't -- nothing is coming into
24 the wetland from the outside.

25 QUESTION: Well, isn't --

1 QUESTION: -- the argument that -- that it's a
2 -- it's not adding material. No new material is added,
3 but as I take the Government's argument, it's converting
4 something that wasn't a pollutant into a pollutant when
5 this deep ripper churns up the earth and deposits the
6 rocks and the soil and the biological material on the top.

7 MR. BISHOP: Justice Ginsburg, the -- the
8 statute, section 404, applies to two types of pollutant
9 only, and that's fill material and dredged material.
10 Dredged material is material that is dredged out of the
11 soil, the sort of thing that a backhoe does, dredging a
12 hole and lifting it up out of the soil. The agency's
13 regulations define dredged material as material that is
14 excavated or dredged from the wetland.

15 The district court didn't find that there was
16 any dredged material involved here, and we don't believe
17 that any reasonable reading of the term, dredged material,
18 or of the regulation that talks about excavating and
19 dredging from the wetland could describe the activity of
20 deep plowing.

21 That leaves fill material. Fill material in its
22 plain meaning is material that is -- is used, is moved in
23 to fill a gap or a cavity. It was defined in the
24 regulations at the time as material that was used for the
25 primary purpose of replacing an aquatic area with dry land

1 or changing the bottom elevation. As Justice Breyer has
2 pointed out, if anything took water out of this wetland,
3 it is the activity of punching the hole in the clay pan so
4 that it drains out. We are not interested in filling this
5 wetland and there was no purpose here to -- to use the
6 material to replace wet areas.

7 And in fact, it's quite irrelevant to a farmer
8 and rancher if the topsoil remains wet, and in this area
9 it does, as a matter of fact, remain wet because the clay
10 pan seals up and during the rainy season, there's --
11 there's water on the surface. It's just not our purpose
12 to do that.

13 QUESTION: You -- you were quoting the -- the
14 regulations as to the -- the definition of -- of dredged
15 material, but the definition in the statute of pollutant
16 includes rock and sand.

17 MR. BISHOP: It does, but the -- but the
18 pollutants -- the pollutants have to be in a particular
19 form in order to be covered by 404, and that form is fill
20 material or dredged material. So it's not enough to say
21 that there is rock or sand involved here. It has to be in
22 the form of fill material or dredged material which is why
23 you have these regulatory definitions of those two
24 concepts.

25 QUESTION: Where do I get that from?

1 MR. BISHOP: In -- in section 404(a) on page 2a
2 of the Government's addendum. The permits are issued for
3 the discharge of dredged or fill material into the
4 navigable waters at specified disposal sites. The -- the
5 regulations then define on page 6a and 7a fill material,
6 discharge of fill material, and dredged material and
7 discharge of dredged material.

8 QUESTION: So the definition -- for present
9 purposes the definition of pollutant is irrelevant.

10 MR. BISHOP: It is -- I'm not sure whether it's
11 irrelevant because under section 301, if you don't get a
12 permit, then what you're charged with violating is section
13 301(a), which is on page 1a. And that talks about the
14 discharge of any pollutant.

15 But the basis on which this case has been
16 litigated is that we needed a 404(a) permit not a 402
17 permit, and that is a permit for the addition of fill
18 material or dredged material.

19 QUESTION: Is -- is -- what is your definition?
20 Because I think that's actually not a bad point. You said
21 it's a conveyance. This is not a conveyance. The
22 dictionary, I guess, defines conveyance as a -- as a means
23 of conveying, and it says conveying is cause to pass from
24 one place to another. So the Government says, well, we'll
25 accept that. And of course, if you take that literally

1 from the dictionary, then this is a conveyance because it
2 is a means of conveying. You say it couldn't be that
3 broad. I have a better definition, more consistent with
4 what the paragraph means, and that better definition is
5 what?

6 MR. BISHOP: It's the -- well, clearly the
7 Government has some room here, but what we do say is that
8 a conveyance does not describe that no one -- no one
9 looking at a deep plow would say that's a conveyance. It
10 is not an object --

11 QUESTION: Well, except Webster would seem to
12 say that it is a conveyance because it fits the
13 definition. And now, so you don't like that definition.
14 I understand. I -- I see where -- in general terms, I see
15 where you're going, but I -- I'm asking you if you have a
16 definition that would help you short of Webster's
17 definition.

18 MR. BISHOP: Well, I'm not sure that Webster's
19 covers this situation. A conveyance in common parlance is
20 something that will move material that is intended to
21 convey, to transport. I'll have to find the page of our
22 brief.

23 QUESTION: Is it --

24 QUESTION: I must say I never thought a plow was
25 a conveyance either.

1 MR. BISHOP: A means -- I mean, this is what I
2 have from Webster's Third. This is on page 4 of our reply
3 brief. A means or way of conveying, carrying,
4 transporting, serving as a means of transportation. I
5 mean, there's the idea in there that it's a purposeful
6 activity --

7 QUESTION: You -- you want to read it as --

8 MR. BISHOP: -- to convey the material to
9 another place. And -- and that's not just want a plow
10 does. A plow just moves through the soil pushing it to
11 the side and turning it over and cutting through the soil.
12 I -- I just don't think any common sense or reasonable
13 meaning --

14 QUESTION: Is that different from --

15 MR. BISHOP: -- would treat that as a --

16 QUESTION: -- the propeller that was involved in
17 the Florida case?

18 MR. BISHOP: In -- in MCC?

19 QUESTION: Yes.

20 MR. BISHOP: The propeller in MCC -- this is a
21 huge propeller on a barge in a very shallow navigable
22 stream. The propeller cut through the -- the material at
23 the bottom of this stream, picked up large quantities of
24 it with every -- with every -- at each stroke, and
25 propelled it out of the -- out of the waters. Whether or

1 not that is --

2 QUESTION: Is that what it was designed to do?

3 MR. BISHOP: No, that's not what it was designed
4 to do. And I think --

5 QUESTION: It wouldn't meet your definition.

6 QUESTION: But isn't that exactly what happens
7 here, that the deep -- deep rigging or whatever you call
8 it -- the -- it breaks up the clay. There's a -- a body
9 of clay, and then the -- the broken-up clay finds its way
10 into the water.

11 MR. BISHOP: Well, yes, it gets pushed. It does
12 get pushed to the side within the -- within the waters.

13 QUESTION: So it's the exact parallel to the
14 other case.

15 MR. BISHOP: MCC -- no. MCC is a suspect
16 decision, and I'm not sure that it fits the definition of
17 the point source or dredged or fill material. I mean, it
18 is more like dredging.

19 But, you know, if a point source is a confined
20 conveyance, our -- our contention is that it must
21 transport -- purposefully transport material from one
22 place to another and it must confine it --

23 QUESTION: The key to your argument, if I
24 understand it, is the purposeful thing. They didn't
25 really intend to do this. It's just a byproduct of what

1 they're doing, and therefore there's --

2 MR. BISHOP: No. That's -- that's not the key,
3 Justice Stevens. The key -- the key is equally that this
4 is to pick up and move material to another place. We
5 don't want it here. Let's move it. And it's just not an
6 apt description of what plowing does.

7 But I don't want --

8 QUESTION: Would give us -- would you give us a
9 -- your best comprehensive description of what this kind
10 of so-called plowing does? Does it leave the clay down at
11 the clay layer and simply break it up? Does some of the
12 clay find its way up in the course of this ripping? I'm
13 not sure that I know how it works.

14 MR. BISHOP: Well, I think primarily what
15 happens is this is a very dense clay layer that the --
16 they have 5-inch shank cutting through it. And I think
17 the most apt description is that it cuts through the clay.
18 This clay is heavy. It is not -- there's not a lot of
19 homogenization, as the -- as the Ag Extension pamphlet
20 that I cite in the reply brief says. There's not a lot of
21 homogenization at the lower levels from below the clay to
22 above or from the clay above because of the nature of the
23 soil and because of the nature of the piece of equipment.
24 This is not like a moldboard plow that has a curved shank
25 that pushes the soil up. It's a cutting device that is

1 intended to allow water to hydrate the roots and to allow
2 the roots room to grow.

3 If I could reserve the balance of my time.

4 QUESTION: Mr. Minear.

5 ORAL ARGUMENT OF JEFFREY P. MINEAR

6 ON BEHALF OF THE RESPONDENTS

7 MR. MINEAR: Thank you, Justice Stevens, and may
8 it please the Court:

9 The Clean Water Act placed no regulatory
10 restrictions on the vast majority of acreage that
11 petitioners sought to subdivide and sell in this case.
12 The act required only that petitioners obtain a Federal
13 permit for those few acres of -- of wetlands that are
14 protected under the Clean Water Act. And those wetlands
15 are concededly protected. The question of whether or not
16 these are waters of the United States is not in this case.

17 Petitioners who are --

18 QUESTION: And the -- the legislation doesn't
19 require that these wetlands be -- be left fallow. You --
20 you could use them agriculturally and -- and they would
21 still be wetlands and you wouldn't be violating the act.

22 MR. MINEAR: That is correct. That is correct.
23 Rather, the focus here is on the activities --

24 QUESTION: Could be used for normal farming and
25 plowing presumably without a permit.

1 MR. MINEAR: They could be under the normal
2 farming exemption.

3 And we have three questions here, so I'd like to
4 try and proceed logically from the question of whether
5 there was a discharge of a pollutant, the first question
6 on which we spent most of the time discussing this so far;
7 the question of whether that discharge would be covered by
8 the normal farming exemption; and then finally, the
9 question of civil penalties.

10 On the question of whether there was a discharge
11 of pollutant -- pollutants, the Clean Water Act makes
12 clear that a discharge is defined as any unauthorized
13 addition of any pollutant from any point source. If you
14 make such a discharge, under 301 you have violated the
15 law. You have two -- 301 provides -- there are two
16 exceptions to 301. You can obtain a permit for normal
17 pollutants under 402 or you could obtain a dredge and fill
18 permit for fill and dredged material under 404.

19 QUESTION: So is a -- is a point source a
20 defined, discrete conveyance? Is that how the statute
21 deals with it?

22 MR. MINEAR: The -- the statute states that a
23 point source is a discernible, confined, discrete
24 conveyance.

25 QUESTION: And is a plow of this type such a

1 conveyance?

2 MR. MINEAR: Yes, it is, and let me describe.

3 QUESTION: Why?

4 MR. MINEAR: Let me describe.

5 QUESTION: Because that's a point of
6 disagreement between you and your opponent here.

7 MR. MINEAR: That is correct, Your -- Your
8 Honor.

9 The equipment we're talking about here is a
10 bulldozer, a Caterpillar D10 bulldozer, that is about 20
11 feet tall and about 25 feet long and typically carries a
12 16-foot blade on the front of it. It weighs about 100,000
13 pounds. In this particular application, this earth-moving
14 application, it carries what's called a deep ripper or
15 shank behind it. Mr. Bishop says it's 5 inches wide. The
16 understanding from my experts is that it's actually more
17 like a foot wide. But the shank is about 5 to 7 feet
18 long. The shank penetrates deeply into the ground and
19 pulls up the material behind it. The idea here is to
20 disgorge the clay material that lies beneath the surface
21 of the soil so that the --

22 QUESTION: It doesn't just go in and come out.
23 It --

24 MR. MINEAR: It pulls --

25 QUESTION: -- in your view moves the material?

1 MR. MINEAR: Yes, and in fact the district
2 court --

3 QUESTION: To the side or forward or something?

4 MR. MINEAR: Yes. The district court opinion
5 states on page 70 that material is moved both horizontally
6 and vertically.

7 QUESTION: Yes, but if -- so long as the
8 material that -- that moved a couple of inches or even a
9 couple of feet horizontally is moved from within the
10 wetlands to within the wetlands, you haven't added
11 anything to the wetlands, have you?

12 MR. MINEAR: No. I disagree with this, Your
13 Honor, and let me make a point here that I think is very
14 important to the entire dredge and fill permit program.

15 Dredged material by its very nature is typically
16 moved from one area of a wetland and placed elsewhere.
17 Think of it when we talk about dredging a river and we're
18 dredging a channel. We are taking the material out of one
19 portion of the waterway and putting it into another. So
20 that's -- this idea of redeposition has been a part --

21 QUESTION: Well, that's easy to see, a dredge
22 that takes a quantity of material and physically moves it
23 to another place. Here your opponent says this goes in
24 but it comes up and down. It doesn't, in fact, move the
25 material to a different spot.

1 MR. MINEAR: No. I think that Mr. Bishop would
2 agree that once the -- what happens is once the plow
3 penetrates into the -- the earth, it stays beneath the
4 earth and it's pulled up. And what happens is that clay
5 -- that clay pan that is beneath the surface is raised to
6 the top, together with other material.

7 QUESTION: He says that's not the purpose. He
8 says the purpose is -- it doesn't do that. It just breaks
9 it up. I mean, maybe some of it come, but that the
10 operation is not intended to mingle the clay with the --
11 with the topsoil. Just to break up the clay. I mean,
12 this is apparently a dispute between the two of you.

13 MR. MINEAR: And it was one that was resolved,
14 with respect, Your Honor, by the district court which made
15 clear that the purpose here is to break up the clay pan.
16 And in the process of doing that, it moves the earth both
17 horizontally and vertically.

18 QUESTION: Well, he doesn't deny that.

19 MR. MINEAR: Yes. And that's sufficient.

20 QUESTION: But -- but you're -- you're
21 describing the moving it -- of it -- of it at least
22 vertically as being the whole purpose of the operation.
23 And -- and he says that's not the case, that what they
24 want to do is break up the clay and a little bit may --
25 may, indeed, come higher in the course of that. But

1 that's not what it's designed to do unlike the kind of
2 plow you -- I'm used to seeing, you know, that you carry
3 behind a horse and it's -- it's shaped in such a way that
4 indeed the soil comes up. This is not that kind of a
5 plow.

6 MR. MINEAR: But, Your Honor, the purpose here
7 is not what matters. It's what happens in the wetland.
8 Is there an addition? And as I said, there's an addition
9 from three different perspectives.

10 QUESTION: Well, I suppose there's an addition
11 if I'm walking through a wetland that -- you know, that --
12 that happens to be dry at this time a year and I kick -- I
13 kick a dirt ball and it moves to another part of the
14 wetland. I guess -- I suppose that's an addition too,
15 isn't it?

16 MR. MINEAR: The regulations make clear -- EPA
17 has made clear that those types of --

18 QUESTION: Lucky for me my foot is not a
19 conveyance. Maybe it is a conveyance. I don't know.

20 (Laughter.)

21 MR. MINEAR: The regulations make clear that de
22 minimis movements of this type are not of concern to the
23 agency. Rather --

24 QUESTION: Suppose a person has boots that --
25 and he regularly -- regularly -- people on this farm

1 regularly walk through some poison and it's on their
2 boots. And they walk further on and, lo and behold, they
3 walk into the place and poison all the fish. And they do
4 that on a regular basis. Are the boots considered a
5 conveyance?

6 MR. MINEAR: EPA has indicated that walking,
7 bicycling, driving a vehicle through a wetland is normally
8 -- has -- has de minimis effects and --

9 QUESTION: No, no. I'm trying to ask --

10 MR. MINEAR: Can it be? Can it be in the
11 abstract sense?

12 QUESTION: I'm interested in the question of
13 conveyance. Are the boots a conveyance where the effects
14 are not minimal where, for example, it happens regularly,
15 seriously, destroys the fish because they're walking
16 through poisons?

17 Now, the boots are not normally considered a
18 conveyance, but they do, in fact, convey the poison. A
19 plow is not normally considered a conveyance. A ditch
20 that you dig to plant roses in is not a conveyance. But
21 any of those things could in a subsidiary way convey
22 something as part of their primary nonconveying objective.
23 Now, I want to know if you consider those subsidiary
24 things where it is serious to be conveyances.

25 MR. MINEAR: Yes. They meet the statutory

1 definition --

2 QUESTION: Gee whiz, Congress should have said,
3 you know, by conveyance or otherwise then. Why did it
4 say, you know, it has to be -- it has to be a conveyance?

5 MR. MINEAR: Because although as Justice Breyer
6 explained --

7 QUESTION: And if a boot is not a conveyance,
8 it's not a conveyance.

9 MR. MINEAR: It is a -- it is a conveyance. I
10 think you -- you need to understand the logic that
11 Congress applied in enacting the statute, and that was to
12 define all of these terms quite broadly, understanding
13 that there would be enforcement discretion.

14 Now, we're not talking about de minimis
15 activities in this case. We're talking about filling two
16 acres of wetlands in this case. And we're talking about
17 activities that were found to have adverse environmental
18 effects.

19 QUESTION: Now, you -- you say filling as
20 though, you know, they're not going to be wetlands
21 anymore, but that's perfectly okay. He can make them not
22 wetlands anymore so long as he's doing it by normal
23 farming. Right?

24 MR. MINEAR: He can --

25 QUESTION: I mean, the evil here is not that

1 this is taken out of our national deposit of wetlands.

2 That isn't the evil, is it?

3 MR. MINEAR: That was the concern that motivated
4 these provisions. Congress understood when it enacted the
5 Clean Water Act --

6 QUESTION: Well, but Congress exempted normal
7 farming and -- and activities such as plowing, did it
8 not --

9 MR. MINEAR: Yes.

10 QUESTION: -- from a permit?

11 MR. MINEAR: Your Honor, it did. And I think
12 what --

13 QUESTION: Yes.

14 MR. MINEAR: -- that indicates is that Congress
15 was aware that plowing was a point source of addition of
16 pollutants. It could have that effect. And for that
17 reason it created an exemption, the normal farming
18 exemption. But that exemption itself is limited and the
19 regulations that EPA and the Corps have issued under this
20 -- under this normal farming exemption make clear that the
21 activities we're talking about here would not be covered.

22 QUESTION: How so?

23 MR. MINEAR: To be sure --

24 QUESTION: How so?

25 MR. MINEAR: The activities that are covered

1 under the normal farming exemption are ongoing
2 agricultural activities, part of a regular farming
3 activity, and also activities that ultimately under the
4 recapture provision, first, do not change the use of the
5 land and do not result in converting a wetland to dry
6 land.

7 Now, the agency was charged with responsibility
8 for -- for fleshing out the scope of the normal farming
9 exemption, and it made clear that a farmer who continues
10 to engage in practices that he's always engaged in,
11 including normal -- normal plowing --

12 QUESTION: And you say here there was a change
13 in the use.

14 MR. MINEAR: Yes. This land --

15 QUESTION: Well, your opponent doesn't want us
16 to reach that exception because he says he wants to rest
17 on the fact that, A, it wasn't a point source, that the
18 plow is not a point source, and B, there was no addition.
19 There was simply a redeposit of material in the same
20 place. Have you dealt with that yet?

21 MR. MINEAR: Yes. I would like to go back to
22 that point. We're now back to question 1 and talking
23 about the question of addition which is fundamental to the
24 idea of a discharge.

25 Our view is that there were additions from three

1 sources here.

2 First, there was addition by material being
3 moved from the upland into the wetland. Counsel states
4 that that occurred in only three cases. The record
5 actually shows that it occurred in at least 33 of the 40
6 wetlands that are involved here. The district court made
7 reference to it only in those three cases where it was the
8 only movement of that material. But it's easy to see that
9 the three cases that are cited in the district court's
10 opinion refer to those cases where the ripper passed next
11 to a wetland but didn't go in and pushed -- nevertheless,
12 pushed soil into the wetland. The same thing would happen
13 in those areas where the ripper actually intruded through
14 the wetland as well. So in the case of all of the -- the
15 areas, the 29 areas that were filled, all of them had
16 movement of material from upland into the wetlands.

17 QUESTION: Well, excuse me. I thought your
18 opponent said it isn't an addition because it's a
19 redeposit of material. Have you dealt with that?

20 MR. MINEAR: Yes. The -- in talking about --
21 before when I spoke about the dredged material, about how
22 material is moved from one place to the wetland to another
23 place, that is a regulable redeposit that is covered by
24 the act. And we believe the Fourth Circuit's reasoning in
25 Deaton is quite persuasive on this.

1 QUESTION: I think that's already a stretch. I
2 mean, you know, with that you'll say, well, literally
3 you're not adding anything to the wetlands just to move
4 the -- the mud from one portion to another. But you have
5 this big dredging operation and it does disturb everything
6 and you move it. So, yes, I'll go along with you on that.

7 But -- but then, you know, that's not enough for
8 you. Now we have to generalize from that and say that any
9 movement of anything within the wetlands is also an
10 addition to the wetlands. And -- and that brings you to
11 this case. And I think it is fanciful to think that
12 anything has been added to the wetlands here.

13 MR. MINEAR: As I said before, Your Honor, not
14 only do we have redeposits. We also have the material
15 that moved from the upland into the wetland.

16 QUESTION: Fine.

17 MR. MINEAR: And we also have material, if I may
18 finish --

19 QUESTION: I see that, but -- but not all of the
20 penalties -- we're going to get to the penalty part.
21 Right?

22 MR. MINEAR: Yes, Your Honor.

23 QUESTION: They were \$25,000 for each pass, and
24 it hasn't been established that every one of these passes
25 had that effect. And -- and he says most of them didn't.

1 MR. MINEAR: Before we get to the penalty part,
2 if I could, Your Honor, I'd like to point to one area --
3 other area in which material is moved into the wetland,
4 and that is material that's beneath the clay pan that was
5 segregated and separated by this impermeable clay pan and
6 instead was pulled up and put into the wetland as well.

7 QUESTION: Okay. Would you be explicit about
8 what is implicit in that is, and that is, the definition
9 of wetland, I take it, is the -- the land area between the
10 surface and the hard pan, and the area beneath that is not
11 part of wetland so that if you take material from beneath
12 and bring it up, you are moving into the wetland. Is that
13 your definition and what you're saying?

14 MR. MINEAR: Yes, that's correct.

15 QUESTION: So I can mine under a wetland, and --
16 and I'm not disturbing the wetland.

17 MR. MINEAR: You would not be regulated by
18 section --

19 QUESTION: Is that -- is that the position the
20 Government -- the Government wants to take, that you --
21 anything that's under the wetland, you know, go -- go for
22 it? It -- it doesn't -- doesn't involve the wetland.

23 MR. MINEAR: Your Honor, we're paying attention
24 to the -- the strict language of the statute. The statute
25 is concerned with additions.

1 QUESTION: How far down does a wetland go?

2 MR. MINEAR: We think in this case it's fair to
3 describe it as going to the bottom of the clay pan because
4 that's what's actually holding the water in the area. In
5 other cases, it might be different. There's vast
6 hydrological variation. In some places wetlands are
7 sustained by the groundwater that comes up from beneath,
8 and so it's very difficult to talk about where the bottom
9 of the wetland would be --

10 QUESTION: You're willing to have us say that in
11 this case, that wetlands only go down as far as whatever
12 -- whatever stratum holds the water in the wetland, and
13 everything else is not included. Below that is okay.

14 MR. MINEAR: Well, Your Honor, respectfully what
15 we're asking you to do in this case is to recognize that
16 the wetland does go to that clay pan. In other cases it
17 might well be different. But we need to deal with the
18 facts --

19 QUESTION: I thought so.

20 MR. MINEAR: Yes, Your Honor --

21 QUESTION: But I -- I think -- I thought you
22 were saying it does not go below the clay level because I
23 thought you were making the argument that when you bring
24 material from below the clay level into the wet area, you
25 are moving it into the wetland from outside the wetland.

1 So I thought you were making the further proposition that
2 the wetland stops at the -- at the clay.

3 MR. MINEAR: In this case that's correct. But
4 in other cases such as in Riverside Bayview, the case that
5 this Court previously addressed wetlands, there the
6 wetland was actually -- was -- received water from
7 beneath, and it did not have a sustaining clay pan.
8 There's simply variations in the types of --

9 QUESTION: No.

10 QUESTION: How do we view --

11 QUESTION: Never mind.

12 QUESTION: The sustaining clay pad is not part
13 of the wetland you're now -- you're now saying.

14 MR. MINEAR: We're saying that the clay pan is a
15 part --

16 QUESTION: Is part of the wetland.

17 MR. MINEAR: But the area beneath it is not.

18 QUESTION: Well, but he --

19 MR. MINEAR: There's -- there's soil beneath the
20 clay pan that he pulled up.

21 QUESTION: Was he -- was he pulling up soil from
22 beneath the clay pan?

23 MR. MINEAR: Yes. I think it's clear from the
24 record that he must have.

25 QUESTION: What -- what about the question I

1 think Justice O'Connor asked? And I think Justice Scalia
2 did too. At least I'm waiting with bated breath. That
3 is, what -- what -- suppose we agree with you that, well,
4 at least the material from the side, at least the material
5 from the bottom was an addition to the wetland, brought
6 about by, let's say, this conveyance. All right.

7 Now, what do we have to do with this case? Do
8 we then have to send it back for a reassessment of
9 penalties or what?

10 MR. MINEAR: No. I think you can affirm on that
11 basis because those two sources were present with regard
12 to all of the -- all of the -- the wetlands that were --

13 QUESTION: All of the passes?

14 MR. MINEAR: All of the -- all of the wetlands
15 that were at issue in this case.

16 QUESTION: Well, he -- he -- I think your
17 opponent said that the penalties rested upon 17 passes or
18 something, and I guess they conceded that each one was a
19 separate violation, which they may regret, if this is the
20 rationale anyway. Do we have to have a reassessment of
21 the penalty or not?

22 MR. MINEAR: We don't think that a reassessment
23 of the penalty would be necessary even if you took this
24 alternative position. And let me say, first of all, the
25 penalty here was based -- what's in contention is how one

1 calculates the maximum penalty that can be imposed on a
2 party in one of these cases. And there's a fair amount of
3 flexibility in determining how that might be done. In
4 this case, the parties had agreed below that each pass of
5 the ripper was, in fact, a violation. The -- the district
6 court then determined the maximum penalty by taking the
7 number of passes of the ripper and multiplying it times
8 the maximum penalty. But it did not impose that penalty.
9 Instead, it looked to the specific statutory criteria that
10 govern the application of the penalty provision.

11 QUESTION: I -- I see that, but I'm still -- I'm
12 writing the opinion let's imagine. I say, all right, they
13 brought some guck from the side. That violates the
14 statute. They got some from underneath the bottom. That
15 violates the statute.

16 Now I'm at the point where the lower court wrote
17 most of its opinion. What about the stuff that's just
18 sort of muck down at the bottom and it simply turns it
19 over? Now, do I have to answer the question of whether
20 that does or does not violate this statute? Do I have to
21 answer that? Because, after all, it turns -- the penalty
22 turns on it.

23 MR. MINEAR: I'm not sure the penalty turns on
24 it. We would say that if -- obviously this Court has
25 discretion to determine this -- the types of -- the type

1 of remand it wants to send back. We do think --

2 QUESTION: All right. If I do have to answer
3 it, what do you say to their argument that, yes, if you
4 churn up a lot and move it, for example, over to the point
5 where the river is running in and dam up the river, that's
6 one thing. But here all it does is turn it around in
7 place. And indeed, it doesn't really cause any harm.
8 It's the hole that causes the harm. That's their argument
9 I think as to that bit. And what do you say as to that?

10 MR. MINEAR: I would say, first, the district
11 court found that there was environmental harm here. On
12 page 106 of the petition appendix, it makes note that
13 these types of activities did cause environmental harm.

14 With regard to the penalty assessment, I would
15 look to the fact that the -- the district court considered
16 the seriousness of the violation, the bad faith
17 activities --

18 QUESTION: You haven't quite answered the
19 question.

20 MR. MINEAR: I'm sorry.

21 QUESTION: The question was think only of that
22 little bit where the plow blade is taking a bit of muck
23 and turning it over. Now, in respect to that they're
24 saying, one, it's a small amount. Two, the redeposit of
25 it has nothing to do with the harm. The harm is caused by

1 the hole. Now, as to that bit, if I have to answer the
2 question, what's your response to that argument?

3 MR. MINEAR: My response is that deposit, that
4 turning over material that's in place, can still cause
5 environmental harm that subjects them to a penalty.
6 Imagine if in that muck, in that material, there are
7 entrained heavy metals, arsenic, the types of materials
8 that are filtered out through the normal wetland process.

9 QUESTION: And they have added those to the
10 wetlands.

11 MR. MINEAR: They -- they have added those to
12 the wetland if they've in fact been released from a
13 situation where they're --

14 QUESTION: They were in the wetland before, and
15 they're still -- and they're still in the wetland.

16 MR. MINEAR: But as the Fourth Circuit explained
17 in Deaton, that when you take material and you physically
18 change its situation, if you change it from an aerobic --
19 an anaerobic environment to an aerobic environment, if you
20 change its reduction oxidation potential, these are the
21 reasons why we have a permit because we're concerned about
22 these types of activities --

23 QUESTION: I understand. It's well to be
24 concerned about it, but -- but Congress did use the term
25 addition -- addition -- to the wetlands. I mean, don't

1 words mean anything?

2 MR. MINEAR: Yes, they do, Your Honor. And as I
3 said before, they must have contemplated that an addition
4 included a redeposit because otherwise the idea of -- of
5 regulating dredging and the placement of dredged material
6 wouldn't have made any sense. Congress was aware of --
7 chose its terms quite carefully. It's just that it
8 understood that --

9 QUESTION: Well, it could have meant dredged
10 from elsewhere, couldn't it?

11 MR. MINEAR: That is -- that is possible, but
12 that is very unusual.

13 QUESTION: Well, if it's possible, it -- it
14 would mean addition --

15 MR. MINEAR: It seems --

16 QUESTION: -- if it was dredged from elsewhere.

17 MR. MINEAR: It seems unlikely that Congress
18 would have enacted provisions regulating dredged and fill
19 material that excluded the most common form of dredging,
20 which is to take material from one area of the water body
21 and move it elsewhere.

22 In any event, it's important to remember that
23 the pollutants we're talking about here include sand,
24 gravel, rock, and biological material. These are
25 materials that are defined within the statute as

1 pollutants. Clearly Congress recognized the dangers of
2 moving these materials about --

3 QUESTION: What about the raking the beach? You
4 know, there are people here worried about what you're
5 going to do next and say they can't rake the beach in
6 front of their house on the shore of the lake. What about
7 that?

8 MR. MINEAR: The answer again is found in the
9 agency's regulations which make clear that de minimis
10 disturbances simply do not rise to the level of a
11 violation.

12 QUESTION: Well, I mean, but they're saying we
13 go out every morning. We like a neat beach and we -- we
14 rake it. And I don't know. Are you going to say that's
15 de minimis or not? They like to rake their beach. They
16 -- they see a lot of muck washed up from the lake. So
17 they go out there and they -- they go rake the beach, and
18 they throw away all the muck. It might be like an oil
19 spill. I don't know. It could be terrible. They clean
20 up the beach, and they say on your definitions what you're
21 going to do is you're going to subject them to permits
22 every time they want to stop -- clean up some
23 environmental disaster.

24 MR. MINEAR: I think, Your Honor, the question
25 is have they been subjected to that type of -- of

1 regulation, and the answer is no.

2 QUESTION: Well, they're worried that they might
3 be. My question is, if we decide the case the way you
4 want, are we, in fact, making their worry justified?

5 MR. MINEAR: I do not think so, Your Honor. And
6 again, I think it's important to remember that what the
7 agency is fully concerned with are those types of serious
8 violations that cause real environmental harm.

9 QUESTION: Well, I don't think Congress wanted
10 the homeowner to have to worry about raking. I don't
11 think they wanted to place the -- the homeowner at the --
12 at the mercy of this benign agency who will say, well,
13 there, there, don't worry. We won't get you for raking.

14 MR. MINEAR: Your Honor --

15 QUESTION: I doubt whether raking was intended
16 to be covered.

17 MR. MINEAR: I think, Your Honor, then if they
18 had not intended that there would be enforcement
19 discretion exercised by an agency, they wouldn't have
20 prohibited the addition, any addition, of any pollutant
21 from any point source. They made the net that was covered
22 here quite broad because they realized there's a vast
23 variety in the types of environmental harm that might be
24 caused --

25 QUESTION: Maybe they didn't think a rake was a

1 point source as I don't.

2 MR. MINEAR: Your Honor, they -- they have had
3 ample opportunities to change the regulations -- or to
4 change the -- the terms of the statute. The statute has
5 been revised three times, and they've been quite specific
6 in what they've done. The normal farming exemption is a
7 good example. Congress could have simply exempted all
8 farming activities from coverage under section 404 or the
9 Clean Water Act itself. Instead, it drew a very specific
10 line in this case and it said that we are only restricting
11 normal farming activities and we're subjecting them to a
12 recapture provision. That recapture provision applies
13 whenever the activity, even if it's simply plowing,
14 results in the change in use of the property and also
15 results in a diminishment of the waters of the United
16 States, if it actually fills --

17 QUESTION: Mr. Minear, are you saying that an --
18 an ordinary plow too, like this deep ripper, would be a
19 point source, but what takes that activity out is that it
20 would come under the normal farming exemption?

21 MR. MINEAR: That's exactly right.

22 QUESTION: But it is a point source.

23 MR. MINEAR: That is correct. The -- the plow
24 would be a point source. And this is the reason why
25 Congress enacted the normal farming exemption. It

1 realized it defined these terms quite broadly, and it
2 wanted to provide sensible exemptions. But it drew limits
3 on those exemptions to avoid covering situations like we
4 have here where we're not talking about a yeoman's plow,
5 but rather we're talking about a 100,000 pound bulldozer
6 pulling a 7-inch -- 7-foot long shank through a wetland
7 area.

8 I think it's important to remember too that this
9 lawsuit could have easily been avoided. The -- the
10 parties were -- were -- discussed this issue on a number
11 of occasions, and the Corps made quite clear that they
12 were not subject to a permit provided they simply avoided
13 these small wetland areas, what's -- in the case of the
14 parcels at issue here are about 1 percent of the property.
15 It was easy enough to simply mark these areas and have the
16 contract rippers who came through avoid those areas. The
17 petitioners in this case decided not to do that. They
18 decided to disregard the law and the fact is that this
19 suit and 10 years of litigation -- excuse me -- 8 years of
20 litigation is the result.

21 The fact is that this is a quite sensible
22 program. The Corps and EPA have applied it quite
23 sensibly, and I think that their actions in this case, if
24 you look at the record, were really quite reasonable.

25 Now, I would like to touch back, since we've

1 covered a lot of material here, just to go over --

2 QUESTION: Excuse me.

3 MR. MINEAR: Yes.

4 QUESTION: What -- what farming exception is
5 there? Is there just one or are there several of them?

6 MR. MINEAR: There's one normal farming
7 exemption. That is contained in section 404(f) of the
8 statute, and that is found on pages 2a and 3a of our --

9 QUESTION: Okay. But, you see, that's -- that's
10 not an exception for -- for normal -- it's an exception
11 from the discharge of dredged or fill material. Right?

12 MR. MINEAR: That's correct. And so what this
13 does is it exempts the party from having to get a section
14 404 permit for activities that would otherwise constitute
15 dredge or fill activities. And the fact that Congress has
16 chosen to exempt activities, including specifically
17 plowing, indicates that Congress understood that plowing
18 could result in a point source addition of pollutants.

19 Now, what Congress additionally did is it -- it
20 states on the carryover -- there's a number of other
21 matters that are exempted as well. It indicates that
22 these activities are not regulated under section 301 or
23 section 404 or section 402, for that matter. But then on
24 the paragraph on page 4a, it recaptures those provisions
25 when they result in a change of use, when someone, such as

1 in this case, decides to take a ranch and subdivide it and
2 sell it as farmettes. And it -- and even that recapture
3 provision only applies when it reduces the reach of
4 waters, which is what happened in this case.

5 As the district court found, these waters were
6 filled. They are no longer wetlands, and the idea that
7 these areas are going to be resealed finds no support in
8 the record. The district court found here that what were
9 once wetlands are now orchards. These are not areas that
10 include wetland -- or have wetland characteristics any
11 longer.

12 I would simply like to touch on -- since we --
13 we have bounced around among the three issues here quite a
14 bit, I'd like to simply say a few more words about the
15 civil penalty provision because I think it's important.

16 The legal issue that's before the Court on the
17 civil penalty is -- is whether a penalty ought to be
18 assessed in terms of determining the maximum penalty on a
19 per-day basis or on the basis of the number of violations
20 per day. And the Congress made -- made quite clear that
21 it wanted the latter to be the basis for determining the
22 maximum civil penalty. It amended the statute in 1987 to
23 eliminate any ambiguity that might exist with regard to
24 the -- to that provision, and it's quite clear that it
25 does apply to every violation each day.

1 Now, it takes into account that some violations
2 can be continuing and go on for a long period of time.
3 And those are treated as receiving a \$25,000 a day
4 penalty. But in the case of the violations we have here,
5 they all occurred in one day on the basis the district
6 court analyzed the -- the problem.

7 Finally, I'd like to make the point that the
8 district court needs to have a great deal of discretion in
9 determining how to apply the penalty provisions that are
10 involved here. There are different ways to calculate
11 violations, determine what is the appropriate measure of
12 violations, but ultimately the fairness turns on the
13 district court's judgment of the individual penalty
14 factors that are considered here.

15 In this case, the court took into account all
16 those factors, including the economic benefits that the
17 party received by avoiding its legal obligations in this
18 case. It's important to remember there are land
19 developers, ranchers, and farmers out there that do comply
20 with the statute, that do comply with the regulations, and
21 they are, in effect, penalized if in fact people who
22 ignore the law are allowed to go forward and not be
23 subject to a substantial penalty in cases in which they
24 have violated the law.

25 In this case the penalties are less than what

1 actually would be necessary to recoup the economic benefit
2 that they received according to the -- the facts that the
3 district court put forward. The court of the -- or excuse
4 me -- the -- the Government put forward. The district
5 court recognized there was some uncertainty with regard to
6 determining economic benefit, but nevertheless I think
7 chose a very reasonable approach here in terms of
8 requiring both a mitigation remedy and also a substantial
9 civil penalty.

10 If there are no further questions.

11 QUESTION: Thank you, Mr. Minear.

12 Mr. Bishop, you have 4 minutes left.

13 REBUTTAL ARGUMENT OF TIMOTHY S. BISHOP

14 ON BEHALF OF THE PETITIONERS

15 MR. BISHOP: I think it's a shame that the
16 Government has chosen to insert at this level for the very
17 first time this idea that soil came in from outside the
18 wetland. On page 36 of the petition appendix, the -- the
19 district court, in describing what the plowing here did,
20 said that it broke up, mixed, turned over material already
21 in the pools, swales, and intermittent streams.

22 If you turn to page 86 through 91, where the
23 court describes in detail factual findings after hearing
24 the evidence on the impacts on waters, on only three -- as
25 to three of the jurisdictional features does the court say

1 that there is any fill coming in from outside, and that is
2 where there is upland plowing parallel to a drainage that
3 pushes a small amount of material into the very margins of
4 the wetland.

5 And the reason that the court didn't need to get
6 into this is, A, that it had made a legal finding to begin
7 with that soil disturbed within a wetland was a discharge,
8 and B, that there was a factual dispute here about the
9 extent to which we have pulled up the plows before we
10 entered across from the upland to the -- to the wetland.
11 And the court didn't want to deal with -- with that. And
12 it didn't have to under this notion that if you disturb
13 soil within a wetland, that's an addition.

14 Second, I'd like to point out on page 8a of the
15 -- of the Government's addendum the regulation about
16 plowing. Plowing means all forms of primary tillage
17 including moldboard, chisel, and wide-blade plowing,
18 discing, harrowing, and similar means utilized on the farm
19 to break up, cut, turn over, or stir the soil to prepare
20 it for the planting of crops.

21 QUESTION: What does primary mean?

22 MR. BISHOP: Primary I think means just
23 preparation. If you -- you have to go to the end and --
24 and see -- it's soil -- to prepare the soil for the
25 planting of crops. Primary is the initial preparation of

1 the soil. You might contrast that, for example, with --
2 even though harrowing is mentioned here, farmers
3 understand that harrowing is actually a secondary form of
4 land preparation. It's like a large rake that -- that
5 clears the seed bed for -- for seeding. Primary is the
6 first movement that prepares the soil for accepting the
7 crops.

8 QUESTION: Why do you need the exception for it?
9 That's what puzzles me.

10 MR. BISHOP: Well, you don't need an exception
11 for it. Our -- our position is that it's not a discharge
12 and so -- and that Congress, if you read the 1972
13 legislative history -- I'm sorry to mention it, Justice
14 Scalia.

15 (Laughter.)

16 MR. BISHOP: But it's clear that they did not
17 intend to reach agricultural activity. The Corps in a
18 dispute with the EPA made noises between '72 and '77
19 about, well, we're -- we're going to start regulating
20 stock ponds and -- and ordinary farming activities. And
21 Congress reacted to that by, as one commentator has said,
22 a provision that reflects the fact that it didn't think
23 that one stake through the heart of the vampire was
24 enough. This is a belt and suspenders provision.

25 But what it does, as you remarked Justice

1 Scalia, is to provide an exemption for agricultural
2 activities that are discharges. It doesn't change the
3 definition of point source, fill material, dredged
4 material, addition in any way. It doesn't change any of
5 the operative terms in the statute that we think mean this
6 activity is not a -- a discharge to begin with.

7 And the exemption also mentions other
8 activities, seeding and cultivation and harvesting, that
9 just are not -- I mean, these are not discharges. These
10 do not result in the addition of fill and dredged material
11 from -- to the -- to the wetland. And -- and that is why
12 this structure is what's reflected in the regulations.
13 The regulation on page 8a. It says plowing, as described
14 above -- I mean, they purport to exclude what we did from
15 the definition of plowing, but plowing, as described
16 above, will never involve a discharge. It's not a
17 discharge to begin with. You don't get into the 404(f)
18 exemption.

19 QUESTION: Thank you, Mr. Bishop.

20 MR. BISHOP: Thank you.

21 JUSTICE STEVENS: The case is submitted.

22 (Whereupon, at 12:08 p.m., the case in the
23 above-entitled matter was submitted.)

24

25