No. 01-1243

IN THE

SUPREME COURT OF THE UNITED STATES

BORDEN RANCH PARTNERSHIP,
ANGELO K. TSAKOPOULOS,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF AMICI CURIAE NATIONAL STONE, SAND AND GRAVEL ASSOCIATION, AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION, AND THE NATIONWIDE PUBLIC PROJECTS COALITION IN SUPPORT OF PETITIONERS

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The National Stone, Sand and Gravel Association, the Nationwide Public Projects Coalition, and the American Road and Transportation Builders Association, as *amici curiae*, respectfully submit this brief in support of Petitioners Borden Ranch Partnership *et al.*[1]

INTERESTS OF THE AMICI CURIAE

The *Amici* are private entities, public sector agencies and associations, and local governments that provide essential services to the public. *Amici* believe that this case has implications that reach far beyond the regulation of farming activities. Indeed, if upheld, the Ninth Circuit's decision allows the United States Army Corps of Engineers to assert jurisdiction over virtually any mechanized earth moving activity that takes place in wetlands or streams. This includes the wide spectrum of extractive or removal activities regularly undertaken by *Amici's* members.

The National Stone, Sand and Gravel Association ("NSSGA") is a trade association that represents more than 895 members and approximately 120,000 working men and women in the aggregates and related industries. During 2001 alone, a total of approximately 2.78 billion metric

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[1] The parties have consented to the filing of this brief. The *Amici* have filed letters of consent with the Clerk. Pursuant to this Court's Rule 37.6, *Amici* state that no counsel for any party in this case authored this brief in whole or in part, and no person or entity other than the *Amici* and their counsel has made a monetary contribution to the preparation and submission of this brief.

tons of aggregate materials (crushed stone, sand, and gravel), valued at $14.5 billion, were produced and sold in the United States. NSSGA's members are responsible for over 90 percent of the annual production of crushed stone and over 70 percent of the annual production of sand and gravel in the United States. Due to how aggregates are formed, sand and gravel are often located under streams. Consequently, NSSGA's members frequently excavate materials from streambeds. The vast majority of these materials is utilized in public infrastructure projects. NSSGA's members also regularly undertake land reclamation activities that include wetland restoration, creation and enhancement, as well as flood storage enhancement.

The Nationwide Public Projects Coalition ("NPPC") is a not-for-profit association that is made up of regional and local government agencies that are involved in water supply, flood control, irrigation, wastewater and stormwater management, street and highway construction and maintenance, aggregate mining, and environmental quality amenities. These agencies represent over 12 million constituents, extending from Connecticut to California and from Alaska to Georgia. Among the members are the Metro Denver Water Authority; the Helix Water District of San Diego County, California; the Rancho California Water District of Riverside County, California; Marrietta-Cobb County Georgia; and the Los Angeles County Department of Public Works. NPPC fundamentally represents the interests of the public in ensuring that vital public infrastructure services are provided in a safe, timely and environmentally-beneficial

fashion. Consisting predominately of public officials and firms that serve public sector needs, NPPC's members must ensure that a responsible balance is achieved between environmental, health, and safety goals and the protection of lives and property.

The American Road and Transportation Builders Association ("ARTBA"), is made up of 5,000 member organizations in the transportation construction industry, including construction contractors, professional engineering firms, federal, state and local transportation administrators, heavy equipment manufacturers, and materials suppliers. These member companies employ more than 1,000,000 people in the transportation construction industry in the United States. ARTBA's members are responsible for construction of vital public infrastructure projects such as highways, bridges, airports, railroads, and mass transit facilities.

This case will have a profound impact on the collective interests of *Amici* and of the public that they serve. At issue is the scope of the United States Army Corps of Engineer's ("Corps") authority to assert jurisdiction over a wide spectrum of activities that are regularly conducted in waters and wetlands. This case is illustrative of but one example of how the Corps attempts to expand its limited authority under the Clean Water Act[2] ("CWA"), to reach mechanized earthmoving activities by characterizing such activities as "discharges" or "additions" of "pollutants." In so doing, the Corps requires *Amici's*

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[2] Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (2002).

members to apply for permits for extractive or removal activities, despite the fact that such activities in no rational way result in an "addition" of a pollutant. This includes, for example, aggregate mining operations that clear large parcels of land and excavate to remove the stone, or local governments that clean stormwater basins of debris and clear vegetation and other obstructions that choke flood control channels. Such vital activities are essentially extractive and remove or disturb, but do not discharge, soil and like materials.

Amici submit that, if the Ninth Circuit's interpretation of the CWA is upheld, the Corps will continue to improperly assert jurisdiction over projects that are vital to the ability of local governments to provide critical public services. *Amici's* diverse membership must be able to rely on some minimal level of certainty and predictability for the projects that they undertake. The present uncertainty in whether a particular activity is considered a regulated "discharge," coupled with the severe penalties for violations of the CWA, has a chilling effect on the regulated community. Forcing *Amici's* members into the CWA section 404 permitting process causes delays and increases the costs of such projects. In some cases, the delays expose lives and property to unnecessary risk. The long-range consequences for the Nation may include significant decreases in not only the quantity and quality of public works projects, but also the ability to timely deliver public services necessary to protect public health and welfare. Clear guidance from the Court is necessary to prevent further intrusion into activities that are outside the scope of the CWA.

SUMMARY OF ARGUMENT

1) The plain language of the CWA states that only activities that result in an "addition" of material are regulated and does not support the effects-based test adopted by the Ninth Circuit.

2) The Ninth Circuit's interpretation of "discharge" has the potential to expand the scope of the Corps's jurisdiction to include virtually any mechanized activity that disturbs soil, including those that are purely extractive in nature. This will have a significant impact on the ability of *Amici's* members to provide vital public services.

3) The Ninth Circuit's reading of the CWA's civil penalty provisions ignores the $25,000/day cap and makes the potential extent of penalties that could be accrued in a day almost limitless.

ARGUMENT

I. THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY OF THE CWA LIMITS JURISDICTION TO DISCHARGES THAT "ADD" MATERIALS AND IS NOT SO BROAD AS TO INCLUDE ALL EARTH-MOVING ACTIVITIES TAKING PLACE IN WETLANDS AND WATERS

The CWA prohibits "the discharge of any pollutant" into waters of the United States, except as otherwise authorized under the Act. *See* 33 U.S.C. § 1311(a). Under section 404, the Corps may issue permits "for the discharge of dredge or fill material

into the navigable waters at specified disposal sites." *Id.* at § 1344(a). A "discharge" is defined by the Act as "any addition of any pollutant to navigable waters from any point source." *Id.* at § 1362(12). In turn, a "point source" is "any discernible, confined and discrete conveyance. . . from which pollutants are or may be discharged." *Id.* at § 1362(14).

A. The Ninth Circuit's Rationale Improperly Allows the Corps to Assert Jurisdiction Over Mechanized Earthmoving Activities Based on Their Effects. This Ignores the CWA's Requirement that the Activity Result in an "Addition" of a Pollutant

Amici are primarily concerned by the fact that the Ninth Circuit's interpretation of "discharge" engrafts an effects-based test into the CWA, although no such test exists. It is clear from the plain language of the CWA that Congress did not intend the Corps's jurisdiction to encompass all activities that move soil or that otherwise affect the hydrology of regulated waters. The Corps's authority is triggered only where such activities result in an "*addition*" of material. The Ninth Circuit, however, interpreted "discharge" so broadly as to regulate virtually any activity that disturbs soil in a wetland or water.

The activity at issue, deep plowing, involved poking holes in the bottom of wetlands and "ripping up the bottom layer of soil [so that] the water that was trapped can now drain out." *Borden Ranch P'ship v. United States Army Corps of Eng'rs*, 261 F.3d 810, 815 (9th Cir. 2001). Acknowledging that

"no new material has been 'added'", the court nonetheless asserted that a "pollutant" was "added" because the "soil was wrenched up, moved around, and redeposited somewhere else." *Id.* The court reasoned that "activities that destroy the ecology of a wetland are not immune from the [CWA] merely because they do not involve the introduction of material brought in from somewhere else." *Id.* at 814-15. Hence, under the Ninth Circuit's interpretation, the jurisdictional determination does not turn on whether there is an addition of material, but on whether there has been a hydrological impact.

Merely moving soil in a stream or wetland, regardless of the impact of that disturbance, is insufficient to implicate section 404 of the CWA. By focusing on the effect of the activity rather than on its process, the Ninth Circuit expanded the scope of the Corps's jurisdiction far beyond the limited confines of the CWA. Judge Gould's dissent below seized on the fundamental flaw in the Ninth Circuit's reasoning:

> deep ripping does not involve any significant removal or 'addition' of materials to the site. . . . It is true that the hydrological regime is modified, but Congress spoke in terms of discharge or addition of pollutants, not in terms of change of the hydrological nature of the soil.

Borden Ranch, 261 F.3d at 820 (Gould, J., dissenting). This common sense interpretation

follows and would extend *National Mining Association v. United States Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998) ("*NMA*"). In *NMA*, the court set aside a Corps regulation that sought to expand the definition of "discharge" to include "redeposit, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation that destroys or degrades waters of the United States." 58 Fed. Reg. 45,008, 45,035 (1993). The *NMA* court found this broad definition outran the Corps's statutory authority, explaining:

> the straightforward statutory term 'addition' cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back.

NMA, 145 F.3d at 1404. The logic of the *NMA* court is consistent with the unambiguous terms of the CWA – activities that do not result in a net addition of material cannot be a discharge.[3] The effects-based test adopted by the Ninth Circuit cannot stand in

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[3] The Ninth Circuit distinguished *NMA* on the basis that "deep ripping does not involve mere incidental fallback, but constitutes environmental damage sufficient to constitute a regulable redeposit." *Borden Ranch*, 261 F.3d at 815 n.2. CWA jurisdiction does not, however, hinge on the level of supposed environmental damage, but rather on the nature of the activity.

light of the plain language of the CWA.[4]

A line of cases pertaining to hydroelectric dams also is instructive. Such cases have held that an "addition" occurs only if the point source itself physically introduces a pollutant into water from the outside world. *See Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982); *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 584 (6th Cir. 1988).[5] In *Gorsuch*, it was conceded that the dam alters the downstream water quality. Nonetheless, the court held that changes to water quality do not trigger the need for a section 402 National Pollutant Discharge Elimination System permit absent an "addition" from the outside world. *See Gorsuch*, 693 F.2d at 175. Similarly, Petitioners' deep ripping altered wetlands hydrology, but did not introduce pollutants from the outside world.

Even if "discharge" were broad enough to cover the movement and redeposit of soil, *Borden Ranch* departs from the requirement that the soil must be discharged at a "specified disposal site." *See* 33 U.S.C. § 1344(a). This requirement evidences that

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[4] In fact, in the preamble to the definition of "discharge" that was promulgated after *NMA*, 33 C.F.R. § 323.2(d)(2)(i), the agencies explicitly stated that jurisdiction "is not dependent upon the effects of the activity. . . ." *See* Corps, Further Revisions to the Clean Water Act Regulatory Definition of Discharge of Dredged Material, 66 Fed. Reg. 4550, 4563 (Jan. 17, 2001).

[5] *Cf. Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dis.*, 280 F.3d 1364, 1368 (11th Cir. 2002) (determining that canal added pollutants because it caused water to flow from one distinct body of water into another).

there is both a temporal and a geographical separation between the act of extracting soil and the act of disposing of it. *See NMA*, 145 F.3d at 1410 (Silberman, J., concurring). For there to be a discharge or addition, the material must be affirmatively relocated from one site to another. *See id.* Under the Ninth Circuit's interpretation of "discharge" the notion of a "specified disposal site" becomes superfluous – the location of the excavation and the disposal would be virtually the exact same. *See Am. Mining Cong. v. United States Army Corps of Eng'rs*, 951 F. Supp. 267, 278 (D.D.C. 1997) ("*AMC*") (affirmed by *NMA*). Yet, Congress used very specific terms ("addition" and "specified disposal site") and did not contemplate that the Corps would regulate the movement of soil in substantially the same location. The Ninth Circuit's policy-oriented reading of the broad purposes of the CWA ignores the very specific limits of the substantive provisions of the Act and therefore cannot be upheld.

B. The Legislative History of the CWA Does Not Support the Ninth Circuit's Interpretation

The legislative history of the CWA further illustrates that Congress did not intend the broad interpretation of "discharge" adopted by the Ninth Circuit. As noted in *AMC*, "Congress understood the 'discharge of dredged material' to involve the moving of material from one place to another." 951 F. Supp. at 273 (citing S. Conf. Rep. No. 92-1236, at 141-42 (1972)). In enacting the CWA, Congress did not intend for routine land use activities such deep

plowing to be subject to regulation. As stated in the 1977 Senate Report:

> [T]he committee bill tries to be free from the threat of regulation those kinds of manmade activities which are sufficiently *de minimis* as to merit general attention at the state and local level and little or no attention at the national level.

S. Rep. No. 95-370, at 644 (1977), *reprinted* in Legislative History of the Clean Water Act at 644, 645 (1978). This narrow jurisdictional view is supported by floor debate over the Act from Senator Domenici, who reiterated the narrow focus of the CWA:

> [W]e never intended under section 404 that the Corps of Engineers be involved in the daily lives of our farmers, realtors, people involved in forestry, *anyone that is moving a little bit of earth* anywhere in this country that might have an impact on navigable streams.

123 Cong. Rec. S13,563 (daily ed. Aug. 4, 1977) (statement of Sen. Domenici).

II. THE NINTH CIRCUIT'S INTERPRETATION OF THE CWA COULD HAVE A SIGNIFICANT ADVERSE EFFECT ON VITAL PUBLIC PROJECTS

While *Borden Ranch* addressed a specific type

of farming activity, *Amici* submit that there are virtually no limits to the types of mechanized earthmoving activities that could be regulated under the broad definition of "discharge" adopted by the Ninth Circuit. As recognized in *NMA*, such an interpretation "[i]n effect . . . subjects to federal regulation virtually all excavation and dredging performed in wetlands." 145 F.3d at 331.

Amici's members regularly engage in large scale projects that involve the removal of soil, vegetation and debris from wetlands and regulated waters. This includes, for example, excavation of streams for removal of aggregates or the cleaning of sediment from flood management conveyances. While the purpose of such activities is to remove material, it is almost inevitable that a small percentage of the material inadvertently falls back during the operation. Under the rationale adopted in *Borden Ranch*, such extractive activities would likely become subject to the Corps's section 404 permitting authority because the soil would be "moved around and redeposited somewhere else." *See* 261 F.3d at 815. Yet, excavation and other removal activities properly fall outside of the scope of the CWA because there is no discrete act that results in an "addition" of a pollutant.

The expansion of the Corps's jurisdiction to include any activity that has a hydrological impact could severely impact the decision-making process for many vital projects sponsored by *Amici*. The *Amici* bring together an alliance of regional water, highway and public works agencies, local and state governments, and private sector associations and

companies that provide the raw materials, plan for, and construct vital public works projects. The *Amici* are motivated by the increasing difficulty for state and local governments to deliver needed services affordably, efficiently, and on a timely basis, as a result of the nature and scope of various federal environmental laws. The role of public works agencies in providing services such as flood control, potable water, and maintenance of utility rights-of-way is severely hampered by the unnecessary intrusion of the complex section 404 permit program. The Corps's expansion of jurisdiction to include all activities that disturb soil in streams and wetlands could have the practical effect of allowing the Corps to overturn state and local approvals of public works projects based on an alleged federal interest in the protection of water quality.

National data concerning public infrastructure funding reflects the greatly increased burdens on local governments. Reports prepared by the Congressional Budget Office ("CBO") indicate that the percentage of federal dollars contributed to the construction, operation and maintenance of public infrastructure has been and will continue to decrease steadily. This includes investment in drinking water infrastructure, as well as funding from the federal Highway Trust Fund.[6] In light of the multitude of public services that state and local governments are now responsible for providing to their residents, state and local governments often

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[6] The CBO reports and other documents pertaining to transportation and infrastructure are available at www.cbo.gov/byclasscat.cfm?class=0&cat=21.

must contract with or rely upon private entities to provide many of these services. With the possibility that the federal government will assert jurisdiction over any project that disturbs soil in a stream or wetland, private entities will have to increase the cost of the contracts in order to account for the risks and unpredictability. Thus, the Ninth Circuit's decision unduly constrains the options of public entities in the current fiscal climate where public agencies are under increasing pressure to provide greater services with fewer resources.

Having projects forced improperly into the CWA section 404 permitting process is made worse by the fact that this process is becoming increasingly more onerous. For example, in March 2000, the Corps made substantial changes to the "fast track" Nationwide Permit ("NWP") program; phasing out NWP 26 and substituting it with a number of activity-specific NWPs.[7] Under the prior program, *Amici's* members could utilize NWP 26, which permitted discharges of up to 3 acres in certain wetlands. However, the new activity-specific NWPs have a one-half (1/2) acre limit and include

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[7] *See* Corps, Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed. Reg. 12,818 (March 9, 2000). The permits were reissued, without significant modification, in 2002. *See* Corps, Final Notice of Issuance of Nationwide Permits, 67 Fed. Reg. 2019, 2020 (Jan. 15, 2002).

numerous restrictions on their use.[8]

Hence, the broad definition of "discharge" will have a greater impact on *Amici* than otherwise would have been the case because more projects (*e.g.* aggregate mining, flood control and stormwater management projects in floodplains) will be forced into the far more onerous and time-consuming individual permit process. [9] As the Corps is aware, the individual permit process takes significantly more time and is exponentially more expensive. Indeed, before making changes to the NWPs, the Corps estimated that the restrictions would result in an additional 4,429 individual permits annually, with $48 million in direct costs to the regulated public.[10] In a separate report, the National Association of Counties concluded that the changes will cost the general public an additional

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[8] For example, the mining permit (NWP 44) may not be used within the flood way of the 100-year floodplain, or within 100 feet of the ordinary high water mark of headwater streams where average annual flow is greater than 1 cubic foot per second. *See* 65 Fed. Reg. at 12,892-893.

[9] The individual permit process involves a detailed evaluation of whether a proposed discharge is in the "public interest." The Corps considers and balances many factors and must determine that there are no practicable alternatives to the proposed discharge, *see* 33 C.F.R. § 322.4, and must also comply with EPA's detailed 404(b)(1) guidelines, *see* 40 C.F.R. § 230.1(b). This involves individual public notices allowing for agency and public comment and the Corps must prepare detailed findings to support its permit decision.

[10] *See* Institute for Water Resources, U.S. Army Corps of Engineers, *Cost Analysis for the 1999 Proposal to Issue and Modify Nationwide Permit* 23 (2000) available at: http://www.usace.army.mil/inet/functions/cw/.

$300 million annually, or $100,000 per acre affected.[11] *Amici* submit that many of these costs will involve public projects and will ultimately be borne by taxpayers.

III. THE NINTH CIRCUIT'S BROAD INTERPRETATION OF "DISCHARGE" VIOLATES THE FUNDAMENTAL PRINCIPLE OF FEDERALISM THAT ABSENT A "CLEAR STATEMENT" FROM CONGRESS, A REVIEWING COURT SHOULD NOT SANCTION USURPATION OF STATE AND LOCAL CONTROL OF LAND AND WATER RESOURCES

In ruling that the Corps has jurisdiction over the "deep plowing" of farmland, the Ninth Circuit adopted an unprecedentedly broad interpretation of the statutory term "discharge." As the Court held last term in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 174 (2001) ("*SWANCC*"), in a decision construing the geographic scope of the Corps's jurisdiction, the courts should be hesitant to intrude upon the delicate balance between federal and state regulation of land and water resources absent a

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[11] *See* National Association of Counties, *Analysis of The Army Corps of Engineers' NWP 26 Replacement Permit Proposal* (January 2000) available at http://www.naco.org/leg/-Advocacy/corps.cfm. In turn, the processing times for individual permits may increase dramatically under the new NWP program as the workload creates backlogs. The NACO Report indicates that it takes an average of 788 days to process an individual permit. *See* NACO Report, at 2.

"clear statement from Congress" that it intended such a result. Just as it did when setting the geographic boundaries of the Corps's jurisdiction, Congress did not seek to impinge on the States' traditional and primary power over land and water use when setting out the scope of activities regulated under the CWA.

A. Nothing In The CWA Evinces A Clear Statement That Congress Intended To Encroach Upon Local Regulation of Soil Disturbance Activities That Do Not Add Pollutants

Section 101 of the CWA specifically limits the authority of federal agencies to intrude into state and local matters:

> It is the policy of the Congress 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 (including restoration, preservation, and enhancement) of land and water resources. . . .

33 U.S.C. § 1251(b). Congress also explicitly stated that nothing in the CWA is to "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." *Id.* at § 1370.

In enacting the CWA, Congress sought to address water pollution issues of national importance, not to regulate every activity that has

some detrimental effect on streams and wetlands. Indeed, Congress spoke directly to this issue in section 208 of the Act – encouraging States to develop area-wide management plans that address the various pollution sources that are not regulated by federal law. *See id.* at § 1288.

One of the principal tenets of federalism is that Courts shall not interpret federal legislation to abrogate local power unless it is clear that Congress considered and intended, when it passed the authorizing legislation, to alter the traditional balance between federal and state powers. This "clear statement" principle applies "in cases implicating Congress's historical reluctance to trench on state legislative prerogatives or to enter into spheres already occupied by the States." *United States v. Lopez*, 514 U.S. 549, 611 (1995) (Souter, J., dissenting) (citation omitted). In cases where the agencies seek to invoke the outer limits of Congress's power, there must be a clear indication that Congress intended that result. *See SWANCC*, 531 U.S. at 172. Indeed, there is an underlying "assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id.* at 172-73; *see also Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

Of course, as long as Congress is acting pursuant to one of its enumerated powers, the Supremacy Clause of the Constitution permits Congress to trump state law, even in areas (such as land use) that by tradition fall within the state sphere. Nonetheless, under the "clear statement"

principle, courts must not simply assume that Congress has used its power to override state authority. *See SWANCC*, 531 U.S. at 172-73. Rather, "[u]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971). Mere ambiguity will not suffice to demonstrate that Congress intended to intrude into state interests. *See Gregory*, 501 U.S. at 464.

A review of the plain language of the CWA and its supporting legislative history provides nothing approaching a "clear statement" from Congress that it intended the CWA to authorize the Corps to regulate all soil disturbance activities that somehow affect water quality. In truth, far from being "unmistakably clear" that Congress intended the statutory term "discharge" to encompass activities such as deep plowing or other routine land uses, Congress set forth the very specific limit that regulated activities must result in an "addition" of material in order to fall within the scope of the Corps's jurisdiction. As discussed *supra*, it is also clear from the legislative history that Congress did not intend to authorize the Corps to regulate every activity that might move earth in a wetland or navigable stream.

Thus, neither the plain text nor the legislative history of the CWA provide the "clear statement" from Congress that this Court has consistently required in cases involving federal infringement upon state regulatory power. This careful balance between state and federal power should not be upset.

B. The States Have Enacted Comprehensive Wetland and Water Quality Protection Statutes That Will Be Supplanted by the Corps's Expansion Of the CWA

Amici recognize the legitimate objective of the CWA to protect the Nation's waters. However, section 404 of that Act does not cover all soil movement activities that could potentially impact water quality. Fundamental principles of federalism dictate that activities such as farming, aggregate mining, flood control and other routine land uses are properly within the purview of state and local governments. Indeed, the Court has recognized that "regulation of land use is perhaps the quintessential state activity." *See Fed. Energy Regulatory Comm'n v. Miss.*, 456 U.S. 742, 768 n.30 (1980). As discussed above, the CWA bestows "primary" responsibility upon the states to protect water resources. The literally thousands of state and local governments that regulate wetlands and waters evidences that the States have assumed this role.[12]

State and local governments throughout the Nation have passed comprehensive wetland laws, many of which are much broader in scope than the CWA, and, therefore, offer far greater protection. In fact, several states began regulating these areas well

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[12] *See Federal Wetland Protection Policy, 1993: Hearings on S. 1304 Before the Subcomm. On Clean Water, Fisheries and Wildlife of the Senate Comm. on Environment and Public Works*, 103d Cong., 1st Sess. (1993) (statement of National Association of State Departments of Agriculture), *available* in LEXIS, Legis Library, Cngtst File (noting that over 5,000 local governments have adopted wetland protection regulations).

before the federal government took interest. "The first wetlands protection statute in the United States was passed in Massachusetts in 1963. . . . By the time Congress enacted the CWA in 1972, Massachusetts had nine years of experience regulating wetlands, and was already reforming its laws to provide greater local control and accountability while maintaining state-level oversight." Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 Envtr. L. 1, 48 (1999).

State-based clean water laws are typically far broader than their federal counterpart – regulating a wider spectrum of land use activities such as material extraction and earthmoving. For example, Virginia's wetland protection law broadly defines "pollution" to include any activity resulting in the "alteration of the physical, chemical or biological properties of any state waters as will or is likely to create a nuisance." *See* Va. Code Ann. § 62.1-44.3. New Hampshire takes an equally broad approach, prohibiting the excavation, removal, filling or dredging of any material in a wetland. *See* New Hampshire Rev. Stat. § 482-A:3.[13]

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[13] *See also* Maine Rev. Stat. § 480-C (requiring a permit for any activity that involves "dredging, bulldozing, removing or displacing soil, sand, vegetation or other materials" within a wetland as well as for "draining or otherwise dewatering" a wetland); Md. Code Ann. Envir. § 5-901(i) (defining a regulated activity as any action that results in the removal, excavation, or dredging of soil, sand, gravel, minerals, organic matter, or materials of any kind).

In a similar vein, all fifty states, the District of Columbia, and the Commonwealth of Puerto Rico, have enacted laws that apply to nonpoint source discharges – a type of discharge that is not regulated by the CWA. *See* Environmental Law Institute, *Almanac of Enforceable State Laws to Control Nonpoint Source Water Pollution*, 1 (1998). The states fill a critical role in the overall scheme of the CWA.

> Nonpoint source discharges, which consist generally of polluted runoff from farms, forests, land development and other activities, are not regulated under the [CWA]. Instead they are addressed primarily through nonregulatory means, such as planning, incentive and cost-share mechanisms. . . . Yet, increasingly, states are finding it necessary to deal with nonpoint source discharges that cannot be prevented, controlled, or abated adequately by these means.

Id.

Well aware of the comprehensive state-based initiatives discussed above, the EPA has also recognized the essential role of federalism in the protection of wetlands and other waters even as to the permitting of point source discharges, explaining:

> More than a dozen States already are currently administering aquatic resources/wetlands protection programs

> similar to the Federal Section 404 program. This makes sense because State and Tribal regulators are, in many cases, located closer to the proposed activities and are often more familiar with the local resources, issues, and needs than are Federal regulators.[14]

Thus, there are ample state and local protections in place to facilitate more creative and, therefore, less burdensome regulatory schemes than under the federal system.[15] Such initiatives are directly threatened by the Ninth Circuit's expansive interpretation of the statutory term "discharge."

IV. THE NINTH CIRCUIT'S INTERPRETATION OF THE CWA'S CIVIL PENALTY PROVISION IGNORES THE PLAIN TEXT OF THE STATUTE

Equally troubling to *Amici* is the manner in which the Ninth Circuit calculated the penalties assessed against Petitioner. In upholding a civil penalty assessment of $1,500,000[16] the Circuit

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[14] U.S. Environmental Protection Agency, Office of Wetlands, Oceans, and Watersheds, *State or Tribal Assumption of the Section 404 Permit Program* (May 25, 1999) at http://www.epa.gov/owow/wetlands/facts/fact23.html.

[15] For example, unlike the CWA, certain states protect both surface and groundwater. *See e.g.*, MD. Code Ann., Envir. § 5-102; Cal Water Code § 13050; 415 Ill. Comp. Stat. 5/3.56.

[16] The maximum penalty that could have been imposed was $8,950,000. *See Borden Ranch*, 261 F.3d at 816.

adopted the district court's theory that each time one of the blades of the deep ripper crossed a regulated wetland a separately punishable violation of the CWA resulted for that day. The Ninth Circuit's theory would allow the Corps to take a single violation and arbitrarily divide it into virtually infinite sub-violations, each of which would be subject to the maximum per day penalty. Coupled with the Corps's unjustifiable attempt to expand its jurisdiction, this improperly broad interpretation of the penalty provisions could have a chilling effect on a wide spectrum of activities that *Amici's* members regularly engage in.

A. Assessing a Separate Penalty For Each Pass of the Farming Implement Over a Wetland is Inconsistent with the Plain Language of the CWA

The CWA prohibits the discharge of any pollutant into the waters of the United States without a permit. *See* 33 U.S.C. § 1311(a). Section 309 of the Act provides that "[a]ny person who violates section 1311 . . . shall be subject to a civil penalty not to exceed $25,000 *per day* for each violation." *Id.* at 1319(d) (emphasis added). Thus, section 301 of the Act provides for a zero tolerance limit for any unpermitted discharge of pollutants into a wetland. Therefore (assuming *arguendo* that the deep plowing engaged in by Petitioner qualifies as a "discharge") Petitioner was liable for a violation of Section 301 of the Act as soon as the deep ripper encountered a wetland and caused soil to be "added" thereto. The penalty for this violation is specified in Section 309 of the Act, which imposes a maximum

daily fine of up to $25,000 for this unauthorized discharge. *See* 33 U.S.C. § 1319(d).

The fact that Petitioner continued to engage in deep plowing throughout the day, and thereby increased the amount of soil "discharged" into the same wetland is entirely irrelevant. Once a daily limit has been exceeded, a violation of the CWA has occurred, and *one* maximum daily penalty of up to $25,000 may be properly imposed.[17]

The Ninth Circuit's contrary view, which gives no meaning to the Act's "per day" limitation, leads to arbitrary and anomalous results. This fact is well illustrated by two hypothetical operations both taking place on the same stream. One company is an aggregate mining operation that is utilizing a drag line to remove aggregates from the bottom of the stream. The other company is a chemical manufacturing company that has set up a wastewater discharge pipe further downstream. In the course of normal operations, the aggregate miner takes several hundred buckets of aggregates from the stream and each time a small amount of soil falls from the bucket into the stream. On the same day,

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[17] There were "348 separate deep rippings in 29 drainages, and 10 violations in a single pool." *Borden Ranch*, 261 F.3d at 813. No one has argued that Petitioner has violated more than one requirement of the CWA. Therefore, the Court need not reach the question of what happens if more than one substantive requirement is violated in a single day. In turn, just as the Corps cannot create separate violations by having each pass of the tractor count separately, the hydrologically-linked wetlands on the site cannot be parsed into separate "waters" for purposes of creating distinct violations. One day of operation equals one violation.

the chemical manufacturing company discharges a continuous stream of wastewater, resulting in the release of thousands of gallons of one type of chemical. Neither company has a permit for its operations and are both therefore in violation of 33 U.S.C. § 1311.

Under the Ninth Circuit's approach, the aggregate mining company – which has "discharged" only *de minimis* amounts of soil – is subject to an exponentially higher fine than the factory (which has maintained a steady stream of pollution throughout the day) for repeating the same operation several hundred times that day.

In addition to the inequitable treatment of the respective parties that results from this calculation, this approach also reads out of the statute the $25,000/day cap for civil penalties. With the cap removed, the Government is free to seek virtually any monetary penalty it desires, by simply parsing daily extraction and removal activities into countless sub-violations which are each subject to a $25,000 penalty.

Amici submit that the penalty theory adopted by the Ninth Circuit makes the potential extent of penalties almost limitless. The hypothetical offered above is based on the reality of how *Amici's* members conduct their operations. For example, aggregate operations require large parcels of land to economically extract the resources. Given that aggregates are often found where water exists or was at one time present, it is not uncommon to have several perennial or ephemeral streams located on a

site. Under the Ninth Circuit's theory, a company that clears a site with a bulldozer that makes numerous passes to remove the overburden, followed by a drag line that that operates all day in removing the aggregates beneath, could be charged with hundreds of violations of the CWA for a single day's work. The fines accumulated in one day's work could put an operator out of business forever.

B. There is no Support for the Ninth Circuit's Interpretation of the Civil Penalty Provisions of the CWA

In reaching its decision, the Ninth Circuit failed to cite any court that has imposed multiple daily fines for violating the same CWA prohibition. Instead, the Ninth Circuit attempted to draw an analogy between the facts of this case and the decisions in *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128 (11th Cir. 1990) and *United States v. Smithfield Foods, Inc.*, 191 F.3d 516 (4th Cir. 1999). Yet, as the Ninth Circuit admitted (in a significant understatement), "these cases do not precisely resolve the problem at issue here." *Borden Ranch*, 261 F.3d at 817.

Both *Atlantic States* and *Smithfield Foods* involved an entirely different set of facts. In both of these cases, the polluter had violated multiple permit effluent limits for different pollutants. Under these circumstances, it was held that the daily penalty under the CWA applies for each of the effluent limitations violated. *See Atlantic States*, 897 F.2d at 1138; *Smithfield Foods*, 191 F.3d at 527. *Amici* do not take issue with this common sense

approach.

In this case, the alleged violation involved the movement of tilled soil within a wetland. This is in contrast to *Atlantic States* and *Smithfield Foods*, where the parties were found to have violated multiple effluent standards by discharging various different pollutants.[18] In both these cases, the courts therefore counted the number of permit limitations exceeded, and multiplied by the number of days in order to calculate the maximum penalty assessable. The *Atlantic States* court justified this approach by focusing on the language of the CWA and noting that the Act "speak[s] in terms of penalties per *day* of violation, rather than penalties per *violation*." 897 F.2d at 1139 (emphasis in original) (citation omitted). Importantly, neither the *Atlantic States* nor *Smithfield Foods* courts attempted to amplify the maximum assessable penalty, as the Ninth Circuit did below, by analyzing the number of different times each pollutant was improperly discharged in any particular day.

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[18] In *United States v. Amoco Oil Co.*, 580 F.Supp. 1042, 1046 n.1 (W.D. Mo. 1984), the court discussed and rejected the theory that "multiple daily 'violations' of a limit for a single effluent" should be subject to multiple daily fines. In defending this position, the court found it "conceptually difficult (if not impossible) to apply the words 'per day of such violation' separately" to multiple violations of the same limitation. *See id.*

C. The Ninth Circuit's Fear Of "Pollution Days" Does Not Justify Its Penalty Amplification Theory

In justifying its novel interpretation of the CWA's civil penalty provisions, the Ninth Circuit expressed its opinion that any contrary holding would lead to "serious incentive problems", because a daily penalty cap would encourage "pollution days" whereby polluters commit "innumerable offenses" subject only to a $25,000 maximum fine. *Borden Ranch*, 261 F.3d at 817. This argument completely ignores the criminal provisions of the Act. The CWA provides for criminal penalties of up to $50,000 per day and three years imprisonment for any "knowing violation" of the Act. 33 U.S.C. § 1319(c). Anyone who intentionally released pollutants in order to take advantage of the daily $25,000 cap would potentially be subject to these criminal sanctions, which are more than sufficient to eliminate any "incentive problem" created by the Act's civil penalty provisions.

CONCLUSION

The *Amici* National Stone Sand and Gravel Association *et al.* respectfully request this Court to reverse the Ninth Circuit's ruling in *Borden Ranch*.

Respectfully Submitted,

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