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 *AMICUS CURIAE* OF SAVE OUR SHORELINE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amicus curiae will address the following question:

Whether deep plowing ranchland to plant deep-rooted crops constitutes the "addition" of a "pollutant" (the plowed soil) from a "point source" (the plow) so as to fall within the regulation of Section 404 of the Clean Water Act?

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OTHER AUTHORITIES

Amicus curiae submits this brief supporting petitioners;[1] both parties have consented to its filing. *See* Rule 37.3.

INTEREST OF AMICUS CURIAE

Amicus Curiae, Save Our Shoreline, Inc. ("SOS"), is a Michigan non-profit membership corporation, comprised of over 1,300 Saginaw Bay residents who own a house or live along the shoreline of Lake Huron. SOS's members have a direct and substantial interest in this Court's decision regarding the U.S. Army Corps of Engineer's ("Corps") authority to regulate "incidental fallback" and other historically lawful activities under Section 404 of the Clean Water Act. Members of SOS engage in routine beach maintenance activities to maintain clean and safe beaches.

Members have historically used a variety of hand tools such as rakes, shovels, and hoes as well as horse-drawn implements and mechanized equipment such as small tractors or golf carts to gather debris, smooth sand, and to eliminate mosquito-infested, stagnant water and nuisance vegetation. This normal beach maintenance results in incidental fallback on the shoreline of their properties and not in the waters of Lake Huron. Nevertheless, the Corps contends that shoreline

[1] No counsel for either party authored this brief amicus curiae, either in whole or in part. Furthermore, no persons other than amicus curiae contributed financially to the preparation of this brief.

property owners' beach maintenance activities are unlawful without a Section 404 permit.

For over a century, the residents in Saginaw Bay have enjoyed unfettered maintenance of their beachfronts. Then in 1988, a dramatic change to the Saginaw Bay began due to the introduction of non-native zebra mussels. These rapidly multiplying mussels profoundly changed the ecology of Saginaw Bay, causing rapid plant growth and increased biological activity and decaying organic matter which ultimately gathers along the shoreline. Zebra mussels and substantial sewage and increased phosphate run-off into the Saginaw Bay have caused significant growth of vegetation near the shoreline and on the beaches themselves. Zebra mussels in high density also enhance the solubilization of phosphorus that causes noxious blue-green algae. *See* William F. James et al., *Enhanced Phosphorous Recycling by Zebra Mussels at High Density Levels in Relation to Food Supply* (Water Quality Technical Notes Collection, U.S. Army Engineer Research & Development Center (ERDC WQTN PD-09)) (May 2001), *available in* (visited August 21, 2002) <http://www.wes.army.mil/el/elpubs/wqtncont.html>. As the ultimate insult, zebra mussels die, leaving behind many thousands of sharp-edged, dead shells on the beaches.

Thus, the SOS homeowners, who for over a century have enjoyed and maintained beautiful sugar sand beaches, now own what the Corps calls "wetland." The Corps has launched an enforcement initiative against these SOS beachfront owners, and has filed three enforcement actions against individual homeowners, demanding that they cease and desist from all normal, routine beach maintenance. *See United States v. Stuart*, No. 02-10054 (E.D. Mich. Feb. 27, 2002); *United States v. Groya*, No. 02-10079 (E.D. Mich. Mar. 25, 2002); *United States v. Kincaid*, No. 02-10149 (E.D. Mich. May 28, 2002). How this Court defines the reach of the Clean Water Act may well determine the fate of the Saginaw Bay's public and private beaches and whether their historical beauty may be restored and maintained or whether they will be forced to stay overgrown with noxious weeds and other vegetation and covered with accumulated trash, debris and other organic matter (that breeds pests and rodents, often carrying diseases).

STATEMENT OF THE CASE

1. This case involves the right of Petitioners, Borden Ranch Partnership, and the title owner of Borden Ranch, Angelo Tsakopoulos, a farmer, rancher, and real estate developer, to "deeply plow" a privately owned 8,400 acre ranch near Lodi, California. Petitioners' Appendix ("Pet.

App.") 2-3. Portions of that ranch are classified as wetland by the Corps. *Id*. In this case, petitioner, Mr. Tsakopoulos, sought to convert his cattle ranch and crop land into vineyards and orchards; these proposed uses are consistent with the agricultural zoning of the property. *Id*. Since vineyards require deep roots, Mr. Tsakopoulos commenced deep plowing, which uses long metal prongs to penetrate several layers of soil. *Id*.

Mr. Tsakopoulos began deep plowing in the fall of 1993, and was granted an after-the-fact permit in the spring of 1994 after he was informed that he needed a wetland permit under Section 404 of the Clean Water Act to plow certain areas of his ranch. Pet App. 3; *see also* Pet. App. 72, 74, 77-78; *Borden Ranch Partnership v. United States Army Corps of Engineers*, 261 F.3d 810, 812 (9th Cir. 2001). He also agreed to mitigate for the wetland that he had disturbed without a permit. Pet. App. 3; *see also Borden Ranch*, 261 F.3d at 812.

In the spring of 1995, respondents issued Mr. Tsakopoulos a cease and desist order because he had engaged in deep plowing in wetland without a permit. Pet. App. 3; *see also Borden Ranch*, 261 F.3d at 813. Thereafter, from July to November 1995, in order to avoid further deep plowing, he plowed with the shank raised as high as possible, as

authorized by the Corps. Pet. App. 3. Respondents, nevertheless, later contended that this plowing was also deep plowing, and respondents issued another cease and desist order to Mr. Tsakopoulos in November of 1995. *Id*.; *see also Borden Ranch*, 261 F.3d at 813. In May of 1996, Mr. Tsakopoulos attempted to settle the matter with the Corps by dedicating a 1418-acre seasonal wetlands preserve (with 1368 contiguous acres) in the heart of the Borden Ranch to be managed by the Corps in perpetuity. Pet. App. 3-4; *see also Borden Ranch*, 261 F.3d at 813.

The Corps and EPA officials provided guidance for 1996 plowing on Borden Ranch in September of 1996, reconfirming that Mr. Tsakopoulos, without a permit, could deep plow uplands and cross the narrow, dry and widely dispersed drainages with the plow shank raised at its highest point. Pet. App. 3-4. Then, in April 1997, the EPA, ignoring the guidance given in September of 1996, issued Mr. Tsakopoulos yet another cease and desist order, requiring him to stop all activity involving "machinery crossing drainages" on the ranch. Pet. App. 4; *see also Borden Ranch*, 261 F.3d at 813.

Petitioners filed suit in federal district court in May 1997, challenging the authority of the Corps and EPA to require that they obtain a permit for deeply plowing wetland.

Pet. App. 4; *see also Borden Ranch*, 261 F.3d at 813. The government filed a counterclaim for injunctive relief and civil penalties. *Id*.; *see also Borden Ranch*, 261 F.3d at 813. The district court granted summary judgment in favor of the government, holding that the Corps could require a permit for deep plowing in jurisdictional waters. Pet. App. 28-56. After a bench trial, the district court held that petitioners had engaged in deep plowing without a permit, and petitioners were fined $1.5 million in civil penalties. Pet. App. 5, 67-121. The district court held that petitioners had committed 358 separate Clean Water Act violations by plowing an aggregate of approximately two acres of widely dispersed intermittent linear drainages and a vernal pool. *Id*.

2. On appeal, the Ninth Circuit Court of Appeals upheld the district court's decision that the type of deep plowing engaged in by the petitioners is subject to federal regulation under Section 404 of the Clean Water Act.[2] Pet. App. 6-8; *Borden Ranch*, 261 F.3d at 815-16. The court below rejected petitioners' argument that the deep plowing was exempt under the normal farming and ranching activities

[2] The court below, however, reversed the district court's decision as to the vernal pool located on the petitioners' property, after the government conceded that that the case of *Solid Waste Agency of North Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), now precludes Corps' authority over such pools. *Borden Ranch*, 261 F.3d at 816.

exemption under the Clean Water Act, holding that the plowing constituted a new use of the ranch. Pet. App. 9-10; *Borden Ranch*, 261 F.3d at 815-16.

Petitioners argued to the Ninth Circuit court that deep plowing simply churns up the soil that is already there, placing it back basically where it came from, and thus, was only incidental fallback, not subject to Section 404 regulation, citing *National Mining Association v. United States Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998). Pet. App. 6-8; *Borden Ranch*, 261 F.3d at 814.

The court below rejected that argument, too, holding that deep plowing should require a permit because "activities that destroy the ecology of a wetland are not immune from the Clean Water Act merely because they do not involve the introduction of material brought in from somewhere else." Pet. App. 7-8; *Borden Ranch*, 261 F.3d at 814-15. The court below distinguished the decision of the D.C. Circuit Court of Appeals in *National Mining Association v. United States Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998), which held that "incidental fallback" is not a redeposit subject to regulation under the Clean Water Act. The Ninth Circuit stated that, "[h]ere, the deep ripping does not involve mere incidental fallback, but constitutes environmental

damage sufficient to constitute a regulable redeposit." Pet. App. 8 n.2; *Borden Ranch*, 261 F.3d at 815 n.2.

In dissent, Judge Gould observed that "[f]armers have been altering and transforming their crop land from the beginning of our nation, and indeed in colonial times." Pet. App. 18; *Borden Ranch*, 261 F.3d at 819 (Gould, J. dissenting). Looking at the Clean Water Act, he saw nothing that prohibited deep plowing, which is a traditional farming activity. Pet. App. 18-22; *Borden Ranch*, 261 F.3d at 819-21. Judge Gould further concluded that since there was no significant removal or addition of material to the site, the Clean Water Act's prohibition on the addition of a pollutant into the nation's waters did not apply. *Id*. He flatly rejected the majority's decision holding that mere ecological disturbance of a wetland violated the Clean Water Act: "The ground is plowed and transformed. 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." Pet. App. 19; *Borden Ranch*, 261 F.3d at 820. The dissent, thus, concluded that "[i]f Congress intends to prohibit so natural a farm activity as plowing, and even the deep plowing that occurred here, Congress can and should be explicit." *Id*.

SUMMARY OF ARGUMENT

In the Federal Water Pollution Control Act, commonly known as the Clean Water Act, Congress prohibited the discharge of a pollutant into the nation's waters, without a permit from the Corps. *See* 33 U.S.C. § 1311(a) (1995 & Supp. 2002); 33 U.S.C. § 1344(a),(d) (1987 & Supp. 2002). The nation's waters have been interpreted to include wetlands adjacent to navigable waters. *See United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 129 (1985) ("The regulation extends the Corps' authority under § 404 to all wetlands adjacent to navigable or interstate waters and their tributaries."). The Clean Water Act defines discharge as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (2000 & Supp. 2002). A point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). A pollutant is defined as "dredged spoil, ... biological materials, . . . rock, sand, [and] cellar dirt." 33 U.S.C. § 1362(6).

The court below redefined the prohibited act to be not the discharge of a pollutant, but the destruction of the ecology:

> These cases recognize that activities that destroy the ecology of a wetland are not immune from the Clean Water Act merely because they do not involve the introduction of material brought in from somewhere else. In this case, the Corps alleges that Tsakopoulos has essentially poked a hole in the bottom of protected wetlands. That is, by ripping up the bottom layer of soil, the water that was trapped can now drain out. While it is true, that in so doing, no new material has been "added," a "pollutant" has certainly been "added." Prior to the deep ripping, the protective layer of soil was intact, holding the wetland in place. Afterwards, that soil was wrenched up, moved around, and redeposited somewhere else. We can see no meaningful distinction between this activity and the activities at issue in Rybachek and Deaton. We therefore conclude that deep ripping, when undertaken in the context at issue here, can constitute a discharge of a pollutant under the Clean Water Act.

Pet. App. 7-8; *Borden Ranch*, 261 F.3d at 814-15.

The danger of adopting this new definition of the Clean Water Act's prohibition is that it would make illegal all manner of activities that the Corps itself has said are beyond the reach of the Clean Water Act. For example,

mowing grass or cutting down trees, removing animal communities, adding plants (whether farming or landscaping), all change the ecology, which is defined as the "branch of biology that deals with the relations between living organisms and their environment." WEBSTER'S NEW TWENTIETH CENTURY UNABRIDGED DICTIONARY 574 (2d ed. 1966). Yet, as the Corps itself has recognized, the Corps's Clean Water Act regulations do not require a permit for any of these actions, even though they may destroy the ecology of the wetland:

> [A]ctivities that would generally not be regulated include discing, harrowing, and harvesting were soil is stirred, cut or turned over to prepare for planting of crops. These activities involve only minor redistribution of soil, rock, sand, and other surface materials. The use of K-G blades and other forms of vegetation cutting such as bush hogging or mowing that cut vegetation above the soil line do not involve a discharge of dredged material. . . . [T]he use of equipment to cut trees above the roots that does not disturb the root system would not involve a discharge. . . . [A]lthough significant adverse environmental effects can result from activities undertaken using mechanized earth-moving equipment, the jurisdictional basis is the presence of regulable discharges.

Further Revisions to the Clean Water Act Regulatory Definition of "Discharge of Dredged Material," Final Rule, 66 Fed. Reg. 4550, 4554-55, 4557 (2001).

While the Corps, by its actions, has spoken to the contrary, the regulations also do not prohibit routine beach maintenance activities such as raking and smoothing of surface beach sand, removal of vegetation and debris, and other general maintenance activities designed only to insure a clean and healthy beach. Such activities should not require a Section 404 permit because they result only in "minor redistributions of soil, rock, sand, and other surface materials." 66 Fed. Reg. at 4554.

Accordingly, *Amicus Curiae* SOS urges this Court to hold that Congress, in prohibiting the discharge of a pollutant without a permit, does not prohibit other acts (including routine beach maintenance), as the Corps and EPA themselves have said. If Congress wishes to expand the Clean Water Act to encompass destruction of the ecology of a wetland, it should do so. *See* Corey Burnham, Note, *The Tulloch Rule: Its Rise, Demise & Resurrection*, 33 CONN. L. REV. 1349 (2001) ("Whatever approach ultimately is taken, the long echoed calls to amend the Clean Water Act must continue until they are heard.").

ARGUMENT

ADOPTION OF THE COURT BELOW'S NEW DEFINITION OF THE CLEAN WATER ACT'S PROHIBITION WOULD MAKE ILLEGAL ALL MANNER OF ACTIVITIES, INCLUDING THOSE THAT RESULT ONLY IN INCIDENTAL FALLBACK, WHICH THE CORPS ITSELF HAS SAID ARE BEYOND THE REACH OF THE CLEAN WATER ACT.

The court below adopted an interpretation of the Clean Water Act that leaps over the "discharge," "point source," and "pollutant" prohibition created by Congress, and substituted a "disrupts the ecology" standard that has no basis in the text or history of the statute.

As the dissent in the court below stated, "Congress spoke in terms of discharge or addition of pollutants, not in terms of change of the hydrological nature of the soil." Pet. App. 19; *Borden Ranch*, 261 F.3d at 820. Section 301(a) of the Clean Water Act prohibits only the discharge of a pollutant without a permit. 33 U.S.C. § 1311(a) (1995 & Supp. 2002). The "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A) (2000 & Supp. 2002).

Although this Court has held that the Clean Water Act gives the Corps authority to regulate navigable waters in

addition to non-navigable waters, such as wetlands (*see United States v. Riverside Bayview Homes, Inc*., 474 U.S. 121 (1985)), Congress has not expanded the Corps's authority to regulate acts that do not involve the discharge or addition of a "pollutant" into those waters. *See, e.g., National Wildlife Federation v. Consumers Power Co*., 862 F.2d 580, 585-86 (6th Cir. 1988) ("Just as in *Gorsuch* the release of storage dam water low in dissolved oxygen, and containing heat, dissolved minerals and nutrients, and sediment did not constitute an addition of a pollutant to navigable waters, so in the instant case the release of turbine generating water containing entrained fish does not constitute the addition of any pollutant to navigable waters. . . . For the Ludington facility, the fish, both dead and alive, always remain within the waters of the United States, and hence cannot be added."); *Greenfield Mills, Inc. v. O'Bannon,* 189 F. Supp.2d 893, 907 n.14 (N.D. Ind. 2002) ("[I]t appears clear to the court that a discharge that results from maintenance, which is what occurred here, would fall squarely within the maintenance exception."); *Froebel v. Meyer,* 13 F. Supp.2d 843 (E.D. Wis. 1998) (holding redeposit of sediment during removal of dam was not discharge of dredged material subject to Clean Water Act).

In 1993, the District Court for the District of Columbia invalidated a 1993 Corps regulation purporting to extend the Corps's jurisdiction to include activities which, although they do not add a pollutant, result in "incidental fallback" of soil to essentially the place from which it was taken (the "Tulloch Rule").[3] *American Mining Congress v. United States Army Corps of Engineers*, 951 F. Supp. 267 (D.D.C. 1997), *aff'd sub nom*., *National Mining Ass'n v. United States Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998). There the court said:

> The Court concludes that neither § 301 nor § 404 covers incidental fallback. . . . . In common dredging practices, excavation is followed by the disposal of dredged material at another location. Thus, Congress understood the "discharge of dredged material" to involve the moving of material from one place to another. . . . Incidental fallback associated with excavation or landclearing does not add material or move it from one location to another; some material simply falls back in the same general location from which most of it was removed. Congress' use of the term "specified disposal sites" underscores this reading as it conveys Congress' understanding that discharges would result in the relocation of material from

[3] Because this regulation was promulgated in response to the case, *North Carolina Wildlife Federation v. Tulloch,* No. C90-713-CIV-5-BO (E.D. N.C.1992), it become known as the "Tulloch Rule."

> one site to another. . . . The Court finds that the Tulloch rule exceeds the scope of the agencies' statutory authority and, accordingly, declares it invalid and sets it aside.

Id. at 272-74, 278.

The D.C. Circuit and other federal courts have affirmed the rule in *American Mining Congress*, holding that replacement of soil in essentially the same place from which it came is not the "addition of a pollutant" as defined by Congress. *See National Mining Ass'n v. United States Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998) ("We agree with the plaintiffs, and with the district court, that 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. Because incidental fallback represents a net withdrawal, not an addition, of material, it cannot be a discharge."); *see also United States v. Bay-Houston Towing Co*., 33 F. Supp.2d 596, 605 (E.D. Mich. 1999) ("Unlike incidental fallback, these activities involve purposeful relocation. . . . Bay-Houston removes materials from the bog and, after a varying period of time, deliberately redeposits the materials in other locations within the bog at varying distances.").

Following the invalidation of the Tulloch Rule, both the Corps and the EPA have interpreted the Clean Water Act to exclude incidental fallback resulting from activities occurring in wetlands, defining those excluded activities as "any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States." 33 C.F.R. § 323.2(d)(1) (2002); *see also* 40 C.F.R. § 232.2(1)(iii) (2002); *see also* Further Revisions to the Clean Water Act Regulatory Definition of "Discharge of Dredged Material," Final Rule, 66 Fed. Reg. 4550, 4552 (2001).[4] The Corps defines "incidental fallback" as the:

> redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal. Examples of incidental fallback include soil that is disturbed when dirt is shoveled and the back-spill that comes off a bucket when such small volume of soil or dirt falls into substantially the same place from which it was initially removed.

33 C.F.R. § 323.2(d)(2)(ii); *see also* 40 C.F.R. § 232.2(2)(ii).

[4] The Corps and EPA made their first major revision to the invalidated Tulloch Rule on May 10, 1999. *See* Revisions to the Clean Water Act Regulatory Definition of "Discharge of Dredged Material," Final Rule, 64 Fed. Reg. 25,120 (1999).

The Corps and EPA further explain their interpretation of the limits placed upon their jurisdiction by Congress: "[A]lthough significant adverse environmental effects can result from activities undertaken using mechanized earth-moving equipment, the jurisdictional basis is the presence of regulable discharges" and "the transport of dredged material downstream or the release of previously bound-up or sequestered pollutants (which are in and part of the dredged material) may constitute a discharge, not by virtue of associated environmental impacts, but by virtue of being added to a new location in waters of the U.S." 66 Fed. Reg. at 4557. The Corps and EPA went even further in the preamble to the current final rule, rejecting a commenter's argument that regulatory authority should be based on the "environmental effects" of an activity:

> We agree that the evidence presented points to the harmful environmental effects that can be associated with redeposits of dredged material incidental to excavation activity within a particular water of the United States, even those redeposits occurring in close proximity [to] the point of initial removal. To the extent commenters believe that we should determine the scope of our jurisdiction based on such environmental effects, however, we decline to do so. As stated previously, today's rule does not adopt an effect-based test to determining whether a redeposit is regulated, but instead

> defines jurisdiction based on the definition of "discharge of a pollutant" in the Act and relevant caselaw. We have chosen to define our jurisdiction based not on the effects of the discharge, but on its physical characteristics-*i.e.,* whether the amount and location of the redeposit renders it incidental fallback or a regulated discharge.

66 Fed. Reg. at 4564. Rejecting the "disruption of the ecology" interpretation adopted by the court below, the Corps and EPA have thus reaffirmed the Congressional limitation of their regulatory jurisdiction to include only addition of a pollutant to the nation's waters, stating that the "presence of a 'discharge' of dredged or fill material into waters of the U.S. is a prerequisite to jurisdiction under section 404." 66 Fed. Reg. at 4557.

Thus, the Corps and the EPA regulations specifically exclude routine activities that would appear to include the kind of deep plowing engaged in by petitioners and, most certainly, would exclude the routine beach maintenance activities engaged in by the SOS homeowners: "The term discharge of dredged material does not include the following . . . incidental fallback." 33 C.F.R. § 323.2(d)(3)(iii); 40 C.F.R. § 232.2(3)(iii). Importantly, and also contrary to the decision by the court below in this case, nothing in this rule

purports to expand the Corps's jurisdiction over activities that harm a wetland ecology or damage the environment.

Furthermore, the court below must defer to an agency interpretation that is reasonable and consistent with the intent of Congress. *See United States v. Riverside Bayview Homes, Inc*., 474 U.S. 121, 131 (1985) ("An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress.") (citations omitted).

Despite the clear limits of Clean Water Act regulatory jurisdiction delineated by Congress, and endorsed by the regulatory agencies themselves, the Department of Justice has boldly sought to expand Clean Water Act jurisdiction by prosecuting landowners whose actions disrupt the ecology without adding a pollutant to the wetland. For example, in the Saginaw Bay area of Lake Huron, Michigan, where SOS members reside, the Corps has launched an enforcement initiative against lakefront homeowners designed to deter homeowners from engaging in the kinds of routine beachfront maintenance activities that they have been performing for over a century. These activities include raking and beach smoothing activities that would appear to be within the Corps's definition of incidental fallback, and thus outside the reach of Corps's jurisdiction. *See* 33 C.F.R.

§ 323.2(d)(2)(ii). This enforcement initiative brought under essentially the same provisions at issue in this case, Sections 301(a) and 404 of the Clean Water Act, consists of three separate enforcement actions brought against beachfront homeowners, two of which resulted in the entry of consent decrees, and one that is being challenged by homeowners, the Kincaids. *See* Draft Consent Judgment at ¶¶ 12, 13, *United States v. Stuart*, No. 02-10054 (E.D. Mich. Feb. 27, 2002) (imposing civil penalty of $10,000 and enjoining property owner from performing, without a Corps permit, beach maintenance activities, including those that would "adversely affect or impede the natural vegetation process of this area"); Compl., *United States v. Groya*, No. 02-10079 (E.D. Mich. Mar. 25, 2002) (involving similar consent decree where property owner found to be in violation of the Clean Water Act for routine beach maintenance activities such as the "tilling" and "grading" of sand).

In *United States v. Kincaid*, No. 02-10149 (E.D. Mich. May 28, 2002), the Corps filed an enforcement action against the Kincaids, elderly homeowners who use a tractor to rake and smooth sand that accumulates on their beach in severe weather and throughout the winter. Typically, over the winter, winds blowing across Lake Huron causes sand to accumulate along bulkheads and temporary snow fences.

The Corps alleges in its enforcement action against the Kincaids that they have "conduct[ed] or caus[ed] to be conducted such discharges of fill by the tilling, grading or dozing of sand and sediments" in violation of the Clean Water Act. For these alleged violations the Corps seeks "a penalty of up to $25,000 per day, the exact number of days being presently unknown to the United States." Compl. at ¶¶ 4, 8, 9, *United States v. Kincaid*, No. 02-10149 (E.D. Mich. May 28, 2002).

The outcome of the present case will determine whether amici and thousands of other landowners across the nation may be held liable for penalties of up to $25,000 per day for ordinary grooming, cleaning, raking, landscaping, and a panoply of similar activities which disrupt (and generally improve) natural conditions, but do not discharge a pollutant into waters of the United States. Furthermore, this case may determine whether shoreline property owners can maintain their historically pristine, white sand beaches (*see* Ex. 1), or live with a shoreline marred by noxious weeds (*see* Ex. 2), decaying organic matter and stagnant pools of water, all of which attract pests and rodents.

If the Clean Water Act were to apply to beaches, such a ruling would have a severe negative impact on our nation's most important industry: tourism. *See* James R. Houston, *The*

Economic Value of Beaches, 2002 Update (U.S. Army Engineer Research & Development Center) (2002), *available in* (visited August 21, 2002) <http://www.virginiashore andbeach.com/valu.htm> ("'Without a paradigm shift in attitudes toward the economic significance of travel and tourism and necessary infrastructure investment to maintain and restore beaches, the U.S. will relinquish a dominant worldwide lead in its most important industry.'") (citation omitted). Each year, approximately 180 million Americans make 2 billion visits to ocean, gulf, and inland beaches. *Id*. (citing Clean Beaches Council, *The Blue Wave Campaign, Protecting a Precious Resource at Risk* (2001)). In 1992, beaches contributed about $170 billion annually to the economy. *Id*. (citing U.S. Travel and Tourism Administration, *World Tourism at the Millennium* (U.S. Department of Commerce 1993)).

Accordingly, amicus curiae urges this Court to reject this expansive assertion of the Corps's jurisdiction over activities not reached by the plain language of the Clean Water Act or the current Corps and EPA regulations. *See Solid Waste Agency of North Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 172 (2001) ("Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that

Congress intended that result."); *see also Borden Ranch*, 261 F.3d at 819 (Gould, J. dissenting) ("The policy decision involved here should be made by Congress . . . The alternatives are an agency power too unbounded or judicial law-making, which is worse.").

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,

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