IN RE RAY & JEANETTE VELDHUIS

CWA Appeal No. 02-08

FINAL DECISION AND ORDER

Decided October 21, 2003

Syllabus

On September 30, 1999, Region IX of the United States Environmental Protection Agency filed an administrative complaint against Ray and Jeanette Veldhuis of Winton, California, charging Mr. Veldhuis ("Respondent") with discharging dredged or fill material into waters of the United States on property he owned in Stanislaus County, California, in violation of section 404 of the Clean Water Act ("CWA"), 33 U.S.C. § 1344. Region IX alleged that the unlawful discharges occurred on or about November 6, 1995, and August 8, 1997, when Respondent "deep ripped" three farm fields in preparation for almond tree planting and in so doing destroyed more than twenty acres of vernal pool wetlands and tributaries to navigable waters. On December 11-13, 2000, Administrative Law Judge Barbara A. Gunning held an administrative hearing to gather evidence and hear testimony in the case. On June 24, 2002, Judge Gunning issued an Initial Decision finding Respondent liable for discharging dredged or fill material into 21.04 acres of wetlands without a CWA permit and assessing an administrative penalty of $87,930.

On September 17, 2002, Respondent filed an appeal of the Initial Decision with the Environmental Appeals Board ("Board"), seeking reversal of the finding of CWA liability on three primary grounds. First, Respondent contended that he was entitled to the "normal farming" exemption contained in CWA section 404(f) because the previous landowner had deep ripped the fields in question prior to Respondent's ownership. Second, Respondent argued that the discharges for which Judge Gunning held him liable were not regulated "additions" under the CWA pursuant to the United States Court of Appeals for the District of Columbia Circuit's reasoning in *National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998) ("*NMA*"). Third, Respondent asserted that Judge Gunning erred in finding the waters of the United States on his property to be "adjacent" or tributary waters rather than isolated waters. He claims that after the United States Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), the Corps has authority over adjacent wetlands but not isolated wetlands.

Held: The finding of CWA liability in the Initial Decision is affirmed. The Board holds that Judge Gunning properly determined, by a preponderance of the evidence, that over twenty acres of wetlands persisted on Respondent's farm fields at the time of his deep ripping, despite the fact that the prior landowner had deep ripped the wetlands previously. The Board also holds that Respondent's destruction of these wetlands via deep ripping does not qualify for the normal farming exemption to CWA regulation. Under CWA section 404(f)(2), a "recapture" provision that Congress established as an exception to the exemption set forth in section 404(f)(1) for normal farming activities, a permit is required for

"[a]ny discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced."

The Board holds that the discharges from Respondent's deep-ripping activities impaired the flow or circulation or reduced the reach of the wetlands on his fields. According to the Board, a preponderance of the evidence in the record indicates that the functions and values previously offered by these wetlands, such as water filtration, wildlife habitat, and erosion control, no longer exist, even in degraded form, because of Respondent's actions. Moreover, the Board also finds that Respondent changed the use of his farm fields from row crops such as alfalfa, beans, wheat, barley, and oats, which are annual crops requiring replanting each year, to almond trees, a perennial crop that takes years to establish. On the basis of the CWA's purpose to restore and maintain the Nation's waters and, specifically with respect to wetlands, to prevent the conversion of such areas to dry land, the Board concludes that where, as here, there is a major change in the type of crops being grown and the change results in the destruction of wetlands in order for the new crops to thrive, there is a change in use within the meaning of section 404(f)(2). Accordingly, because both requirements of section 404(f)(2) are fulfilled, Respondent's activities are "recaptured" and thus subject to CWA regulation.

With respect to Respondent's *NMA*-based argument, the Board declines to entertain the issue on appeal because, despite having ample opportunity to do so, Respondent failed to raise it in the proceedings below. The Board acknowledges that Judge Gunning discussed *NMA* in the Initial Decision but finds her discussion of the case and its relevance to the instant matter to be dicta rather than the type of "adverse ruling" for which an appellant may seek redress before the Board.

Finally, the Board rejects Respondent's *SWANCC* argument, holding instead that Judge Gunning properly found, by a preponderance of the evidence, that the federal government lawfully exercised jurisdiction over 21.04 acres of adjacent and tributary wetlands that had existed on Respondent's fields prior to his deep ripping.

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich, and Kathie A. Stein.

Opinion of the Board by Judge McCallum:

> "'Well, what are vernal pools?' * * * 'That's where the fairy shrimp live.'"[1]

I. *INTRODUCTION*

This is a case about vernal pools and other types of "intermittent" or "ephemeral" wetlands that form during the rainy season but typically disappear in the heat of summer. These intermittent waterbodies owe their existence to a dense

[1] Administrative Hearing Transcript ("Tr.") at 540.

layer of soil, called the "restrictive layer" or "hardpan," that lies at varying depths beneath the soil surface and prevents water from filtering down through the soil beyond that layer. Vernal pools have existed for thousands of years, and their continued existence in the American landscape today is due in part to the protections of the federal Clean Water Act ("CWA" or "Act"), 33 U.S.C. §§ 1251-1387. The CWA regulates activities, such as certain types of farming operations and other activities, that tear through the restrictive layer underlying protected wetlands, thereby destroying those wetlands. This, therefore, is also a case about farming, the precautions today's farmers must take to ensure protection of certain intermittent waterbodies, and the consequences that flow from failures to do so.

On September 17, 2002, Ray and Jeanette Veldhuis of Winton, California, filed with the Environmental Appeals Board an appeal of an administrative judgment entered against Ray Veldhuis ("Respondent")[2] on June 24, 2002, by Administrative Law Judge ("ALJ") Barbara A. Gunning. In a lengthy opinion, the ALJ determined that on or about November 6, 1995, and August 8, 1997, Respondent violated sections 301(a) and 404 of the CWA, 33 U.S.C. §§ 1311(a), 1344, by discharging dredged or fill material into 21.04 acres of protected wetlands, which are considered waters of the United States, without a CWA permit authorizing him to do so. Pursuant to CWA section 309(g)(2)(B), 33 U.S.C. § 1319(g)(2)(B), the ALJ assessed a Class II administrative penalty of $87,930 against Respondent for these violations.

In his appeal, Respondent contends on a number of grounds that the ALJ erred or abused her discretion in finding him liable for violating the CWA. For the reasons set forth below, we affirm the ALJ's finding of liability.[3]

II. *BACKGROUND*

A. *Statutory and Regulatory Background*

Under the CWA, it is unlawful for any person to discharge dredged or fill material from a point source into navigable waters unless that person obtains a permit authorizing the discharge. CWA §§ 301(a), 404(a), 33 U.S.C. §§ 1311(a),

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[2] Region IX of the U.S. Environmental Protection Agency named both Ray and Jeanette Veldhuis as respondents in the caption of the complaint filed in this case but specified that "[u]se of the term 'Respondent' in the complaint indicates Mr. Ray Veldhuis only." Admin. Compl. at 6 n.3. Judge Gunning therefore treated Mr. Veldhuis as the sole respondent in this case. *See* Initial Decision at 4 n.1. We shall do likewise.

[3] Respondent does not appeal the calculation of the penalty assessed in this case, but only the ALJ's finding of liability. Accordingly, our analysis in the pages below does not include consideration of any penalty issues.

1344(a); *see In re Slinger Drainage, Inc.*, 8 E.A.D. 644, 647-48 (EAB 1999) (section 404 "operates under the umbrella of section 301(a)," which prohibits the discharge of any pollutant except in accordance with, *inter alia*, the permitting provisions of section 404), *appeal dismissed for lack of jurisdiction*, 237 F.3d 681 (D.C. Cir.), *cert. denied*, 534 U.S. 972 (2001). The term "discharge of a pollutant" is defined by statute as "any addition of any pollutant to navigable waters from any point source." CWA § 502(12)(A), 33 U.S.C. § 1362(12)(A). A "pollutant" is, among other things, "dredged spoil," "biological materials," "agricultural waste," "rock," "sand," and "cellar dirt," while a "point source" is "any discernable, confined and discrete conveyance * * * from which pollutants are or may be discharged." CWA § 502(6), (14), 33 U.S.C. § 1362(6), (14).

"Navigable waters" are "the waters of the United States, including the territorial seas." CWA § 502(7), 33 U.S.C. § 1362(7). The "waters of the United States" are defined by regulation as:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
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> * * * *
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> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce * * * ;
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> * * * *
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> (5) Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;
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> * * * *
>
> (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section * * * .

40 C.F.R. § 230.3(s)(1), (3), (5), (7); *accord* 33 C.F.R. § 328.3(a)(1), (3), (5), (7). The term "wetlands," as used in the prior regulatory provisions, is defined as "areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a

prevalence of vegetation typically adapted for life in saturated soil conditions." 40 C.F.R. § 230.3(t); 33 C.F.R. § 328.3(b). Wetlands "adjacent" to other waters are "bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are 'adjacent wetlands.'" 40 C.F.R. § 230.3(b); 33 C.F.R. § 328.3(c); *see In re Richner*, 10 E.A.D. 617, 629-32 (EAB 2002) (waters on one side of railroad embankment not isolated from waters on other side).

The U.S. Army Corps of Engineers ("Corps") and the U.S. Environmental Protection Agency ("EPA") are jointly charged with administering the CWA section 404 regulatory program. *See* CWA § 404, 33 U.S.C. § 1344 (setting forth respective responsibilities of Secretary of Army and Administrator of EPA). Both the Corps and EPA are authorized to determine the geographical extent of wetlands and other waters of the United States over which the agencies may exercise federal CWA jurisdiction. The Corps performs the majority of these "jurisdictional delineations," as they are commonly denoted, while EPA retains ultimate authority to decide jurisdictional scope.[4] The United States Department of Agriculture's Natural Resources Conservation Service ("NRCS") also has authority to delineate wetlands that are situated on "agricultural lands" pursuant to the Wetland Conservation (Swampbuster) provisions of the Food Security Act, 16 U.S.C. §§ 3821-3824.[5]

B. *Factual and Procedural Background*

The facts of this case are set forth in detail in the ALJ's Initial Decision and therefore will be only briefly summarized here. *See generally* Initial Decision ("Init. Dec."). Respondent owns real property in Stanislaus County, California, identified in state records as Farm 4709, Tract 2375, Fields #3, #4, and #5. *Id.* at 7. Prior to the Respondent's acquisition of the property in the early 1990s, it had been farmed for several decades by Mr. Len Van Gaalen in row crops such as alfalfa, black-eyed beans, wheat, barley, and oats. Tr. at 72, 337-38; Complainant's Exhibit ("CX") 59, at 3. After initially considering using the fields for a dairy operation, Respondent ultimately decided to plant almond trees on the property instead. Tr. at 533-42. On or about November 6, 1995, and August 8, 1997, Respondent "deep ripped" Fields #3, #4, and #5 in preparation for almond tree plant-

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[4] *See Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions Under Section 404(f) of the Clean Water Act* ¶¶ I-II (Jan. 19, 1989); *see also Slinger Drainage*, 8 E.A.D. at 649 n.9 (explaining shared responsibility of Corps and EPA to administer CWA section 404).

[5] *See Memorandum of Agreement Among the Department of Agriculture, the Environmental Protection Agency, the Department of the Interior, and the Department of the Army Concerning the Delineation of Wetlands for Purposes of Section 404 of the Clean Water Act and Subtitle B of the Food Security Act* ¶¶ II-IV (Jan. 6, 1994).

ing. CX 69, at 6-7 (Joint Set of Stipulated Facts, Exhibits, and Testimony (Nov. 3, 2000)).

"Deep ripping" is a form of plowing "in which four- to seven-foot long metal prongs are dragged through the soil behind a tractor or bulldozer." *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 812 (9th Cir. 2001), *aff'd by an equally divided Court*, 537 U.S. 99 (2002) (mem.); *see* CX 49, at 6 (U.S. Army Corps of Engineers & U.S. EPA, Regulatory Guidance Letter 96-2, *Applicability of Exemptions Under Section 404(f) to* "*Deep-Ripping*" *Activities in Wetlands*, Issue ¶ 2 (Dec. 12, 1996) ("RGL 96-2") ("'[d]eep-ripping' is defined as the mechanical manipulation of the soil to break up or pierce highly compacted, impermeable or slowly permeable subsurface soil layers, or other similar kinds of restrictive soil layers")); CX 17, 34 (photographs of deep-ripping equipment). The metal shanks tear through the restrictive layer or hardpan that underlies the soil surface. Respondent deep ripped the fields in which he intended to plant almond trees because prior plowing and ripping of those fields for row crops had not produced adequate soil and drainage conditions for the almond trees. *See*, *e.g.*, Tr. at 218, 505-06, 556 (deep ripping ensures water will not pool in root zone of plants).

The NRCS, EPA Region IX, and the Corps had previously notified Respondent on multiple occasions, beginning in 1994 and continuing into 1995, 1996, and 1997, that federally protected wetlands existed on Fields #3, #4, and #5, and that any deep ripping or other disturbance of such wetlands would require the authorization of a CWA section 404 permit. *See*, *e.g.*, Tr. at 24-26, 40-52, 62-64, 71, 82-83, 85-87, 93-99, 102-07, 112-30, 251-59, 538-46, 550-56; CX 7-13, 18, 23-26, 69. The agencies originally became involved in this case in December 1994, when a neighboring landowner reported that Respondent was using heavy equipment to level and fill wetlands on Field #5. *Id.* at 81-82. NRCS responded at that time by deploying Mr. Michael McElhiney, a soil scientist, to contact the landowner in person and to conduct a wetlands delineation on Field #5. Tr. at 24-25. Mr. McElhiney subsequently determined that 3.46 acres of vernal pool wetlands adjacent to Sand Creek, a navigable waterbody, were situated on Field #5 prior to its deep ripping by Respondent. CX 4-6. As for Fields #3 and #4, EPA Region IX dispatched Mr. Robert Leidy, a wetlands scientist, to conduct an "atypical" or "after-the-fact" delineation of wetlands there after Respondent had already deep ripped those fields. Mr. Leidy determined, among other things, that 15.77 acres of drainage swale wetlands that were tributaries to the navigable San Joaquin and Merced Rivers, along with 1.81 acres of vernal pool wetlands adjacent to those tributaries, had been situated on Fields #3 and #4 prior to their deep ripping by Respondent.[6] Tr. at 148-49; CX 31-32.

[6] Mr. Leidy also determined that 3.16 acres of "isolated wetlands" and another 0.84 acres of tributary wetlands had existed on Fields #3 and #4 prior to Respondent's deep ripping. Region IX, Continued

Despite receiving throughout the mid-1990s numerous telephone calls, certified letters, draft section 404 permits filled out on his behalf, site visits, and information requests from staff members of these federal agencies, Respondent hired a contractor to deep rip his fields in advance of his almond tree planting. Importantly, NRCS had asked Respondent to notify the agency before he leveled or deep ripped Field #5, and he had told EPA and NRCS that he had avoided wetlands on Fields #3 and #4, but neither the requested notification nor the promised avoidance actually occurred. Tr. at 254-56, 551-53; CX 7, 57, 69. Accordingly, on September 30, 1999, Region IX filed an administrative complaint against Respondent, charging him with unlawfully discharging dredged or fill material into federally protected waters of the United States on or about November 6, 1995, and August 8, 1997. *See* Admin. Compl. ¶¶ 21, 29, 34-36.

On December 11-13, 2000, Judge Gunning held an administrative hearing in Modesto, California, to gather evidence and hear testimony in this case. On June 24, 2002, she issued an Initial Decision, finding Respondent liable for discharging dredged or fill material into 21.04 acres of wetlands without a CWA section 404 permit and assessing an administrative penalty of $87,930. Respondent filed his appeal of the ALJ's Initial Decision on September 16, 2002, and Region IX filed its reply to the appeal on November 12, 2002. *See* Respondent's Appellate Brief ("Appeal Br."); Complainant's Reply to Respondent's Appeal Brief ("Reply Br."). The case now stands ready for decision by the Board.

III. *DISCUSSION*

The Board reviews an administrative law judge's factual and legal conclusions on a *de novo* basis. 40 C.F.R. § 22.30(f) (the Board shall "adopt, modify, or set aside" the ALJ's findings of fact and conclusions of law or exercise of discretion); *see* Administrative Procedure Act § 8(b), 5 U.S.C. § 557(b) ("[o]n appeal from or review of the initial decision, the agency has all the powers [that] it would have in making the initial decision except as it may limit the issues on notice or by rule"). In so doing, the Board will typically grant considerable deference to an administrative law judge's determinations regarding witness credibility and the judge's factual findings based thereon. *See In re City of Salisbury*, 10 E.A.D. 263, 276 (EAB 2002); *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998); *In re Echevarria*, 5 E.A.D. 626, 639 (EAB 1994). All matters in

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(continued)
however, withdrew its allegations regarding the isolated wetlands after the U.S. Supreme Court handed down *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (discussed *infra* Part III.C), for lack of jurisdiction. The Region also withdrew its allegations regarding the 0.84 acres when it became clear at the administrative hearing that an irrigation spigot had created that wet area. *See* Init. Dec. at 5 n.5.

controversy must be established by a preponderance of the evidence. 40 C.F.R. § 22.24(b); *In re Britton Constr. Co.*, 8 E.A.D. 261, 274 (EAB 1999).

In this case, Respondent raises three primary issues on appeal. First, Respondent contends that he is entitled to the "normal farming" exemption of the CWA because the previous landowner had deep ripped the fields in question prior to Respondent's ownership. Second, Respondent argues that the discharges for which the ALJ held him liable were not regulated "additions" under the CWA. Third, Respondent asserts that the ALJ erred in finding that the waters of the United States on his property were "adjacent" or tributary waters rather than isolated waters. We address each of these issues in turn below.

A. *Normal Farming Exemption to CWA Regulation*

Respondent begins his appeal by arguing that the CWA did not prohibit his deep ripping of Fields #3, #4, and #5. Appeal Br. at 1-2. Respondent rests this argument on the "normal farming exemption" contained in CWA section 404(f)(1), which specifies:

> Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material --
>
> (A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, [or] minor drainage * * * ;
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> * * *
>
> is not prohibited by or otherwise subject to regulation under this section * * * .

CWA § 404(f)(1)(A), 33 U.S.C. § 1344(f)(1)(A). According to Respondent, deep ripping (or, as he sometimes terms it, "deep plowing") is a procedure that is "followed uniformly throughout the San Joaquin Valley" to prepare soil for the planting of row crops or trees. Appeal Br. at 4. He contends that the deep ripping he conducted to prepare the property for tree planting was merely a continuation of the deep ripping the prior property owner, Mr. Len Van Gaalen, had engaged in for two decades in the course of farming row crops. *Id.* at 5. Respondent concludes that his deep ripping therefore qualifies as a normal farming activity that is exempt from CWA regulation under section 404(f)(1). *Id.*

1. *Issue Properly Raised on Appeal*

Region IX responds by asserting that Respondent did not raise this argument before the ALJ and thus cannot raise it for the first time on appeal. Reply Br.

at 11. The Region's contention is premised on 40 C.F.R. § 22.30(a), which authorizes appeals of adverse orders or rulings issued by administrative law judges, as well as on Board case law that has enunciated the reasoning for restricting the scope of appellate review, as follows: "'Because the Presiding Officer cannot issue an adverse order or ruling on an issue that was never raised during the proceedings below, it follows that section 22.30(a) does not contemplate appeals of such issues.' * * * Thus, arguments made * * * for the first time on appeal are deemed to have been waived * * * ." *In re Woodcrest Mfg., Inc.*, 7 E.A.D. 757, 764 (EAB 1998) (quoting *In re Lin*, 5 E.A.D. 595, 598 (EAB 1994)), *aff'd*, 114 F. Supp. 2d 775 (N.D. Ind. 1999); *accord In re Spitzer Great Lakes Ltd.*, 9 E.A.D. 302, 317-18 (EAB 2000), *cited in* Reply Br. at 11-12.

Interestingly, although the ALJ observed in her Initial Decision that Respondent had not explicitly raised the normal farming defense in the pleadings, briefs, or evidentiary hearing before her, she also — in the course of investigating another of Respondent's arguments below — raised and discussed the applicability of the normal farming exemption herself. Init. Dec. at 58. She volunteered that the defense was "perhaps implied by Respondent's general assertion that the wetlands were 'prior-converted cropland' and/or by Respondent's protestation: 'How can anyone state with a straight face that a farmer's sole activity on property is [sic] plowing or ripping his fields is a discharge into navigable waters[?]'" *Id.* (quoting Respondent's Reply Br. at 6).

For assistance in analyzing the question whether deep ripping in wetlands qualifies for the normal farming exemption, the ALJ looked to the United States Court of Appeals for the Ninth Circuit's decision in *Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 261 F.3d 810 (9th Cir. 2001), *aff'd by an equally divided Court*, 537 U.S. 99 (2002) (mem.). In that case, a developer had purchased an 8,400-acre ranch in California's Central Valley that formerly had been used as rangeland for grazing cattle and as farmland for producing wheat, hay, alfalfa, tomatoes, sugar beets, beans, and corn. *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, No. CIV.S97-0858 GEBJFM, 1999 WL 1797329, at *1 (E.D. Cal. Nov. 8, 1999), *aff'd in part & rev'd in part*, 261 F.3d 810. The developer intended to convert the ranch into vineyards and orchards, which required root systems much deeper than those of the row crops and native rangeland plants. To achieve that end, the developer deep ripped the property and, in so doing, breached the restrictive layer of soil underlying federally protected wetlands on the ranch. 261 F.3d at 812-16. The developer subsequently argued, in the course of defending against an EPA enforcement action, that his deep ripping was a "normal farming activity" exempt under section 404(f) from CWA regulation. *Id.* at 815.

The Ninth Circuit disagreed with the developer. The court determined that the activity of deep ripping in wetlands falls within the "recapture" provision of CWA section 404(f), which states:

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

CWA § 404(f)(2), 33 U.S.C. § 1344(f)(2), *cited in* 261 F.3d at 815. This provision establishes that normal farming practices may, in certain circumstances, be subject to CWA permitting, despite the section 404(f)(1) exemption; such otherwise exempt practices are "recaptured" by the CWA for regulation because of their change-in-use purpose and their adverse effect on the flow, circulation, or reach of waters of the United States. *See, e.g.*, *United States v. Akers*, 785 F.2d 814, 819-20, 822-23 (9th Cir.) (plowing, discing, and seeding in attempt to convert wetlands for upland farming purposes is recaptured under § 404(f)(2) because activities adversely affect wetlands), *cert. denied*, 479 U.S. 828 (1986); *United States v. Huebner*, 752 F.2d 1235, 1242-43 (7th Cir.) (cleaning drainage ditches and draining wetlands to expand cranberry beds are recaptured under § 404(f)(2) because activities disturb reach of wetlands), *cert. denied*, 474 U.S. 817 (1985); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 926 (5th Cir. 1983) (landclearing to change forested wetland to soybean field recaptured under § 404(f)(2) because purpose and effect of clearing was to bring area into new use).

The ALJ noted that pursuant to the recapture provision, the court in *Borden Ranch* reasoned:

> "[T]he intent of Congress in enacting the [CWA] was to prevent conversion of wetlands to dry lands," and we have classified "as non-exempt those activities [that] change a wetland's hydrological regime." * * * In this case, [Borden Ranch's deep-ripping] activities were not intended simply to substitute one wetland crop for another; rather they radically altered the hydrological regime of the protected wetlands. Accordingly, it was entirely proper for the Corps and EPA to exercise jurisdiction over [Borden Ranch's] activities.

Borden Ranch, 261 F.3d at 816 (quoting *Akers*, 785 F.2d at 822), *quoted in* Init. Dec. at 57.

In light of this legal precedent and the factual record before her, the ALJ determined that Respondent's deep ripping "destroyed the hydrological functioning of the wetlands in order to plant almond trees, a new and different crop requir-

ing a deeper root system than [the] previous [row] crops." Init. Dec. at 58. She therefore concluded that Respondent's deep-ripping activities did "not come within the 'farming exception' for the same reasons that [Borden Ranch's] deep-ripping activities did not come within the 'farming exception' in *Borden Ranch*." *Id*.

Given the ALJ's explicit rejection of the normal farming exemption defense, and, as noted earlier, her acknowledgment that the defense was perhaps raised implicitly, it is our opinion that the defense is properly before us: the ALJ here issued an "adverse ruling" against Respondent by holding that his activities did not qualify for the CWA's normal farming exemption. *See* 40 C.F.R. § 22.30(a). Under the Consolidated Rules of Practice that govern this proceeding, a party's right of appeal extends to issues raised by the initial decision as well as to issues raised during the course of the litigation. *See id*. ("[t]he parties' rights of appeal shall be limited to those issues raised during the course of the proceeding *and by the initial decision*") (emphasis added).

Region IX also contends that the normal farming exemption involves factual considerations not previously raised by Respondent and thus that the Board should not rule on the matter. Reply Br. at 11. The Region does not specify, however, what factual considerations it believes to be lacking from the record, and we are hard-pressed to divine them ourselves. Instead, it appears to us that all requisite facts pertaining to Respondent's normal farming argument were in the quite extensive administrative record before the ALJ or were in the public domain (i.e., statutes, regulations, case law, guidance documents). Indeed, the ALJ's decision to rule on the normal farming issue is at least an implicit acknowledgment that in her view all necessary facts for a legal ruling on that defense were present. We therefore hold that this issue is properly before us on appeal. *See* 40 C.F.R. § 22.30(c); *see also In re Rogers Corp.*, 9 E.A.D. 534, 548 n.7 (EAB 2000) (noting in dicta that review of new legal issues raised for first time on appeal is a matter of the Board's discretion, which the Board will exercise "quite narrowly" and in accordance with the limits of 40 C.F.R. § 22.30(c)), *remanded on other grounds*, 275 F.3d 1096 (D.C. Cir. 2002).[7]

[7] Region IX also cites *Rogers*, 9 E.A.D. 534, as well as one other case as support for its contention that review of this issue should be denied because it was not raised below. *See* Reply Br. at 12-13 (citing *Rogers*, 9 E.A.D. at 573 n.25; *In re B & R Oil Co.*, 8 E.A.D. 39, 49 n.12 (EAB 1998)). Notably, neither of these two cases can be employed for the exact purpose intended by Complainant. Neither case presents a fact pattern similar to this one, where an ALJ made a legal ruling on the issue in question in the initial decision. Instead, the cases both involve situations where parties attempted to raise on appeal issues that were neither addressed in the proceedings below nor analyzed in the initial decisions. Thus, we do not find the cases persuasive in this specific context.

2. *Prior Deep Ripping by Previous Landowner*

As presented in the appeal brief, Respondent's normal farming argument consists, in essence, of two primary components: (1) a factual question whether any wetlands that might have existed on the property prior to Respondent's deep-ripping activities in 1995 and 1997 had already been destroyed by deep ripping conducted by the previous property owner; and (2) a legal question whether Respondent's deep-ripping activities in wetlands qualify for the normal farming exemption set forth in CWA section 404(f). The Region does not challenge the first part of Respondent's argument as not having been raised before the ALJ, but only the second part. As discussed above, we find that both questions are properly before us, and we address them in turn below.

a. *Existence of Wetlands Prior to Respondent's Deep Ripping*

Respondent begins by stating, "It is * * * interesting to note from the [ALJ's] findings that [the] restrictive layer was determined by EPA's expert, Mr. . Leidy[,] to be approximately 4 to 6 inches from the top surface" of the soil. Appeal Br. at 2. If this were uniformly the case throughout the affected acreage it might suggest that repeated deep ripping by the prior owner, Mr. Van Gaalen, would have inevitably destroyed the restrictive layer. Respondent cites Mr. Van Gaalen's testimony that from the early 1970s through the early 1990s, he had deep ripped the land in question "every Summer to a depth of up to five feet."[8] *Id*. at 4. Respondent concludes from this evidence that "prior to subsequent deep plowing by Veldhuis, the restrictive layer had already been penetrated." *Id*. at 2-3. Nonetheless, later in his appeal brief, Respondent acknowledges that the ALJ actually found the restrictive layer to range in depth from approximately four to forty-five inches beneath the soil surface. *Id*. at 4 ("Ms. [Diane] Moore[, Respondent's expert witness,] concurred the restrictive layer was between four inches to less than four feet."). Thus, the exact impact of Mr. Van Gaalen's deep ripping cannot be disposed of as easily as would be the case if the restrictive layer were located so close to the surface as first alleged by Respondent.

Respondent next contends that the "only evidence to the contrary" regarding the impact of his own deep ripping activities was provided by the testimony of Mr. Leidy, who determined that the hardpan underlying Respondent's property had been fractured fairly recently (i.e., within the last five years). Appeal Br. at 4. Mr. Leidy had made this determination by, among other things, digging eighteen-

[8] The weight of the evidence in the record indicates, and the ALJ so found, that only Field #5 was deep ripped every summer (or almost every summer) by Mr. Van Gaalen. *See, e.g.*, Init. Dec. at 40-43; Tr. at 336-48, 350-51, 506; Answer to Admin. Compl. at 2. Mr. Van Gaalen deep ripped Fields #3 and #4 to a depth of three-to-five feet "at least once" during his ownership, not annually. *See* Init. Dec. at 42-43; Tr. at 338-51.

to thirty-inch deep soil pits in Fields #3 and #4 and examining pieces of ripped hardpan that were present in the soil profile. Tr. at 223-24, 584. Mr. Leidy testified:

> [T]he pieces of the restrictive layer * * * are still very sharp-edged. And where they have been fractured, they have not been worn by further weathering over time, so they are fairly sharp edged. They are not that rounded.
>
> In addition, if you look at the soil profile, all of those layers * * * had been thoroughly mixed. And if soil sits for a long period of time, there will be a tendency for the silty or smaller particles over time to sort of settle out; and you will find, again, [soil] horizons starting to form in sort of their infancy.
>
> And I did not find that at this site. I found that the soil was still very, very well stirred and mixed and homogenized. So based on my previous experience in these types of systems that have been deep ripped, it looked to me like the ripping had been fairly recent.

Tr. at 165-66; *see id*. at 206-07; CX 41-42, 44 (photographs of pieces of fractured restrictive layer).

Respondent argues that Mr. Leidy was not qualified to act as an expert with respect to these soils issues, stating:

> Digging a few holes in the ground after a significant rain event without any more qualifications is not the equivalent of the extensive investigations conducted * * * in the *Borden Ranch* case.[9] Nowhere in the Curriculum Vitae of Mr. Leidy * * * or in the Record does it state Mr. Leidy[] is an expert agronomist or soil scientist.

Appeal Br. at 5. Respondent therefore contends that the ALJ abused her discretion by affording weight to Mr. Leidy's opinion and by ignoring the testimony of his witness, Mr. Van Gaalen, regarding the latter party's regular deep ripping of the

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[9] Interestingly, Mr. Leidy was actively involved in the "extensive investigations" conducted in the *Borden Ranch* case, which involved the digging of soil pits up to thirty inches into the soil. *See Borden Ranch*, 261 F.3d at 816; *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, No. CIV.S97-0858 GEBJFM, 1999 WL 1797329, at *8 (E.D. Cal. Nov. 8, 1999) (Robert Leidy was most frequent companion of Dr. Lyndon Lee, EPA's wetlands consultant for the case, in Dr. Lee's on-site visits to Borden Ranch property), *aff'd in part & rev'd in part*, 261 F.3d 810.

subject property prior to Respondent's deep ripping.[10] *Id.* at 5.

We note at the outset that some of the manifold complexity of this case has been glossed over in the appeal briefs, for there is an important distinction to be made between the wetlands delineations conducted on Field #5 and on Fields #3 and #4. As mentioned in the fact section above, the NRCS conducted a wetlands delineation on Field #5 *prior to* Respondent's deep ripping of that field in 1995, while EPA Region IX conducted a wetlands delineation on Fields #3 and #4 *after* Respondent had deep ripped those fields in 1997. This latter delineation was an "atypical" or "after-the-fact" delineation, the type of delineation used when one or more of the three wetlands indicators — i.e., hydric soils, hydrophytic vegetation, and wetlands hydrology[11] — has been disturbed. *See* Tr. at 138-39. The latter delineation, and not the former, involved Mr. Leidy's digging of soil pits and examining of chunks of ripped hardpan in the soil profile. Thus, Respondent's focus on perceived flaws in Mr. Leidy's analysis and the ALJ's reliance thereon is relevant only to the wetlands on Fields #3 and #4, not to those on Field #5.[12]

That being said, we are unpersuaded that the ALJ abused her discretion or erred in her analysis of these issues and treatment of evidence and hearing testimony. Respondent contends that the ALJ "ignored" Mr. Van Gaalen's testimony about his deep-ripping practices, but the Initial Decision provides ample evidence to the contrary. In summarizing her findings regarding historical farming activities on the property, the ALJ wrote, among other things:

> [I]n light of the foregoing testimony of Ms. Moore, Mr. Van Gaalen, and Mr. Veldhuis, I find that between 1971 and 1991 Mr. Van Gaalen deep-ripped field #5 annually to a depth of 3-5 feet and deep-ripped fields #3 and #4 at

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[10] As a subsidiary argument, Respondent contends that Region IX failed to carry its burden of establishing, through "reputable evidence," that Respondent violated the CWA. Respondent labels as "voodoo science" Mr. Leidy's opinion that the hardpan had been recently fractured. *See* Appeal Br. at 5. Because, for reasons set forth in this section, we find the Region's evidence to be reputable and credible, we reject this argument.

[11] *See* 40 C.F.R. § 230.3(t) (definition of "wetlands" includes three indicators); 33 C.F.R. § 328.3(b) (same); U.S. Army Corps of Engineers, Wetlands Research Program, Tech. Rep. No. Y-87-1, *Corps of Engineers Wetlands Delineation Manual* ¶¶ 26, 29-49, at 13, 16-41 (Jan. 1987) (elaboration of three wetlands indicators).

[12] Indeed, the ALJ noted several times that Respondent essentially agreed with the NRCS's delineation of 3.46 acres of wetlands on Field #5. Init. Dec. at 25, 47; *see* Tr. at 420 (testimony of Ms. Diane Moore, Respondent's expert witness) ("I believe that the [3.46 acres of delineated wetlands] is probably pretty good as far as wetland acreage"); Tr. at 624-25 (closing statement of Respondent's counsel) ("We're not disputing that there's 3.46 acres [of wetlands on Field #5]"; "[M]y client knows somewhere along the way we mitigate it. We pay for it. We have to do something."). Despite this, Respondent makes no distinction between Fields #3, #4, and #5 in his appellate brief.

> least once to the same depth, and that Respondent deep-ripped field #5 and fields #3 and #4 to a depth of 5-6 feet in 1995 and 1997, respectively.

Init. Dec. at 43. Plainly, the ALJ was fully aware of the prior deep ripping in Fields #3, #4, and #5, and she factored it into her analysis of the issues before her. Yet, after considering the totality of the evidence in the record, and notwithstanding the fact that the restrictive layer was shallower than five-to-six feet deep (the maximum depth to which Mr. Van Gaalen deep ripped), she nonetheless determined that the preponderance of that evidence indicated Respondent, and not Mr. Van Gaalen, fractured the hardpan beneath these fields. Init. Dec. at 50-51.

In this regard, the ALJ found persuasive Mr. Leidy's testimony that Fields #3 and #4 had been deep ripped relatively recently. Respondent argues that the ALJ gave improper weight to this testimony, but we are unconvinced that that is so. The record clearly indicates that Mr. Leidy was well-qualified to conduct wetlands delineations, including evaluation of soils. Mr. Leidy began working for EPA in 1985, and at the time of the hearing in December 2000 he served as Region IX's wetlands science and field program manager, as well as the CWA section 404 enforcement coordinator. Tr. at 133. Mr. Leidy holds a Bachelor of Science in conservation and natural resources, a Master of Science in wildland resource science, and, at the time of the hearing, he was a doctoral candidate in the field of ecology with an emphasis on wetlands ecology. Tr. at 133; CX 28; *see* Init. Dec. at 26 n.101. He has written extensively in the natural resources area and has published approximately six articles on wetlands science, and he has taught the Corps' wetlands delineation course on several occasions. Tr. at 134; CX 28. In the fifteen years prior to the hearing in this case, Mr. Leidy performed over 500 wetlands delineations, ten to twenty percent of which were atypical delineations, and he reviewed over 1,000 aerial photographs in the course of these delineations. Tr. at 137, 183, 586; *see supra* note 9 (noting Mr. Leidy's involvement in Borden Ranch wetlands delineation). These credentials are not those of a person who lacks the expertise to evaluate wetlands soils in a meaningful fashion.

Significantly, the ALJ explicitly rejected at least two attempts by Respondent to call into question Mr. Leidy's credibility as a wetlands delineation expert. First, Respondent had pointed out that, using aerial photography and the other indirect tools of atypical delineations, Mr. Leidy had incorrectly identified an area around an irrigation spigot as a wetland. Mr. Leidy subsequently withdrew this determination at the hearing on this case. Tr. at 572. The ALJ held that, in her judgment, this incident "did not impeach [Mr. Leidy's] credibility with regard to the entire atypical delineation." Init. Dec. at 37. Second, Respondent had urged the ALJ to assign less weight to Mr. Leidy's testimony regarding wetlands on Fields #3 and #4 than she afforded to the countervailing testimony of Respondent's expert, Ms. Moore. Both parties had delineated wetlands on those fields, but, for a variety of reasons, the ALJ found Mr. Leidy's delineation to be "more

comprehensive" than Ms. Moore's. *See id*. at 39 (finding that Mr. Leidy had considered materials and information that Ms. Moore had not, but not vice versa).

On appeal, Respondent provides us no legitimate reason to find that the ALJ erred in treating Mr. Leidy as fully qualified to evaluate soils for the purposes of an atypical wetlands delineation. Respondent asserts, "I submit that Mr. Leidy's expertise as an agronomist was equivalent to his expertise in his delineation of a shadow cast by an irrigation spigot as being a jurisdictional wetland." Appeal Br. at 5. This pejorative argument fails to fairly reflect the circumstances of this case: it neither recognizes that, by its very nature, an atypical delineation involves the use of indirect and/or historic evidence such as aerial maps, nearby geomorphically similar properties, and other off-site materials, nor does the argument admit the fact that Mr. Leidy withdrew this disputed portion of his delineation at the hearing. We cannot possibly rest a finding that the ALJ erred in crediting Mr. Leidy's testimony on so flimsy a foundation.

For similar reasons, we reject a related attack Respondent makes on the legitimacy of certain historical evidence Mr. Leidy used to conduct the atypical wetlands delineation for Fields #3 and #4. Among many other things, Mr. Leidy examined aerial photographs of the subject property taken in 1987 and 1993 and identified wetlands on Fields #3 and #4 that no longer existed on the site after Respondent's deep-ripping activities in 1997. *See*, *e.g.*, Tr. at 139-45, 183-86, 609-10; CX 29-30, 45-48; *see also* Init. Dec. at 28-29, 36-39, 46, 64. Respondent contends in this regard that hydric soils found in wetlands remain dark in coloration for years after the restrictive layer originally supporting those wetlands is fractured, and thus the soils will appear on aerial photographs as dark shadows long after the wetlands are destroyed. Appeal Br. at 6. Respondent asserts that such evidence "is not evidence that vernal pools exist," and he indicates that the ALJ herself acknowledged that the "remaining mud puddles" on Respondent's property "were basically degraded previously by Mr. Van[G]aalen in his earlier farming practices." *Id*.

Respondent raised this argument before the ALJ, and she rejected it on several grounds. First, the ALJ found that, in addition to identifying hydric soils in the 1987 and 1993 aerial photographs, Mr. Leidy also observed wetlands vegetation and hydrology in those pictures. *See* Init. Dec. at 28-29, 32, 49; *see also* Tr. at 143-44, 176-77. Second, the ALJ noted that Mr. Leidy had made field observations of wetlands vegetation and hydrology, as well as hydric soils, on an unripped portion of Field #3 and on the adjoining Field #5; she found the geomorphic similarities of the parcels supported a conclusion that similar wetlands had existed in the ripped areas of Fields #3 and #4 prior to 1995-1997. Init. Dec. at 30-39, 49; *see* Tr. at 159-62, 186-89, 583; CX 33. The ALJ therefore concluded, "[T]he fact that hydric soils retain their [wetlands] characteristics, including dark color, long after the disappearance of wetlands is not sufficient to refute Mr. Leidy's 'atypical' delineation of fields #3 and #4." Init. Dec. at 49. Respondent has provided us

with no rebuttal on appeal other than a simple reassertion of his original contention below. In our view, the preponderance of the evidence supports the ALJ's conclusion; we therefore find no error in her use of the relevant evidence here.

Moreover, it bears noting that the ALJ relied on a wide variety of other evidence in the record in finding that Respondent, and not Mr. Van Gaalen, fractured the hardpan beneath Fields #3, #4, and #5.[13] That evidence included, among other things, the following points: (1) the NRCS's wetlands delineation data sheets for Field #5 showed an intact, in-situ restrictive layer in many places in that field, prior to Respondent's deep ripping there; (2) Mr. Van Gaalen found it necessary to deep rip Field #5 annually, despite the extra expense of deep ripping

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[13] We do not mean to suggest that Mr. Van Gaalen's activities had no adverse effect whatsoever on the hardpan underlying Fields #3, #4, and #5. As we mention below, evidence in the record indicates that Mr. Van Gaalen's deep ripping may have partially disturbed the hardpan in some places, so that wetlands still existed on the surface, although in degraded form. Importantly, however, Respondent's expert witness, Ms. Diane Moore, testified that deep ripping must "substantially" fracture the hardpan in order to destroy wetlands reliant thereon, and that where substantial fracture does not occur, the hardpan may reconsolidate into a restrictive layer that can still support wetlands. *See* Tr. at 415-16 (ripping and reripping is done because soil layers "tend to sort of recement in a semiconsolidated hardpan layer that's semi-impervious"; "[Y]ou don't get total mixing during some ripping practices. It depends on how well it was done."). Moreover, Mr. Leidy testified that the historic aerial photographs of Respondent's fields demonstrated that wetlands on those fields were functional at the time the photographs were taken, despite Mr. Van Gaalen's ongoing farming activities on those fields at those times. Tr. at 183-84. Mr. Leidy explained:

> If we assumed that the fields had been deep-ripped previously, the wetland features are still evident in the photos * * * after the other deep-ripping events, those wetlands, whether they were deep-ripped or not, if they meet the three parameters of a wetland, they're still regulated.
>
> It just so happens that the last event of deep-ripping on fields three and four not only deep-ripped the area, it filled in the drainages so they're no longer evident. And so my conclusion is regardless of how many times it was deep-ripped before, the photos show that the wetlands have persisted up until the most recent deep-ripping event.
>
> They are gone now except for the north --extreme northern portion of the property that was not deep-ripped. There are no drainages that are evident. There are no bed and bank features. There is no hydrophytic vegetation, any of these features, and the water does not pond. The site has been well-drained now.
>
> The areas are missing either one or all three of the parameters and so they no longer qualify as a jurisdictional wetland. Those things happened subsequent to the last ripping event.

Tr. at 609-10. For these and other reasons listed below, we agree with the ALJ's determination that Respondent's deep ripping was the *coup de grace* that ultimately destroyed these wetlands.

over discing,[14] indicating that ponding water was likely a substantial and recurring problem on that field during his tenure; (3) during Mr. Van Gaalen's ownership, Fields #3 and #4 were hilly and drained naturally, and thus ponding water was not as significant a problem on those fields as it was on Field #5; (4) Mr. Van Gaalen's deep ripping may possibly have "bumped" into the restrictive layer and in so doing partially disturbed the hardpan, so that wetlands still existed on the surface, although in degraded form; (5) hardpan takes thousands of years to form and, once fractured, is irreversibly destroyed, but if deep ripping only partially breaches the hardpan layer, the hardpan can "resettle" or "reconstitute" itself into at least a semi-impervious layer that can support functioning wetlands; and (6) Respondent's deep ripping was far more extensive than Mr. Van Gaalen's (i.e., it was deeper and included "cross-ripping" with multiple passes through the soil at different ripping angles). *See, e.g.*, Tr. at 80, 327-28, 341-44, 351, 368, 415-16, 441-42, 541-42; CX 4, 18, 59; Init. Dec. at 41, 43-45, 50-51.

The ALJ thoroughly evaluated all of this and other evidence, and she considered several challenges to witness credibility and evidence relied upon by the various parties to determine CWA compliance. *See* Init. Dec. at 18-58. Respondent has failed to identify any error in the ALJ's analysis and ultimate conclusion that wetlands did, in fact, exist on Fields #3, #4, and #5 prior to Respondent's deep ripping in 1995 and 1997.[15] Respondent also has failed to convince us that

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[14] Discing is another form of plowing activity that can be used to aerate heavy soils (albeit not to the depth offered by deep ripping). As the ALJ points out in her analysis, however, the cost of deep ripping "is substantial and greatly exceeds the cost of discing. For example, on July 8, 1996, Respondent was charged $37.50 per acre for ripping and $14 per acre for discing." Init. Dec. at 50 n.227 (citing CX 59, at 14 (Letter from William E. Gnass, Esq., Mason, Robbins, Gnass & Browning, L.L.P., to Elizabeth White, EPA Region IX, at 14 (Jan. 15, 1999))). Respondent himself testified that deep ripping cost substantially more than that — approximately $500 per acre. Tr. at 556.

[15] Notably, in his answer to the complaint, Respondent presented as an "affirmative defense" his argument that Mr. Van Gaalen's prior deep ripping of the fields irreversibly destroyed the wetlands thereon. *See* Answer at 2 ("Affirmative Defense #4") ("the 28.8 acres referenced in the Administrative Complaint is part of a larger parcel [that] was ripped at least twice prior to Respondents' ownership"). In her analysis and ultimate rejection of this argument, the ALJ also characterized Respondent's argument as an affirmative defense. *See* Init. Dec. at 45, 47, 51. This characterization is not technically correct. As we explained in *In re New Waterbury, Ltd.*, "'A true affirmative defense, which is avoiding in nature, raises matters *outside* the scope of the plaintiff's prima facie case.'" 5 E.A.D. 529, 540 (EAB 1994) (quoting 2A Moore's Federal Practice Manual 8-17a (2d ed. 1994)) (emphasis added); *accord In re Titan Wheel Corp.*, 10 E.A.D. 526, 530 n.10 (EAB 2002), *appeal docketed*, No. 4:02-CV-40325 (S.D. Iowa July 19, 2002); *In re Carroll Oil Co.*, 10 E.A.D. 635, 661-62 (EAB 2002); *In re City of Salisbury*, 10 E.A.D. 263, 289 nn.38-39 (EAB 2002).

Here, the Respondent raised a defense that directly challenged a portion of the Region's prima facie case (i.e., the existence of waters of the United States on the fields). Thus, the defense cannot be construed, consistently with the *New Waterbury* line of cases, as an affirmative defense. The effect of the ALJ's finding otherwise in this regard is that she misallocated the burden of persuasion regarding this defense. Under the Consolidated Rules of Procedure that govern this proceeding, a respondent

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the ALJ's determinations as to witness credibility were erroneous and thus did not warrant the deference we typically grant to factfinders in this context. We therefore reject Respondent's appeal on this ground and hold that, as the ALJ determined, 21.04 acres of federally protected wetlands existed on Fields #3, #4, and #5 prior to Respondent's deep ripping in 1995 and 1997.[16]

b. *CWA Section 404(f) Exemption*

i. *Congress Established Narrow Exemption*

As for the legal subargument raised on appeal, we find no reason to depart from the ALJ's determination that Respondent's deep-ripping activities in wetlands fail to qualify for the normal farming exemption. In enacting CWA section 404(f), Congress provided that discharges into wetlands of dredged or fill material from normal farming, silviculture, and ranching activities — such as plowing, seeding, cultivating, minor drainage, or harvesting — may occur, in at least some cases, without a CWA permit.[17] CWA § 404(f)(1)(A), 33 U.S.C. § 1344(f)(1)(A). The exemption is a narrow one, extending only to those activities that have little or no adverse effect on the Nation's waters and that are part of an established, on-going operation. *See* 40 C.F.R. § 232.3(b), (c)(1)(ii); 33 C.F.R. § 323.4(a)(1)(ii); *see also United States v. Sargent County Water Res. Dist.*, 876 F. Supp. 1090, 1098 (D.N.D. 1994) (noting that Third, Fourth, Fifth, Seventh, and Ninth Circuits have held that section 404 exemptions should be narrowly construed "to avoid adverse impacts on wetlands") (citing cases); *United States v.*

(continued)
must carry the burdens of presentation *and* persuasion for any affirmative defenses raised, whereas he or she must carry only the burden of presenting rebuttal evidence to support nonaffirmative defenses (i.e., defenses that challenge part of the prima facie case), with the burden of persuasion remaining with complainant to establish that the purported violations occurred as alleged in the complaint. 40 C.F.R. § 22.24(a); *Salisbury*, 10 E.A.D. at 289.

That being said, we find that the preponderance of the evidence in the record establishes that wetlands existed on Fields #3, #4, and #5 prior to Respondent's deep-ripping activities. Thus, the ALJ's error is immaterial to the outcome of this case.

[16] On a related point, Respondent asserts in the conclusion of his appeal that "[a]ppellant was entitled to the exemption regarding normal farming practices, or prior converted wetlands." Appeal Br. at 11. Region IX treats this statement as a possible argument that Respondent's property is "prior converted cropland," a term of art under the CWA. *See* Reply Br. at 36-38. The ALJ addressed in great detail the question whether Fields #3, #4, and #5 were "prior converted cropland" and determined they were not. *See* Init. Dec. at 51-58. Her analysis is thorough and persuasive and we are not inclined to disturb it in the absence of anything other than an off-hand statement in the conclusion of Respondent's appellate brief. *See* 40 C.F.R. § 22.30(a)(1) ("appellant's brief shall contain * * * argument on the issues presented").

[17] The statutory terms "plowing," "cultivating," "minor drainage," "seeding," and "harvesting" are not specifically defined in the statute itself. However, EPA and the Corps have defined the terms by regulation. *See* 40 C.F.R. § 232.3(d); 33 C.F.R. § 323.4(a)(1)(iii).

Cumberland Farms of Conn., Inc., 647 F. Supp. 1166, 1175-76 (D. Mass. 1986), *aff'd*, 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988). In the words of Senator Edmund Muskie, the primary sponsor of the CWA:

> New subsection 404(f) provides that Federal permits will not be required for those narrowly defined activities that cause little or no adverse effects either individually or cumulatively. While it is understood that some of these activities may necessarily result in incidental filling and minor harm to aquatic resources, the exemptions do not apply to discharges that convert extensive areas of water into dry land or impede circulation or reduce the reach or size of the water body.

3 Legislative History of the Clean Water Act of 1977, at 474 (1978) (Senate Debate, Dec. 15, 1977); *see United States v. Akers*, 785 F.2d 814, 819 (9th Cir.) (noting that as legislation's primary sponsor, Senator Muskie's remarks are "entitled to substantial weight"), *cert. denied*, 479 U.S. 828 (1986); *see also United States v. Brace*, 41 F.3d 117, 123 (3d Cir. 1994) (discussing CWA legislative history), *cert. denied*, 515 U.S. 1158 (1995); *United States v. Huebner*, 752 F.2d 1235, 1242-43 (7th Cir.) (same), *cert. denied*, 474 U.S. 817 (1985); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 926 (5th Cir. 1983) (same).

ii. *Two Components of Exemption: 404(f)(1) and 404(f)(2)*

To avoid obtaining a CWA permit to work in wetlands under section 404(f), a landowner must "demonstrate that proposed activities both *satisfy* the requirements of § (f)(1) [(e.g., qualify as 'normal farming' under § 404(f)(1)(A))] and *avoid* the exception to the exemption[] (referred to as the 'recapture' provision) of § (f)(2)." *Akers*, 785 F.2d at 819. Analytically, therefore, the statute establishes that if a particular activity is deemed "normal farming" under section 404(f)(1), then the recapture parameters of section 404(f)(2) must be examined to determine whether CWA regulation attaches. However, if an activity does not qualify as "normal farming" under section 404(f)(1), there is no need to proceed to section 404(f)(2); the activity is not exempted from regulation in the first instance.

In this case, we are mindful of the fact that, as discussed in Part III.A.1 above, Respondent did not explicitly raise section 404(f) below, and thus no arguments were made before the ALJ by either side as to whether Respondent's deep ripping constituted "normal farming" (e.g., plowing, cultivating, minor drainage) pursuant to section 404(f)(1). Moreover, in the course of analyzing the issue herself, the ALJ made no determination as to the applicability of section 404(f)(1). Instead, she followed the example of the Ninth Circuit in *Borden Ranch* by omitting any explicit section 404(f)(1) analysis and focusing exclusively on the section

404(f)(2) recapture provision. *See* Init. Dec. at 57-58; *Borden Ranch*, 261 F.3d at 815-16. Whether this approach constituted an implicit determination that Respondent's deep ripping (or, in the case of *Borden Ranch*, the developer's deep ripping) qualified as normal farming under section 404(f)(1), or whether it was merely the absence of a decision as to (f)(1), is an unanswered question. Given the procedural posture of this case and the definitive outcome established in accordance with section 404(f)(2), however, we need not decide whether Respondent's deep ripping constituted normal farming activity.[18] Even if Respondent's activities successfully met the requirements of section 404(f)(1) and were exempted as such from the Act (which we do not decide), they nonetheless fail to escape CWA regulation under section 404(f)(2).

iii. *Section 404(f)(2) Recapture Provision*

In quoting the section 404(f)(1) exemption in his appeal brief, Respondent does not address or even acknowledge the recapture provision of section 404(f)(2), despite its direct and obvious relevance to the circumstances of this case. Instead, Respondent takes the position that the prior property owner's deep-ripping activities had already breached the restrictive layer and thus the purpose of his deep ripping was only "to aerate the soil and to de-compact heavy soils." Appeal Br. at 2-3. Casting this argument into section 404(f)(2) terms, Respondent is essentially asserting that the purpose of his deep ripping could not have been to "change the use" to which wetlands on his property were put because, as a result of the prior property owner's farming practices, the wetlands on the property no longer actually existed. *See id*. at 6. For the reasons set forth below, we disagree.

In enacting the recapture provision of the CWA, Congress wrote:

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

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[18] Respondent argues on appeal that deep ripping is a procedure "followed uniformly throughout the San Joaquin Valley" for the planting of row crops or trees, thereby implying that something so purportedly universal must be a "normal farming activity" within the meaning of CWA § 404(f). This particular argument is a nonstarter. *See, e.g., United States v. Brace*, 41 F.3d 117, 126-27 (3d Cir. 1994) (holding that question of 404(f) applicability does not hinge on whether farmers in particular area typically do certain activity or whether that activity is necessary for farming there; rather, question is whether activity falls within statutory term "normal farming activity" as defined by regulations), *cert. denied*, 515 U.S. 1158 (1995).

CWA § 404(f)(2), 33 U.S.C. § 1344(f)(2). This language establishes two requirements, both of which must be met for a particular excepted activity to be recaptured for CWA regulation: (1) a "change in use" or "new use" requirement, and (2) an "impairment of flow or circulation/reduction in reach" requirement.[19] *Id*.; *see* CX 49, at 5 (RGL 96-2, Background ¶ 5); CX 50 (Memorandum from Gerald H. Yamada, Acting General Counsel, U.S. EPA, to Josephine S. Cooper, Assistant Administrator for External Affairs, U.S. EPA, *Issues Concerning the Interpretation of 404(f) of the Clean Water Act* 8 (Feb. 8, 1985)) ("OGC Memo"). A number of courts have either reviewed this provision in linear order, treating first the change-in-use question and then proceeding to the impairment/reduction question, or they have compressed the two requirements into one. *See, e.g., United States v. Brace*, 41 F.3d 117, 128-29 (3d Cir. 1994), *cert. denied*, 515 U.S. 1158 (1995); *United States v. Akers*, 785 F.2d 814, 822-23 (9th Cir.), *cert. denied*, 479 U.S. 828 (1986); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 925-26 (5th Cir. 1983); *Leslie Salt Co. v. United States*, 820 F. Supp. 478, 481 (N.D. Cal. 1992), *aff'd*, 55 F.3d 1388 (9th Cir.), *cert. denied sub nom. Cargill, Inc. v. United States*, 516 U.S. 955 (1995); *United States v. Cumberland Farms of Conn., Inc.*, 647 F. Supp. 1166, 1176-77 (D. Mass. 1986), *aff'd*, 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988). One court, however, reverses the analytic order set forth on the provision's face, construing the second requirement as a "threshold issue" that, if not present, renders irrelevant the first requirement. That court states as follows:

> The plain language of [CWA section 404(f)(2)] entails two clauses, one ("bringing an area of the navigable waters into a use to which it was not previously subject") modified by and subordinate to the second ("where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced"). * * * The structure of the language thus creates a two prong test, in which only satisfaction of the threshold issue — the im-

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[19] We recognize, of course, that the focus of CWA § 404 regulation revolves around determining whether a discharge occurred and not whether a particular activity had adverse effects on a wetland. *See, e.g., Save Our Community v. EPA*, 971 F.2d 1155, 1163-65 (5th Cir. 1992); *In re Slinger Drainage, Inc.*, 8 E.A.D. 644, 656-57 (EAB 1999) ("the pivotal consideration for purposes of deciding whether an individual activity is or is not subject to the section 404 permitting requirements is whether a discharge of dredged [or fill] material takes place"), *appeal dismissed for lack of jurisdiction*, 237 F.3d 681 (D.C. Cir.), *cert. denied*, 534 U.S. 972 (2001). However, we have also acknowledged that, in the case of CWA § 404(f) exemptions for certain discharges that purportedly do not change the character of wetlands, "EPA and the Corps may [also] look to the effects of the discharges in deciding what activities to exclude (exempt) from regulatory coverage, partly or completely." *Slinger Drainage*, 8 E.A.D. at 657 n.18. Thus, it is appropriate in the § 404(f) context to evaluate whether activities alter existing hydrology in determining whether to apply the normal farming exemption. *See, e.g., Brace*, 41 F.3d at 124-28; *Akers*, 785 F.2d at 819-20, 822; *Huebner*, 752 F.2d at 1242-43; *Avoyelles*, 715 F.2d at 925-26.

> pairment of flow, circulation or reach, can give rise to consideration of the second element of the two prong recapture provision — a substantial change in use of the wetland, such as "conversion of wetlands to dry land." *Akers*, 785 F.2d at 822.

In re Carsten, 211 B.R. 719, 732 (Bankr. D. Mont. 1997). Notwithstanding the seemingly different approaches taken by various courts, particularly *Carsten*, it appears to us that the statute establishes a two-prong test without assigning any particular priority to which of the two prongs must be satisfied before giving consideration to the other. In other words, since both prongs must ultimately be examined in order to determine whether the defense is available, we will examine each accordingly.

(a) *First Prong of Section 404(f)(2): Impairment of Flow/Circulation or Reduction in Reach*

Turning first to the question whether Respondent's deep ripping impaired the flow or circulation or reduced the reach of wetlands on Fields #3, #4, and #5, we conclude that it did. As discussed above, the preponderance of the evidence in the record indicates that wetlands existed on Fields #3, #4, and #5 prior to Respondent's deep ripping but not afterwards. The evidence establishes that in this case, as in *Borden Ranch*, Respondent's preparation of the soil for almond trees "radically altered the hydrological regime of [] protected wetlands," 261 F.3d at 816, by destroying the ability of the soil to retain water and thereby destroying the wetlands themselves. *See*, *e.g.*, Init. Dec. at 18-58 (evaluating evidence pertaining to question whether wetlands existed prior to Respondent's deep ripping; concluding that wetlands existed despite prior deep ripping by previous owner and were ultimately destroyed by Respondent); *cf. United States v. Huebner*, 752 F.2d 1235, 1242 (7th Cir.) (cleaning drainage ditches by discharging dredged material onto wetlands disturbs reach of wetlands), *cert. denied*, 474 U.S. 817 (1985). The functions and values previously offered by those wetlands, such as water filtration, wildlife habitat, erosion control, and the like, no longer exist, in even degraded form, because of Respondent's actions.[20] *See*, *e.g.*, Tr. at 181-82, 186-95,

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[20] Notably, EPA and Corps guidance states the following:

> It is the agencies' experience that certain wetland types are particularly vulnerable to hydrological alteration as a result of deep-ripping and related activities. Depressional wetland systems such as * * * vernal pools * * * whose hydrology is critically dependent upon the presence of an impermeable or slowly permeable subsoil layer are particularly sensitive to disturbance or alteration of this subsoil layer. Based upon this experience, the agencies have concluded that, as a general matter, deep-ripping and similar practices, consistent with the descriptions

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218-20, 269 (testimony regarding functions and values of wetlands on Respondent's fields); CX 4, 51-52, 61. Respondent destroyed these wetlands to ensure the health and long-term viability of a new almond orchard on land that had previously been farmed only in row crops.

(b) *Second Prong of Section 404(f)(2): Change in Use*

Having satisfied ourselves that the first prong is met in the instant case, we turn next to the question whether Respondent's deep ripping was a "change in use" or "new use" of the wetlands. The statutory language --"a use to which [an area of the navigable waters] has not previously been subject" — is not defined in the CWA or the implementing regulations. As one court has observed, "the expression apparently is not a term of art with a specific meaning under the CWA. Therefore, the court will analyze the expression pursuant to its common sense meaning." *Envtl. Def. Fund v. Tidwell*, 837 F. Supp. 1344, 1350 n.2 (E.D.N.C. 1992); *accord United States v. Akers*, 785 F.2d 814, 822-23 (9th Cir.), *cert. denied*, 479 U.S. 828 (1986). We shall do likewise.[21]

In this case, the facts establish that Respondent changed the use of Fields #3, #4, and #5 from row crops, which are annual crops requiring replanting each year, to almond trees, a perennial crop that takes years to establish. Although the change is major in certain obvious respects, it is nonetheless difficult to gauge whether it is so significant that it amounts to a "change in use" or "new use" for purposes of section 404(f)(2), for it must also be acknowledged that the change in question occurred without altering the fundamental use of the property as a farming operation (as opposed to the more dramatic type of change involved in transforming a farming operation into a ranching operation). The regulations and case law provide a number of examples of changes in use, but none of those examples are on all fours with the facts of the instant case.[22] Absent specific examples of

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> above, conducted in * * * vernal pools * * * destroy the hydrological integrity of these wetlands.

CX 49, at 8 (RGL 96-2, Conclusion ¶ 3).

[21] In that regard, we are using, for purposes of this case only, the three phrases "a use to which it has not previously been subject," "change in use," and "new use" interchangeably.

[22] *See, e.g.*, 40 C.F.R. § 232.3(b) note (conversion of cypress swamp to other use is change in use, as is conversion of wetland from silvicultural to agricultural use); 33 C.F.R. § 323.4(d) (same); *Borden Ranch*, 261 F.3d at 815 (conversion of ranch land to orchards and vineyards brings land into new use); *United States v. Brace*, 41 F.3d 117, 129 (3d Cir. 1994) (completion and improvement of existing drainage system along with subsequent drainage of land and growing of crops in former wetland is change in use), *cert. denied*, 515 U.S. 1158 (1995); *United States v. Larkins*, 852 F.2d 189, 192-92 (6th Cir. 1988) (conversion of forested wetland to soybean field is change in use), *cert. denied*,

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changes in use more closely akin to those presented to us today, we find it appropriate to look to the purpose of the legislation. That purpose, of course, is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," CWA § 101(a), 33 U.S.C. § 1251(a), and, specifically with respect to wetlands, to prevent the conversion of such areas to dry land. *Akers*, 785 F.2d at 822; *Cumberland Farms*, 647 F. Supp. at 1176. Based on this purpose, we have no trouble concluding that where, as here, there is a major change in the type of crops being grown and the change results in the destruction of wetlands in order for the new crops to thrive, there is a change in use within the meaning of section 404(f)(2).[23]

(c) *Conclusion*

Therefore, both requirements of section 404(f)(2) are fulfilled in the instant case and Respondent's deep ripping qualifies as a recaptured activity. Accordingly, Respondent's appeal on this ground fails: the deep-ripping activities in this case are regulable under the CWA. *See* CX 50, at 8 (OGC Memo at 8) ("The fact that some farming operations may have previously been conducted in the wetland without altering its wetland status * * * does not mean that discharges associated with an operation [that] does convert the wetland are exempt.").

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489 U.S. 1016 (1989); *United States v. Conant*, 786 F.2d 1008, 1010 (11th Cir. 1986) (conversion of wetlands to fish farming ponds is new use); *Akers*, 785 F.2d at 822-23 (conversion of Big Swamp to farm fields is new use, even though portions of swamp may have been farmed during dryer periods in past); *United States v. Huebner*, 752 F.2d 1235, 1243 (7th Cir.) (conversion of marsh to expand cranberry beds is new use), *cert. denied*, 474 U.S. 817 (1985); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 925-26 (5th Cir. 1983) (conversion of forested wetland to soybean field is change in use); *United States v. Cumberland Farms of Conn., Inc.*, 647 F. Supp. 1166, 1176 (D. Mass. 1986) (conversion of Great Cedar Swamp to cornfield is change in use), *aff'd*, 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988).

[23] As an alternative basis for arriving at this same conclusion, we observe that, in a "note" incorporated in the EPA regulations implementing the CWA, the "conversion of a Section 404 wetland to a non-wetland," which ultimately happened as a direct result of Respondent's activities here, "is a change in use of an area of waters of the United States." 40 C.F.R. § 232.3(b) note; *see* 33 C.F.R. § 323.4(c); *accord Borden Ranch*, 261 F.3d at 815 (federal government "cannot regulate a farmer who desires 'merely to change from one wetland crop to another,' [but] activities that require 'substantial hydrological alterations' require a permit") (quoting *Akers*, 785 F.2d at 820); *Brace*, 41 F.3d at 128-29; *Avoyelles*, 715 F.2d at 925-26; CX 50, at 8 (OGC Memo at 8) (legislative history of section 404(f) "leaves no doubt that the destruction of the wetlands character of an area (i.e., its conversion to uplands) is a change in use of the waters of the United States").

Notably, this alternative analytical approach compresses the CWA's two-pronged recapture test into a single test (i.e., were the wetlands converted into nonwetlands?) to determine whether the activity is subject to recapture. In the interest of maintaining fidelity to the original formulation of the recapture test, we do not rest our conclusion that the activity is subject to recapture solely on a single prong. We instead elect to retain the two-pronged structure for purposes of this decision.

B. *Addition of a Pollutant*

Next, Respondent argues that his deep-ripping activities did not constitute a regulated "discharge of a pollutant" under *National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998) ("*NMA*"). Respondent notes that in *NMA*, the United States Court of Appeals for the District of Columbia Circuit held that the Corps exceeded its authority under CWA section 404 by regulating the "redeposit" of dredged spoil that incidentally fell back off the dredging bucket into waters of the United States during dredging operations. Appeal Br. at 6. The CWA defines the term "discharge" as "any addition," *see* CWA § 502(12), 33 U.S.C. § 1362(12), and the District of Columbia Circuit in *NMA* stated, "[T]he 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 (quoted in Appeal Br. at 6). Respondent contends that deep ripping, like dredging, "does not involve any significant * * * 'addition' of material to the site," and thus the activity is not a regulated discharge under the CWA. Appeal Br. at 7 (quoting the dissent in *Borden Ranch*).

Region IX responds by pointing out that Respondent did not raise an incidental fallback argument before the ALJ and thus, for the reasons set forth in Part III.A.1 above, cannot raise it for the first time on appeal. *See* Reply Br. at 11-14 (citing 40 C.F.R. § 22.30(a) and Board cases denying review where appellants had opportunities to raise arguments below but did not do so). The Region acknowledges that the ALJ mentioned *NMA* in her Initial Decision and noted that the case was "at odds" with *Borden Ranch*, but the Region asserts that "this brief discussion by the ALJ does not cure Respondents' failure to raise [its *NMA*-based argument] in a timely manner." *Id*. at 13 n.8.

The ALJ's discussion of *NMA* arose as part of her analysis of the question whether Respondent's deep ripping constituted the discharge of a pollutant. *See* Init. Dec. at 58-64. She approached the question by once again parsing through *Borden Ranch*, which distinguished *NMA*, and which at the time of the ALJ's opinion was pending review in the U.S. Supreme Court, challenged primarily on the ground that the Ninth Circuit's decision in that case conflicted with the District of Columbia Circuit's decision in *NMA*. The ALJ observed in this regard that she had no need to speculate on whether the Supreme Court might find a conflict between *Borden Ranch* and *NMA* because the case before her arose in the Ninth Circuit and thus Ninth Circuit precedent (i.e., *Borden Ranch*) governed. Init. Dec. at 63. She then noted that *Borden Ranch* had been cited with approval in the Ninth and Seventh Circuits prior and subsequent to, respectively, the filing of the *Borden Ranch* petition for certiorari to the Supreme Court, stating, "Those cases continue to hold that 'activities having as their very design movement and excavation of soil and sediment' are subject to the permitting requirements" of CWA section 404. *Id*. at 63-64 (quoting *Greenfield Mills, Inc. v. O'Bannon*, 189 F. Supp. 2d

893, 912 (N.D. Ind. 2002)). Finally, the ALJ distinguished the Respondent's activities from those in *NMA*, finding that the "purpose, design, and actual effect" of Respondent's deep ripping was "the complete draining and elimination of the wetlands at issue." *Id*. at 64. She concluded that "[s]uch activity simply is not analogous to the situation in which 'material is dredged from a water, and some of it falls back off the dredge bucket into the same general location.'" *Id*.

The District of Columbia Circuit decided *NMA* in June 1998, more than a year before Region IX filed the complaint in this case and two years before the administrative hearing. Thus, Respondent had ample opportunity to raise an *NMA*-based incidental fallback argument in the proceedings below. The ALJ's discussion in the Initial Decision of *NMA* and examination of deep ripping versus incidental fallback is dicta, given her explicit finding that she was bound by the Ninth Circuit's ruling in *Borden Ranch* irrespective of any alleged conflict with *NMA*. Thus, the ALJ's discussion is not an "adverse ruling" for which an appellant may seek redress from the Board. *See* 40 C.F.R. § 22.30(a). Accordingly, we will not entertain the issue on appeal.[24] *See In re Spitzer Great Lakes Ltd.*, 9 E.A.D. 302, 317-18 (EAB 2000) (arguments raised for first time on appeal are waived); *In re Britton Constr. Co.*, 8 E.A.D. 261, 277-78 (EAB 1999) (same).

C. *Adjacent or Isolated Wetlands*

In his final argument on appeal, Respondent contends that the ALJ erred in holding that the 21.04 acres of wetlands on Fields #3, #4, and #5 were not "isolated" wetlands. Respondent asserts that after two United States Supreme Court cases — *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*") — "the Corps has authority over 'adjacent' wetlands but not 'isolated' wetlands." Appeal Br. at 9. He contends that the wetlands on his property should be categorized as "isolated" because they purportedly have no "significant nexus" to navigable waters.[25] *Id*. at 9-10. Respondent describes his farm as being "100 miles away from the [Pacific Ocean and] miles away from the nearest river"; he therefore takes the position that "only by the

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[24] Even if Respondent had not waived the *NMA*-based argument, his appeal on this ground would fail because the "return of soil in place after deep plowing" is not factually parallel to the incidental fallback of material that unavoidably occurs during dredging operations, as described in *NMA*. *See In re Slinger Drainage, Inc.*, 8 E.A.D. 644, 662-63, 667-68 (EAB 1999) (distinguishing drainage tile installation activities from *NMA*-style incidental fallback activities), *appeal dismissed for lack of jurisdiction*, 237 F.3d 681 (D.C. Cir.), *cert. denied*, 534 U.S. 972 (2001); *see also Borden Ranch*, 261 F.3d at 814-15; *United States v. Deaton*, 209 F.3d 331, 335-36 (4th Cir. 2000).

[25] The Supreme Court noted in *SWANCC* that the wetlands it deemed "adjacent" in *Riverside Bayview* — and hence subject to CWA regulation — had a "significant nexus" to navigable waters. *SWANCC*, 531 U.S. at 167. The Court explained:

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following of distorted and convoluted reasoning can one conclude that the Veldhuis property is 'adjacent' and the alleged wetlands had a 'significant nexus' with navigable waters." *Id*.

In response, Region IX begins by reminding us of the sequence of events in this case. The Region filed the complaint on September 30, 1999, initially alleging that Respondent had discharged dredged or fill material into 25.01 acres of wetlands on Fields #3, #4, and #5. The ALJ held a hearing on December 11-12, 2000, and a month later, on January 9, 2001, the U.S. Supreme Court issued *SWANCC*. The ALJ subsequently directed the parties to brief the question of *SWANCC*'s applicability, if any, to the Veldhuis case. In post-hearing briefs, Respondent argued that all wetlands on his property were isolated and thus excluded from CWA regulation under *SWANCC*. The Region, for its part, withdrew its allegations regarding 3.16 acres of the original 25.01 acres on the ground that those 3.16 acres were isolated wetlands. The Region maintained at that time, however, that the remaining 21.04 acres of wetlands alleged in the complaint to have been filled by Respondent were tributary and/or adjacent wetlands and thus still subject to CWA regulation, even in the aftermath of *SWANCC*. *See* Reply Br. at 26-27.

Now, Region IX asserts that it proved by a preponderance of the evidence that the 21.04 acres of wetlands were, in fact, adjacent to and/or tributaries of navigable waters of the United States. Reply Br. at 26-33. The Region also contends that the ALJ thoroughly analyzed the evidence in the record and reached a supportable conclusion on both the facts and the law that should be upheld by the Board. *See id*. at 33-35.

In brief, the ALJ deemed "overly broad" Respondent's interpretation of *SWANCC* as dramatically restricting federal jurisdiction over waters and wetlands. Init. Dec. at 66. Instead, she interpreted the case to be a narrow holding invalidating the "Migratory Bird Rule," agency guidance intended to clarify the regulatory definition of "waters of the United States" that extended federal jurisdiction to intrastate waters used or potentially used as habitat by migratory birds. *Id*. at 66-72; *see* 53 Fed. Reg. 20,764, 20,765 (1988); 51 Fed. Reg. 41,206, 41,217 (1986). Because Region IX had withdrawn the portion of its complaint pertaining to 3.16 acres of wetlands delineated as such on the basis of the Migratory Bird Rule, and because federal jurisdiction over the remaining 21.04 acres of remaining wetlands was premised on other grounds — specifically, on the "adjacency" and "tributary" provisions of the regulations, *see supra* Part II.A (quoting

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> We found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands "inseparably bound up with the 'waters' of the United States."

Id. (quoting *Riverside Bayview*, 474 U.S. at 134).

40 C.F.R. § 230.3(s)(5) & (7) and 33 C.F.R. § 328.3(a)(5) & (7)) — the ALJ determined that *SWANCC* was not applicable to this case. Init. Dec. at 72. Finally, the ALJ concluded that Region IX had established the adjacency of all 21.04 acres of wetlands to tributaries of navigable waters. *Id*. at 73-80. She held that her finding of adjacency was not precluded by the distances involved, the number of tributary connections, the intermittency of those connections, or the manmade character of some of the tributaries. *Id*. at 80-87. She therefore rejected Respondent's argument that the federal government had no jurisdiction over the purportedly "isolated" vernal pools and drainage swale wetlands on Fields #3, #4, and #5.

We agree that the ALJ conducted a comprehensive review of these issues and see little benefit in reproducing her detailed analysis here. *See* Init. Dec. at 18-39, 64-87. Indeed, in the absence of a challenge by Respondent to any specific component of the ALJ's analysis with respect to any particular wetland, we see no reason at this juncture to belabor this issue. *See* 40 C.F.R. § 22.30(f) (Board may adopt findings of fact and conclusions of law contained in initial decision); *see also In re Conservation Chem. Co.*, 2 E.A.D. 66, 67 n.3 (CJO 1985) ("[t]hat an appellate administrative tribunal may adopt the findings, conclusions, and rationale of a subordinate tribunal without restatement is well-settled").

The ALJ determined that the federal government lawfully exercised CWA jurisdiction over 21.04 acres of wetlands on Respondent's property, which consisted of 15.77 acres of drainage swale wetlands that were tributaries to the San Joaquin and Merced Rivers on Fields #3 and #4, 1.81 acres of vernal pool wetlands adjacent to the tributaries to the San Joaquin and Merced Rivers on Fields #3 and #4, and 3.46 acres of vernal pool wetlands adjacent to Sand Creek on Field #5. After conducting our own *de novo* review of the administrative record, we find that the ALJ properly judged that the preponderance of the evidence in the administrative record supports these findings and that the statutory, regulatory, and case law bears them out. *See, e.g., United States v. Rapanos*, 339 F.3d 447, 453 (6th Cir. 2003) (federal jurisdiction properly asserted over wetlands adjacent to 100-year-old manmade drain that flows into creek that flows into navigable-in-fact Kawkawlin River, which drains into Saginaw Bay and Lake Huron; distance between wetlands and River is eleven-to-twenty miles); *United States v. Rueth Dev. Co.*, 335 F.3d 598, 604-05 (7th Cir. 2003) (wetlands next to unnamed tributary that flows into several ditches that lead to navigable-in-fact Little Calumet River are adjacent wetlands); *United States v. Deaton*, 332 F.3d 698, 708-12 (4th Cir. 2003) (federal jurisdiction properly asserted over wetlands adjacent to roadside ditch whose waters flow through various tributaries into navigable-in-fact Wicomico River and Chesapeake Bay, thirty-two miles downstream); *United States v. Krilich*, 303 F.3d 784, 791-92 (7th Cir. 2002) (*SWANCC* is narrow holding), *cert. denied*, 123 S. Ct. 1782 (2003); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533-34 (9th Cir. 2001) (irrigation canals that carry water to/from streams and lakes are federally regulated tributaries); *Driscoll v.*

Adams, 181 F.3d 1285, 1291 (11th Cir. 1999) (intermittent stream is water of United States), *cert. denied*, 529 U.S. 1108 (2000).

IV. *CONCLUSION*

For the foregoing reasons, we affirm the ALJ's finding that in 1995 and 1997, Respondent discharged dredged or fill material into 21.04 acres of waters of the United States on Fields #3, #4, and #5 without a permit authorizing him to do so. Accordingly, Respondent shall pay the full amount of the civil penalty assessed by the ALJ, $87,930, within sixty (60) days of receipt of this final order. Payment should be made by forwarding a cashier's or certified check payable to the Treasurer, United States of America, at the following address:

U.S. Environmental Protection Agency, Region IX

Attn: Regional Hearing Clerk
Post Office Box 360863M
Pittsburgh, Pennsylvania 15251

So ordered.