

I. ENVIRONMENTAL QUALITY

A. Clean Water Act

1. Pacific Coast Federation of Fishermen's Ass'ns v. Glaser, 945 F.3d 1076 (9th Cir. 2019)

The Pacific Coast Federation of Fishermen's Association, along with recreationists, biologists, and conservation organizations (collectively, Association),¹ filed a citizens suit against the United States Bureau of Reclamation and the San Luis & Delta Mendota Water Authority (collectively, defendants),² alleging that a drainage system managed by the Defendants discharged pollutants into the surrounding waters without a National Pollutant Discharge Elimination System (NPDES) permit, in violation of the Clean Water Act³ (CWA). The United States District Court for the Eastern District of California entered judgment for defendants.⁴ On appeal, the Ninth Circuit held that the district court properly interpreted the CWA's term "irrigated agriculture," but erred by placing the burden on the Association to show that the discharges were not covered by an exception, in interpreting "entirely" to mean "majority," and in striking the Association's seepage and sediment theories of liability from the Association's motion for summary judgment.

The CWA requires that the NPDES permits be obtained prior to the discharge of pollutants from any point source to navigable waters of the United States.⁵ The Association's claim arose from suspected discharges of pollutants, in violation of the NPDES requirement, from the Grasslands Bypass Project (the Project), jointly administered by the defendants, which collects the selenium and salt-rich water that is not absorbed by crops during irrigation and diverts it through a drainage system to surrounding waters. The Project includes the San Luis Drain (the Drain), which collects and discharges contaminated groundwater from irrigated lands adjacent and upstream of the Drain into nearby waterways, which both parties agree meet the "navigable waters of the United States" jurisdictional element of the CWA.⁶

In November 2011, the Association filed their initial complaint alleging defendants violated the CWA by failing to obtain an NPDES permit for discharges from seepage into the Drain from adjacent lands, sediments from within the Drain, and groundwater discharges from lands underlying a solar project. The defendants argued that the discharges at issue did not require them to obtain an NPDES permit under an exception for discharges composed entirely of return flows from irrigated agriculture.⁷ The district court granted Defendants' motion to dismiss, but allowed the Association to file their First Amended Complaint. The district court again entered judgment for defendants, holding that three of the Association's theories of liability in their motion for summary judgment did not arise from the allegations in their First Amended Complaint, and the Association's remaining claim was based on discharges from the solar facility that amounted to a minority of discharges from the Project.

The Association appealed, contending that the district court erred by placing the burden of proof upon the Association to show the Drain's discharges were not exempt. The Association also argued the district court incorrectly interpreted what constitute discharges from irrigated agriculture and that the district court erred in holding the word "entirely" in the CWA exception means "most." On appeal, the Ninth Circuit reviewed de novo both district court's grant of summary judgment, as well as the district court's interpretation of the CWA and its implementing regulations.

¹ Plaintiffs included the Pacific Coast Federation of Fishermen's Associations, California Sportfishing Protection Alliance, Friends of the River, San Francisco Crab Boat Owners Association, Inc., The Institute for Fisheries Resources, and Felix Smith.

² Defendants included Donald R. Glaser, in his official capacity as Regional Director of the U.S. Bureau of Reclamation, United States Bureau of Reclamation, and San Luis & Delta Mendota Water Authority.

³ Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2012).

⁴ Pac. Coast Fed'n of Fishermen's Ass'ns v. Murillo, No. 211CV02980KJMCKD, 2017 WL 3421910 (E.D. Cal. Aug. 9, 2017).

⁵ 33 U.S.C. § 1323(a).

⁶ *Id.* § 1362(7).

⁷ *Id.* § 1323(a).

The Ninth Circuit first considered the burden of proof issue, holding that the defendants had the burden of establishing that the Project's discharges were composed entirely of return flows from irrigated agriculture. The court reasoned that to establish a violation of the CWA, a plaintiff must prove five jurisdictional elements, none of which includes proving the absence of an exception. Instead, once the plaintiff establishes the five elements, the defendant carries the burden to demonstrate the applicability of a statutory exception to the CWA.⁸

Second, the Ninth Circuit analyzed the district court's interpretation of "irrigated agriculture." The court held that though the district court erred by first focusing on the statute's legislative history instead of beginning with the meaning of its text, it ultimately came to the correct result by interpreting the term "irrigated agriculture" broadly. The Ninth Circuit found that the plain meaning of the statutory text demonstrated that agriculture has a broad meaning, but went on to consider legislative history, as well. The court concluded that because Congress amended the CWA five years after its enactment to include an exception for discharges composed entirely of return flows from irrigated agriculture and because Congress wanted farmers who relied on irrigation and those relying on rainfall to be treated equally under the CWA's permitting requirements, Congress intended the exception to be defined broadly and include discharges from all activities related to crop production.

Third, the Ninth Circuit analyzed the Association's argument that the district court erred by holding that the CWA exempts discharges from the CWA's permitting requirements unless a majority of the total commingled discharge is unrelated to crop production. The court first considered the ordinary meaning of entirely, determining that it is defined as "wholly, completely, or fully."⁹ The Ninth Circuit found that such a definition differed significantly from "majority," the meaning that the district court gave the term, and that the district court had erred in this interpretation. The court further reasoned that because many activities related to crop production fall under the definition of "irrigated agriculture," Congress's use of "entirely" was meant to limit the scope of the statutory exception, without which, it would become all-encompassing. Thus, the court concluded, Congress intended for discharges that include return flows from activities unrelated to crop production to be excluded from the exception.

The Ninth Circuit next considered the effect of the district court's erroneous interpretation of "entirely" on the Association's solar project seepage claim, holding that the lower court improperly struck the Association's claim. The Ninth Circuit determined the district court improperly dismissed the Association's solar project seepage theory since the district court based its decision on an erroneous interpretation of "entirely." The district court acknowledged that the Association had provided sufficient evidence to raise an inference that discharges came from the solar project, but due to the unlikelihood that the Association could show that the majority of discharges came from the project, they stipulated to the dismissal of that claim. The Ninth Circuit reversed the district court, finding that the district court's interpretation of "entirely" was the but-for cause of the Association's seepage claim being struck.

The Ninth Circuit then analyzed the effect of the district court's improper placement of the burden of proof on the Association's other claims, holding that it also resulted in the lower court erroneously striking the Association's claims. The district court determined that the Association had failed to provide evidence to show that discharges stemmed from activities unrelated to crop production, and dismissed the Association's claims. The Ninth Circuit explained, however, that had the district court properly imposed the burden of proof on Defendants, any such lack of evidence would have been fatal to the Defendants, not the Association.

Finally, the Ninth Circuit held that the Association's First Amended Complaint provided Defendants with fair notice of their seepage and sediment theories of liability. The court reasoned that because the Association's essential allegation was that the Drain's discharges violated the CWA because the contaminants in the discharges originated from non-agricultural areas and uses, the Association's later inclusion of sediments and seepages from highways and residences could be understood as encompassed by the allegations in the First Amended Complaint. In addition, at oral

⁸ N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 1001 (9th Cir. 1993).

⁹ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 758 (2002).

argument the defendants conceded that they received the Association's expert witness reports, were on notice as to "what their expert was talking about," and had enough information to respond.

In sum, the Ninth Circuit held that the district court properly interpreted the CWA's term "irrigated agriculture," but erred by placing the burden on the Association to demonstrate that the discharges were not covered by an exception, in interpreting "entirely" to mean "majority," and in striking the Association's seepage and sediment theories of liability from the Association's motion for summary judgment because they were adequately encompassed by the First Amended Complaint.