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The Ninth Circuit Limits the Irrigation Return Flow Exception in the Clean Water Act

On September 6, 2019, the Ninth Circuit Court of Appeals issued a decision in *Pacific Coast Federation of Fishermen's Associations v. Glaser*, D.C. No. 2:11-cv-02980-KJM-CKD. *Glaser* involved the Central Valley Project, the largest federal water management project in the nation, and the Grasslands Bypass Project, a tile drainage system that consists of a network of perforated drain laterals underlying farmlands in California's Central Valley (together the "Project") that catch irrigated water containing selenium and other pollutants and directs the water to surrounding surface waters. *Id.* at 2.

Generally, under the Clean Water Act (CWA) a discharger must obtain a National Pollutant Discharge Elimination System (NPDES) permit before discharging pollutants from any point source into navigable waters of the United States. There is a prominent exemption to that requirement "for discharges composed entirely of return flows from irrigated agriculture." 33 U.S.C. § 1342(l)(1), the irrigation return flow exemption.

Certain environmental groups filed a complaint alleging that the Bureau of Reclamation and the San Luis & Delta Mendota Water Authority, the joint managers of the Project, violated the CWA by discharging pollutants from the drainage system to waters of the U.S. The district court dismissed certain of plaintiffs' claims and granted summary judgment as to others. The plaintiffs voluntarily dismissed one remaining claim retaining the right to appeal.

The core issue on appeal was whether the discharges from the drainage project were exempt under 33 U.S.C. § 1342(l)(1). The district court required the plaintiffs to prove that the flows were not exempt, broadly construed the term "irrigated agriculture" and held that the exemption covered discharges when the majority of the comingled flows were from irrigated agriculture.

First, the Ninth Circuit held that the burden to prove that the discharges are exempt rests with the discharger, not the plaintiffs. After a plaintiff establishes a violation of the CWA by proving the defendants (1) discharged (2) a pollutant (3) to navigable waters (4) from (5) a point source without a permit, the burden to demonstrate the applicability of a statutory exemption shifts to the defendant. The Court held that this general rule applies to the irrigation return flow exception in § 1342(l)(1).

Second, while the district court concluded based on the legislative history of the CWA exemption that the exemption meant discharges that “do not contain additional discharges from activities unrelated to crop production,” the Ninth Circuit stated that the interpretation of the exemption should have begun with the language of the statute prior to consulting the legislative history. However, the Court concluded that the plain meaning of the term “agriculture” has a broad meaning which “encompasses crop production.” *Id.* at 12. The Court then consulted the same legislative history and held that the district court’s definition was correct and that the exclusion included “discharges from all activities related to crop production.” The Court rejected plaintiffs’ argument that the exemption did not cover flows from fallowed or retired crop lands.

Third, the Court held that the term “entirely” in the exemption was clear and reversed the district court’s conclusion that the exemption was satisfied if a majority of the discharges came from irrigated agriculture. The Court began by observing that: “Claims of exemption, from the jurisdiction or permitting requirements, of the CWA’s broad pollution prevention mandate must be narrowly construed to achieve the purposes of the CWA.” *Id.* (citing *N. Cal. River Watch*, 496 F.3d at 1001). The district court concluded that reading the term “entirely” literally would lead to absurd results. The Ninth Circuit disagreed. The Court believed that, because many activities would fall under the broad definition of the term “irrigated agriculture”, the use of “entirely” as a modifier made perfect sense. Accordingly, the Court held that “Congress intended for discharges that include return flows from activities unrelated to crop production to be excluded from the statutory exception, thus requiring an NPDES permit for such discharges.”

The Ninth Circuit remanded the case back to the district court. The key issue on remand is the extent to which discharges from the drainage project contained flows from the Vega Solar Project, a 20 MW solar array. Because there was some evidence of discharges from the solar project as opposed from to the surrounding agricultural lands, it was error to dismiss the claim that an NPDES permit was required. The Court also held that the plaintiffs should be permitted

to pursue their claims that other discharges within the Grasslands Project were unrelated to agriculture, and allowed the plaintiffs on remand to amend their complaint to allege that discharges from highways, residences, seepage into the drain from adjacent lands, and sediments from within the drain were unrelated to agriculture. In both cases the Court held that the burden is on the defendants to prove that those alleged sources are unrelated to agriculture.