21-178
No.

ORIGINAL

IN THE
SUPREME COURT OF THE
UNITED STATES

CHARLES G. KINNEY,
Petitioner,

v.

THREE ARCH BAY COMMUNITY
SERVICES DISTRICT; et al.,
Respondents,

On Petition For Writ Of
Certiorari To The
Ninth Circuit Court of Appeals
#18-56550 (3/3/21 denial of
petitions for rehearing)

U.S. District Court, Cent. Dist. of
Cal. (Los Angeles *not* Santa Ana)
#8:17-cv-01693-RGK-JC

PETITION AND APPENDIX FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The ocean near Laguna Beach, CA, is plagued by muddy storm-water runoff events, and some of the best beaches in the U.S. are suffering.

Sufficient environmental rules exist, but there was a failure to enforce the rules coupled with a long-standing cover-up by public entities and others. That means the rules are being ignored.

Here, 3 public entities are continually violating the Clean Water Act, their own NPDES permits, Cal. Coastal Commission rules, or nuisance laws.

In addition, 2 state regulatory agencies keep turning their backs on the yearly CWA violations.

The public entities and some federal courts are "gaming the system" so that CWA citizen lawsuits are heard in the wrong court (not in Southern Div.) and then the cases get summarily dismissed.

Some of the ***questions presented*** include:

Are public entities violating the CWA, their NPDES permits, and/or nuisance laws when rain falls over 0.5 inch per "day" because their muddy storm-water runoff goes straight into the ocean?

Can defendants ignore public, real-time data that tracks daily rainfall amounts which show when CWA or NPDES permit violations occur?

Must a 60 day notice *list* real-time public data?

Can a district court require a pre-filing review of a citizen's lawsuit under the CWA?

Can this district court ignore a Local Rule and re-assign the case to a court in the wrong division?

Can these courts ignore federal court rulings as to "adequate notice" and obvious CWA violations?

Can the Ninth Circuit do a *de novo* review that ignores ministerial abuse of discretion decisions?

PARTIES TO THE PROCEEDINGS

The parties to this proceeding are those appearing in the caption to this petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Charles Kinney requests that a writ of certiorari issue to review the "final" 3/3/21 decision by the Ninth Circuit [App. A, pg. 1, Dk #62] that denied a rehearing of its 11/16/20 dismissal [App. B, pg. 3, Dk #57-1] of Kinney's CWA citizen's lawsuit appeal.

The Ninth Circuit ignored non-judicial decisions (i.e. administrative decisions) by the district court for its pre-filing review and improper re-assignment of this case to the Western Division of the Central District of Calif. [when a Local Rule required this case to stay in the Southern Div.]. This was an "abuse of discretion" because the rules don't allow this and because this same Judge made the same non-judicial assignment decision in Kinney's prior CWA case which was also dismissed [see USDC #8:16-cv-00796-RGK-JC; Ninth Circuit #17-55899; and SCOTUS #18-907].

Here, the district court: (1) did an improper pre-filing review of this CWA lawsuit; (2) made a non-judicial re-assignment to a Western Division court [rather than allow the case to stay in Southern Div. court per Local Rule]; and (3) required specific public real-time daily rain data to be in Kinney's CWA 60 day notice to polluters [40 C.F.R. 135] but the county's rain gauge data was available to all, so the polluters were ***informed*** where to look to see when muddy storm water went into the ocean (even if they didn't watch or track daily rainfall) in case they didn't know when daily CWA or NPDES permit violations had occurred.

The Judge's non-judicial acts have ***tainted*** the entire judicial process so much that all his decisions must be vacated, and this case must be returned to the Southern Div. to start over with the basic pleadings.

From observations by anyone since 2001, the ongoing pollution continues to cause nuisances and trespass, and continues to violate the CWA in Laguna Beach whenever there is a 0.5+ inch/day storm water event (as measured by the county's real-time rain gauges).

Nuisances, trespass and CWA violations also occur whenever uphill fire hydrants, hot tubs, swimming pools, or water storage tanks are flushed into the unstable fill in the ravine above Kinney's property.

As shown by historic aerial photos, that ravine is filled with loose, uncompacted fill from road grading during the 1940s-1960s. The granular composition of that fill means it won't easily compact, so any rainfall exceeding 0.5 inch per CWA "day" causes erosion of mud which comes down the hill and into the ocean.

That ravine is located in the exclusive, gated Three Arch Bay subdivision in Laguna Beach (so Kinney's access is limited). That subdivision is where the road grading occurred. The spoils (fill) from that grading were dumped into this ravine several times during the 1940s-1960s as shown by historic aerial photos.

The muddy storm-water events cause nuisances and trespass on Kinney's property and cause CWA and NPDES violations. Kinney filed a CWA citizen's lawsuit as authorized by the Legislature as amended in 1972, 1977 and 1987; see 33 U.S.C. Sec. 1365, A plaintiff becomes an agent of the Environmental Protection Agency (EPA) due to a citizen's lawsuit. In Cal, the Regional Water Quality Control Board (RWQCB) acts for the EPA as to CWA and NPDES permit violations. The Cal. Coastal Commission (CCC) has some duties as to new construction in the "coastal zone" since that can cause CWA violations.

OVERVIEW

This petition seeks to have: (1) this case transferred back to the correct division per Local Rule 83-1.1 and General Order #16-05 (formerly #14-03) [to Southern Div.]; (2) all decisions by Judge Klausner vacated [since he re-assigned the case to the wrong court]; and (3) the existing environmental rules [e.g. for "adequate notice" to polluters; numeric and narrative CWA and NPDES permit violations] applied in a proper manner to the 3 public entities, 1 homeowner association, and 3 private individuals, all of whom have been *colluding* for 2 decades to ignore the ongoing damage caused by muddy storm-water runoff events [and because the 2 state regulatory agencies, RWQCB and CCC, have not yet enforced the rules].

The public entities and others seem to have created a "horizontal agreement" or "enterprise" with federal courts to ignore environmental and other damages, to punish whistle-blowers like Kinney who have filed CWA lawsuits, and to summarily dismiss their cases.

Here, the 3 public entities include the Cal. Dept. of Transportation (CalTrans), City of Laguna Beach (City), and Three Arch Bay Community Services District (CSD). CalTrans and the City each have their own National Pollutant Discharge Elimination Permit (NPDES) permit under the CWA that prohibits them from accepting muddy runoff from others which occurs when rain exceeds 0.5 inch/ CWA "day" (via a rain gauge 24 hour "day" ending at 8 am).

CSD, Three Arch Bay Association (TABA), and the 3 individuals do **not** have NPDES permits under the CWA, so they cannot have **any** mud in storm-water runoff, but mud keeps appearing in "their" runoff.

In 2015, NPDES permit restrictions were explained by the state regulatory agency in charge of enforcing the CWA, the Calif. Regional Water Quality Control Board [USDC Dk #85-1]. The City was evasive and ignored that [USDC Dk #85-2], as did CalTrans.

The mud in the storm-water runoff is being created by a large amount of loose fill (from road grading in 1940s-1960s) repeatedly dumped into a steep ravine in the exclusive, gated Three Arch Bay subdivision.

In the 1940s, the road grading was done by the Three Arch Bay Association (TABA), a private homeowner association, but that loose fill was never compacted. TABA has never applied for a NPDES permit.

CSD was created in 1957 to control all storm water runoff from the Three Arch Bay subdivision, but several more road grading events occurred in the 1950s-1960s (again with no compaction of the loose fill). CSD has never applied for a NPDES permit.

The graded soil (spoils or fill) is composed of material that won't easily compact over time, so "mud" keeps eroding during every 0.5+ inch rain event per CWA "day"; and that mud goes directly into the ocean.

In 2010, CSD built a large, deep concrete funnel in the ravine, but never obtained a CCC permit, NPDES permit, or building permit. The CCC discovered this in 2012 and reported it. This funnel (aka sediment basin with a large drain in the bottom) collected mud caused by 0.5+ inch/day rainfalls, then forced that by hydraulic pressure down the hill which emptied onto Kinney's land, and ultimately went into the ocean.

Just below Kinney's land, 3 private home owners jointly "maintain" a sediment "basin" in the private street Virginia Way which redirects some muddy runoff, collects and retains some mud, and sends the rest of the mud to CalTrans. They all knew and were complaining about muddy storm-water runoff as of 1992 onward. This subjects them to the CWA rules because they never obtained a NPDES permit, and because they still "maintain" a structure that collects and redirects muddy storm-water runoff. Natural Resources Defense Council v. City of Los Angeles, 725 F.3d 1194, 1197-1210 (9th Cir. 2013) [outfall is a point source which allows runoff to go into the ocean]; U.S. v. Milner, 583 F.3d 1171, 1193-1196 (9th Cir. 2009) ["regulatory authority under the CWA" prohibits a discharge to US waters by a homeowner]; Comm. to Save Mokelumne River v. East Bay Muni. Util. Dist., 13 F.3d 305, 308-309 (9th Cir. 1993) [system designed to capture runoff is a point source]; Driscoll v. Adams, 181 F.3d 1285, 1287-1291 (11th Cir. 1999) [private party without NPDES permit is liable for collecting storm water and then discharging "sand and silt" or "sediment" contained therein into US waters]; City of Milwaukee v. Illinois & Michigan, 451 U.S. 304, 317-319 (1981) [defines and describes CWA violations].

CalTrans collects that mud on its highway and then sends it to the City's storm-water drain system which goes directly into the ocean. CalTrans is prohibited from accepting mud from others under its NPDES permit, but CalTrans ignores that. CalTrans has known about this muddy runoff from about 1992 onward (i.e. 9 years before Kinney bought his house).

The City is also prohibited from accepting mud from CalTrans and others under its NPDES permit, but the City ignores that. The City has known about this

muddy runoff from 1992 onward (i.e. 9 years before Kinney bought his Laguna Beach house), but it is "in denial" [USDC Dk #85-1, 85-2, 85-3, and 96-2].

All rain events are monitored by the county in real time on a public website, so everyone should know when muddy runoff occurs [i.e. when rainfall in the area exceeds 0.5 inch/day because that causes muddy runoff]. This real-time public data provides adequate notice to polluters as to each CWA violation "day" so each "day" doesn't have to be listed in a 60 day notice.

FILINGS

In the US District Court, Central District of Calif., on 9/5/17, Kinney presented a CWA complaint for filing [Case #8:17-cv-01693 Dk #1]. The required CWA 60 day notice was attached, and it described the county's public real-time rain gauge data and the creation of muddy runoff after 0.5+ inch of rain per CWA "day" [Dk #1, pgs. 12-19] which caused CWA violations.

The case was assigned to the Southern Division per Local Rules [Dk #3] because the CWA complaint and cover sheet showed that all events and defendants were located in the Southern Div. [Dk #1, pgs. 20-22].

As shown by the 9/5/17 "lodged" (received) stamp and 9/28/17 "filed" stamp, the district court conducted a pre-filing review even though Kinney was not subject to any pre-filing vexatious litigant order related to a CWA lawsuit [Dk #1, pg. 1].

On 11/17/17, Judge Klausner re-assigned the CWA case to Western Division (in Los Angeles) by way of a "related" case [Dk #16] contrary to Local Rules, to which Kinney objected on 11/25/17 [Dk #21]. The

prior "related" CWA case was improperly assigned to Judge Klausner of the Western Div. The prior CWA case was based on similar facts, so it also should have been assigned to Southern Div. Judge Klausner was "gaming" the assignment system (i.e. administrative or non-judicial act) for the present CWA case, just as was done with Kinney's prior CWA case. He has no discretion to change the Local Rules (so his acts were intentional abuses of discretion, intentional torts subject to the Federal Tort Claims Act via the "law enforcement proviso", and/or RICO predicate acts).

In a series of 2018 orders, Judge Klausner dismissed Kinney's CWA complaint based mostly on the lack of "adequate notice" because Kinney didn't list the specific public real-time rain gauge data in his 60 day notice [Dk #49, 72, 137, 145, 146 and 154] even though earlier decisions say specific dates of CWA violation "days" are **not** required in the 60 day notice when the violations are found in public data (e.g. in real-time rain gauge data from county's gauge #100) **and** defendants are *informed* about how to find that data (which Kinney did in his 60 day notice). Friends of Frederick Seig Grove #94 v. Sonoma County, 124 F.Supp.2d 1161, 1164-1172 (N.D. Cal. 2000); Alaska Community Action v. Aurora Energy Services, 765 F.3d 1169, 1171-1174 (9th Cir. 2014); Cal. Sportfishing Protection v. Chico Scrap Metal, 728 F.3d 868, 871-878 (9th Cir. 2013); Natural Resources Defense Council v. City of Los Angeles, 725 F.3d 1194, 1197-1210 (9th Cir. 2013); Envtl. Def. Ctr., Inc. v. EPA, 344 F.3d 832, 840-880 (9th Cir. 2003); Ecological Rights Found. v. Pacific Lumber Co., 230 F.3d 1141, 1145-1154 (9th Cir. 2000); Comm. to Save Mokelumne River v. East Bay Muni. Util. Dist., 13 F.3d 305, 308-310 (9th Cir. 1993).

In real-time public rain gauge data, CWA violation "days" [collected for 24 hours *before* the 8 am reading] were for **2012**: 7/13/12; 12/3/12; 12/24/12; **2013**: 5/6/13; 10/10/13; **2014**: 2/28/14; 3/1/14; 3/2/14; 12/3/14; 12/4/14; 12/12/14; 12/13/14; 12/17/14; **2015:** 1/12/15; 2/23/15; 7/19/15; 7/20/15; 9/15/15; 11/27/15; **2016:** 1/6/16; 1/7/16; 3/6/16; 3/7/16; 11/21/16; 11/27/16; 12/16/16; 12/22/16; 12/23/16; 12/24/16; **2017**: 1/13/17; 1/19/17; 1/20/17; 1/21/17; 1/23/17; 2/7/17; 2/18/17; and **2018**: 1/9/18; 1/10/18; and 3/11/18 (as of the 2018 dismissal orders).

Based on **actual knowledge** from 1992 onward, all defendants knew of the muddy runoff problem from Three Arch Bay and knew that problem occurred on medium to heavy rainfall days. After Kinney found the aerial photos in 2006, all defendants knew of the **actual cause** of the "muddy" runoff problem.

On 11/19/18, Kinney filed an appeal [USDC Dk #156].

On 4/22/19, Kinney filed his Opening Brief in the Ninth Circuit [NC Appeal #18-56550 Dk #6].

Answering Briefs were filed by CSD [NC Dk #11 on 6/20/19]; TABA [Dk #26 on 6/21/19]; the City [Dk #28 on 6/21/19]; Chaldu [Dk #30 on 6/21/19]; Viviani [Dk #31 on 6/21/19]; and CalTrans [Dk #40 on 6/27/19]

On 8/13/19, Kinney filed his Reply Brief [NC Dk #54].

On 11/16/20, the Ninth Circuit dismissed Kinney's appeal [NC Dk #57-1] in which it admitted a *de novo* review applied. It talked about adequate notice (in the 60 day CWA notice), but ignored the real-time public rain gauge data and ignored all defendants had **actual** knowledge of the muddy runoff problem for over **2 decades**. It mentioned several instances

in which the district court did not abuse its discretion even though that Judge (once again) refused to follow the Local Rules as to case assignments **and** knew he had *no discretion* to change the assignment rules.

On 3/3/21, the Ninth Circuit summarily denied Kinney's petitions for rehearing [NC Dk #62] and ignored the abuse of discretion by Judge Klausner.

LAW

There is no CWA statute or case that allows a CWA-citizen's lawsuit plaintiff to be subjected to vexatious litigant laws (e.g. since the EPA cannot be subjected to vexatious litigant laws). The CWA includes penalties for violations (e.g. criminal imprisonment and civil fines) and specifically mentions a citizen's right to file a citizen-lawsuit. 33 U.S.C. Sec. 1319.

The Local Rules do not allow a district court Judge to re-assign this CWA lawsuit to the wrong court unless specific findings are made (which were not done when Judge Klausner re-assigned this case [Dk #16]).

This CWA lawsuit was filed by a *pro se* plaintiff. That allows a relaxation of some formalities that an attorney would face with a similar lawsuit. Hamilton v. United States, 67 F.3d 761, 764 (9th Cir. 1995) ["...duty of federal courts to construe pro se pleadings liberally..."]; Hughes v. Rowe, 449 U.S. 5, 9 (1980) [allegations in pro se complaints "...are held to less stringent standards.." than those drafted by lawyers].

The polluters are 2 ***public*** entities each with NPDES permits (CalTrans and the City, who violated their NPDES permit requirements); 1 ***public*** entity (CSD, without a NPDES permit); 1 *private* organization

(TABA, without a NPDES permit); and 3 *private* individuals acting together to "maintain" a sediment "basin" (aka funnel) in a private street which collects *and* redirects muddy storm water runoff (Chaldu and Viviani, without any NPDES permits).

NPDES violations are also CWA violations. Alaska Comm. Action v. Aurora Energy Services, 765 F.3d 1169, 1171-1174 (9th Cir. 2014) ["any violation of the permit's terms constitutes a violation of the CWA."].

Calif. Dept. of Transportation (CalTrans) refused to comply with its NPDES permit about stopping muddy runoff from getting onto its public highway (South Coast Highway aka Pacific Coast Hwy). This is a *narrative* NPDES permit requirement.

The City of Laguna Beach (City) refused to comply with its NPDES permit about stopping muddy runoff from getting into its storm-water drainage system. This is a *narrative* NPDES permit requirement.

All other polluters (CSD, TABA, Chaldu and Viviani) don't have NPDES permits, so each is restricted from having ***any*** mud in the storm water runoff under the CWA. This is an absolute prohibition of any mud, so it is both a *narrative and numeric* CWA limit.

Most of these polluters were engaged in state court litigation filed by plaintiff CSD in 2001 as to the same muddy storm water runoff problem. In that state court litigation, Kinney located a 1947 aerial photo which showed road grading in the Three Arch Bay subdivision, and the dumping of loose fill into a steep ravine above Kinney's house. The photos were at Whittier College in the Fairchild Aerial photo surveying collection (see Appendix, pgs. 7-10).

When Kinney got the 1947 and 1964 aerial photos, he shared those photos [USDC Dk #138-2 and 138-3] with all participants in the state court litigation [i.e. 2001 state court plaintiff CSD (and TABA who had all the same Three Arch Bay personnel as its own management team), CalTrans, the City, Chaldu, Viviani, and uphill Three Arch Bay home owners].

It cannot be contested that all defendants knew what was causing the muddy runoff when they got their CWA 60 day notice, **and** also knew that medium to heavy rain days caused the loose, unconsolidated fill to turn into muddy storm-water runoff that was coming down the hill from the Three Arch Bay subdivision, across Kinney's land and a private street with a sediment "basin" still maintained by Chaldu and Viviani, onto CalTrans' public highway, into the City's storm-water drains, and (lastly) into the ocean.

Three Arch Bay Community Services District (CSD) was formed under Calif. Gov. Code Secs. 61000 etc in 1957. In 2010, CSD refused to get a Calif. Coast Commission (CCC) permit when it built a large concrete "funnel" and 24" diameter underground pipes that continue to send polluted muddy runoff into the ocean. CSD's "funnel" is not a basin because it has a hole in the bottom which forces muddy runoff down the hill. That muddy runoff comes from loose, uncompacted fill created by Three Arch Bay Association (TABA) during Vista Del Sol grading projects where graded soil was pushed over the edge of a ravine (above Kinney's property). That fill was never compacted or stabilized (with straw wattles).

A true sediment "basin" has no hole in the bottom, but rather captures sediment in the bottom and allows clean water to flow over the top (so sediment

can be collected and later removed). Here, no true "basin" exists because all the "funnel" structures were not designed "for holding liquid". CSD lied to the state courts in 2010-2012 about having permits for this. In 2012, CCC discovered that no permits existed for CSD's "funnel" which was built in 2010.

For decades, all polluters knew that CWA and Calif. laws were slowly being tightened to include smaller and smaller sources of pollution. Those laws now prohibit mud or sediment in any amount in the storm water runoff if the polluter does **not** have a NPDES permit. Neither CSD nor TABA (with the loose soil, unpermitted "funnel", and underground piping down the hill) has a NPDES permit. Neighbors Chaldu and Viviani [i.e. an "association of persons" under 33 U.S.C. Sec. 1319(c)(3)(B)(iii) who jointly "maintain" a "funnel" structure in the middle of Virginia Way that collects **and** re-directs muddy runoff up to 80 feet away from the historic runoff path as shown by a survey of Virginia Way performed by Coastal Land Solutions, Inc.] do **not** have a NPDES permit.

As to polluters that **do** have a NPDES permit (i.e. the City and CalTrans), each permit prohibits the holder from accepting any mud or sediment (in any amount) in the runoff (from storm or non-storm) that comes into (or onto) their drainage system.

The City and CalTrans each have a "legal authority" obligation under their own separate NPDES permits to stop any polluter from dumping muddy runoff (in any amount) into/onto their own drainage system. Here, each public entity has refused (and continues to refuse) to stop accepting polluted muddy runoff.

The "legal authority" CWA obligation is a "***narrative*** NPDES standard", rather than "**numeric** standard".

A "**numeric** standard" would include the complete prohibition of mud in runoff (i.e. a limit of "zero" for mud) if a polluter did **not** have a NPDES permit.

One goal of the CWA is to "restore" the "integrity" of the "nation's waters" which includes tidal areas of the ocean near 1000 Steps Beach. Here, **muddy runoff** originates from loose fill in the Three Arch Bay subdivision; it is collected in an unpermitted "funnel" and forced down unpermitted pipes; it goes across Kinney's property; it gets collected **and** redirected by a "funnel" maintained by the "association" of Chaldu and Viviani in Chaldu's part of Virginia Way; it gets deposited on CalTrans' South Coast Highway (aka Pacific Coast Highway); it goes into the City's storm-water system; and then it goes directly into the ocean near 1000 Steps Beach in South Laguna (causing a *per se* CWA violation each "day" that occurs).

During discovery, it was determined that a large water tank near the private street Vista Del Sol in the Three Arch subdivision [operated by the public entity South Coast Water District (SCWD)] may be an additional source of muddy runoff during some ***non-storm days*** because that tank is flushed into the same loose fill below Vista Del Sol, which then causes muddy runoff on a *sunny* (non-storm) day.

The Cal. Regional Water Quality Control Board in San Diego (RWQCB) is the agency with the task of enforcing violations of NPDES permits. In May 2015, RWQCB reminded the City of its NPDES permit obligations to not accept muddy runoff from others, but the City has consistently ignored that obligation.

CalTrans also has an obligation in its NPDES permit to not accept muddy runoff. CalTrans was involved in CSD's 2001 state court lawsuit about this muddy runoff, but it has consistently ignored that obligation.

The Calif. Coastal Commission (CCC) requires a permit to build any large structure within a certain distance from the ocean. There are 2 entities in the Three Arch Bay subdivision who have previously applied for CCC permits, public entity CSD and private entity TABA. Both entities intentionally ignored the CCC permit requirements for the new concrete "funnel" built in 2010. CCC discovered this in 2012 when reviewing a permit for a property owner with the unpermitted concrete "funnel" on his land. CCC advised CSD and TABA of this violation, but they have yet to apply for any CCC permit.

After a year to review briefs and record on appeal, the Ninth Circuit issued its 3 page Memorandum [NC Dk #57-1] with only 5 findings:

(1) Kinney "failed to provide defendants with adequate notice of the alleged CWA violations". It is not necessary to state the date of each CWA violation if Kinney tells defendants exactly where to find the CWA violations (which he did). By using the Orange County online public rain gauges for Laguna Beach (e.g. gauge #100), all defendants knew they could easily determine when the daily rainfall exceeded 0.5 inch of rain for a given day. CWA cases have held that ***informing*** defendants where to find CWA violation dates is equivalent to listing the violation dates in the 60 day notice. Kinney had also ***listed*** the ***actual CWA violation dates*** with more than 0.5 inch of rain per CWA "day" in his briefs.

(2) The district court "did not abuse its discretion by dismissing the first amended complaint

without leave to amend" because an amendment "would have been futile". This is similar to finding #1 because public (online) daily rain gauges in Laguna Beach show each daily 0.5+ inch of rainfall which then causes a CWA violation since: (i) muddy runoff is created by actions and inactions of non-NPDES permit holders each time rain exceeds 0.5 inch/day; and (ii) muddy runoff goes into the ocean [e.g. without any "legal authority" action by the NPDES permit holders, CalTrans and the City].

(3) The district court "did not abuse its discretion by declaring Kinney a vexatious litigant and entering a pre-filing review order against him because all of the requirements for entering a pre-filing order were met". This is ***false*** as noted below.

First, Kinney was not properly labeled a vexatious litigant on Nov. 19, 2008 in state court because the order does not list 5 *pro se* losses in 7 years and because attorney Kinney was not a *pro se* plaintiff in LASC case #BC374398 on Nov. 19, 2008, so the court did **not** have subject matter jurisdiction over any plaintiff's "attorney" (e.g. Kinney).

Second, Kinney was not properly labeled a vexatious litigant on Dec. 11, 2011 in state appellate court (COA) because the order does not list 5 *pro se* losses in 7 years; because attorney Kinney was not a *pro se* plaintiff or appellant contrary to what is stated by In re Kinney, 201 Cal.App.4th 951 (Cal. 2011); and because there is no language in Cal. Code of Civil Procedure Secs. 391 et seq. that refers to a "puppet" client, so the court did **not** have any subject matter jurisdiction over any "attorney" (e.g. Kinney).

Third, Kinney as a *pro se* litigant has never met the vexatious litigant criteria in any federal court as to CWA cases (and Kinney was only the attorney in the *Van Scoy v. Shell Oil Co.* case as to CWA and ESA violations more than 7 years prior).

Fourth, as to Judge Gutierrez's 2016 vexatious litigant order, all bankruptcy and removal matters support Kinney's actions because of the ongoing 11 U.S.C. Sec. 524(a)(2) violations by the Chapter 7 discharged-debtor Michele Clark and her attorneys David Marcus etc who filed improper cost motions.

Fifth, the CWA statute and cases do not have any language that allows a CWA citizen-lawsuit plaintiff to be pre-approved or stopped under either state or federal vexatious litigant laws.

Sixth, Kinney's CWA complaint was subjected to Judge Gutierrez's 2016 pre-filing order even though that order only applied to lawsuits against Chapter 7 debtor Clark and her attorneys [USDC 2:15-cv-08910-PSG-JC (Dk #70 filed 5/13/16)].

Seventh, in the 2001 state court case filed by CSD against Kinney, Kinney named as a "defendant" prevailed in the main case in 2009, and prevailed as a "cross-complainant" in 2010. *In re Kinney* **incorrectly says** Kinney lost those cases as a justification for COA Justice Roger Boren to label Kinney a vexatious litigant in 2011 [In re Kinney, 201 Cal.App.4th 951, 954 (Cal. 2011)].

Eighth, Kinney got permission to file the CWA lawsuit **and** got permission to file this appeal, but the Ninth Circuit wants to ***retroactively penalize*** Kinney and to ignore ongoing CWA violations.

(4) The district court "did not abuse it discretion by re-assigning (transferring) the case to Judge Klausner". This is ***false*** because a Local Rule and General Order require the case to be assigned to a Judge in the division in which all events occurred [i.e. in Laguna Beach which is part of the Southern Division] and where almost all parties resided. This case was properly assigned to Judge James V. Selna in the *Southern Division* which hears Laguna Beach cases. Judge Klausner in the Western Division took

over this case ***contrary*** to a Local Rule and General Order as to assigning or transferring cases because this was *always* a Laguna Beach case (and that Judge had done the same with a prior CWA case).

(5) It will "not consider matters not specifically and distinctly raised and argued in the opening brief". That does **not** apply here since all facts, law and arguments were clearly presented by Kinney in his 48 page Opening Brief [NC Dk #6] and repeated in his 29 page Reply Brief [NC Dk #54].

A CWA lawsuit **only** requires proof of a few facts to establish a CWA violation, and then a daily civil penalty is imposed on the polluter that is paid to the US Treasury (not Kinney). 33 U.S.C. Sec. 1365. "To establish a CWA violation, Kinney **only** has to show that: (1) there has been a discharge by a person (2) of a pollutant (3) into U.S. waters (4) from a point source (5) without a NPDES permit [or is contrary to some standard or limit in the NPDES permit that is held by that "person"]." Parker v. Scrap Metal Processors, Inc., 386 F.3d 993, 1008-1009 (11 Cir. 2004).

The CWA is a strict liability statute for any "person" **without** a NPDES permit (because any pollutant in any amount in the runoff is a violation), and **with** a NPDES permit (because permit holders can't accept any muddy runoff from others). Alaska Community Action v. Aurora Energy Services, 940 F.Supp.2d 1005, 1014-1015 (D. Alaska 2013) ["discharge in violation of the CWA is ordinarily a strict liability offense"].

CSD, TABA, and the 3 neighbors were maintaining "funnels" and piping structures that caused muddy water (from TABA's uncompacted, loose soil) to be collected and re-directed, so CWA violations occur each day that muddy runoff water (in any amount)

gets sent into the ocean. Alaska Community Action v. Aurora Energy Services, 765 F.3d 1169, 1171-1174 (9th Cir. 2014) [if pollutant "discharges are not on this list" (in a NPDES permit), "they are plainly prohibited"].

Thus, any collection and re-direction structure (e.g. maintained by an association of persons) that sends polluted runoff into the ocean results in liability for any "person" who doesn't have a NPDES permit.

If CSD, TABA, or the 3 neighbors had obtained a NPDES permit, they would not be liable for muddy runoff unless the amount of mud or concentration of the mud in runoff exceeded their permit limits.

This is **not** a situation where a private person does nothing to the muddy runoff, but simply allows that muddy water to pass over his/her land. Chaldu and Viviani have jointly operated and maintained a "funnel" structure for decades, and their "funnel" collects mud and redirects runoff by changing the historic path of muddy water 80 feet to the south. The 3 neighbors have refused to re-align the historic path of the runoff, or to get a NPDES permit.

If a "person" has a NPDES permit (i.e. CalTrans and the City), any pollutants in excess of the limit in that permit is a violation, and any non-compliance with any condition in that permit is also a CWA violation (e.g. violating a narrative condition in that permit).

The City and CalTrans accepted muddy runoff (from CSD, TABA, and the 3 neighbors, none of whom have a NPDES permit) which is not allowed by their NPDES permits, so a CWA violation occurred on each day when rain exceeded 0.5 inch per CWA "day" (as shown by 24 hour readings of a nearby rain gauge).

The days on which CWA violations occurred are shown by the Orange County public online daily rain gauges for Laguna Beach (e.g. rain gauge #100). If more than 0.5 inches of rain falls, then muddy water comes down the hill. The rain gauges operate day and night, so these gauges can give an accurate record of when a CWA violation occurs ***even if*** it is dark outside when nobody can see the muddy water.

From his observations, Kinney knows that rainfall of less than 0.5 inches in a day can also cause muddy water to come down the hill, but the 0.5 inch of rain per day threshold ***always*** causes muddy water to come down the hill. As such, the 0.5 inch/day violation "threshold" is conservative and easily-obtained from public online rain gauge records for Laguna Beach maintained by Orange County.

As shown by photos, the muddy runoff is "chocolate brown" in color from the mud and sediment. Here, any non-NPDES permit holders (i.e. CSD, TABA, and the neighbors) cannot allow any mud in storm-water runoff, so the CWA "standard, limitation, or order" for them is "zero" or no mud. Envtl. Prot. Info. Ctr. v. Pac. Lumber Co., 301 F.Supp.2d 1102, 1105-1113 (N.D. Cal. 2004) [must be "composed entirely of storm runoff"; a CWA violation occurs when they "redirect stormwater *and pollutants* (i.e. something not 'composed entirely of stormwater') into" US waters].

Kinney's CWA 60 day notice had informed polluters how to find all the days on which CWA violations occurred. Friends of Frederick Seig Grove #94 v. Sonoma County, 124 F.Supp.2d 1161, 1164-1172 (N.D. Cal. 2000) [not required to "list a specific date for a violation that is premised on the alleged violator's

failure to act"; only need to "provide enough information" for the violators "to identify the dates"].

Kinney included the 1947 and 1964 aerial photos of the road grading and resulting loose fill (spoils) in the Three Arch Bay subdivision in Appendix, pgs. 7-10.

Muddy runoff photos were included in Appx., pg. 11:

The top (and first) photo shows muddy runoff in CSD's unpermitted drain pipe coming from Three Arch Bay subdivision just behind Kinney's house.

The middle (and second) photo shows the "funnel" in Virginia Way (as maintained by neighbors Chaldu and Viviani), part of Kinney's property, and the private street Virginia Way covered in mud from the muddy storm-water runoff (going down a drain).

The bottom (and third) photo shows muddy runoff flooding Pacific Coast Highway (and blocking traffic) in front of the hospital at 7th Street in South Laguna as that muddy runoff (most of which came from Three Arch Bay) goes into the City's storm-drain system and directly into the ocean near 1000 Steps Beach (one of the best beaches in the county).

Kinney included an aerial photo of where the muddy runoff goes into the ocean (at the "X") from the City's large 7th Street storm-water drain in Appx., pg. 12.

In this CWA case, it is important to remember that the U.S. Supreme Court has said all federal courts must follow the law (including the CWA), and the Ninth Circuit has agreed. Bosse v. Oklahoma, 580 U.S. ___, 137 S.Ct. 1, 196 L.Ed.2d 1 (2016); Navarro v. Encino Motorcars, LLC, 845 F.3d 925, 926-928 (9th Cir. 2017) ["We may not disregard the court's existing, binding precedent"; citing *Bosse*]. Here, the district court and Ninth Circuit didn't follow the law.

As one example, the CWA absolutely prohibits any mud in runoff from CSD, TABA, and the neighbors because none of them have NPDES permits. A violation by all of them ***can be proven*** with a muddy runoff photo by Kinney's house (Appx., pg. 11). The district court and Ninth Circuit ignored that.

As another example, CalTrans and the City cannot accept muddy runoff from others, but they did. A violation by both of them ***can be proven*** with a muddy runoff photo of the City's storm-water drain on South Coast Hwy. at 7th Street (Appx. pg. 11). The district court and Ninth Circuit ignored that.

As another example, a CWA notice is sufficient if it ***informs*** defendants where to find CWA violation "days" (in the county's real-time public online rain gauge data as described in the CWA 60 day notice). The district court and Ninth Circuit ignored that.

The "adequacy of information" in Kinney's 60 day notice depends on numerous factors which require an analysis of the "nature of the purported violations, the prior regulatory history of the site, and the actions or inactions of the particular defendants" (aka a summary judgment analysis where facts alleged by Kinney are deemed to be true). Paolino v. JF Realty, LLC, 710 F.3d 31, 35-42 (1st Cir. 2013); Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 56-60 (1987). The Judge never did this analysis.

The courts do not address the separate role of each polluter. It is undisputed CSD and TABA helped to create the mud in the runoff. However, once Chaldu and Viviani collect, channel, and redirect that muddy runoff, it becomes "their" own pollution. Northwest Envtl. Def. Ctr. v. Brown, 640 F.3d 1063, 1070-1071

(9th Cir. 2011); U.S. v. Milner, 583 F.3d 1171, 1193-1196 (9th Cir. 2009); Comm. to Save Mokelumne River v. East Bay Municipal Utility District, 13 F.3d 305, 308-309 (9th Cir. 1993).

If Chaldu and Viviani re-opened the historic runoff path toward the ocean, they would no longer "collect, channel, and redirect" the pollution, so it wouldn't be "**their**" pollution anymore. ***If that occurred,*** CSD and TABA would still be liable for pollution created up on the hill, but that pollution would now pass over Virginia Way **without** causing flooding. Chaldu and Viviani would then no longer be liable since they would no longer collect, channel, and redirect that muddy pollution. That means ***the mud would no longer be "their" pollution*** under the CWA.

In spite of the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given to them", here the district court made a re-assignment to Western Div. in the complete absence of all subject matter jurisdiction. Colo. River Water Conser. Dist. v. U.S., 424 U.S. 800, 817 (1976); Ariz. Life Co., Inc. v. Stanton, 515 F.3d 956, 962 (9th Cir. 2008).

OPINIONS BELOW

On 3/3/21, a three judge panel of the Ninth Circuit issued a denial of Kinney's petition for rehearing for his pending CWA appeal. [Appendix A, 1[1]].

On 11/16/20, the Ninth Circuit dismissed Kinney's CWA appeal as noted herein [App. B, pg. 3].

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[1] Citation method is Appendix ("App."), exhibit letter, and sequential page number.

The rulings violated Kinney's "federal" constitutional rights for redress of grievances as a plaintiff in a CWA case (e.g. 1st Amendment) and civil rights under color of authority or official right (e.g. 42 U.S.C. Sec. 1983; 8th Amendment) since the rulings were based on laws that didn't apply to this CWA case. Fitzpatrick v. Bitzer, 427 U.S. 445, 448 (1976); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 102-106, 123 n. 34 (1984); Patrick v. Burget, 486 U.S. 94, 101-104 (1988); Pennsylvania v. Union Gas Co., 491 U.S. 1, 57 (1989); F.T.C. v. Ticor Title Ins. Co., 504 U.S. 621, 631-638 (1992).

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code ("U.S.C."), Secs. 1254(1), 1257(a), and/or 2101(c).

As noted herein, the Ninth Circuit and district court violated Kinney's First Amendment and other rights by acting as ***prosecutors*** of Kinney under color of authority or official right which resulted in the loss of "honest services" from the federal judiciary in this CWA lawsuit. American Railway Express Co. v. Levee, 263 U.S. 19, 20-21 (1923); Cohen v. California, 403 U.S. 15, 17-18 (1971); Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 159-161 (1954).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Court has jurisdiction to address violations of federal law (e.g. as to a CWA citizen's lawsuit) by the federal district courts and the Ninth Circuit.

The federal courts have exclusive and original jurisdiction under 28 U.S.C. Sec. 1331, 1441 and/or 1443 (and under 42 U.S.C. Secs. 1983 etc) to consider violations of federal constitutional rights (e.g. 1st Amendment rights) and other federal statutes (e.g. violations of the CWA, the "honest services" law, the Hobbs Act, the FTCA, and/or the RICO statutes).

The federal courts have exclusive and original jurisdiction under 28 U.S.C. Sec. 1331, 1441 and/or 1443 to consider violations of federal civil rights, and CWA violations under 33 U.S.C. Secs. 1251 et seq.

STATEMENT OF THE CASE

This petition involves at least one abuse of discretion (when the district court re-assigned the CWA case to the wrong court) and misstatements of law applicable to a CWA citizen's lawsuit (when the district court and Ninth Circuit dismissed the case and appeal).

This petition also involves compelling silence as to ongoing CWA violations, nuisances and trespass.

SUMMARY OF LOWER COURT PROCEEDINGS

Please refer to the summary of the proceedings in the district court and in the Ninth Circuit listed herein.

STATEMENT OF FACTS

Please refer to facts discussed herein in this petition.

On 11/16/20, Kinney had a pending appeal for a CWA citizen's lawsuit which was summarily dismissed by the Ninth Circuit [App. B, 3].

On 3/3/21, the Ninth Circuit denied Kinney's petitions for rehearing in his CWA appeal [App. A, 1]

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Certiorari Should Be Granted Because Federal Courts And Public Entities Are Engaging In Intentional Violations of the Clean Water Act Which Violates Kinney's First Amendment Rights, and Other Laws as to Kinney; And The Method and Application of Alleged Due Process by the Ninth Circuit (When It Dismissed Kinney's Appeals or Conducted A *De Novo* Review) Severely Impairs Meaningful Review of Important Questions of Federal Law; And Severely Impairs Rights Guaranteed Under the First, Fourth, Fifth, Eighth, and Fourteenth Amendments; and Is In conflict with the Decisions of This Court and Other US Court Of Appeals (including the Ninth Circuit).

In this CWA citizen's lawsuit case, the Ninth Circuit and the district court are trying to silence on Kinney as to this CWA citizen's lawsuit in violation of the *Janus, NIFLA* and *Riley* decisions. [App. A, 1; App. B, 3] Janus v. American Federation of State, County and Municipal Employees, Council 31, 585 U.S. __ (2018); National Institute of Family and Life Advocates v. Becerra, 585 U.S. ___ (2018); Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, 796-797 (1988).

Both the Ninth Circuit and district court acted as *prosecutors* of Kinney, not as neutral arbitrators of disputes, when they dismissed his CWA case and appeal; denied his petition for rehearings; and violated

his federal constitutional and civil rights, the "honest services" law, and the Hobbs Act. [App. A, 1; App. B, 3] Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 736 and n. 15 (1980); Hafer v. Melo, 502 U.S. 21, 25-31 (1991); Devereaux v. Abbey, 263 F.3d 1070, 1074 (9th Cir. 2001); Canatella v. State of California, 304 F.3d 843, 847-854, n. 6 and 14 (9th Cir. 2002); Bauer v. Texas, 341 F.3d 352, 356-360 (5th Cir. 2003); In re Justices of Supreme Court of Puerto Rico, 695 F.2d 17, 24 (1st Cir. 1982); United States v. Murphy, 768 F.2d 1518, 1523-1539 (7th Cir. 1985); Zarcone v. Perry, 572 F.2d 52, 54-57 (2nd Cir. 1978).

The decisions were discriminatory retaliation at a federal level (e.g. see *In re Kinney,* and *Kinney v. Clark* at the state level) to the detriment of Kinney, his CWA cases and appeals, his interstate businesses, and/or his real property. 42 U.S.C. Secs. 1983 and 1985. USDC Judge Klausner has now imposed a vexatious litigant order upon Kinney even though no authority exists for that in a CWA case.

The decisions eliminate Kinney's Amendment rights (e.g. as to his CWA cases and appeals), restrict his fair access to the courts, **and** retaliate against him. Hooten v. H Jenne III, 786 F.2d 692 (5th Cir. 1986); United States v. Hooten, 693 F.2d 857, 858 (9th Cir. 1982); Sloman v. Tadlock, 21 F.3d 1462, 1470 (9th Cir. 1994); Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1313-1320 (9th Cir. 1989); Lacey v. Maricopa County, 693 F.3d 896, 916 (9th Cir. 2012).

Kinney has the right "to petition the Government for a redress of grievances" including a right to a review by appeal (which is being routinely denied to Kinney in federal courts). That First Amendment Right is "one of the most precious of the liberties safeguarded

by the Bill of Rights". BE & K Constr. Co. v. NLRB, 536 U.S. 516, 524 (2002) [quoting United Mine Workers v. Illinois Bar Assn., 389 U.S. 217, 222 (1967)].

A standard of strict scrutiny should be applied to procedural barriers made by rule or statute, as applied in appellate courts, which chill or penalize the exercise of First Amendment rights, and act to limit direct review by a higher court. "The consideration of asserted constitutional rights may not be thwarted by simple recitation that there has not been observance of a procedural rule with which there has been compliance in both substance and form, in every real sense." NAACP v. Alabama ex rel. Flowers, 377 U.S. 288, 297 (1964).

Fundamental to the Fourteenth Amendment's right to due process of law is the opportunity to be heard. Grannis v. Ordean, 234 U.S. 385, 394 (1914). That was not allowed in this CWA case and appeal.

When a person is deprived of his rights in a manner contrary to the basic tenets of due process, the slate must be wiped clean in order to restore the petitioner to a position he would have occupied if due process had been accorded to him in the first place. Peralta v. Heights Med. Ctr., Inc., 485 U.S. 80, 86-87 (1988).

Procedures which adversely affect access to the appellate review process requires close judicial scrutiny. Griffin v. Illinois, 351 U.S. 12 (1956).

An appeal cannot be granted to some CWA litigants and capriciously or arbitrarily denied to others without violating the federal Equal Protection Clause. Smith v. Bennett, 365 U.S. 708 (1961).

Certiorari should be granted to provide guidance on the method and manner in which the federal courts apply, restrict, or summarily deny the right of access to the courts by a CWA citizen plaintiff, or compel silence on "difficult" *pro se* CWA citizen litigants.

As to the acts by the Ninth Circuit and district court in this CWA case, an appearance of impropriety, whether such impropriety is actually present or proven, weakens our system of justice. "A fair trial in a fair tribunal is a basic requirement of due process. In re Murchison, 349 U.S. 133, 136 (1955).

While claims of bias generally are resolved by common law, statute, or professional standards of the bench and bar, the Due Process Clause of the Fourteenth Amendment "establishes a constitutional floor." Bracy v. Gramley, 520 U.S. 899, 904 (1997). That "floor" has not be reached in this CWA case.

These federal courts have ignored that "void" orders (based on vexatious litigant laws) cannot support decisions in a CWA case. Sinochem Intl. Co. v. Malaysia Intl. Ship Corp., 549 U.S. 422, 430 (2007); Plaza Hollister Ltd. Ptsp v. Cty of San Benito,72 Cal.App.4th 1, 13-22 (Cal. 1999); Airlines Reporting Corp. v. Renda, 177 Cal.App.4th 14, 19-23 (Cal. 2009).

Besides compelling silence on Kinney, these federal courts have ignored: (1) ongoing nuisances, trespass and CWA violations in Laguna Beach; (2) adverse impacts on Kinney's real property rights; (3) adverse impacts on Kinney's businesses (including interstate commerce businesses); and (4) Kinney's right to be free from retaliation, all subject to review by federal courts that have the obligation to determine the issues and to follow the law. McCarthy v. Madigan, 503 U.S. 140,

146 (1992); Colorado River Water Conservation District v. United States, 424 U.S. 800, 817-818 (1976); Bosse v. Oklahoma, 580 U.S. __, 137 S.Ct. 1, 196 L.Ed.2d 1 (2016); Navarro v. Encino Motorcars, LLC, 845 F.3d 925, 926-928 (9th Cir. 2017). That was not done here by any measure.

Here, there appears to be a decades-long "horizontal agreement" between public entities and a few federal courts to NOT enforce the CWA in this area. There is evidence of that because: (1) CalTrans and the City each have a separate duty under the "legal authority" condition in their own NPDES permit to stop muddy runoff from entering their own operational space, but they seem to have jointly agreed to NOT enforce that condition against each other; (2) CalTrans, CSD, and TABA appear to have agreements by which CalTrans doesn't use its "legal authority" to stop muddy runoff from the Three Arch Bay subdivision even though the muddy runoff routinely floods South Coast Highway; (3) the City in its response to the RWQCB's 2015 letter refused to accept responsibility for its non-compliance with the "legal authority" condition in its NPDES permit and/or for its periodic dumping of muddy runoff [from others] into the ocean at its 7th St. drain; and (4) USDC Judge Klausner has gone out of his way to cause the improper assignment of both of Kinney's CWA cases to his court in Western Division, contrary to requirements of a Local Rule and General Order.

There is no doubt that an agreement between public entities and others can be a "horizontal agreement" if they agree to NOT enforce environmental laws with which they all have to comply. 15 U.S.C. Sec. 1; see complaint in U.S. v. Automobile Mfrs. Ass'n., Inc., 307 F.Supp. 617 (C.D. Cal. 1970) and National Society of Prof. Engineers v. U.S., 435 U.S. 679, 695-696 (1978).

By the same reasoning, it seems Judge Klausner has engaged in 2 predicate RICO acts, 2 intentional torts under the FTCA (under the law enforcement proviso) and/or 18 U.S.C. Sec. 1519 violations by his improper assignment of both of Kinney's CWA cases to his court in the Western Division (in Los Angeles) which were non-judicial acts (aka ministerial or administrative acts) done in the complete absence of all subject matter jurisdiction due to a Local Rule and General Order since both those CWA cases had to be assigned to the Southern Division (in Santa Ana) of the Central District of Calif. given that all defendants resided in that area and all events occurred in that area.

It also seems that Judge Klausner was making these ministerial "assignment" rulings to benefit one or more of the polluters, to keep control of the outcome of Kinney's CWA cases, and/or to be able to further retaliate against or punish whistle-blower Kinney.

Note lastly that the Ninth Circuit's 3/3/21 denial order [Dk #62] incorrectly states in the caption that the district court was located in "Santa Ana" when in fact that court was always located in "Los Angeles". That mistake is assumed to be intentional misdirection as to which court actually made the dismissal decisions.

CONCLUSION

This petition should be granted or, in the alternative, this Court should vacate the Ninth Circuit's and district court's rulings, and remand this CWA case to the Southern Division of the Central District of Calif. for a fresh start based on the already-filed pleadings.

Dated: 7/31/21 By: /s/ Charles Kinney, in pro per